

## JOINT AGENCY PUBLIC MEETING

November 14, 2002 - 9:00 a.m.

Bedford, New Hampshire

RE: RM02-16-000

HYDROPOWER RULEMAKING

PANEL MEMBERS: Ronald McKittrick - FERC, Chair

Timothy Welch - FERC

Kathryn Conant - National Marine Fisheries

Nancy Skancke - GKRSE

Jeffrey Vail - USDA - OSG

Gloria Smith - Department of the Interior

Tom Dewitt - FERC

Andrew Sims - Kleinschmidt Associates

Mona Janopaul- USDA - Forest Service

Ken Hogan - FERC

James Kardatzke - Bureau of Indian Affairs

Court Reporter: Brenda J. DiMatteo, CERT

## P R O C E E D I N G S

MR. MCKITRICK: Thank you all for coming. My Name is Ron McKitrick. We're here today, as opposed to where you signed in, it said Milwaukee, we are in Bedford, New Hampshire today. We are here to talk about hydroelectric licensing regulations. Again, my name is Ron McKitrick. I am staff with the Federal Energy Regulatory Commission. I have been with the Commission in licensing since about 1980.

What I would like to do is kind of let the panel introduce themselves, check and make sure that the microphones are working and you can hear them, because they will be here to help us today, maybe answering any questions about IHC proposals or NRG proposals. Tim.

TIMOTHY J. WELCH, Fishery Biologist, FERC: Tim Welch, Federal Energy Regulatory Commission, I am a fishery biologist. I have been with FERC about twelve years.

KATHRYN CONANT, National Marine Fisheries Service: Kathryn Conant with National Marine Fisheries Service. I work in our headquarters office in Maryland and I work on wetlands and fish issues.

NANCY J. SKANCKE, GKRSE: Nancy Skancke with the law firm of GKRSE in Washington D.C.. I am presenting

the NRG proposal and I have been doing hydro licensing since '74.

JEFFREY VAIL, USDA - OGC: Jeffrey Vail with the General Council's Office at the U.S. Department of Agriculture in Washington, working with the Forest Service and the Department and working as part of the HIC process.

GLORIA SMITH, Department of Interior:

Gloria Smith, Department of the Interior, Solicitors Office. I represent the Fish and Wildlife Service and the Park Service in hydropower licensing.

MR. MCKITRICK: Maybe just a show of hands to kind of see the distribution of folks we have out here. Licensees raise of hands proudly. State agencies. That's good, good representation. We appreciate you all coming. NGO's? Good, that's good too. Consultants and attorneys together. Anyone else either representing themselves or tribal concerns, like that. Okay, good. Good cross section, this should be a pretty good discussion today. We appreciate all of you coming to share with us and not each other. Thank you.

As I mentioned, we are here today because of some potential changes in hydro power regulations. This is a co-sponsored forum with the Federal Energy

Regulatory Commission, the Department of Commerce, the Department of the Interior, and the Department of Agriculture. The reason that we are co-sponsoring this is because of the Federal Power Act. The Federal Power Act is the Federal Regulatory Commission responsibility for licensing non-federal hydropower projects licensing and within the Federal Power Act, specific parts of that gives sort of a relationship between the three agencies, Commerce, Interior, and Agriculture to provide comments, conditions, and prescriptions, and that's why we're cosponsoring this forum, to hear your comments on potential changes to the regulations.

I might mention that Tim will talk about a number of things, some administrative changes that we have made already. We are here today to talk about regulation changes. We are really not here to talk about changes in any statutes or laws. So, we need to focus ourselves on just regulatory change.

Just a quick chronology of events, where we've been and where we're going. This started with a notice that we put out on September 12 announcing the forum that we are now doing, we have held so far in Milwaukee, Wisconsin, Atlanta, Georgia, and last week in Washington D.C.. We are all here in Bedford, New

Hampshire today. Next week we'll be in California, in Sacramento, and Tacoma, out in Washington. That will end the public forum part of hearing comments initially. We will then take those comments and expect to see them no later than December 6. What we are really interested in in your comments, we know there are problems, concerns, issues, challenges, whatever you want to talk about, but what we're really interested in is identifying those and then moving on to solutions. So, your comments if you can give them to us today that would be great, but if you feel like you need to do that in your written comments, focus on solutions and even specific language that may help us in putting together any notice of proposed rulemaking or change in regulations.

After the comment period, quickly after the comment period in December 10, 11, 12 there will be public meetings in Washington D.C.. That notice is now on our website and those of you that read the Federal Registry regularly, you can see it in there also. Those will be again public and looking forward to your participation in that as a review of the comments that we have, and again helping us towards any rulemaking that may be made.

After the December meeting we are looking in

February of putting out the notice of proposed rulemaking, or NOPR, and then holding public technical conferences, that if everyone got your blue handout, on the back you can see that these conferences will be held actually now in four places. It shows Charlotte, Portland, and Chicago. There will also be one in Washington D.C. and as I understand, it is planned around the NHA conference that is held somewhere between the 6th and 9th of April. Following that April 22-25th there will be additional times for the public to come together with us in D.C. and talk about specific comments with the NOPR, some drafting sessions working on the language, so that we can then get the rule out by July 2003. Realizing that this is a very aggressive schedule, we appreciate you working with us and if you can get those comments to us as early as possible, you will help us through this process.

A little bit about the agenda and what we are going to be doing today, if everybody got the handout, you can see that the public forum agenda is toward the front. We'll talk about that in a minute. Some of our speakers may be referring to this handout occasionally. The slides are in here for your notes and also the public notice and copies of the IHC and

NRG proposal. So, as they reference you to the page numbers you will have this before you.

We will then hear from Tim Welch and he will tell us a little bit about what we have done and why we are here today, followed by Kathryn Conant dealing with the Interagency Hydropower Committee's proposal that is in the blue book, followed by the NRG proposal. We will then have a chance for those that would like to make some sort of public comment on the record. I would like to mention that this is being recorded, so as you speak please give us your name. If you have a fairly unusual name you may want to spell it so that we get it correctly. In addition to that, I recommend you giving your card to the Court Reporter, so that it can be recorded correctly, as well as who you are where.

The public comment period, we have asked you to come forward so we can put that on the record. We will then take a break depending upon the number of commenters. I understand we have a fairly small number of those, all you out there who would like to speak. We will look at the schedule again and see if we can go into the discussion part of the forum today dealing with just concerns that you may have or would like to talk about some of the issues that were in the

notice or that you see listed up here. We can talk about those. So we may be able to do that in the morning, take lunch, and then come back and finish the rest of the day, but we'll follow this as we go along and update the schedule as we can, but we will take lunch and then follow-up with discussion.

Just for housekeeping kinds of things, if people need to take breaks, feel free. We will take a break, but there are restrooms as you go out the door down to the left. There is a corridor right before you go out the door, to the left, where there are phones, the restrooms are down there. I think that probably gives you a brief introduction of what has happened so far and I would like Tim to tell us a little bit more about why we are here today.

MR. WELCH: Thanks, Ron. Yeah, I am going to talk a little bit about now, not only why we are here but sort of how we got here. I know a lot of you in this room were involved with the class of '93. For those of you who might not be familiar with it, back in 1991 the Commission received about 157 license applications for relicensing and unfortunately very few of those projects were actually licensed by the time the license expired two years later. I mean there are a number of reasons for that and I know most

of you in the room are vaguely at least familiar with a lot of those reasons for a it. But nevertheless, a lot of people, especially at FERC and the resource agencies and the industries, sort of scratched our heads and said surely there must be a better way here.

So, after a lot of discussion, the first sort of step that we took was to try a series of administrative reform efforts, you know. I think a typical agency response is like, okay, what can we do without having to do a rulemaking, so we can make this process more efficient and we can work better with the applicants, how can we work better with the resource agencies who are, you know, involved in this massive relicensing process.

So, one of the first things that happened was that we formed what was called the Interagency Task Force, the ITF, and we joined with our sister federal agencies that were involved in the process, Interior, Commerce, Forest Service, USDA Forest Service and the EPA and we sort of formed this Interagency Task Force and we looked at various aspects of the relicensing process and we came up with a series of seven reports, that many of you may or may not have read, that dealt with how we deal with issues under the Endangered Species Act, how we do NEPA, how we handle mandatory

terms and conditions and 10-J recommendations.

The ITF also developed sort of a handbook of guidelines of sort of how to get through the alternative licensing process. So, we had a series of reports sort of dealing with how we can do some quick fixes, some efficiencies, and I think we gained some efficiencies through that process. And we also, at the very least, we improved communications between the resource agencies.

Now, while that was going on, the industries then sort of took an initiative through the Research Power Institute outreach and they formed what is called the National Review Group. And again, that was sort of a consortium of not only representatives from the hydroelectric industry but also non-governmental organizations, and the federal agencies as well and they came up with a series of sort of best practices reports that were designed to help future applicants sort of get through the process. So that happened parallel with the Interagency Task Force.

Now, many of you remember last December the Commission convened a hydro licensing status workshop and the reason for that workshop was the Commission was very interested in the class of '93 projects that were five years or older and had been in front of the

Commission for more than five years. So, it was an effort by the Commission to sort of get to the bottom of why are these projects still here. So, out of that grew the regional workshops with the state agencies to talk a little about how we could make the 401 Water Quality Certification process and the FERC licensing process, how could we make that mesh a little bit better. So, we went around the country and met with a lot of the water quality certifying agencies and the CVM, consistency determination agencies, and we had some conversations and we talked a lot about the process.

And in my next slide I am going to talk to you a little bit about what we learned when we talked to the states. Finally, I would like to mention that the resource agencies also independently initiated some administrative reform efforts, most notably the Departments of Commerce and Interior came up with what is called the MCRP, the Mandatory Conditioning Review Process, and in a process very similar to the Forest Service's 4-E appeal process, they came up with a process that subjected their mandatory conditions to public comment.

So, let me talk a little bit about our state workshops. About a year ago we kicked it off right

here in Manchester, when we met with New York, and Vermont, and Massachusetts, and many of the New England states, and Jeff and Brian, they were both here. And I just wanted to go a little bit about, you know, what did we hear from the states? Well, the main thing we heard was the states felt that more complete license applications were sort of the key for them for efficient processing of 401 water quality certificates, because most of the states use these federal applications for hydroelectric licensing as their application for 401 water quality certification. So, they felt that more complete license applications would help them be more efficient and help them more quickly get these 401 certificates out.

So then we said, okay, what can we do to make sure those applications are more complete? And the states talked about early identification of issues through NEPA scoping. Right now under the traditional process, we have scoping after the application is filed. So there were some ideas for our analysts, like hey, why don't you do scoping right in the beginning at the very first thing, so everybody knows what the issues are and what studies need to be done to address those issues. So, that sort of led to, well, we all know that a lot of times there are study

disputes between FERC and resource agencies and applicants. Let's get those study results or study disputes resolved early on, rather than waiting until after the application is filed with FERC.

They also talked about early establishment of a licensing schedule, so sort of everybody is on the same page right from the beginning. The applicant knows what is expected not only from FERC but from the federal and state resource agencies as well.

And finally, another idea was that when the notice of intent is issued in the very beginning that that should come simultaneously with the initial consultation package.

So, those are some of the things that we have heard from a lot of the state agencies from New York, Vermont, and out in California as well. So, keep some of those things in mind as you hear about some of the proposals that are being made today for a new process.

As I said earlier, the administrative reforms that we implemented went a long ways to helping to gain some efficiencies in the process. As I said, better communication between the federal agencies, FERC, and the other federal agencies as evidenced by the fact that we are up here cosponsoring these series of public forums. But we felt at FERC that we needed

to take another step, a big step, regulatory reform. So today we're beginning or this fall we're beginning a new journey into regulatory reform and that is why we're here today, to get your ideas about how we can improve the current regulations, that is the traditional process, that are needed to reduce the time and cost of licensing, and we can't forget this, while at the time providing for environmental protection and ensuring that our state and federal statutory and Indian Trust responsibilities are fulfilled. And I might add that this is consistent with the National Energy Policy, which calls for a more efficient hydroelectric licensing process.

So we began, we sort of kicked things off back on September 12 with our notice that provides the opportunity for these types of discussions and public and tribal forums. We also set up a schedule for getting your written comments to FERC by December 6, as Ron mentioned earlier, on the need and the structure for a new licensing process.

Now, the notice sort of had three major components to it. First of all, it had an attachment which was the Interagency Hydropower Committee proposal, which you are going to hear from Kathryn here in a few minutes. Now, the IHC was sort of the

successor to the ITF, was the son of ITF as I call it, and that was sort of our next step. And once again, it involved the federal agencies, Commerce, Interior, Agriculture and FERC and the staffs from those agencies got together and came with an integrated licensing proposal that you are going to hear about in a few minutes. Now, the other group, the NRG group also continued working. The federal agencies sort of stepped back from that group a little bit and acted as advisors, but the conservation/environmental organizations and the industry people continued to work on a process also that is an integrated licensing process that you are going to hear about from Nancy Skancke here in just a few minutes. So, the notice contained both of those proposals and that notice is in your blue book here back on page enclosure C. So C-1 is the notice and that includes both the NRG and the IHC proposals.

Now, the notice also on page C-7 and C-8 included a series of 9 questions that we were asking people to sort of shape the comments and get the information that we are going to need to do this new rule and we talk about the integrated process, state processes, and the most important question about how a new process will relate to the old processes. And so I

will say a little bit more about that in a minute.

So, what are our goals for today? We are going to be up here talking all morning, maybe not all morning, but for another hour or so, but then it is your turn. So, we want to listen to your ideas about the traditional process; what works, what you like about it, and what you don't like about it. In order for this to be a productive session, we really want to hear about specific problems with the current regulations and then not only do we want to hear about the problems but we want to hear about your ideas of how to solve the problems. So, problem-solution, problem-solution. And then this afternoon during our discussion period we would like to -- actually I am kind of going out on a limb here. This all works differently depending on what part of the country we're in, but we really want to try to translate those solutions into concepts about how you would like a new process to work. So we are going to go from problems, to solutions, to concepts, so we can begin to put together our notice of proposed rulemaking.

Getting back to our suggested discussion topics, these bullets up here are sort of a summary of those 9 questions that I talked about. Again, they are posted up here on the wall. These are the types of things we

would like to discuss with you this afternoon. First of all, we want to talk about an integrated licensing process. That is integrating the NEPA, ESA, 401, how all those things fit together in the most efficient manner for the process. Now, you are going to hear two proposals for an integrated process, once again, once from the IHC and one from the NRG. We want to hear what do you think about those proposals, do you have another one that you think is even better. We want to talk about study development. What is the best way of communicating with the agencies, and FERC, and applicants; what is the best way we can put together study plans that everybody can live with and when people can't live with things we want to talk about how we resolve those disputes, how we can have our little arguments and discussions, how we can have those in an efficient manner so we can get those things solved and we can move along in the process.

Settlements are a big issue. A lot of you have worked on settlements in licensing, especially with the class of '93. How can the process best accommodate settlements? Now the IHC proposal has a lot of time periods in between a lot of those boxes in there. Are those time periods realistic? Can we live with them? Are they too short? Are they too long? I

would like to hear about that.

Then again, one of the more important ones, coordinating state and federal agencies, tribal, and FERC processes. How can all of those things that happen, how can they fit together?

Then finally, as I mentioned earlier, what is the relationship to the existing processes. And by existing processes I mean the traditional and the ALP, maybe exemptions. You know, should we retain the traditional; should we retain the ALP; should we throw it all out and start all over again? We want to hear what you think about that. So, that is what we would like to talk about this afternoon.

Now, when this is all said and done and we have our final rule in July, we hope that we've set up a process, and this process is on the back, of these types of public meetings and stakeholder drafting sessions. When this is all said and done, we hope that we can have a final rule that can do three things. Number one, we want regulations that are easy to understand. As I said last week, for those of you who may have been in Washington, you don't need to hire yourself a lawyer to get you through the process. So, something that everybody can understand.

The second thing is something that makes our

lives easier, that we can all do our jobs, no matter if we are an applicant, or FERC staff, or a resource agency person, something that allows us to do the job that we need to do for our agencies a lot easier. In other words, one concept to keep in mind is, we want to work in parallel and not sequentially. We want a process such that we are never waiting -- one agency is never waiting for another agency to do something; we are all working together in a parallel process to get to a good end point. So, the second thing is making our lives easier.

The third, and probably most important is a level playing field, that everyone has an opportunity to participate in the process. So, if we could do those three things, then I think we will have a process here that we can truly say is in the public's interest. So, that is all I have right now. I would like to turn things back over to Ron.

MR. MCKITRICK: Thank you, Tim. Kathryn will give us some information about the IHC proposal.

MS. CONANT: Good morning. As Ron said, I'm Kathryn Conant. I work for the National Marine Fisheries Service, but I am here today to represent the Interagency Hydropower Committee which has developed over the past six months or a proposal of

how to integrate the licensing process and I will go into more detail about that. But I'm glad everyone is here and fought the weather yesterday to get here.

What I am going to talk about today is, first of all, give you a little bit of background about the Interagency Hydropower Committee. Given Tim had a pretty extensive background I won't spend that much time on it and I will focus my efforts on giving you some of the objectives and an outline of the proposal we have developed, as well as discuss some of the anticipated benefits.

And as Tim had mentioned earlier, the IHC proposal is in your book and I just want to let you know that it starts on page C-13 and then also you might want to note that on C-26 there is actually a fairly detailed flowchart that I am not going to refer to during my presentation, but we might actually refer to it later on in the open discussion. So, to let you know both of those.

So as Tim had mentioned, the Interagency Hydropower Committee was formed last year as a follow-up to the Interagency Task Force and it had several federal agencies, FERC; the Department of the Interior, which included Fish and Wildlife Service, Bureau of Land Management, Bureau of Indian Affairs

and the Solicitors Office and well as Interior's staff as well; and then also the Department of Agriculture through the Forest Service; and Department of Commerce through National Marine Fisheries Service.

