

BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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In the Matter of: :

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HYDROELECTRIC LICENSING : Docket No.

REGULATIONS UNDER THE FEDERAL : RM02-16-00

POWER ACT :

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Hyatt Regency
333 West Kilbourn Avenue
Milwaukee, Wisconsin

Friday, April 4, 2003

The above-entitled matter came on for hearing,
pursuant to notice, at 9:10 a.m.

BEFORE: ELIZABETH MOLLOY

Federal Energy Regulatory Commission

APPEARANCES (CONTINUED):

Doug Cox - Menominee Indian Tribe

Paul Strom - WDNR

John Clements - FERC

Patti Leppert - FERC

{Via Telephone}

Jim Thannum - GLIFWC

Jim Zorn - GLIFWC

TRANSCRIPT OF PROCEEDINGS

MS. MOLLOY: We're going to introduce everyone that's here so you guys know who's here, and then we'll get started. I'm Liz Molloy. I'm from FERC, and I'm the tribal liaison for rule-making.

MR. CLEMENTS: John Clements, FERC OGC.

MS. LEPPERT: Patti Leppert, FERC.

MR. COX: Doug Cox, Menominee Indian Tribe, Wisconsin.

MR. STROM: Paul Strom, Wisconsin Department of Natural Resources. I was here yesterday. I thought I'd sit in and hear today's discussion.

MS. MOLLOY: Can you hear us all on the phone?

MR. ZORN: Yeah, Paul was a little faint as well as Patti. My name is Jim Zorn, Z-O-R-N. I'm an attorney with GLIFWC. I've been here about 16 years and was involved a little bit in some of the GLIFWC comments back in '86 or '87, so I got a little history on the issue.

MS. MOLLOY: And then Jim Thannum.

MR. THANNUM: Jim Thannum. I'm the planning director for GLIFWC. I've been with GLIFWC

since 1986 as well. One of the objectives that GLIFWC has undertaken a project to do a scoping process with FERC. We had a two-prong attack. One, we looked at some of the policy issues and some of these new developments fit right into that as well as a scientific scoping process.

We wanted to find out where were the FERC sites in the ceded territory, when were they coming due, which of the first sites were harvested tribal resources such as walleye and wild rice and just get a sense of what's out there and what's on the horizon.

In the past we've been active on a couple of different sites. LDD has requested assistance of GLIFWC. We've been working with the tribe and the forest service on wild rice re-establishment. Our biologists also have undertaken juvenile sturgeon surveys on the White River, and our biologists work closely with the DNR. We share information and a lot of the juvenile sturgeon surveys on that data was shared with the DNR. And there's a whole relationship between the tribe and the DNR through court stipulations and so forth.

MS. MOLLOY: Excellent. We appreciate

you joining us today. I'm going to start with -- we did that little presentation that I just faxed to you, and I'm going to run through it quick. And if you have any questions on the rule, we'll answer clarifying questions, and then we'll identify issues that you all might see an issue with or have a problem with or think that we need to address. And we'll try to talk about how we can address them, and then that should take us through to the end.

MR. ZORN: This should go to 10:30 at least.

MS. MOLLOY: I'm thinking maybe 10:45. As you know, we issued a