I did want to let everyone know that the Interagency Hydropower Committee proposal is something that we felt was important to get it out in the public arena, that is why it is included in the Federal Register notice, but we also recognize that there are some deficiencies in that we were not able to spend enough time to incorporate some of the state issues, some of the tribal issues, as well as things like integrating the Endangered Species Act consultation and Coastal Management and some of those things. But we thought that since FERC was moving forward with the rulemaking effort that it was important to get what we had out on the street. But for the committee ourselves, IHC, we don't intend to revise the proposal. So any comments that you actually have on the proposal will go to FERC and be used as part of the rulemaking drafting of the proposed and final rule, but we don't intend to revise the proposal at all and I just want to make sure everyone is clear about that at the beginning.

So, the objectives we had for the proposal was to

improve coordination. One of the themes that has been throughout Tim's presentation and some of the stuff that has happened over the past couple of years is there is a real strong need to have FERC, the federal resource agencies, state agencies, the licensee, as well as the other stakeholders to have more coordination and try to do that coordination earlier in the process. The benefit of that is maybe we can start identifying issues earlier that need to get incorporated into the process later on.

The next thing is that, as Tim had also mentioned, the licensing process currently has some duplication in it, in that there is some duplication in that in that there is some activity that happens with the applicant working with stakeholders before the application is filed that then has some redundancy with what FERC does after the application is filed. So, the idea is to reduce some of that duplication to make a process a little more efficient and more streamlined.

Then the other thing we wanted to do was focus on trying to improve the process from a cost and time standpoint, but also ensuring that the end product, the license, is satisfactory to everyone involved or interested; that we shouldn't focus on just the

process, but also the end product as well. So, that was also of interest to us.

There are four main components or large groupings of the proposal and I will go into a little bit more detail of each of those parts. But in summary, the first one is some of the early coordination and consultation that happens when the applicant is developing what is currently now called the initial consultation package or document and then also the study plan. So, that is the first component, with the end result being a study plan that then leads to the second component or part that is if needed is a resolution on any of the parts of the study plan. Then your third step is to actually implement the studies that have been agreed to. And then your final step is the actual application, filing the application which then goes to your NEPA document that FERC would issue.

Our proposal talks about a track A and track B. Let me just quickly say it, I'll explain it now and then in a little more detail later on. Track A is when FERC issues NEPA a document, a draft and then a final NEPA document. So they issue a draft NEPA document, get comments on that and then issue a final and that could be both for an environmental impact

statement and as well as an environmental assessment. Then track B is when FERC issues, does a final EA, an environmental assessment. They also will receive public comments on that EA but the public comments will be addressed in the license order.

So, track A and B doesn't mean that one has public comments on the NEPA document and one does not. But it actually means that how FERC addresses and deals with the comments afterwards. So track B is a little bit more of an expedited process.

So, the first part, as I mentioned, is some of the earlier activity that happens while you're developing your study plan. The first thing that the Interagency Hydropower Committee recognized is that one of the things to make the licensing process more expedited is to gather all of the existing information early in the process. So what we thought could happen is FERC should give an advanced notice to existing licensees saying that their license is going to expire in eight years and that in five to five and a half years before the license expires they are going to have to do some work and activities. So, this is not giving them advance notice of what is going to come, as well as it has a list of existing information that would be beneficial if they maybe want to start

thinking about gathering it now. But the idea with this is that it is optional and it is just a heads up. There is no requirement to have any coordination or consultation or need for the licensee to do anything at this point. It is just letting everyone be informed of what is going to happen in a couple of years from now.

Then the next step is where the applicant starts developing what we are calling the prescoping document. It would be in lieu of the initial consultation document or package which currently happens under our traditional process. And the idea behind this is -- why we are calling it a prescoping document is because it really would lay the foundation for FERC to do their scoping document that they are required to do for NEPA. So, the idea and one of the themes that you will see throughout our proposal is that the document format would stay about the same and as more information gets compiled and gathered the document builds upon itself. One of the things that we find is we are taking the same information and just reshuffling it for different formats for different purposes. So, we tried to make the document appear more streamlined so it looks more similar throughout the process.

So, that is what the prescoping document would consist of and there would be some discussion with the prescoping document and the development of the study plans. Then what happens, as I mentioned, is FERC takes the prescoping document and issues it as a scoping document for their scoping meetings that they do for their NEPA process, which is similar to what we have now, and then in that scoping document would be the final study.

The idea with the final study plan is that if there were studies that everyone seemed to agree to and there were no disputes on them, they would just proceed as planned. But if there were some disagreement on the study plan, some components of that study plan at this time, then the parties would proceed with a study dispute resolution process.

And how we came up with the study resolution dispute process is that first of all there would be two issues that the resolution process would focus on. One would be is the study needed and the second issue is, if the study is needed, is the methodology that is proposed, is that adequate. So, those were the two components that the resolution process would focus on. And related to that, the panel would have specific criteria that they would use to evaluation the study

proposal and study that is under dispute and the specific criteria would help guide the panel as well as the applicant when they are doing their study plan and requesting agencies on to develop their study plan, or study request rather. So that everyone has an understanding of what are the objectives of meeting your study request.

So, what we have developed is it would be a party of three that would be part of this dispute. It would include a representative from the requesting agencies and then a representative from FERC and then a neutral third party.

First of all, let me talk about the representative from the agency and from FERC. The idea is that these two people would be different than the people who had been at the negotiation table earlier on working with the applicant on developing the study plan, so you wouldn't have the same people sitting at the table trying to resolve a dispute that they weren't able to do for the past six months. Then the neutral third party would be someone who has an expertise in that field or in that specific issue and then both FERC and the requesting agency both agree upon this neutral third party. Then the idea is this panel would then also solicit input from other

stakeholders, from the applicant, from maybe other agencies that would have an interest but aren't necessarily disputing that study. They would look at all this information and then evaluate it on the criteria they have in front of them and make a recommendation. This finding then goes to FERC and then FERC makes the final decision.

The next stage is implementing the studies as per the study plan that had been agreed to or at least disputed and resolved. The important concepts to take away from implementing the study plan is the idea that people aren't going to just walk away from the study, that, you know, okay, well, we all agree to it, okay, see you in two years let me know what happens; but that there would be some interaction and some coordination between interested parties with the study. And the idea of that is to ensure that everyone is comfortable that it is proceeding as intended and then also look at some preliminary data to say is this what we are expecting or is this the information that we were hoping to get. And then, what that also allows is that if all of a sudden things were dramatically different or you set up a study plan that seemed to work, but then actually come to find out once it is being implemented that the

reality is that it wasn't getting the information that everyone needs, so that there could be some mid course corrections taken throughout. And then if needed the study dispute resolution process could be made available in those times as well.

Then, taking all this information, as well as all of the existing information that is out there, then the applicant will prepare their application and what we thought is that if the application could actually have a similar format in organization, structure, and comment to FERC's NEPA document. So, what that does is it helps give, if an applicant is that interested in helping to develop the NEPA document this is the way to do it. They actually would only have to do one document, which would be their application, as well as helping FERC do the NEPA document and then it also allows FERC to more quickly get out the draft NEPA document.

So then the last step is, once the application has been filed the final one has been filed, FERC then accepts it for the criteria that they have to use and then FERC issues the notice to get intervention comments, recommendations and conditions. Then this leads to the two track process that I mentioned earlier, in that FERC will take the application which

looks fairly similar to the NEPA document. They also have had all of the scoping and all of the activity earlier on before the application is filed and then turn that into a NEPA document. And as I said, if they are going to be issuing a draft NEPA document it follows along track A. If they are just going to be issuing a NEPA document with public comment, but not issuing a final NEPA document, then that follows track B. Both processes will have more of a coordinated approach on when the federal agencies submit our mandatory conditions, either through section 480 for federal lands and reservations and section 18 for fishway prescriptions. The idea is that these would be filed at the same time throughout the draft, before the draft NEPA document and then after the NEPA document; where currently right now, they are not filed at the same time.

So, anticipated benefits of our proposal: One is that by working together in a more coordinated fashion the NEPA document will ultimately serve as the basis for decisions for not only FERC, but it will support the decisions that are made by other federal agencies and hopefully the state agencies as well. It also encourages all stakeholders to get involved earlier in the process. And by all stakeholders it also includes

FERC, which under the traditional process they currently don't get involved in most of the pre-filing activity and even under the alternative licensing process they have more of a limited role. Where we envision that FERC's role is that they would be providing comments on the prescoping documents developed by the applicant and also would be providing input into the study request and the study plan that is being developed, so that we aren't waiting until later on in the process to get FERC's input. And the idea of also getting other stakeholders, all stakeholders, involved is to help identify when recreational issues are important, when there is going to be a fish passage that's important, to get some of these issues earlier in the process as opposed to waiting until later on.

Then that also leads to -- we're hoping that this process will help identify results, study disputes earlier that then could get resolution done. Everyone might not be happy with the decision, but at least there is a decision, and everyone can move forward together on that.

The other idea is to have time frames and specific deadlines for all participants. And what this does is it allows everyone to anticipate what

will happen or what they are going to be required to do up front earlier in the process, rather than having some unknowns of when is FERC going to issue their REA notice and everyone is just trying to guess when that is going to happen and then there is a specific deadline of when that notice is issued what everyone has to do, but if you don't have an idea of when that is going to come out, it is hard to plan ahead from a staffing standpoint from gathering information and preparing for that.

As I mentioned in the previous slide, one of the other benefits is to have concurrent filing of the federal agency conditions. That seems to be a big concern for a lot of people. And the idea of getting at least the federal agencies coordinated is a big benefit.

And then we also felt that this process would allow for stakeholders who are interested in pursuing settlement discussions, this process would allow that to occur, though we didn't necessarily say, okay, here is the standard time of when you are going to be discussing the settlement agreement, but we did feel there is enough flexibility to allow that to occur. So, thank you.

MR. MCKITRICK: Thank you, Kathryn. Nancy will

give us some insight into the NRG proposal.

MS. SKANCKE: As I said earlier, my name is Nancy Skancke. I am with the law firm with the unusual name of GKRSE which just as a side note are initials of people's names, some of which are no longer there, so now it's a fixed firm. In any case, I have been involved with the NRG, not since its inception, but certainly for the last approximately a year.

What I am going to do is focus on the summary of the NRG proposal without all of the details. The NRG proposal is included in the blue book starting on page C-27. And in addition, you probably also have a blue handout that looks like this, so you can write on it and that is what I will work from.

Basically, what is the NRG? The NRG is a task force of licensees and public interest groups, as well as having other advisors from the agencies who were not active members on it but served as advisors. The mission was to improve the licensing process. And as indicated previously, it started back in 2000 with various forms and reports that were issued trying to establish guidelines for voluntary compliance that might help the process expedite and be more efficient. The current proposal goes beyond the voluntary. We are trying to change the rules, regulations. The word

"law" there does not mean statutory, it is talking in terms of regulations. But we are talking about changes in the regulatory framework from the context of FERC's regulation. And I won't go over these, but you can see from the list, the membership in the NRG was fairly broad. It was intended to bring a representative from all different sections of the industry to make sure that people in the industry, different interests were represented. It was not an exclusive group. Pretty much anyone who wanted to could join and participate and it was facilitated by Kearns and West. It also had, as I said, agency advisors, and these were people who, I think it has been described best by Julie Kyle, a member of the NRG as well, it is a game of hot or cold. The agencies wouldn't tell us what we have is right or wrong; it is you are getting hot, you are getting cold, you're really cold, you're really hot and that gave us guidance without getting into problems from limitations.

The current role of the NRG proposal, as Kathryn mentioned with the IHC, the NRG is not, other than doing these presentations on the road shows so that we can answer questions particularly of the proposal, we are not actively going to be filing comments as the

NRG. The NRG, to some extent, one could say doesn't exist any more, in the sense that all of us are moving on to our respective roles as attorneys for clients, attorneys for licensees, consultants, members of licensees, NGO community, etcetera, and that is where you will see the comments at this point. So, the NRG proposal is not going to be revised, reinvigorated and changed. It is intended to be a framework for discussion. We wanted it to be to raise important issues. We were addressing one concept, the one cycle NEPA process, trying to get a more integrated approach and it is not intended to be a complete licensing scheme. I know some people have faulted us that we don't have dates and times in there. Frankly we ran out of time. The IHC proposal took a different tact when it did its using boxes and dates and it has been really beneficial to all of us. The NRG proposal was trying to get consensus between two groups that often have divergent interests, NGO community and the licensee applicant community, trying to see where we could hit common ground and so we were getting more conceptual, but did try and work it through to make sure the process didn't become elongated, that in fact we were able to complete the process as we described in there within the appropriate time frame. So we

have in our -- when we went to the drafting, in our minds we had the ideas of how the dates fit and the concepts fit together, we just didn't put exactly 45 days, 60 days, etcetera on it.

Basically, the NRG focus on this particular, and as I said back in starting in 2000 NRG was focusing on other aspects of the licensing. But on this one, on the one step NEPA there were basically two area that we wanted to address.

MR. MCKITRICK: Could you slow down a little bit. We are having a problem getting every syllable.

MS. SKANCKE: Okay. I'll try. Basically we were trying to address two problems, overlapping, repetitive and incomplete application development. The idea was to get people to get studies developed, information out and get the information together so all interested parties could be knowledgeably and efficiently involved in the process before the formal environmental review. Secondly, we saw a problem that seems to be evolving but certainly was a problem when things got started back in 2000 or at least it appeared to be, which was that we didn't see necessarily that FERC and the other federal agencies were cooperating, working closely together, interacting in the way that could perhaps provide the

most efficient process. We were all looking at limited resources from the concept of our own clients, our own licences, our NGO communities, and we wanted to be able to use those resources effectively and efficiently in the relicensing process.

Why a coordinated environmental review process? Well, I did address some of these already. Basically we want to improve agency participation in the relicensing process, getting agency, state, federal, tribal and other stakeholders, NGO community, involved early. We wanted to eliminate late discovery of issues. I think it doesn't benefit anybody, we all feel I believe, not just me, it doesn't benefit anybody for a process to go on for years and years and all of a sudden at the eleventh hour an issue that is a legitimate issue or maybe not a legitimate issue arises at that point in time. That is not really an efficient use of people's time and resources. So, we were trying to focus on that.

We wanted to combine the NEPA processes of the agencies to the extent possible, recognizing that of course under the Federal Power Act FERC is the lead agency for NEPA. It is the lead agency on licensing and is in control of the process, but we did want get more efficiency as I mentioned early. And again, we

wanted to eliminate redundant, conflicting, environmental documents.

The NRG goal was to have one NEPA document that could be used for FERC's licensing process, for the other agencies' mandatory conditioning process, for the related CZMA 106, 401 state process, and tribal issues as well, so that people working basically from the same table and could look at that document, not for decisional purposes. Obviously, each agency, each stakeholder, is going to use that environmental base information for their purposes to apply their statutory mandates and their concerns, but it made a lot of sense for everybody to work from the same NEPA document. And I think to mention that it came up in the, as I understand it, in the state meetings as well, that it was useful to have one document for that purpose.

Finally, we wanted to reduce uncertainty as to whether the applicant had met the study request. It didn't make a lot of sense for an applicant to go merrily along thinking that they had done all of the studies and find out closer to the eleventh hour that there was a major hole in the whole process.

These, just to hit quickly, again cooperation and this includes dispute resolution and decision making.

And just a footnote here, you have been hearing a lot of parallel ideas from the IHC. I think it is probably a recognition for a lot of people in the room, and they can see the elephant in the middle of the room and recognize the problem. So, at the same time as the NRG was developing these concepts so was the IHC.

Reduce information requests from consulting agencies. This was intended as a footnote to say that we want to avoid information requests when necessary for agencies to fulfill their obligations and other stakeholders as well. So, just to make sure that they are timely and they are complete so the licensees can move ahead and know what they have to do to finish the process. And again, delineating the responsibilities of each agency for assembly/document drafting with the idea that you have one NEPA document that can be used by multiple agencies, federal, state, tribal and also by NGO's and others. There may be a benefit, as discussed by the NRG, in having that document done in pieces by the people who have the expertise. So, the NRG proposed the concept of FERC is the lead agency, coordinates the NEPA document, but quite possibly there is a benefit by having one of the resource agencies that does shortnose sturgeon and knows it

well and it happens to be in the project. Maybe they are the ones that should be doing that aspect of the draft NEPA document. Again, FERC retaining control of the document, but thereby sharing the obligations and the resource expenditures.

Just to hit -- I am not going to go through a detailed discussion of the proposal, it is in the book and in particular I am not going into a detailed discussion because NRG is not setting this up as the framework for the perfect relicensing program. We see a lot of, in talking with NRG members, we see a lot of benefits in the IHC proposal that we really like. Some of them we like even better than we thought we could get. So there are improvements beyond the NRG proposal. So, just to hit a couple of highlights, however, that we believe really do stand out and may be enhancements even to the IHC proposal and certainly to the current process. Early consultation to identify issues, obtain and share needed information. This is something that has been mentioned by Kathryn. It has been mentioned by Tim. It's in the IHC proposal. I think it is basically get the information out. The NRG proposal has a two way street on this, this early meeting that occurs under the NRG before the NOI is filed is intended to be a sharing, sharing of the

agencies with the applicant of information that is available; a sharing by the applicants with the agencies and other stakeholders of what information they perceive is available and the issues they feel are going to be raising their heads in the issue, in the case. It requires early information by the licensee, the applicant and admittedly the NRG proposal is crafted in a way that seems to most closely track a relicensing process.

One of the challenges by FERC in its notice was can this integrated process work for a new license? NRG didn't address that, except to the extent that I believe in the introduction it said that we believe many of the concepts in the NRG can be and at that point the NRG ran out of time. We were running with the deadline of rulemaking that was starting up at FERC and wanted to get the NRG document out for public scrutiny, but we do believe that there needs to be early information from the licensee equivalent to a draft license application. This concept is then the stakeholders are not looking at different documents on the track that change forms. They start with what we hopefully will end up with a license application framework and you start disseminating information in that same framework, so that anybody tracking the

process can see how that information has changed, has been amplified, modified, as the issues arise and are revolved. The other aspect of it is that it allows more thorough and accurate scoping early in the process. The better the scoping the better the NEPA process from the viewpoint of all stakeholders.

Finally, one thing that is not on here is the NRG proposal clearly contemplates early involvement by all stakeholders. Now, somebody reading the NRG document again might say wait a minute, I didn't see my name listed in part 35 of 2.3. The idea is that throughout that NRG proposal, it's early involvement by the stakeholders, early identification of those stakeholders that have an interest, and early participation. The earlier they raise the issues, such as before the NOI, the earlier the licensee applicant has an opportunity to respond.

Another aspect of the NRG proposal which some of us are particularly proud of, I'm not sure it will end up in the final rule, but is the concept of use of MOU's and MOA's. There is a difference between the two. Perhaps we've crafted an arbitrary difference between the two because the terms get used by people in different ways. But under the NRG proposal, the idea would be a memorandum of understanding, an MOU,

that would be negotiated between the FERC and the various federal agencies that they interact with in the hydro licensing process. FERC has recently done this in the natural gas pipeline certification process, where they issued an MOU with 13-15 federal agencies and coordination in the process. This is the concept it would be a general MOU with the agencies. Ideally you might also, FERC might also have MOU's with the individual state agencies on how they are going to handle generically hydro relicensing, not project specific, general. The MOA in contrast is intended to cover individual projects. It might be a one page that simply says the MOU is perfect and everyone thinks we're on board, but it might also be a recognition that this is unique particular project that requires some tweaking to the coordination between the two. The goal of this, the MOU/MOA, is that all resource agencies, all stakeholders, understand how the players are going to work together on the process, at least in the broad conceptual level.

So, as I said, it establishes the cooperation procedures; it describes the development of the record; it puts in place how the parties are going to resolve disputes, because these are federal agencies

that we have. FERC's regulations are going to be changed but these are the federal agencies who are arguably to some aspect of FERC's regulation, beginning timing in, but the idea of an MOU allows those to be more firmly in place, so people understand. It would describe dispute resolution and decision making, with the concept again of trying to reach a NEPA document that can be used by all agencies and then a separate decisional document or record of decision that would be the individual agencies decision based upon the broad NEPA document.

Again, Kathryn talked about studies and study dispute resolution. Frankly, we came up with the proposal we did with an advisory panel that came in and a panel, many of us, at least I think I speak for myself and many of the other NRG members, really like the IHC dispute resolution process. So, you can take a look at both and compare them to see what you like and pick and chose. And again, a NEPA document and license conditions trying to by having one solid NEPA document the licensee and other stakeholders are not sitting there trying to respond to three or four NEPA documents on the same project. You may or may not agree with the science or the methodology or the environmental analysis, but at least it is one solid

piece of work, as opposed to three different environmental analyses that hopefully all end up at the same point, but may or may not. And then again, the parties may or may not like the decisional document that talks about what is required in connection with the project, but that can be addressed as decisional, with working with the same baseline environmental.

And again, even though we didn't put days on our boxes, we tried our time line to fit within the existing statutory requirements. We specifically, although some have faulted the NRG proposal and it is perhaps a criticism well taken, that it isn't clear that it's got two years of dispute resolution, it was intended clearly to have two years of -- not dispute resolution, studies, I'm sorry, two years of studies. Quick dispute resolution, sorry. But two years of study seasons as necessary, quick dispute resolution so that people can focus on the activities and the licensing. That's it. Thank you.

MR. MCKITRICK: Thank you, Nancy. Before we go to break, what I would like to do is take a few minutes, just if there is any clarification of what you heard from either, Tim, Kathryn or Nancy, as far as their presentation, so that it will help you later

on. We could take a couple of minutes to do that, realizing that your question shouldn't be why did you leave the licensee off of the dispute resolution, Kathryn, that is discussion in the afternoon, but do I understand that you left the licensee off, and the answer would be yes. So, those kinds of clarification questions, if anybody has anything we can do that. It will get you use to stating your name first before you speak and those kinds of training exercises.

Okay. No questions. I understand there are about eight speakers. If I could have a quick show of hands of those who would like to give some sort of public comment after we come back from break. We have a couple of hours here, but it may be nice not to take all of that, so maybe ten minutes, fifteen minutes at the outside, put your comments together. If you do have written comments prepared, you may want to give those to the court reporter if you have cards I suggest you give the Court Reporter and if you have cards, I would suggest before you go to break to five her a copy of your card. Give the Court Reporter a copy of your card.

Let's take fifteen minutes and resume. I have almost 10:30, so about a quarter to eleven. Thank you.

(Recess)

MR. MCKITRICK: We ended up I have a list of about ten people that may want to speak. If I call your name and you decided that everybody has said everything you are going to say and really don't want to speak, don't feel obligated. On the other hand, as we get towards the end of this, if somebody left out something and you feel moved to come forward and give testimony, just please feel free to do that also. Given the number of speakers, I would hope that you would probably keep it to ten-fifteen minutes. If it goes past that we may ask you to summarize comments. But just to give everybody an opportunity to say what they would like, I would ask you to come forward to the podium, use the mic, make sure to give your name, your affiliation. And don't get hurt, I don't think this is any particular order or sign in. The first person I have is William Heinz.

WILLIAM HEINZ, Essex Hydro & Granite State Hydropower: We submitted our comments for the record and feel like that is satisfactory.

MR. MCKITRICK: Okay. William Heinz indicated that he has already submitted his comments, written for the record and feels like that is satisfactory. Matt Manahan. If you would come up here we would

appreciate it. William, who are you here representing?

MR. HEINZ: Essex Hydro and Granite State Hydropower Association.

MATT MANAHAN, Pierce Atwood: Good morning. My name is Matt Manahan and I am from the law firm of Pierce Atwood in Portland, Maine. We represent numerous hydropower licensees in Maine and New Hampshire. I am here to speak today on behalf of three of them, Domtar Incorporated, Madison Paper, and Great Lakes Hydro America.

I just first want to briefly thank FERC for its efforts. This is a good process and we hope that FERC continues to work through all of these issues in a timely fashion to move along in this very important process. I would want to first say that we would urge the Commission to pursue these licensing process improvements but beyond those that have been discussed this morning, beyond the NRG and IHC proposals. Those proposals obviously are important and should be considered but there are other concerns that some of our clients have expressed and one of them -- let me just give you an example of something that hasn't been discussed here and I think could be worked into these regulations and those deal with headwater benefits

jurisdictional issues. Several of our clients have faced issues concerning FERC jurisdiction for very small headwater benefits projects, projects that either produce a very small amount of power at downstream generating license projects or even a negative amount of headwater benefits and we think that the rules should include a concrete method for evaluating the percent contribution of a storage process to downstream power generation. It is clear under FERC precedent and under judicial precedent that headwater projects that contribute only a diminimus amount to downstream generation are not required to be licensed, but no one knows how to make that determination and when FERC will find that the contribution is diminimus. We have had numerous instances of that difficulty in Maine and we think that this problem should be fixed.

Storage project owners need to know what is required to be able to plan and to be able to devote their time and resources to that particular determination. So that is just an of example of how some other issues beyond what are in those proposals should be considered in these reform processes.

A couple specific areas that I think have been addressed, but I just wanted to touch upon on behalf

of some of my clients. First and foremost, the NEPA efficiency issue. FERC should eliminate the redundancy in the consultation and the environmental review processes. As they are currently structured, the process requires, as you know, years of consultation prior to submission of the application and then further years of consultation and comment as the environmental review process proceeds and other laws unfold. That structure is incredibly burdensome and time consuming for licensee and even resource agencies, particularly for the smaller projects I am talking about. We support the suggestions that have been made for improving the scoping process, particularly with moving FERC's scoping to the beginning of the process and permitting licensees to conduct scoping and prepare draft EA's and EIS's as well.

The second major issue I want to touch upon is just the baseline issue. We think that the rules should provide that the environmental baseline is not the preproject condition, but rather is the condition of the environment at the time of the relicensing. The license conditions have to start from that baseline and having that concept codified in the rule would assist in eliminating the continuing efforts

that are made in relicensings to obtain a reversal of FERC's position on that issue.

Next, the consultation process itself, we think that the rules should more strongly discourage what we see as FERC's increasing tendency to treat nongovernmental organizations in a manner that is similar to federal and state resource agencies. We think that that treatment is inappropriate and it is not consistent with FERC's rules.

Just briefly, buffers also have been an increasing issue for several of our clients. The rules relating to buffers we think should be clarified and discourage the frequent efforts that are made in relicensing to obtain greatly expanded buffer zones beyond the two hundred feet as set forth as the assumption in the rules.

Mandatory conditions are obviously a very significant issue and have been touched upon this morning. We think that FERC should clarify the scope of any mandatory conditioning authority, including identifying each agency with such authority and the scope and timing for exercising that authority. Obviously, you are not dealing here with the statutory provisions, but there are certain changes that can be made to improve that process. We think the rules

should be specifically identify FERC's role in reviewing mandatory conditions, including their evidentiary basis and how they effect other aspects of the project. The increasing use of mandatory conditions to dramatically reduce FERC's discretion, which is to balance competing interests under the Federal Power Act has been an unwelcomed hallmark of recent FERC licensing proceedings.

We support the suggestions that have been made that the Commission should evaluate and make findings and recommendations regarding post conditions, as well as the reasonableness of the conditions and the evidentiary basis. We would also encourage the Commission to explore joint actions with other agencies to resolve the mandatory conditioning issue. Agencies, of course, often impose mandatory conditions without sufficient recognition of the impacts of those conditions on project operations. We think the agency should be encouraged to recognize those impacts and there should definitely be an agency appeals process for all mandatory conditions.

Just briefly, two more key issues, one is reopeners, which has been a big issue for many of our clients. We think the rule should include a provision on reopeners that makes clear that reopeners are not

appropriate when the resource agencies and the licensee have agreed upon appropriate conditions in a settlement and have not specifically agreed reopeners as part of that settlement. And settlements also should be addressed. We think FERC should retain the alternative licensing process but revise the rules to provide for greater deference to settlements that arise from that process and to eliminate redundancy. For example, the rules should encourage FERC to adopt the applicant prepared EA, rather than creating its own new analysis when all parties are in agreement. We support the suggestions that have been made that the Commission should create flexibility in its time lines to allow for the successful resolution of settlement efforts, to provide options so that licensees can alter deadlines so that promising settlement discussions are not arbitrarily derailed.

Just in closing, we would encourage FERC to retain the flexibility in its current traditional and alternative licensing processes, because as I think others have recognized, a one size hydro licensing process does not fit all projects.

That is all have I to say. I will be submitting written comments as well. Thank you for this opportunity.

MR. MCKITRICK: Thank you, Matt. John Suloway.

JOHN SULOWAY, President, National Hydropower Association:  
Good morning. My name is John Suloway. I am currently the President of the National Hydropower Association and I am also Director of Licensing at the New York Power Authority. I have been licensing hydro projects for over twenty years.

I am making these comments on behalf of the National Hydropower Association. NHA applauds the Commission and its sister agencies for undertaking this rulemaking. This is the time to make significant changes in the process while recognizing the roles of all stakeholders. I think that the IHC and NRG proposals have many good suggestions, but we at NHA also believe that the rulemaking offers an opportunity to address issues not included in those proposals, and I think Matt did a wonderful job on outlining some of those. Consistent with the National Energy Policy process, we have the opportunity to make the process more efficient, more reasonable, and less costly, while still preserving the environmental protection that is meant to be there and also still preserving the existing authorities of the federal and state resource agencies.

As Chairman Wood said in a November 7 FERC forum

in Washington D.C., "We can improve this process so it produces better results. I think that is very important. It is not a matter of just cutting time lines and cutting costs. We at NHA want to make sure we have better results, because those better results are needed for America's leading renewable resource and for those of us who benefit from that resource, hydropower.

What are the key issues that need to be addressed in this rulemaking? Number one is flexibility. No two projects are alike. Applicants need the flexibility to chose a licensing process that best meets the needs and characteristics of a particular project. We do advocate the retention of the alternative licensing process and the traditional licensing process, particularly for those companies that are using them now. We don't want to see anybody caught in the transition between projects that are under way and projects that will be started after this rule has been finalized.

Secondly, we think, as Matt stated, that there is big room for improving the NEPA process. The existing process is duplicative and not very well coordinated, to say the least. As Matt said, applicants end up doing a lot of the same tasks with regard to

consultation prior to the filing and the final application and then FERC kind of redoes all of that work all over again after the application is filed.

We also think it is important to improve the coordination and integration with the Clean Water Act certification under 401, ESA section 7 consultation, section 106 consultation, CZMA certification, and tribal consultation. How did I do? Okay.

Third, thing that we think is important to address is studies. The development of study plans as well as the conduct and interpretation of studies are a costly and time consuming part of the process. For many projects, along with the efficient scoping of issues in the beginning of the process, needed studies should be determined up front with agencies and stakeholders involved. FERC involvement from the beginning and an effective dispute resolution process will improve the efficiency and determine the appropriate study and study methodologies. Also, the timing of studies is an important aspect of this issue. The new rule should include provisions to ensure that study requests are provided as soon as possible and late requests are discouraged or rejected.

The last issue I wanted to bring up is the

enforcement of time lines. FERC should establish, although it has a lot of them established all ready, and enforce guidelines and deadlines. Although the current regulations have deadlines, FERC generally accepts late file conditions and study requests. This results in time delays and additional costs. At the same time, FERC should exercise this responsibility with common sense. Recently under the theme of enforcing deadlines FERC has rejected requests for extensions of deadlines that were supported by all the members of an alternative licensing process, to complete settlement negotiations. This use of enforcement of deadlines is counter productive.

So, to address these issues the National Hydropower Association has developed a process at the conceptual level that was presented in the Washington D.C. forum. In our new process an applicant can have NEPA scoping and analysis after the final license application had been filed, as is done today in the traditional licensing process. As part of this, for projects that do not merit extensive review, an applicant could request waivers to minimize the consultation required prior to the filing of the license application. That is not to say that stakeholders wouldn't be involved in this process, it

is just that most of their involvement would be after the application is filed.

On the other hand, for those applicants that want NEPA scoping and analysis prior to the filing of the final license application, as is done today in the alternative licensing process. NHA's process provides an opportunity to use pre-filing NEPA in various ways, including an applicant prepared EA, a third party EIS or an EIS or an EA prepared by the FERC and its sister agencies as proposed by the NRG.

The NHA proposal is aimed at addressing the issue of flexibility to a great degree. However, it also provides an opportunity to address the issues that I addressed earlier, including study development, enforcing deadlines, and finally improving the NEPA process. Thank you. I would be happy to answer any questions when we have time.

MR. MCKITRICK: Thank you, John. Bruce Carpenter.

BRUCE CARPENTER, New York Rivers United: I am Bruce Carpenter. I am the Executive Director of New York Rivers united, a member of the Hydropower Reform Coalition, and have been involved with both the Interagency Task Force in the past and also the NRG group.

One of the things certainly that from the resource/environmental community has to be brought out, while this is a process discussion, what we are looking at are rivers and there will be over 130 rivers that will be effected by these decisions for the next fifteen years, so we can't forget what we are looking at and it is very important that we keep this in mind.

We have looked at the relicensing process and feel that the development of a single process so everyone is on the same page, moving in the same direction, and the decisions that are being made are being made consistently throughout the country and throughout projects within the states. More than one process complicates things; it adds confusion to the public who are involved in these and I think it adds confusion to agencies who don't necessarily understand the entire processes to begin with. But, any new process should be flexible and enable participants to tailor that to the individual needs and conditions. This is certainly something that ourselves, and agencies, and industry, all agree upon. Not every project is exactly the same.

Enhanced public participation. Early public involvement is a key to moving forward in a new

process. This means that all of the issues, scoping, and study design and all of the things that have caused extensive time delays in the past could be resolved early if the public was involved. There are issues that not necessarily all of the agencies are familiar with and by involving the public early, you are able to bring those to the table. The alternative process currently is vague and we are not exactly sure of the guidelines that involve us inconsistently across the country. Again, that is why we would like one process.

Any process should facilitate settlement. One of the keys we think in moving forward with this is, when you have a group and they are able to resolve disputes early and able to move forward, settlements are the key to making the thing successful. A robust dispute resolution process, and we certainly looked at the processes that have been put forward and think that they should be incorporated.

Finally, a better coordination with the state process. Start the clock for the 401 certification after the state deems the application is complete; they have all the studies, they have all the necessary information, and that would move the whole process along faster.

We look forward to working with everybody in this process. We look forward to hopefully being involved in the drafting committee that will be involved in Washington and we think that FERC in keeping the scope of this fairly narrow can resolve these issues. If we broaden it too much, the way other speakers have suggested, we will only open up a can of worms. Let's take one step at a time and start the process and fix this process now. Thank you.

MR. MCKITRICK: Thank you, Bruce. Tom Christopher.

TOM CHRISTOPHER, New England Flow, AWA, HRC:

Thank you very much for putting this conference together. My name is Tom Christopher. I represent the American Whitewater Affiliation, New England FLOW, based here in central Massachusetts and I am also a member of the Hydropower Reform Coalition and one of Bruce Carpenter's colleagues. I have been doing relicensing work here in New England now for fifteen years. I represent a couple of NGO's that for the most part have been modestly successful in using the ALP in developing settlement agreements.

We believe that whatever process comes out of these hearings and goes forward should be a single process that should incorporate settlement agreements.

We believe the process should be flexible and allow NGO's, stakeholders, state and federal agencies, and applicants, the opportunity to put together the best possible proposals that will balance the use of the resources and will also enhance environmental mitigation.

I would like to speak directly about public involvement in this process. As I look at the proposals that have been put forward this morning, there certainly has been some emphasis on the role of the agencies, the role of the applicants, and the role of the existing processes, but there has been not nearly enough emphasis on the rural NGO's. In all of the relicensing procedures that I have been involved in in the last fifteen years, it has been very, very difficult for NGO's that do not have statutory authority to engage themselves into the process to represent the public interest and to achieve higher levels of mitigation on these resources. We believe that for the most the role of the public and NGO's in this process is critical if we are going to go forward and continue to mitigate for the damage that is done by hydropower historically.

We disagree with the idea that the baseline should be established at the time of relicensing.

Public utilities and hydro operators for years have been using these resources on the back of the public to generate profits for their corporations. That is understandable, that perhaps we did not have the knowledge or experience of the damage that was being done to the resources at the time these licenses were granted. Times have changed. We have new ideas, new technologies, new ways to evaluate what is actually happening to all of our riparian resources and we need to take into consideration what has happened over the last fifty years if we are to do an effective job of evaluating the types of mitigations that should go forward.

In closing, I would just like to say one of the things that we would like to see eliminated is annual licenses. The problem with granting annual licenses is the fact that an applicant can drag these licenses out for years and years while these studies are being done and who suffers in the end but the resource itself. So, it would be very helpful if the new process that does go forward would certainly include a component that would eliminate annual licenses. Thank you very much.

MR. MCKITRICK: Thank you, Tom. Ken Kimball.

DR. KEN KIMBALL, Appalachian Mountain Club:

Thank you. My name is Ken Kimball. I am the Research Director for the Appalachian Mountain Club. I am here to represent our 93,000 members.

AMC has been engaged in hydro relicensing since the mid nineteen eighties. We are a member of the Hydropower Reform Coalition. I am a board member of the Low Impact Hydro Institute and I also participated on the National Review Group 1, which is what led up to the proposal from the NRG 2.

First I would like to express my appreciation to the Commission for its open outreach efforts here today and across the country to include public participation. I think it is extremely critical because we are talking about publicly owned resources and there has been a lot of concern about the ongoing traditional processes where the public really has been given a secondary role and I think this outreach effort here today is a tremendous effort forward in trying to resolve part of that problem.

The Commission has established a very aggressive schedule to complete this task in the rulemaking and changing of the procedures for the hydro relicensing. Our organization fully understands that many of the current relicensings have had unnecessary costs and delays. We do not disagree with this conclusion at

all, including the issuances of multiple annual licenses and the problems that Tom just outlined before me. When this happens the public and the resources are cheated of the implementation of needed mitigation enhancement. The AMC believes that some of those costs and delays are not due to the process itself, but rather represent cases where the licensees have failed to provide adequate information as required in an early enough part in the process, combined with the Commission's reluctance to remedy these study deficiencies in an early and consistent manner and I will try to give some suggestions a little bit later on how some of these can be resolved.

That said, we agree that the licensing process can be improved NGO's and public many times find the current system extremely confusing, burdensome, complicated, and the time to complete a licensing over taxing. If the licensees feel like they have limited resources, I think I can exhibit that the NGO's and the public in many cases have even more limited resources in this process. So, it is in the best interest I think of all of us to see if we can improve the process.

The alternative licensing process has very good intentions but currently it is vague and at this time

it works at the sole discretion of the licensee. The other thing I would like to emphasize is that if we are going to move on to a fast track process, there is a need to make sure that the agencies, both at the state and the federal level have adequate fiscal resources so that they can meet these compressed time schedules. At times I think it is very clear to us in the NGO sector that the public agencies do fall down but a lot of times they fall down because of inadequate resources that are provided to them to try to meet the tight time schedules and the multiple requirements that they have in the relicensing process and I think this issue has to be addressed along with condensing the time schedule if what is put together is actually going to work in the future.

Let me try to touch on a few of the questions that have been highlighted by the Commission for this process. First, number one is develop one process. Reform the traditional licensing process and incorporate the best elements of the alternative licensing process, include collaboration, required early public involvement, input on study designs, and early development of the NEPA process, I think are elements that need to be incorporated as we look at a single process that has several flexible tracks

underneath it, as opposed to a series of multiple processes for which many of us who have been engaged in hydro relicensing for over a decade are still scratching our heads trying to figure out how they actually work and what is the next step.

Second, it is extremely critical to enhance public participation. Rivers are a publicly owned resource. The current process to allow an applicant to marginalize the public and NGO's until after the application is filed, this is a perfect formula to guarantee more delay. As most of you know, in the traditional process right now, if an applicant keeps the public and the NGO's out until the applicant has filed, the only recourse we have at that time if we feel things have been done poorly is to file for an additional information request, etcetera; that is the current process guarantees failures under those types of situations.

The second is the ALP process, though having good intentions, does have very vague guidelines. The new licensing process should clearly require the licensee to engage all parties from the onset in scoping, study design, and so forth.

Facilitating settlement, the best outcome is a joint settlement, other than commission arbitration.

So, have earlier FERC involvement in the NEPA and the study design processes, have clear guidance from FERC about acceptable settlement terms and for adaptive management strategies, make sure that they are set up so that there are clear results, so that the outcome of the adaptive management strategy is result oriented, not process oriented.

Timeliness without sacrificing thoroughness. Timeliness is extremely important to the NGO's and the public, as I have outlined before. Before final license these discussions -- Excuse me, before a license is issued we need to understand that timeliness is critical, that the final decisions are actually going to impact rivers for three to five decades. Therefore, the new rules must have a strong oversight and forcefulness from the Commission to guarantee the complete ICD's or their MORF are done in a timely manner.

Let me try to be a little more detailed here. We recommend that the ICD be a complete compilation of current conditions, take the NEPA documents and the required elements in section E, et cetera, and have a defined list of what is expected of the applicant when the ICD comes in, so that when we get into the study scoping phase we all are working with a common

knowledge of the river system that is out there.

Let's not use the whole process just trying to determine what current conditions are.

In the ICD require that all of the comprehensive management plans for that basin are listed and not only are they listed but the particular elements are identified that are relevant to that particular licensing, so that we know where the agencies are coming from with their goals and so forth. List out all of the positive and negative impacts of the project. This will allow when we get into scoping to be able to identify the necessary studies that can focus in on impacts and necessary mitigation enhancement.

Lastly, have the ICD list the applicant's suggested studies, then we can move into the scoping document and the NEPA process with the background information behind us and the focus of that process in on, as I mentioned earlier, the impacts and necessary mitigation enhancement. We can explore the alternatives. Make sure that there are two field seasons and when you design the time schedule make sure that those two field seasons are set up so that they adequately address the biological questions that are being asked. That is, don't start the study

definition on March 1, understanding that you need to hire a consultant to be in the field May 31st or some time schedule like that. Make those two field seasons realistic, so we can get at the heart of the questions that are out there and have better coordination with state processes and the federal processes relative to the Endangered Species Act, the 401 water quality certifications and so forth and develop, I think as other speakers have said before me, clear time lines and expectations of the products that are necessary when those elements of time lines become due.

Relative to study dispute resolution, we strongly urge that it be an independent third party. I think we have to understand that in many cases a lot of the studies that are done for licensees are done by consultants and the consultants basically are tied in on a business contract with the applicant. That really means that the studies are not done in what we would call a pure scientific arena. It is done as a business decision and a lot of times there is conflict because of the way that this is set up and there is a need for third party dispute resolution to come about, and that third party that is making those decisions has to be independent basing their decisions on science, not on political pressure.

Next, and I think a very important element that has not been really outlined in either the IHC or the NRG process is, is there a way that we can get licensing within a watershed all on the same time schedule. What we are doing now is relicensing headwater storage projects independent of downstream facilities. And I think as a previous speaker just mentioned, there is a lot of conflict that comes up and there is a lot of debate about how much they are contributing and so forth, but I think a major step in trying to resolve this would be to get many of these interlocked projects together so that they are licensed on the same time frame. It would go a long way to reducing the question about the baseline condition. It would go a long way in reducing the question about cumulative impacts.

In summary, we believe that both the IHC and the NRG proposals have much in common, though the IHC process needs to better incorporate public involvement at an earlier stage and in a guaranteed form, have definitive time lines and expectations of the products and make sure that FERC is acting as a strong traffic cop on these, so we do not get into a lot of dispute late in the game. Establish criteria for studies and those criteria should not just be hurdles for

requesting agencies and the public, but they should also have expectations about what the applicant should be putting out there for studies. And finally, as mentioned before by Tom, we need one process that is flexible, not a Chinese menu of methods left to the applicant to choose from which best fits their needs. Thanks a lot.

MR. MCKITRICK: Thank you, Ken. Bill Sarbello.

WILLIAM SARBELLO, New York State, Dept of Env. Cons.:  
Thank you. I'm Bill Sarbello. I am with the New York State Department of Conservation. Within New York State we have over two hundred licensed or exempted hydropower projects and I have been involved with hydro since 1981 approximately and was involved in one of the subcommittees of the Interagency Task Force and also have been involved in about thirteen settlements on approximately fifty developments.

Before my comments today, I would like to thank the Commission and agencies again for the opportunity to address the issues and for the opportunity to look at the betterment of the existing hydropower processes and for reaching out and having these regional forums as well.

I just wanted to fill in some few things that some other people haven't touched upon. Our first

point is that we would like to ask FERC and the agencies to recognize the special roles and needs of the states; that the states have specific statutory responsibilities. We need information in order to make sound decisions and have a record upon which we can be challenged by either side, both in administrative and judicial proceedings. So therefore, we request that FERC treat the states as regulatory partners who implement delegated federal authority, specifically the 401 Water Quality Certificate and Coastal Zone Management Act. Toward that end, the going forward with a process, we note that the IHC proposal if you added everywhere where it said "federal resource agency or Indian tribe," if you had it "or state," I think that that would go a long way toward picking up the state roles throughout the process.

And while the NRG proposal is not as specific in places, I just wanted to point out that both the NRG and the alternative licensing processes really depend upon a cooperative status, cooperating parties, a memorandum of understanding, and a lot of times it is very beneficial and good to do these. We have had some good settlements under alternative licensing processes. But also, depending upon how this

ultimately gets worded in the final regulation, sometimes states have difficulties signing away certain responsibilities very much up front, very early in the process, especially before you have the studies and other information that might disclose additional facts or additional things that need to be looked. That is just a general comment on, you know, potential difficulty to keep in mind.

The second thing I ask is that FERC and the agencies all recognize that the states have a restoration role. We are charged with restoring minimal acceptable levels of water quality and habitats. Our study needs often entail assessing not only the current levels of impacts but also projecting what the river would look like under alternative operating from the current conditions. So, we very often in order to fulfill our needs of meeting minimal water quality standards have a different baseline from FERC and as partners that have to issue a decision, we really need that information in order to fulfill our role. So in considering study needs, please consider that, because if we don't have the information we will have to make a decision in a vacuum which puts us in a difficult spot; we are either in a position of conditioning a water quality certificate say in the

absence of information, which means we need to be more protective perhaps than we would be if we had more information or we may have to seek additional information under our own independent state authority, which could delay the process, or being put in the position of having to deny a water quality certificate without prejudice for lack of information. On the other hand, if you build the information needs of the states in early, we can flesh these needs out, get them satisfied and end up just front loading the process, which I guess is really my second point, which is that we support a lot of the front loading of the process that both proposals or most of the proposals have for early FERC involvement in seeing that studies are identified, that there is adequate follow through, and doing it right, doing it the first time.

We like the IHC elements which have a scoping document, one scoping document, two concepts of assuring that we can do the best job collectively for ferreting out issues and solving them, which also leads me to the issue of dispute resolution that in the current traditional licensing process there are good -- we think good standards within the traditional licensing process, they are a relatively recent

addition to that process and it's voluntary, so it doesn't get used very often. We see in the IHC process that it is bringing dispute resolution into the process early at the correct stage to resolve issues. I think that is a positive feature. I think there are some elements of the way that the decision making and dispute resolution is done that we'll comment on. We think that can be made better, so we will comment on that in writing later.

And in conclusion -- well, let me add a couple of other points. Settlements, I think it is important that there be provisions for settlements in the processing. I think settlements can work very well and FERC has done I think a very good job of incorporating some of the settlements that we have achieved in New York into final licensing decisions. Caution on time periods, some other people have said this as well, I think for -- we support the idea of having two years of studies, but the time period seems to be a bit tight for really making this happen effectively. And in our experience, sometimes for the applicant in order to be able to contract with consultants often additional things have to be done to the project, it may require some engineering to fit nets onto the project for doing sampling and that

again requires contracting, and design, and other things. It is kind of a tight time frame I think to get everything done that needs to be done, so you may want to take look at that.

And in conclusion, I would like to again thank you for the opportunity to speak and we will be following up with some comments in writing. Thank you.

MR. MCKITRICK: Thank you, Bill. Kevin Webb.

KEVIN WEBB, CHI Energy: Thank you. I'm Kevin Webb with CHI Energy. I would like to spoke focus my comments specifically on item 9 of your questions posed in the handout; that is, if the Commission adopts a new licensing process, should it also retain the traditional and or ALP processes. With respect to the traditional process, my answer is yes, absolutely.

I will admit that I have not taken a very detailed review of the two proposal alternative processes, however it is my impression that looking through those that they would both substantially increase the time and expenses incurred in relicensing. I can't give you any solid figures on that, but that is my initial impression just looking at the complexity of the process. And it is my impression that, you know, while this may be

appropriate for very large and complex or possibly controversial projects, I question whether it is appropriate for the your typical project under FERC license, that is a small project under 5 megawatts operating in a run of river mode. As you are aware most of, the majority of projects under FERC license are in fact under 5 megawatts in size. So, it is my opinion that increasing the complexity and expenses of relicensing would be unduly burdensome for small projects. The projects operated by CHI Energy and their subsidiaries range in size from 250 kilowatts to 25 kilowatts and the typical project we operate is between one and one and a half megawatts. Even under the traditional process relicensing costs will consume one to two years of revenues and that's just if you do that every thirty years that is a substantial expense on the licensee.

In contrast to our portfolio and they typical license project, I would like to point out that the projects represented by the hydro energy under the NRG are typically large projects, somewhere in the hundred megawatts and up range. And again, a large complex process may be appropriate for those projects, but I don't believe that that should hold true for the smaller projects. And just in further support of

this, I would like to point out that on October 30 the Commission issued licenses for two projects that we operate in New York State, these are 900 kilowatts and just under 1.5 megawatts in size and the Commission went through the rather unusual practice there of actually having the presentation at the regular meeting and actually having the commissioners act on those licenses personally and this was done because these were, as I understand it, two of the rare instances where new licenses were issued without need for any annual extensions of the existing license and I believe that that was done for kind of a show and tell for Congress, to show that FERC can push the projects through in a rather timely manner. So, I think that shows that that traditional process can work and I encourage the Commission to retain the traditional process as an option for the licensees, especially in cases for small projects that are not -- need to be overly complex. Thank you.

MR. FRINK: Thank you Kevin. Tom Howard.

TOM HOWARD, Domtar Industries: My name is Tom Howard. I am the Government Relations Director for Domtar Industries. Domtar owns and operates two different projects in the United States, three hydro projects on the Wisconsin River near Wisconsin Rapids

and then three storage projects on the St. Croix River, between the border that separates Maine from New Brunswick, the U.S. from Canada.

What I want to do is just sort of give a little bit of prospective from a company that is currently going through relicensing and speak about the storage projects on the St. Croix and bring in a little perspective from that area.

First of all, I would like to say that we do appreciate very much the Commission setting these forums up and allowing us the opportunity to participate. The storage projects that we own and operate on the St. Croix are very, very small projects. There's one in Forest City, one in West Grand, and there's another one in Vansboro. These are projects that were built in the 1800's primarily to float logs down the St. Croix River, down to mills that were down river. In about 1993 we began internal discussions within the company to discuss our relicensing and in 1995 we began the formal process. We are currently awaiting a final jurisdictional determination in the court system, but before we got to that point we spent approximately \$2 million on our relicensing effort. And I want to point out, that is \$2 million dollars spent on a couple of dams that

don't produce a single kilowatt of electricity. These are just storage dams. They provide water downstream to a couple of non-FERC licensed or regulated dams. These are dams that operate through orders of approval through the International Joint Commission. So, \$2 million for dams that essentially have no economic value to us. We've done headwater benefits analysis and actually have shown that they have a negative impact on the power generation downstream.

I do have a couple of specific recommendations, they have been covered in large part already by Matt Manahan and John Suloway, so I would just like to highlight them if I can. The first one, to eliminate redundancy in the consultation and environmental review process.

Two, to clarify the scope of any mandatory conditioning authority, including identifying each agency with such authority and the scope and timing for exercising that authority.

Next, to address FERC's increasing tendency to treat NGO's in a manner that is similar to federal and state resource agencies.

Fourth recommendation, to retain the alternative licensing processes but revise the rules to provide for greater deference to settlements that arise from

the process and to further eliminate redundancy.

The next one is an important point to us and that is to development a concrete method for evaluating the percent contribution of a storage project to downstream power generation and to determine the percent contribution that is diminimus with such licensing when licensing of the storage project is not required.

Incorporate into rule the conclusion that the environmental baseline is not the preproject condition, but rather is the condition of the environment at the time of relicensing.

My seventh point, to revise the rules related to project buffer to discourage the frequent efforts of NGO's to obtain greatly expanded buffer zones in excess of 200 feet.

My last point, to include a provision on reopeners that makes clear that provisions are not appropriate where the resource agencies and licensee have agreed upon appropriate conditions in settlement and have not specifically agreed to a reopener. Thank you very much.

MR. MCKITRICK: Thank you. Tom Howard is the last speaker I have on the list. That is not to say it is the last speaker. If someone would like to come

up and give some comments, you are certainly welcome at this point. If not, we are actually about an hour ahead of schedule. I think we have a couple of things we can do. I is maybe take a quick break and come back and start our discussion like we had planned. My personal recommendation would be that we kind of break now for lunch and come back. I think we have a possibility of some very good discussion with the other two groups or four that I have been involved with. It was primarily licensees but we got a good showing of NGO's and state here and I would like you to encourage a good discussion. But I am open to this. I don't know if anyone has any distinct feelings, if you would like to proceed or just take lunch and come back this afternoon. Yes, Tim.

MR. WELCH: Do we want to identify some of the issues?

MR. MCKITRICK: That's a good point. Jim, did you introduce yourself? Jim, tell us who you are and what you're doing here.

JAMES NARDATZKE, Bureau of Indian Affairs: I am Jim Nardatzke. I work with the Bureau of Indian Affairs and I belong to the Eastern Regional, which is located in Nashville and basically I have all the projects east of the Mississippi.

MR. MCKITRICK: And Jim has been helping me keep and is helping me with keeping track of what has been going on here and has been taking some notes during the presentation. And maybe if you just kind of quickly review what you have got here.

MR. NARDATZKE: I think the issues that were raised in the order that they were raised was headwater benefits; storage; NEPA issues, both time and structure; baseline issues and that's a couple of different aspects of baseline apparently, going back to before the bam and others; the issue of consultations; buffer zones; mandatory conditioning, reopeners; use of settlement agreements; flexibility of the system; retention or nonretention of the ALP and traditional system; study plan development, the time lines used to develop it was an issue; the need for a single and one person wrote for multiple processes; public involvement; dispute resolution; use of annual licenses; strong oversight; coordination with state and federal processes; consolidation of watershed projects; and early FERC involvement. The numbers behind it are just people that I thought raised it in their discussions, because we you want to do it in an order when we get back for the main issue that somebody has, they can do that.

MR. MCKITRICK: Our thought was that these are some of the things that people had brought up which may be good issues to start the discussion this afternoon. I guess what I would like -- first of all, would people like to break now, go to lunch and come back, as opposed to start a discussion on some of these issues and then break and then come back. Is there anybody that feels very strongly about staying here now and the starting discussion? Given the lack of interest, we will take lunch and then come back.

But what I would like you to do is give this some thought. Either before you leave or when you come back, why don't you come up and put -- we kind of have this marked out from people that presented, but there are a lot of people here who didn't have a chance to present anything and maybe put check mark by your two top choices, so that would help us frame where we would like to get started. We will cover these topics and anything else anybody wants to get started to discuss, but we want to focus on what is really important with you to start off with.

So again, we will break for lunch. Either as we break and before you leave, put check marks by your two top choices, not two by one top choice, or when you come back from lunch do that. It will help us get

started. I would suggest -- you want to take a little over an hour come back about 1:30. Okay. Let's shoot for one o'clock. I know we have a restaurant here. There are other quick choices, Chinese buffet I hear that is close by. Find a place, get here about one o'clock. And if we left something off, feel free to add it on.

(Recess)

MR. MCKITRICK: For those of you wondering how this is going to work, I'll throw an idea out. We would like to keep away from discussions of particular horror stories. I mean we can do that later. Everybody's got their own thing that went completely wrong, if you can generalize that into the types of things that we've been talking about, that's fine. We really don't want to talk about specific projects, particularly ongoing projects and specifically those projects that may be before either a hearing or some sort of civil court proceeding. We just don't want to get involved with that. So you could help us by just not talking about specific projects.

The other is, we are looking for good discussion. There is a diverse crowd here and that should be good, but nothing should be personal. Leave your baggage aside here. Let's just kind of focus on the issues

that we brought up and try to find solutions for these issues that we have identified or anything else later on in the day is certainly open.

What I would ask you to do is, anybody in here is open for discussion. We could have more explanation of the NRG proposal, the IHC proposal. The folks at the panel may very well be engaged in trying to sort out the information that may help them reach -- get better information for any proposed rulemaking, so we can engage each other. The one thing that I do ask is this is still on the record and my mic -- in a couple of minutes somebody will come back with a mic. If you raise your hand you will be acknowledged. Take the mic, give your name and then we can start the discussion. That may seem awkward, but it worked well in the past and it makes sure that everybody gets their statements on the record and it will help us define where we are going with any rulemaking.

As I looked through the check marks, it looked like there were two things that had at least three new marks by it, one was baseline issues and the other was dispute resolution. I think what we are looking for again is any discussion dealing with baseline and particularly if there are issues dealing with baseline, what kind of solutions do you see going into

regulations that may change that. So, we have at least three check marks. So, would anybody like to start?

MR. KIMBALL: Ken Kimball. Relative to the baseline question, you know one of the solutions, if you move the NEPA process up to the front, which was proposed in both the IHC and the NRG proposal, I think the baseline issue can be dealt with there, because it is required in the NEPA process under the cumulative impacts to look at past, present, and future and use that as the area where the baseline question is going to be resolved.

MS. SKANCKE: I'm not wearing my hat as NRG, but just as somebody involved in the process. I think that any analysis of the baseline though has to recognize the case law as it exists and what the courts have told FERC it needs to do on some of the baseline matters with respect to new license, in other words, relicensing.

MR. WELCH: Tim Welch, FERC. We have all debated the baseline issue many, many times. As Nancy said, you know, FERC's policy on that is quite clear and that has been formulated by obviously thought and discussion at FERC, plus a number of case law decisions that Nancy had mentioned. So, I think the

question here is, as I heard this morning, was not the baseline itself, but it sort of takes it a step further; should we codify it in the regulations. I guess my thoughts on that are just because it is such an issue, as I said, it has been determined by certain circuit courts in certain areas and just noting that there are certain ALP's that I am aware of that have sort of gone outside of the FERC policy for baseline just because it was agreed to by all parties and we sort of want to have that flexibility as well.

My personal feeling is if we codified it in the regulations that says baseline will be this, then I think it will be difficult to -- I just think it makes things more difficult.

MR. KIMBALL: Ken Kimball again. I agree with you one hundred percent, because part of the value of a hydro project is to exhibit that it is adding benefits relative to air pollution and so forth and if you codified baseline to say that you could only look at current conditions, than many of the positive advantages that hydro has to offer cannot be compared against past conditions and hence would be neutralized.

TOM DEWITT, FERC: Tom Dewitt, I'm with FERC also. I don't know that the Commission has said that

you can't look at preproject conditions. What the Commission I think has said up to this point is that We didn't find it appropriate for the Commission to ask applicants to do studies to try to determine what preproject conditions were. I think to have a baseline as established by the courts and you could still have some semblance or some degree of investigation into preproject conditions with a carefully worked out settlement with the licensee or in the case of states, like Bill Sarbello said, there might be something a licensee could do to bring together information that would help them in their statutory responsibility for restoration. So, I think you can still keep the definition of baseline and still to some degree do those things that are critical for the state or some other organization to find out potentially what was there prior to. It is just that the Commission has chosen up to this point not to require those studies.

WILLIAN SARBELLO, New York State, Dept of Env. Cons.:  
Bill Sarbello, New York State. I would just like a clarification on what are you considering the baseline. Is it project operating as it currently is or some variation off of that.

MR. WELCH: I would have to leave it to what the

court said and I don't want to paraphrase it at this point. My understanding is it is the project as it exists today within the existing environment, this baseline.

MR. SARBELLO: Does that mean with the project operating under its current operating scheme? Because the project as it currently is can be the project not operating with the water going over the dam, which is under certain circumstances that is a normal project condition when you are doing repairs on the project.

MR. WELCH: I have to go back to what the courts have told us and probably some of you know that better than I, because the difficulty is states are going to have different statutory requirements and it is probably going to vary from state to state in terms of what they consider for the baseline, but in order to, you know, see what the river looks like in a situation with flow going down. Let's say the situation is a scenario where you have a by-pass reach that is dry most of the year with water flowing in a pen stock or a power canal, if you continue the current conditions, that reach is not going to meet water quality standards. At least in our state it is not going to support fish propagation and survival, nor support the best uses that have been designated for it. What we

need as an information base is to have that analysis of what that reach would look like under different flows, so that you could establish what level of water would be needed in order to provide at least the minimum levels and I guess the issue, again just to be sure we're clear, is that if the states don't get that information they are in a corner, because they need that information in order to make their legal determinations and if FERC treats the states as partners and puts it into the regulations that you have to give some deference or some other way of doing it to legitimate requests that are made by states and we could tie it to why we need the information, that if you get that information up front you can front load the process; if you don't, it is often going to be an issue of incompleteness and additional information requests, which is going to end up back loading the process. That is my only caution in terms of holding narrowly to a baseline condition that may satisfy the Federal Power Act but does not satisfy the Clean Water Act.

MR. CARPENTER: Bruce Carpenter. I agree with the idea that this is an issue that has been discussed, will be discussed, and continues to be a point of something that we do not agree on, but it

does seem that most of us do agree within NEPA a cumulative analysis does have to be done and if we can all agree on that and leave aside the baseline issue, we move past this issue and I would encourage everybody, that is what we have done in New York and it has worked. Now, I am not saying that solves everybody's problems, but I think we are getting into an issue that we could spend the rest of the day on and we would not have consensus in this room, I'm sure.

FRANK DUNLAP, FPL Energy: Frank Dunlap with FPL Energy. I would join in and encourage that the Commission indeed codify their existing policy and the courts decisions on baseline being in existing conditions. To do so will help end this continuous discussion, wherein a lot of time and effort is wasted. If they're in settlement agreements or any other proceeding a licensee or other entity desiring to that, you are certainly welcome to. Nothing would prevent a licensee from choosing to compare to a prior condition of one hundred years ago or whatever it is, but to codify that for the Federal Power Act purposes and the licensing purposes that existing conditions or baseline conditions will allow everybody to move forward in a beneficial manner.

MR. SARBELLO: Bell Sarbello, New York State DEC. Yes, the point I guess I am trying to make is it is not just the Federal Power Act in granting a license. FERC has to meet all of the statutory requirements which does include, you know, Clean Water Act, Coastal Zone Management Act, et cetera, et cetera, et cetera, there is a long list of them and you can't just focus on one act, you need to satisfy all of the obligations.

MR. MCKITRICK: I think we have kind of discussed a lot of sides of this and we probably understand each other's positions. You have probably heard a couple of positions here, where everybody stands. If you are going to submit comments to us and that is an issue with you, I would encourage you to develop that as a problem and then how you would solve that within changes of regulations, if they should be changed or not be changed or should be considered somehow, what kind of language would allow that given where we stand legally and that type of thing would be very helpful to us in helping to initially sort that issue out. So, I think it is a fruitful discussion. If you want change in regulation or how it should be considered please give us some language or solutions on how to do that. Anything else dealing with baseline?

MARK WOYTHAL, NYSDEC: Mark Woythal with the New York State DEC. I am really asking for a point of clarification. If you have had a project that has been decommissioned and a new applicant decides to pick that project up, but the river by-pass reach, whatever, has been fully watered for a number of years, what would you consider baseline in that case? It is preproject, what the present conditions are because it is a new project or do we have to go back to the old project and say well, fifty years when that was licensed, that is what the baseline preproject conditions would be.

MR. WELCH: Tim Welch,FERC. That is a good question, Mark. I think it just would depend on the time frame. I mean if it were like that for twenty years that is not such a difficult decision to make, I think it would be that current condition as it existed in that by-pass reach for twenty years. If it were like that for five years, a little bit tougher decision. If it was like that for a year, I don't know.

MR. MCKITRICK: I think the next one that came dispute resolution. We had a couple of ideas that were presented, specifically with dispute resolution through the IHC and NRG, realizing that what you saw

were two ideas of how to go about doing something, if you support one over another that is good to know, but if you would like to see changes, given that probably neither one of these is going to end up as the rule, what we are looking for is help here on how to fine tune these or deal with dispute resolution and any ideas that you all may have. Is there anybody that would like to start the dispute resolution?

BETTY LOU BAILEY, Adirondack Mountain Club:

Betty Lou Bailey, the Adirondak Mountain Club. I would like to make a statement that it appears that dispute resolution as it currently exists in the traditional approach to licensing is vested in the licensee up until the time of the license application. In other words, you propose studies and it is up to the licensee what he runs.

MR. MCKITRICK: Was that a specific thing that you saw within the IHC proposal?

MS. BAILEY: No, I would either proposal gets away from this, but I think that it should be recognized that the starting point that we are dealing with here in dispute resolution is not with FERC deciding these things at present. The licensee is the deciding person up until the license application.

MR. MCKITRICK: So you would be proposing that

the licensee is the one that solves the dispute?

MS. BAILEY: Well that is the way it is right now. I mean You can propose things. It doesn't get done and then you propose it again when there is the ASR and if in it gets into the AIR, then it may get done.

MR. MCKITRICK: And that's a good thing?

MS. BAILEY: If you want things done up front, it is better to take away this prerogative of the licensee deciding what gets done and what doesn't.

MR. MCKITRICK: Okay. I understand.

MR. CARPENTER: Again, with regards to studies, I think we have to look at the problem in the real world. A lot of times it is not whether to do the study, but it is the methodology. There may be a proposed method by the agencies and an alternative proposed by the applicant or NGO's and we need to recognize that there is more than one way to do things. Develop criteria for the outcome to ensure that whatever method is used will give the outcome that will satisfy all of the parties. So, the dispute resolution process has to have some sort of criteria built into it and it also has to be, I think, a third party, because if in fact any of the parties involved in it are deciding, because there is money involved or

something else, it doesn't get the satisfaction of the other parties.

MR. MCKITRICK: For instance, there should be criteria dealing with what type of study should be done?

MR. CARPENTER: The outcome of the studies; in other words, in this particular case, the study I am speaking of, if we can agree on what the outcome of the study should be, then that formulates some criteria for how the study will be implemented if in fact it will satisfy that criteria.

MS. SMITH: Ron, I have a question for him.

MR. MCKITRICK: Gloria.

MS. SMITH: Gloria Smith, IHC. Would this work best for you, Bruce if in addition to the criteria that is already laid out in the IHC proposal, in other words did we sort of miss the mark in addressing the issues concerning you?

MR. CARPENTER: I think they are there but it is not spelled out clearly to me. That's me. So, I think that if it was clearly identified, and again, sometimes examples help for us.

MS. SMITH: I think that is a good point. Please, when you submit comments expand on that a little bit and let us know if there is anymore

criteria that may benefit the process.

MR. MCKITRICK: On other thing that deals with a third party making a decision, I think what was proposed to me was some sort of panel of people, but you are talking about bringing in like a single third party to hear the dispute or make the decision or is it --

MR. CARPENTER: This kind of goes to the flexibility and it does have to be flexible. There are issues that could be decided by the parties choosing one party. On the other hand, I am involved in an example where we have a whole panel of experts that have aided us and it has been very, very good, but we all decided upon that, the size of the project, the size of the scope, so that flexibility in determining who the final arbitrator is something that could be built into the process.

MR. MCKITRICK: I think that is a good point. I would just like to veer off on the flexibility point a bit. When you are fine tuning your comments to us, realize at some point we have to put this in regulation and when you start writing it is very easy to conceptually understand and talk about, but then when you have to put it in 3.4-F.1 or something, help us with those kinds of things.

MS. SKANCKE: Nancy Skancke again, not speaking for the NRG, but as a practitioner. One of the things that I see missing actually in both the IHC and the NRG dispute resolution is assurance that the licensee is involved with the dispute resolution, even though it may be on studies that they are going to be told to do by the agencies. The licensee may have some beneficial input that says here is a way to do it that is a little cheaper but gets to your end point that you want. And similarly, I would suspect that the NGO's are asking for the study, they should be involved. It should not just be between two federal agencies in the dispute resolution.

MR. MCKITRICK: This is something that I think would be something different from the IHC proposal?

MS. SKANCKE: I think both the IHC and the NRG, I know the NRG proposal doesn't specifically have the licensee or the NGO party, non-agency parties seeking the study involved in the dispute resolution process and I think that is an omission. I don't believe IHC -- In the NRG process the licensee can present information to the panel advisory panel, which is then the third party group that decides, and that's the licensee's input, but if you move to something that is more interactive than just filing stuff that sits in a

different room and decides, I think you need to have the licensee and the person requesting the information both there to answer question and give suggestions. And I can let Kathryn talk about the IHC, but I don't think it had the licensee actively involved.

MS. CONANT: No. And actually, Nancy, I had more of a clarifying question for you. You are correct that the IHC proposal has the finding that ultimately goes to FERC is made up by a panel of three members which would include somebody from the requesting agency, FERC, and then a neutral party, but the applicant and other interested stakeholders would provide input into the panel. So my question to you is, are you thinking that the panel should actually be more than three people, that would maybe include the licensee? I am just trying to figure out the best way, when you say involved in the process --

MS. SKANCKE: Well, in the IHC and NRG process this panel idea I think was submitted, but I get the sense that there may be alternative processes suggested for dispute resolution which may not involve a panel per se, but which will involve more of an interactive iterative dispute resolution process. And if that is the case, as opposed to people filing paper and then having the panel decide, then it definitely

seems to me that the loser process, as opposed to a panel process needs to have the parties seeking the data, even if they are not an agency, and the licensee and there should be recognition that there may be an easier cheaper way to get to the end result from the way the person seeking the study has requested.

MR. MCKITRICK: Ken I think you are probably our next speaker.

MR. KIMBALL: I just wanted to go back on the question of whether the IHC proposal is totally satisfactory and the answer for the NGO's is a definite no, because essentially as written it just relates to federal agencies, tribes, or the Commission staff and we do believe that the NGO's should have the ability to bring forward study requests and if those study request are not adequately met, we should be able to have a voice in the process as well.

MR. MCKITRICK: So you would be in agreement that if there is a dispute dealing with NGO's is you could be part of that resolution?

MR. KIMBALL: Yeah, because I think in part, if you take a look at many agency requests they are bound to their requirement like the Endangered Species Act and so forth. NGO's may come in and ask for a boating study or something that does not have that sort of

legal mandate behind it and yet is a required part of process and the NGO's and the public probably should have some say on some of those issues.

MR. DEWITT: I think I agree with a lot of the discussion going on and I sort of worry about one set dispute resolution process, like a licensing process, one size does not fit all. And while some of my colleagues might choke on this a little bit, I would look for you all to come forward with some recommendation on how we could have some sort of a flexible process. It might work, if you remember the NRG proposal where there is an MOU wherever there is a case specific memorandum, I think we are finding that dispute resolution processes work best when the stakeholders of a particular case decide how they want to solve disputes, rather than having to face this one dispute resolution fits all. So, I think some of our experience is that if you establish a dispute resolution process and for the most part it is going to be used very little because it often times doesn't fit a certain situation. So, we might come forward with some recommendations on how the dispute resolution could be flexible. Gloria.

MS. SMITH: I just want to clarify something real quick to hopefully help you when you're formulating

your comments, I think what the IHC intended to do was to very much have all the stakeholders, NGO's, states, tribes, involved in setting the studies that will be conducted. If you have seen our complicated diagram, the first eight boxes go to having everybody at the table figuring out what recreation studies need to be done, you know, what have you and it is when and it's, faster, cheaper, better, all of that will be discussed at that time. It is when there is a complete breakdown in the unusual case we're predicting that it will go to the dispute resolution. Now, I see people sort of skipping the really important part that we spent a lot of time on, making sure that all stakeholders were involved in establishing the study schedule and criteria.

MR. MCKITRICK: Good and make sure you give your names before we start here again.

MR. DUNLAP: Frank Dunlap with FPL Energy. I think it is important that we make a distinction here of what we are talking about, arbitration versus dispute resolution. Much of what is being bantered about is an arbitration, which is a separate party making a decision. That happens in court cases where somebody has been harmed. To have a dispute resolution process which eliminates the licensee quite

frankly is ludicrous. They are the ones with the most information. They are the ones most involved and they are the ones that have to carry it out. So if we are trying to resolve a dispute, you need to include the licensee as an equal party, not just as an information gatherer.

Q.

MR. WOYTHAL: Mark Woythal, with New York State DEC. I would like to go one step farther with your comments, sir, on the most involved person, the one with the most information could be actually the licensee. My concern with the IHC proposal was that the representatives at the table by design were going to be different than those involved in the actually workings of the project and eventually designing the study, those people won't be informed either. They won't know the merits of the project and the specific situations that are very important, both from the stakeholders, from the agencies, from the FERC's position, and from of course the licensee's position. And secondly, as far as the third neutral party, I would recommend that it be from academia where they are fully aware you mutually select somebody that could also be selected through consultation with the licensee, where this person knows the merits, knows

the state of the art as far as study design, he is not tied to the economics of the project, which of course is what the agencies are concerned about, you know involving the licensee might -- they may be looking at the economics, but they do know the cost of this study and they are saying they will bring a lot of benefit to the group by saying yes, it is a very good methodology, here is one that is equally as -- you know, will give you the same results but it will be cheaper. I think that will go a long way.

KIM OWENS, Department of the Interior: Kim Owens with the Department of the Interior and also a participant in the IHC and I have a clarifying comment and then I will follow-up with a question for both of the previous speakers. I think that when we developed the study resolution process, what we contemplated, and it is stated in the IHC proposal, although it may be a bit varied is that the license applicant and all other stakeholders would have the opportunity to provide input to the panel that is resolving this dispute. I don't think it was ever contemplated that we would have a panel off in a room making this decision in a vacuum of people who are not informed. With that said, what more, what additional role would you like to see for the licensee, or the state, or

other stakeholders to help inform the dispute resolution process?

MR. MCKITRICK: I guess we have one more comment right behind him and we'll get back to you.

JIM GIBSON, FAMP, DE&S: Jim Gibson with FAMP. Just as a follow-up to what Nancy was saying and Frank in the back. I think the panel, the third party, should be the licensee. The licensee is most familiar with the project, more than likely has the resources to access the types of resources that academia would provide in terms of the expertise, knowledge, and knowledge about the cost of the study. Thank you.

MR. WOYTHAL: Mark Woythal again New York State DEC. Nancy, thanks for the clarification. In going through the IHC proposal I hadn't picked up on that being somebody separate. It was this morning's presentation, no blame at all, that caught my ear that it would be somebody separate and I would hope that it would be fully involved, you know, the whole party that has been working on the license would be involved to basically feed the panel information.

MR. MCKITRICK: So all the work that is going on prior to the dispute may help the input that is needed.

MR. WOYTHAL: Clearly. As soon as I heard this

morning I envision it, okay, now we have the V.P. from the licensee and I've got my division director going to a meeting and they don't know what the heck we're talking about.

MR. CARPENTER: Bruce Carpenter. It seems, again, getting back this flexibility that some of us need to focus our comments in two areas. One, those disputes that can be resolved at a more what I'll call a local level by the parties there and maybe the new rule just has to put that in some sort of a context and then those disputes that rise above the parties that are involved in a mechanism that will satisfy all our needs, because certainly all of the comments are accurate. Obviously the applicant needs to be involved; obviously the agencies need to be involved, but we need to have parameters around both and I don't think the rule that we're speaking of should eliminate or just focus on either one of those. It has to be flexible enough to accommodate the lower end and yet kind of boxed in enough so that there is resolution within the rule to disputes in the future.

MR. MCKITRICK: Dispute resolution, again, I would urge you as you listen to folks and you saw what the IHC and NRG have proposed how to -- how that should be changed, if it needs to be changed,

recommendations in that regard would be very helpful.

Tim.

MR. WELCH: Yes. It is obvious here that the dispute resolution process has generated far more discussion than anything so far that we have proposed. I think from my perspective, what we would like people to focus on is I guess the big fear would be that FERC would be handling these dispute resolutions like three and four on every case and it would take all sorts of time. So, I would stress maybe what Tom said earlier, keep in mind that this is going to be a last resort. So, maybe what we all should focus on is how do we not get there. Maybe right now the IHC proposal doesn't have enough sort of lead in thing to avoid dispute resolution. So, I would ask you all to focus on, you know, how can we not get there. What kind of regulations can we put in place to not get there?

MR. SARBELLO: I just had a question for Nancy or the NRG group and that would be in the NRG proposal one of the things that troubled us and eventually has an effect on maybe dispute resolution is that in order to become a cooperating agency you had to essentially sign away the right to become an intervener later and that can be problematic. I was just wondering, why was that envisioned as being necessary or is it

envisioned as being necessary?

MS. SKANCKE: Just to briefly respond to that, the energy proposal was trying to walk the fine line of getting as many agencies, if not all of the agencies involved into the NEPA planning process as a cooperating agency, so that you would have one NEPA document with FERC as the lead agency and other agencies as cooperating agencies. Through the NRG process we were also trying to balance this concern by agencies of their need to be an intervenor so they can protect their legal rights on rehearings. John Soloway is in the audience, he may be able to help me too on this but the idea of the lead was that we didn't have the answer to that because right now FERC's regulation have a certain mind set or peridine for what a cooperating agency can do so we tried to put into the NRG proposal a way that people would cooperate that then have basically a kick out time. At some point they could then say well, you know, we just can't deal with this anymore. We are no longer cooperating. Now we are an intervenor so we can fight you, so to speak, down the road. We're hoping that never happens, but that was the concept trying to work within the Commissions policy and regulations on cooperating agencies and intervenor status. And John.

MR. SULOWAY: To clarify or to amplify what Nancy said, Bill, what we were trying to do basically is something similar to the case for the north country of New York State, which we can't talk about, because it's an ongoing proceeding. And basically, we wanted to set a situation just like we have with ADC, that you could basically be a cooperating agency for a long long, long, time and still deal with the Commission's ex parte rules or their interpretation of the ex parte rules. So, but at one point or another you have to make a decision whether or not you are going to remain as a cooperating agency or you are going to decide to be the intervenor. What we tried to do on the NRG proposal is go one better than that project in the north country, in that we have limited the amount of ground you could basically argue with with FERC. Basically, all the stuff that you had worked together for X period of time and agreed on, that was not disputable, if you will, because you had worked in harmony. For those areas that you had not agreed on and you had documented in the record that you had not agreed on it, then you could go in and intervene on that stuff. So, we try to, dealing with FERC's current interpretation of the ex parte rules allow -- not even allow, encourage the 401 agencies, as well as

the other federal agencies, to participate as cooperating agencies for as long as possible and to basically cooperate with FERC as much as it possibly could. So, I don't think we did a very good job of explaining that in the proposal, because you kind of saw something completely different in it, so I think that is something maybe and if we decide as we go down the path to include that as part of say NHA's proposal or maybe something we would work with you on, that we need to clarify that, so it does not seem to be so threatening or as unworkable.

MS. SMITH: Gloria Smith. I want to go back two comments ago. I want to reiterate and sort of fill out something that Tim said about how the whole goal is to not have to reach the study dispute resolution process. At every one of these meetings that's what we focus on most is the process. Let's not even have to get there, and I think the way that we can best avoid that in this final rule is on page 11 of the IHC proposal, it has study request criteria. I am going to sort of take the IHC hat off and put a federal resource agency hat on here for a second, and what these criteria first has the resource agency do is to absolutely justify its need for these studies, project nexus, all that stuff, help us make sure these

criteria are the best they can be and that they meet everybody's needs, and then we are not going to have to worry about the study dispute resolution process to the point that I think a lot of people in the room are worried about.

MR. MCKITRICK: What page in the book, in the new book?

MS. SMITH: It is C-23.

MR. MCKITRICK: John.

MR. SULOWAY: Just one more comment on dispute resolution and what can be done, and it has already been talked about really in a way. For the most part, at least in my experience, study requests, the whole process is done in, you know, an up and up manner, but there are always cases where it could be a licensee, it could be a 401 agency, it could be an NGO that is using study requests for the purpose of leverage and negotiations. That is one situation that could be a problem. There are also other situations where there is really an honest dispute about whether or not a study should be done and I think both of those situations can be addressed to a large extent in avoiding dispute resolution by having FERC involved early in the process and FERC basically saying to an applicant, or to an NGO, or to a 401 agency, look we

are going to require that study or we are not going to require that study and then the cards are kind of on the table and if the particular party that disagrees with FERC wants to go another step, then they can do that.

MR. VAIL: Jeff Vail with the Department of Agriculture cooperating agency FEMA. I know within the Department of Agriculture. Just going back to the whole cooperating agency NEPA analysis issue, just a couple of points. One, I know within the Department of Agriculture and I think among all the federal resource agencies there is a renewed commitment to work on one NEPA document and that makes it possible to maximize our respective resources in concert with FERC in developing the NEPA analysis. But as to the whole consulting and cooperating issue, I think the resource agencies can work closely with FERC without being designated a cooperating agency, which is really a term of art, in NEPA's implementing regulations and avoid the whole issue of not being able to intervene in the proceeding and accomplish much of what everybody wants in the NEPA process by working closely. So, I think that can be dealt with. It was something I know NRG and IHC talked about when we met earlier this year, but I think that at least is one

issue that we can deal with in any rulemaking and maximize the resources that the federal resource agencies, the state agencies and FERC can bring to bear on one NEPA process.

MR. MCKITRICK: I congratulate everyone for giving your names first. It really helps out.

MS. SKANCKE: Nancy Skancke. Just as a follow up on John Suloway's comment, in addition to FERC earlier involvement and study issues, I really would to see and I think many of us would like to see all stakeholders involved early in identifying what they think the studies need to be, so the licensee applicant can come in and say that's great but here's another idea. You can get into FERC involvement and it helps a lot if you have everybody knowledgeable and involved as early as possible. And I believe under the IHC and NRG process there is the tool for doing that.

MR. CARPENTER: One thing that might help, and we have certainly thought about it, I haven't heard it mentioned today, but at least we have a list of required studies and then some of those studies may be eliminated if they don't pertain, but then there is no real argument over them. These are studies that will have to be done virtually on every project and that

might be at least someplace to start and move forward, again, past that idea of whether we are going to be arguing over the base studies or not. Early participation is essential.

MR. MCKITRICK: I heard a couple of things, one certainly an interest in trying to not get to the dispute phase and maybe emphasizing that and how we can best do that and there seems to be general discussion dealing with dispute resolution and maybe how to fine tune that if it actually gets there and we would appreciate those comments. But one of the things that maybe is related and it was marked up here with some of the NEPA issues and scheduling and time structure that was fairly high on people's lists. If we could maybe move on here, I think again it was dealing with NEPA issues, was there a specific thing either dealing with time lines, you want to incorporate studies, how to get defined studies into this. Study plan development, I think there were some ideas from the IHC as far as criteria and those kinds of things. Is that what we are talking about? Tim.

MR. WELCH: I just wanted to key off a little bit from what Nancy just said and I think Bruce said the same sort of thing about getting studies done early and I do notice in the IHC proposal that fairly early

on in the process they have the applicant making early study proposals and the agencies as well. I heard a very interesting comment. I heard a very interesting comment last week at the November 7 Commission meeting by David Muller from PG&E. David sort of raised a question, I would like to raise the same question to this group as well. As far as early study development, why would you come up with studies before scoping? In other words, why would you start talking about studies even before you have defined the issues and I remember what David pointed out, you know, was just number one, the practicality of doing that and number two, it has been his experience and it has been my experience as well, once the study issue comes up early on, that is when a lot of the positional meandering sort of begins. So, I guess I wanted to pose that maybe to the group if anyone had any ideas for discussion about that, exactly how early should you get into the studies. Should you have some idea before scoping or should you wait until after scoping?

MR. KIMBALL: Yes, Ken Kimball. As I suggested in my comments this morning, I think if you have a very thorough ICD, a very stringent guidelines as to what is expected. What the ICD should be doing is dealing with the current conditions and in the ICD you

can also have the applicant list out what it thinks are the necessary studies to answer the questions about potential impacts, whether they be positive or negative, and that way you can narrow the boundary as to where the studies are going to be needed.

Currently what we have is a fight over studies a lot of times, some that are focused in on just whether or not baseline conditions, current conditions, the data needs to be collected and then we have the fights about potential impacts that the project may or may not be having. I think if you can get a thorough ICD people will be well grounded then in what the existing situation is out there and the existing information base and then when we get into the scoping document process what we are really looking at is scoping out studies that are solely necessary to answer questions about potential impacts.

MR. MCKITRICK: So you would move actually talking about studies into the scoping process, as opposed to after or before?

MR. KIMBALL: That is correct, but it is essential that you have a fairly stringent set of criteria about what is expected from the applicant in the ICD, so that we have truncated the difference in studies between getting baseline information of

current conditions, versus studies that are focussed in on potential impacts from the project and leave the second part, the second type of studies to be the ones that would be faded into the scoping document process.

MR. MCKITRICK: John.

MR. SULOWAY: This may shock Ken, but I totally agree with him. Ken, I think when we throw the word study around some people get confused. There is a certain amount of information, and I agree a robust ICD is a good idea and that information sometimes is just collected out of existing books or whatever and sometimes you have to perform a study to get that existing information, whether it's, you know, maybe they haven't collected fish from a particular river before or haven't done it in many, many years, and so that kind of information and those kinds of studies have to be done prior to going into scoping, so you do have a robust ICD, so people can say, okay, this is what I think my issue is and I want you to collect information in order to address that issue. So, I am in agreement with you on that.

MR. MCKITRICK: So, the studies that you were talking about, would they be ones that the licensee would just collect in order to develop the ICD, as opposed to discussing with resource agencies or NGO's.

MR. SULOWAY: Yes, but in doing that, in establishing the basic information that is needed for and ICD, it is a good idea for the applicant to reach out to the resource agencies and find out what kind of information they have in their own files and then you can figure out what kind of information you need if any to supplement that four year ICD.

MR. MCKITRICK: I see.

MS. CONANT: Kathryn Conant. I just wanted to clarify, because I don't think I probably was as clear as I should have been in my presentation on the IHC proposal. So let me just, if you can bear with me for a couple of minutes and you might want to follow along on C-26, which has that dreaded flowchart. But I did want to explain a little bit what was our thinking and I think it kind of incorporates some of the ideas that we have already talked about, in that the idea is that the applicant prepares the prescoping document which is, you know, replacing the ICD in our proposal and this prescoping document initially does not have any study proposals. Then the idea is then it has gone out for public comment and in the public comment is when issues are starting to be identified and then associated with those issues if additional information needs to be gathered, then in the comments we would

include if a study request would be proposed on the table. Then the idea is then the applicant takes the comments on the prescoping document which includes study requests and then refines their prescoping document which includes a draft study plan. Then we go through FERC's scoping process of issuing their scoping document and having a scoping meeting and it is after that discussion that then the study plan is finalized. So, I think our idea was that it would be -- that you want to get the issues out on the table first, before people start getting entrenched in study requests, and then you go through the scoping of the issues before the study plan is finalized. So, I just wanted to clarify that that is what the process was and I'm sorry if I wasn't clear earlier.

MR. MCKITRICK: Ken.

MR. KIMBALL: Yes, I was just going to make an observation, having been through many relicensings up to this point. And that is, that in the case where the applicants have come forward with very complete ICD's, my observation has been that the number of study disputes and study requests is typically much less than those where the ICD's are very incomplete.

MS. SKANCKE: Nancy Skancke, wearing my NRG hat. The NRG proposal is parallel to the IHC in many ways

on this and it sounds consistent with what Ken is talking about, where we are trying to get more information out at the beginning of the NRG proposal, section 2.1 and 2.2 talks in terms of meeting with the parties before the NOI and the ICD and then has based upon that input the comment preparation of an ICD which would include a preliminary draft of the study plans and the study requests that have been made to date. So again, it is front loading the whole issue.

MR. CARPENTER: I just want to comment here, while all of this, obviously I agree with. This is where I worry when we talk about two processes and somehow the idea that the size of the project may be the criteria for doing one project or the other. If we started here and start down this road, then what will determine how involved the process will be will be the issues and that's what we need to focus on. The size of the project may or may not determine what kind of studies and what kind of mitigation and everything else. So, this is why I focus on one process and here, right up front, where we all seem in agreement is where it needs to start. How it becomes flexible after this is where we need to be looking at.

MR. MCKITRICK: I think we have probably moved a little bit from study plans development, which seem to

be kind of exhausted, into another issue which was up here dealing with the processes, should there be one, two, three. The idea of flexibility seemed to be brought up a couple of times, pretty strong opinions. I think maybe the idea that small projects are different, maybe we want to move into that discussion to kind of flesh that out and see where people want changes in regulations or any new rulemaking. Tim.

MR. WELCH: Getting back to the comment you just made Bruce about -- and I heard it a lot from most of the NGO's this morning about, you know, one process, get flexible and I kind of wanted to hear a little bit more specifically about that. Just let me pose an example. On page C-26 the dreaded flowchart, referred to by some as the shuttle wiring diagram. Just taking that for an example Bruce, at what point in that diagram would you say that the flexibility should begin? I am not posing this just to you, Bruce, but to anybody who wants to answer.

MR. CARPENTER: I am not saying that it can't begin probably after two-three -- somewhere early on in the process. Once the initial documents have been put out, the public has been involved, the agencies have looked and prepared some requests and have dealt with the applicant, at that point I think you have a

good sense of what direction you are going to be heading and how detailed the scopes and the lengths of studies are going to be. It would seem there would be where you would have a much more flexible track for those projects that you pretty much have agreement that ninety percent of the information is there and available and can be agreed upon.

MR. MCKITRICK: Tom.

MR. WELCH: Unfortunately our Byzantine diagram of the NHA proposal is not included at part of this package and I didn't bring fifty copies of it, but I think I can cover this in narrative. What we propose is that the applicant prepares an ICD and then hosts a meeting with FERC there right before or right at the issuance of the notice of intent to go ahead with relicensing. And at that point, at this public meeting, a couple of things would go on. FERC would explain the various roles of the agencies and stakeholders in the process and would also explain the various variations on the one process, the flexibility if you will. And also at the same time, the applicant would be interested in speaking with the stakeholders and everybody there about what their issues are in order that the applicant can kind of get a sense of given the project, given the resources, given the

issues, what process, what flexibility would the applicant propose to use. So basically you have this public meeting and they would also be able to, as a matter of fact probably encouraged to meet with these folks even before this big public meeting, but at this big public meeting it would be the formal hosting with FERC there.

After that meeting the applicant would then prepare a proposal of how they would propose to proceed to license the process. Would they propose to use an applicant prepared EA, would they propose to use a process with cooperating agencies in an MOA and FERC and the agencies writing either an EA or an EIS or whatever particular path seemed to work best or use the traditional process. The applicant would submit that proposal to the FERC for approval and also to all of the stakeholders for comments and that way the FERC would make a decision whether or not the applicant would be allowed to use that particular variation on the process or would ask questions to refine it or ask the applicant to address comments made by the other stakeholders and then after going through that and getting the approval to use the process, then the applicant would proceed.

MR. MCKITRICK: So, let me see if I understood.

We would retain the ALP and the traditional, we would have an integrated process or whatever, this new rule may develop but within that then at some point you would move through the initial part of the information there may be a process that is actually maybe none of these but is something that is specific for that process or project that the participants agree upon.

MR. WELCH: I must have done a terrible job explaining.

MR. MCKITRICK: I probably wasn't listening. I missed the point.

MR. WELCH: Like I said I don't have the entire piece of this, but the idea is again -- the idea is, and I think it is pretty consistent with what a lot of people want, there would be information up front that the applicant would supply through an ICD. There would be a public meeting and maybe even a premeeting before that publicly hosted meeting with FERC and the applicant there. So again, there would be a formal opportunity to get issues on the table. So again, the applicant could get a sense of what was apparently best to move its project through the FERC maze, if you will.

MR. MCKITRICK: Okay. Ken.

MR. KIMBALL: The question that was posed and let

me try to take a shot at it is, what do you mean if you have one process that is flexible, which could sound like an oxymoron. I think the challenge that we've had with like the NHA proposal in the current situation is we have a series of multiple choices that the applicant can pick from. It is basically a Chinese menu, but the only group in that process that gets to pick it is the applicant and then the others have to go along with it. It is also very confusing for the public, because the traditional way by its own right is very complicated and then you have the ALP and so on and so forth and John Q. Public has a very difficult time understanding all of the different types of strategies, forget the five or six proposals by NHA. So, what we are suggesting here is that you have one way and the flexibility is, is that if the stakeholders and the applicant with FERC present, decides to make some modifications to that one way, that is the flexibility. They all understand the modifications that are being made at that point, as opposed to having to go back and memorize a whole different series of rules and regs under the traditional versus the ALP, versus the other routes that the NHA has out there.

MR. MCKITRICK: Again, this has been something

that has been brought up at the meetings before and we certainly are going to need information to develop this. Kim.

MS. OWENS: I'm Kim Owens. We have heard from several commenters today and at some of the other meetings that there is a need for flexibility and several I think commenters from industry, from the licensee standpoint, that would like to retain the traditional process because that may be more appropriate for certain projects. At the same time, if you recall back to the opening presentations today, one of the reasons we got here in the first place is that we heard overwhelmingly from folks that the traditional process is broken, it takes too long, it costs too much.

So, I would ask you either here today or more specifically in your detailed written comments to tell us what components of the traditional process are you most interested in retaining. What components are those components that are more appropriate for the smaller projects, because at this point I am sort of confused.

MR. MCKITRICK: John.

MR. SULOWAY: I am going to try to respond to respond both to Ken, and I am going to try to do it in

a civil way, Ken, as far as characterizing the NHA proposal and also Kim's question about the retention of the traditional licensing process. First of all, we did present a proposal that had four tracks to it, not five or six, and really there are basically two tracks. There is one track where you do your consultation after you file your application or go through NEPA rather after you file your application. The other one is that you do it before. Those are the two fundamental choices and there are variations off of that choice. The first one being, if you do the scoping after the filing of the application, like we do now in the traditional process, that there would be an opportunity there, not because the project was small, I agree with Bruce. The idea would be if a project did not require extensive consultation, if it did not have a lot of impacts. If a lot of the information was already out there because it had gone through licensing or relicensing recently, so it wasn't one of these brand new, you know, hadn't gone through -- hadn't gone through any environmental review, then you could ask for a number of waivers and basically get an expedited process for a project like that. Now, that may be very few and far between, but that kind of option should be valuable.

Also, some folks, some licensees, have had the traditional process work for them. Some people continue to use the traditional licensing process and they don't want that option closed and we feel that should be retained and that is why, Ken. It does work for some folks and so it should be retained. If it turns out that through this rulemaking or refinements in this rulemaking there becomes one process that all applicants migrate to, then that would become the process. But in the meantime, I think it is important to retain that flexibility.

I would like to make one more comment, because I am getting really frustrated with hearing that the general public and the people that participate in these processes get confused, that they can't handle one or two paths. In my opinion that is insulting the intelligence of the people who participate in the process. In our case in the north country of New York State, we did an ALP before there were ALP regs and these folks, who definitely don't do relicensing for a living, you know, they are farmers, they are local politicians, they are real estate people, they worked with us to develop the process. Sure sometimes they got confused, but they figured it out and when they had questions they reached out to the FERC. They

reached out to our independent facilitator. They reached out to the third party contractor. They reached out to Bruce sometimes. They managed to figure out how to do this. So I really think that in my experience, maybe Ken has a different experience, most of the people who participate in the process can figure it out if there is a little flexibility in there.

KEN SANDERS, NYS-DEC: Ken Sanders, New York State DEC. I have had a number of comments about, you know, different alternative processes for smaller projects. My concern is that it is not the megawatt output of a project that determines the impact and the process we are talking about, environmental review, we're worried about the impacts and issues. You might have a very small project that has disproportionate impacts or issues. So you need to determine what those issues or impacts are before you decide flexibility. So we need to have the initial scoping and develop what the issues are and then you would have your flexibility of picking by consensus among stakeholders what path to follow. But to pick that before there is a consultation, you really risk missing issues that pop up later in the process.

MR. MCKITRICK: Tom.

MR. DEWITT: This question is for John. Suppose there were new regs and there were four or more process lines that you could take and suppose there was no confusion or little confusion as to how each of those processes are conducted, would it be okay for, and this is probably more rhetorical than anything else, would it be okay for NHA and that constituency to have a consensus of the stakeholders decide which of those tracks to take, rather than it be a decision of the licensee.

MR. SULOWAY: You anticipated a comment I was going to make. I'm sorry, I didn't get your name, Mr. Sanders. No, we have a problem with that, that the applicant would have to have the consensus of the stakeholders. We want FERC to make the judgment on whether or not the project that the applicant is proposing is appropriate. And I'll tell you why, it's very simple and if you were in the applicant's shoes you would do exactly the same. An applicant does not want to be held hostage, does not want to basically be subject to extortion by one or more of the stakeholders, that if you don't do what I tell you, then I am not going to agree to your process, you won't have consensus and you will be stuck.

MR. MCKITRICK: Tom.

MR. DEWITT: So your answer was you want the Commission to decide?

MR. SULOWAY: That's correct, but understand it is the Commission would be making the decision based on not only on their judgment, well, the Commission staff, based on their judgment, based on the input, not just from the applicant but from all the stakeholders involved. So, if DEC says NIPA is trying to use this abbreviated process and requesting all of these waivers and that is inappropriate because this issue needs to be addressed, and this issue needs to be addressed, and the Commission says, sorry NIPA, you can't use that abbreviated traditional process, that is perfectly appropriate. That is the way it should be.

MR. MCKITRICK: Kim.

MS. OWENS: Just to follow-up John. Currently the ALP regulations set forth certain standards that the licensee has to meet to show it has made some outreach to the community and some consensus exists for the use of an ALP, would you anticipate the same type of standards for the various tracks? He is shaking his head No, for the Court Reporter.

MR. SULOWAY: No. No, Counsel, absolutely, because again, we have already seen in some of the

ALP's that some of the stakeholders basically try to use it as leverage on licensee whose track doesn't fit and that is just not appropriate.

MR. CHRISTOPHER: Tom Christopher, American Whitewater. I don't have any problem with doing that. The NHA proposal as it stands right now takes a giant step backwards into carving NGO's and public participate away from the process. And I think FERC, since I have been doing this work for the past fifteen years, has taken some tremendous and giant steps forward to include public participation in the process and they need to be commended for that and I am very please to see that the IHC model and the NRG model do put some emphasis on it. I would like to see a little more emphasis on it. But if we were to follow the path that this gentleman is suggesting, that would certainly be a giant step backwards and I don't see that as being productive in going forward with a process that is going to expedite relicensing.

MR. MCKITRICK: Bruce, I'll let you have the last word on this and then we'll take a break.

MR. CARPENTER: I think that, again, this discussion, if in fact we have early involvement, if in fact we go through the prescoping and the other methods that we have all agreed upon; we all said

that's a good idea, that's a good idea, and then we get to this point and then suddenly it appears to us, NGO's, that the applicant says I have enough information, I want to go a different route. I see where this is going. One process, so we know from the start. Yes, we will all agree on flexibility but we need to be involved in the decision making. We all have to buy in for this process to work and whether or not the industry can agree with that, I think it's really -- if FERC wants to improve the process they have to do it for everybody.

MR. MCKITRICK: Why don't we take a fifteen minute break and cool off.

(Recess)

MR. MCKITRICK: I think we are getting pretty close here to some of the major topics people have listed. A couple of points we would like clarified, I think one of the comments that came up, we talked about the number of processes, be they ALP, traditional, some other type of process. We have kind of ground that into the ground. However, There was an issue about the ALP, I think that was brought up by the NGO's about how they participate within the ALP process and if there is any additional clarification from that comment early this morning that would like

to be made we would welcome that. If it has already been made about the ALP being too vague as far as public participation. If not, public involvement was an issue that was brought up and we have talked about that dealing with a number of different things but making sure that the public is involved. The type of thing that Tim had indicated as far as making sure that everybody has a chance to participate in the process. Any additional comments that people would like to make about public involvement in the process?

MR. SANDERS: Ken Sanders, DEC, New York State. The public involvement process, obviously not just confined to FERC licensing and we do it with a number of our programs and permitting areas and it has always been our experience that the earlier you have public involvement, the better, up to the point where the project itself has to be defined enough so the public at least knows what they're commenting on. If you get them involved too early you end up where they don't really know -- they can't develop an issue because they won't really know what the project is. So, as early as possible after there is some concreteness, so there is something substantial to comment on or to develop issues on.

MR. MCKITRICK: Jim what else do we have?

MR. NARDATZKE: That has a mark on it? Something about settlements.

MR. MCKITRICK: There is discussion about settlements. I think there was a general discussion. I didn't hear anybody say there shouldn't be settlements, but is there any idea of how, if settlements are important, how we can incorporate that in some sort of regulatory language or a solution to make sure that is put into the regulations, any ideas anyone would like to flesh out on settlements?

MR. DUNLAP: Frank Dunlap, FPL Energy. I am not sure just how to require that things be, that settlements be incorporated into the licenses, but I want to emphasize the importance of FERC's staff carefully taking settlements that have been crafted over perhaps years, certainly many months and hours or negotiations and incorporating them basically in total into the licenses and that would resolve a lot of anxiety on both sides, NGO's and licensees, to have an understanding somehow that FERC is going to do view this favourably. I think historically they have done a reasonable job, but I can think of recent occurrences, you know, fairly subtle or one would think would be subtle changes to the settlement agreement, basically upsets the applecart and puts

everybody back to square one. So, I just want to emphasize the importance of incorporating those settlement agreements into the licenses.

MR. MCKITRICK: Make sure that the settlement is incorporated into the license, is that what you're saying?

MR. DUNLAP: Yeah, incorporated into the licenses as closely as possible to using the language that the settlement has.

MR. MCKITRICK: Ken.

MR. KIMBALL: I would agree with Frank and the one addition that I would add to that is I think it would be very helpful if FERC put out some stronger guidelines as to what is or is not acceptable in settlements, because we have had a number of settlements, as I think all parties here are accustomed to, that have been submitted where FERC made some changes or said we could incorporate some parts and not other parts and I think if there was a clearer definition from FERC on those parts that should be in a settlement that they can have in a jurisdictional area and some parts that are not it would help in the crafting of those right from the beginning.

MR. MCKITRICK: So this would be more of guidance

that might be on the web or something like that, as opposed to something that would go into a regulation?

MR. KIMBALL: That's correct, and the parties, if they know they are in that uncharted territory, at least they can figure out how to deal with it as they are writing the settlement.

MR. MCKITRICK: I understand.

MR. CHRISTOPHER: We have been very fortunate here in New England to have gone through some very successful settlement agreements in the last few years. Part of what this meeting is all about is process. I think it would be certainly advisable for FERC, as they look at this settlement component of process, to recognize one important thing, the fact that quite often, more often than not, we are getting better results with settlements than we are with the traditional process. We are getting better balance in the use of the resources. We are getting better participation, and more important we are actually doing a better job of mitigating those issues that have been detrimental to the resource through hydropower. So I would strongly encourage FERC to include a settlement component as this process gets going.

MR. MCKITRICK: And we certainly encourage people

to help us along those lines. Again, any kind of specific recommendations would be extremely helpful to us.

TOM SULLIVAN, Gomez and Sullivan Engineers: My name is Tom Sullivan with Gomez and Sullivan Engineers. We have been involved in a number of licenses and settlements over the years, and I am a big advocate of settlements. However, I would caution the FERC staff that I don't think that you want to put too much language into a rulemaking that would send people down that path. Not every settlement is a good settlement. Not every settlement partner is a good settlement partner for each other. By their nature they happen because people can't get to where they want to in regulatory proceeding. To codify them in a regulation I don't think would really serve anybody's interest.

MR. MCKITRICK: Point and counter point and I would encourage you to help us, how to encourage or should they be encouraged through regulation or not; that is an excellent point.

Mandatory conditioning was one that is really something that is kind of within the Federal Power Act at this point I kind of personally see that as a change in law, but if there is some way that could be

changed within regulations or whatever was being talked about that we would be interested in hearing. Nancy.

MS. SKANCKE: I just have a question for the agencies that are here, other than FERC, if they could give any kind of or are able to give any kind of status report on the appellate process on mandatory conditioning and where that might stand processwise within their agencies.

MR. MCKITRICK: Is there anybody that would like to address that or not.

MR. VAIL: I guess I don't really understand what you mean by mandatory conditions.

MS. SKANCKE: If a non-FERC federal agency imposes or issues a statement that they have certain mandatory conditions, what have they done about formalizing the appellate process. I believe there is a policy in place, but I believe some of the agencies have talked in terms of having potentially a more formalized process and I was curious as to whether that has gone anywhere or it's under discussion, whether we're going to see reopeners on that or what?

MS. CONANT: As you aware the Department of Commerce and Interior a couple of years ago developed mandatory conditions review process policy and that

was signed in early 2001. There is a two year trial period and then they will embark on reevaluating that. We have not, Commerce and Interior, have not had discussions about how that process is going to unfold. But whatever, be assured whatever we end up doing there will be a public involvement component to it.

MR. VAIL: This probably isn't that relevant in the northeast, since I don't know that there are any hydro projects in the Green Mountain or White Mountain National Forests, but the Forest Service for a number of years has had an administrative appeal process for its mandatory conditions, which a number of licensees have exercised the option of. So, at least within the USDA, if you want to appeal a mandatory condition, there is an administrative appeal process available.

MS. OWENS: I would direct you to the written testimony of Lynn Scarlet, Assistant Secretary for Policy Management and Budget. I believe Ms. Scarlet stated in her opening statement that Interior is currently examining the development of an appeal process, it is very preliminary and I'm not sure there is more that we can say at this point.

MR. MCKITRICK: We'll go from the top of the list and we will just go down. Headwater benefits came up as an issue and maybe we would like to see how that

should be incorporated. I think I understood the issue, but how that would be put into either regulation or specifically dealing with licensing. Tom.

MR. DEWITT: I don't really see how headwater benefits has anything to do with the licensing process. Certainly if the parties here want to comment on headwater benefits or something they see as an inequity or inefficiency they should certainly comment on it, but as far as our process goes, a licensing process I just see as two totally different things at this point.

MR. MCKITRICK: Okay. Consultation was -- Jim, did you want?

MR. GIBSON: I was just going to add that one way to reduce the cost of these is to have the headwater projects come up with the licensing at the same time that the beneficiary dams downstream are coming up economies of scale there. You can deal with cumulative impacts etcetera in a much more efficient way and in many cases the water management plans, etcetera are very integrated.

MR. DEWITT: I think if you approach it from that connection, I think that is a reasonable issue to bring up relative to your -- I think it was you that

raised that initially, making licenses expire concurrently or very close together, so they are reviewed in one time period and you say that could go a long way toward making those fees more appropriate.

MR. MCKITRICK: So future timing of licenses to expire, seems to be a good approach.

STELLA SHIVELY, Northeast Utilities: Stella Shively from Northeast Utilities. I think the headwater issue that people raised that are not here not is that the regulations don't make it clear when a headwater project requires licensing and FERC has some cases that give sort of a vague standard and they would like to see the regulations make it clear which headwater projects require licensing and which ones don't.

MR. MCKITRICK: Maybe you could help me on this. Is that a specific part of our regs that talks about headwater benefits or is that something that is in the current traditional or ALP process that needs to be clarified in some sort of new process.

MS. SHIVELY: It is not my issue so.

MR. MCKITRICK: No, but you seem to know more than we did.

MS. SHIVELY: I think the issue is that FERC has been looking at headwater projects recently and saying

this project needs licensing and this project needs licensing and the people who have downstream projects want to know what is the standard for licensing a headwater project; which ones need licensing and which ones don't. There is nothing clear in the regulations right now. If you are amending the regulations and you are trying to make the licensing process better that is one thing they would like to see added in.

MR. MCKITRICK: Okay. That is something we will have to look at and see where within the regulations that should be done. Okay, good.

MR. SARBELLO: Bill Sarbello, New York State. I just agree with Ken. Again, if you can have the whole system, a whole watershed come up simultaneously it would probably clarify these issues. I don't know what FERC's criteria is for including or not including headwater projects, but I suggest something that might be a criteria and that is if the project is just a dam and it is being operated essentially in a run of river mode, it probably isn't something that needs licensing. On the other hand, if it is controlling the whole water regime of the downstream watershed, then it becomes something where the operation of that project completely effects all the other downstream projects. Where we have had success in New York State

in having multiple projects on a river get settled and licensed has been when those upstream reservoirs have been part of the negotiation process, because really they are key to the whole system and unless their operations get integrated in with the operations of everything else downstream, you just can't do it.

MR. DUNLAP: We are really dealing with three separate issues here and two of them don't really deal with licensing. None of them deal with licensing process and only one deals with licensing at all. The headwater discussion that Matt Manahan brought up this morning was requesting license that is brought up this morning was requesting establishing a diminimus level as to whether a project is jurisdictional period and then you go from there. You make a decision and then you get a new licensing process. It is not really a precursor to the licensing in the process sense.

The other item we are talking about is headwater benefits, which really is a contractual arrangement between the owners of the headwater storage project and the downstream generators to share the cost of providing the benefit from that storage and that is not at all a licensing or a process issue. That is a contractual issue that FERC happens to approve.

The other item that perhaps is related to

licenses is the coterminous licenses and there is only so much that you can do about that until you come to license process, a project that's up for renewal and then I am aware that the Commission itself is encouraging the establishment of conterminous licenses as much as possible. I know many licensees are. So, if you want to address that as a process, that should be just narrowly defined as how to get projects within a watershed to be on a similar time frame.

MR. MCKITRICK: I understand. And for whoever, I think it was Mike that brought it up as an issue, those of you that know him, if it is something that needs to be dealt with within the confines of process or regulation, he should probably help us with that. If not, if it is outside of that, then address that to the folks that deal with that on a daily basis.

Consultation was brought up and I think that to the extent of I guess if we need to know something, we probably all agree consultation is good, then how are regulations not doing that now and how should that be changed with any idea of new reg would be helpful to us.

Buffer zones, there is I think an issue dealing with we should define within the regulations the buffer zone is 200 hundred feet as opposed to -- I

guess that is more in policy now, I believe, but it may be within regulations. Ken.

MR. KIMBALL: I think we could agree with Matt's proposal this morning if we had 200 feet around all of the reservoirs, but I don't think that is what he intended. I do think though that his proposal, we would not support it on several grounds. Sometimes you do have resources where it needs to be greater than 200 feet. If you had an eagle nest or something the boundary just has to be greater to protect the resource of concern.

Another think I would point out is the number of cases, shoreline lands that are owned by applicants are owned out to a certain contour line and sometimes it is far less than 200 hundred feet and sometimes it is far greater than 200 feet. So, the arbitrary 200 feet I have never understood and if you try to go back and take a look at the science protecting riparian areas, etcetera, the 200 hundred feet does not conform with many of the scientific analysis as to what sort of depth a buffer really needs to be and my recommendation to FERC on the 2000 feet would be go back and take a look at the science as to where the recommended boundaries are, as opposed to working with the arbitrary 200 feet.

MR. MCKITRICK: Is that a separate issue or something that should be looked at in any change in regulations?

MR. KIMBALL: My take right now is you are dealing with the relicensing process and not the particular elements underneath at this level, but since it was brought up this morning and it is on the board, I am just responding to it.

MR. MCKITRICK: Sure, I appreciate it. Anything else dealing specifically with buffer. Reopeners were also mentioned in the context of settlements. Is there any -- that's good. I mean we have talked about flexibility. What I remember is that I was at water power when Mark announced this and I remember him saying flexible, flexibility may be what was needed and I thought, wow, boy, that sounds good. And it was mentioned here, that when you sit down and think about drafting up flexible regulations it becomes difficult and any help, I mean conceptually it is nice and good, but if we could get into the specifics or language it would be very helpful. Kathryn.

MS. CONANT: I just wanted to add, because I think this is a really important point, to try to balance making a process clear and predictable and also flexible, so I guess to echo what Ron was saying,

if anyone has any ideas on how to do this, because if you have flexibility, then you are reducing predictability and clarity. So, it is a balance that the regs are going to have to make and putting that actually in regulatory language is going to be extremely difficult. So, when you are writing up comments or if anyone has any ideas now, definitely please share them with us, because it is going to be a difficult balance.

MS. BAILEY: Betty Lou Bailey, Adirondack Mountain Club. I assume that when you say reopeners you mean revisions to the settlement and we have seen it done very successfully where maybe we hadn't chosen the right words in the settlement or we left out something that was really intended, so those went very smoothly. We gathered everybody around the table and had a short meeting and people buy into it. It is more difficult if say the configuration of the plant changes or something like that. People We are not expecting at the time that we finish the settlement. You have to put in the words -- we have had words in all of our settlements that we have done in the last years since '95 and they have to be adhered to.

MR. MCKITRICK: My recollection, and somebody can correct me. I understand that settlements have built

in reopeners for monitoring and changes that take place. I don't know if that was the issue or not. But it may have been after there is a settlement -- well maybe that is it and let's not change it again, but I am not sure if it had to do with fine tuning of the process. But I don't think the person is here to address that.

MS. BAILEY: We have written it up as revisions to the settlements.

MR. MCKITRICK: Used revisions rather than reopeners. I understand.

MS. BAILEY: Some of them are pretty minor and go swiftly. Others have been more troublesome.

MR. SARBELLO: I think reopeners mean different things to different people, so it is kind of a little bit difficult to say for sure what the gentleman meant that isn't here right now. What I took him to say was that if somebody has signed a settlement, that FERC should not permit a reopener in the license. And if that is what he meant, then I would have to disagree with him. I think right now under the FERC standard L forms, condition 15 generally is that a resource agency or others may under certain circumstances have the opportunity to make a case that things have changed and the license should be reopened. I think

FERC should continue to retain that. Every settlement is going to be different and have different languages. Some settlements may permit the parties to reopen under the settlement. In other cases I guess an involved party may decide that things have changed so dramatically that they need to do this for some other reason and risk whatever peril there is in reopening the settlement. But essentially I think it should be, you know, you're licensing a project for thirty to fifty years, things change, times change. I think you need that escape hatch built into the license and then people you use it.

The other issue on reopeners kind of stimulates thought in another area, which is adaptive management, which again means different things to different people. In some cases there are situations where perhaps you may not be able to do a study or understand an impact until after a project is built or an operation is changed and I think there still is a need for some guidance on adaptive management. The Interagency Task Force had a draft paper that wasn't approved in one of the reports and I would just like to put in a plug and say it may be worth while to go back and take a look at that to see if it can't be, you know, completed, revised as needed, but I think

that there still is a need for having adaptive management, if there was some guidance on that that might be helpful. Now, that may not be part of the relicensing process, but just as part of the overall effort of making processes work better.

MR. MCKITRICK: I understand. Tom.

MR. DEWITT: I was going to respond to something a few minute ago, but I think I'll slip over into something that I was going to warn people against and that is there has been a lot of discussion about guidance and policy and that the Commission should, you know, create guidance or establish a policy, you know, a policy on baseline or guidance on adaptive management and these types of things and while on the surface they would be had helpful to all of us, I think you need to understand that the Commission establishes for the most part its policy and I think Kim called it in a common law manner, in that the Commission makes decisions on certain aspects, whether it be the size of a buffer zone on a particular project and the size of a buffer zone on one project may be completely different from the buffer zone on another project. So, the Commission is to this point establishes its policy and in some cases guidance, and there is a fine line between police and guidance in

the decisions that it makes every day of the year and it changes over times. Settlements, what is good for settlements, what the Commission can include in a license for a settlement and what it can't evolves over time as we see more and more settlements and more creative settlement writing. So, I would just warn that the desire to have the Commission establish policy within this rulemaking I think is going to be very doubtful, in that they would prefer to do that on a case by case basis, because that is just the way they do it. And the other thing you need to realize is the Commission changes. The administration changes, so does the make up of the Commission. While we might spend a year establishes say a baseline policy, you put it in the rulemaking or put it in the regs someplace and the next Commission we have or the next Commissioner we have will either change it or tell us just to ignore it. So, I think it is best to keep to real process stuff and not policy and guidance.

MR. MCKITRICK: Thank you, Tom. Frank.

MR. FRANK: I think we are back to a point of predictability on both of these items. To the point of reopeners, the point is that the man was trying to make this morning is, if you have gone through a

settlement agreement, you come to terms, you shouldn't then apply through FERC for a reopener in the license that has potential to once again destroy that settlement agreement. If there are issues that are being dealt with in the settlement that need to be handled through adaptive management or whatever the current phrase is, then that can be accommodated while developing the settlement agreement. But it is incumbent upon the people, agencies included, at the table to explain why you need to have something reopened or why something might need to be considered or reconsidered in the future. And if that is the case, it should be included in the settlement agreement. But to develop a settlement agreement that people can rely on, a licensees can rely on for thirty or fifty years to be able to run a business, to manage a resource, it needs to have some level of definition and definitiveness to it. So, that's the point and not in essence to arbitrarily place reopeners for something that has been settled.

MR. MCKITRICK: Betty.

MS. BAILEY: Are getting to be a little bit smarter on this business of revising and reopening. If people don't show up at the revision meeting, you know, then they get -- they are absent, so then they

don't count. So we are putting in words now that require that a best effort be made to update all the addresses and that's getting written right now in the review procedures, because realistically it may be fifteen or twenty years before some new adult toy comes up and causes problems. And so, it is important to get the different groups around, with thirty to fifty year licenses you know darn well those addresses are going to change.

MR. MCKITRICK: Again, I would say as I understand it right now, the person who brought it up, it is hard to speak for them and I wouldn't do that and they need to clarify what they want, but if there is some way to revise something within an existing settlement, I don't see argument with that. On the other hand, if there is a standard reopener that is in the forms that was brought up and I don't see that changing to be quite frank, but if there needs to be something done about that, that may be a separate issue. John.

MR. SULOWAY: Now, what the person was getting to I think you described perfectly and is something I don't think you could address in this process, for just the reason you said, Ron. I mean it is a standard condition that is going to be in. The best

way to address that that I am aware of is, when you get your settlement agreement, when you put it together you put in language in there that everybody agrees that they are not going to try to reopen the license on items that you have resolved in the settlement. To the best of my knowledge that is the best protection you can put in there, and it is not perfect because somebody could violate that. You know, a party could decide it was worth it for them to kind of blow up the agreement, two, three, five, ten years afterwards and deal with the consequence. But that to my knowledge, that is the best way to address that.

MR. MCKITRICK: Thank you, John. We have talked about time lines. Is there any additional information that needs to be brought up dealing with solutions for time lines that I think we have talked about. There are questions about the IC time line sometimes, but if you have specifics we look forward to that either now or in your formal comments. We have talked about -- we have talked about that really quite a bit, the need for a single process or multiple processes, I think that has been talked about quite a bit. Is there anything else?

There was a question about the annual licenses

and I think they should be abolished and I think some of those folks may have left. So, as they read the transcript I would encourage them to write solutions to that. We have talked about early FERC involvement. One of the things that maybe we would want to -- the coordination with the state process. We have a state here that we really appreciate, that is not only, you know, the state process, but the federal processes, if there is anything else that needs to be flushed out with coordinating such things as the 401, so that we don't -- we don't want to get in each other's way. We would like to see all this kind of come together. If there are any additional comments to that either now or specifically with your written comments, that would really be appreciated. I think we see that as an important issue. Anything else that we have not covered or somebody would like to go back.

MR. DUNLAP: Just a quick note on the annual licenses, I would caution the staff at the Commission against abolishing those. That is a very practical and real necessity for the Commission. We all know there is plenty of work to do and not all licenses will be completed by their expiration date and to abolish that will reek havoc through the entire system to the point of amending those to considered

additional environmental measures. If the staff has not yet been able to do an environmental analysis and issue a license, a full term license, then it doesn't make any sense to try to condition an annual license and go through the effort of doing a separate environmental evaluation for that.

To the point of mandatory conditions, I just want to step back for a moment and emphasize the importance of establishing through all the agencies, including FERC if that is the appropriate place, administrative appeals process. To simply have mandatory conditions with no recourse is untenable. You have to be able to appeal that for whatever reason. And prior to even the need for an appeal process the Commission does need to establish some policies or regulations to define the level of justification or the evidentiary basis, if you will, for those recommendation. They started to do that gradually through establishment of common law by individual licenses, but you really need to establish a policy whereby the conditions that are being recommended by agencies with mandatory authority are justified with science. Thank you.

MR. MCKITRICK: Tim.

MR. WELCH: I don't know if you mentioned this earlier, maybe I wasn't paying attention, which is

very possible, about annual licenses. Frank, thank you for the cautionary on the annual licenses and we take that to heart because, as may or may not have been mentioned earlier, the concept of the annual licenses is in the Federal Power Act itself and only Congress can change that. So, that is not really a subject of our regulations and it is not someone suddenly took it out.

MR. MCKITRICK: Jeff.

MR. VAIL: Jeffrey Vail with USDA. As regard to comments, on mandatory conditioning, it really isn't FERC's role to determine the adequacy of the 4-A conditions or other mandatory conditions submitted. I appreciate the grievances some have with what those conditions are or whether they are supported by substantial evidence, but I think case law is quite clear it is the court of appeals and the supreme court's role to determine the sufficiency of the evidence to support conditions. So, I am not sure if that is really appropriate for this process that we are looking at.

MR. MCKITRICK: Tom.

MR. DEWITT: I was just going to add to what Tim was saying. He is correct. The concept of the annual license is part of the Federal Power Act and is not a

policy that the Commission has. But the reason we are all here today and the reason we have embarked on this rulemaking is if we have a process, whether it is one process that is very flexible or four individual processes that are again flexible, as long as we have a clarative approach to this and people that are willing to come to the table and work through issues and give and take, we can get through these licensing processes and it is our goal to act on an application for relicense before the annual license has to come into play. So, in effect we can get away from that issue if what we are doing here works.

MR. MCKITRICK: So, design a good process so we don't have to talk about annual licenses. Nancy.

MS. SKANCKE: In response to the comment about mandatory conditions, the court cases do say however that FERC does have a role to play in connection with mandatory conditions in the sense that FERC has the ability to comment on its own as to whether those mandatory conditions have an adequate evidentiary basis and are consistent with the statutory mandates. The court does say that FERC can't overturn them, but it does say it would -- it essentially implies it would like to hear what FERC's position is, because when it gets to the court of appeals, that is when the

court will review those mandatory conditions and without FERC's input, it is relying solely on the mandatory conditioning agency. So, I think that this has been in the comments NHA has filed already and I am sure it will be consistently followed in the future, but there is a role FERC has to play in connection with the mandatory conditions.

MR. MCKITRICK: Frank.

MR. FRANK: To follow that up only briefly, because we will never solve this issue here. FERC has taken that role seriously. We have had FERC overrule mandatory conditions based on lack of substantial evidence. So there is a role there and if it is a weak role it ought to be reinforced because FERC has a balancing, has a statutory requirement to balance.

MR. MCKITRICK: I guess I will put that back in the context of, like Tom did with annual licenses, if we all work together through many processes and coordinate and define these studies there may not be an issue.

Anybody from the panel, any kind of concluding remarks or anything they would like to encourage people to do? If not I would certainly -- I think we have covered a broad swath. If you look at many of the other issues that have come up, many of them have

been similar in seeking resolutions and solutions and I would encourage you to do that; take the concepts and turn them into specifics. And Tim wants to say something.

MR. WELCH: In deference to my colleague John Clemments who is working very diligently on this rule as part of our interagency committee, even though the comment date is December 6th, which I am very, very, very much would like to get comments sooner rather than later, like by December 1. So, if you can make any kind of special effort, or sooner, to do that, you have probably saved John's marriage. He would take preliminary comments that he could analyze later. Electronic filing would be very helpful and very quick. There was one more thing, but I forgot.

MR. MCKITRICK: I'll talk for a second and you can dive in. I would encourage everyone to make sure that you have this, showing where you can get involved with us. There is a number of places and meetings coming up very soon in D.C.. There will be additional meeting in the months of March and April before we start closing this rule to get it out by July.

So, I really appreciate the comments. The diverse crowd helps us a lot to help us see what the issues are. If there are no additional comments, we

will close the official part of this and people can talk. Thank you very much for coming.

## C E R T I F I C A T I O N

I Brenda J. DiMatteo, CERT, do hereby certify that the foregoing 164 pages are a verbatim transcription of the November 14, 2002 Joint Agency Public meeting regarding RM02-16-000, Hydropower Rulemaking.

I further certify that I have no affiliations with the parties involved in this proceeding.

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Brenda J. DiMatteo, CERT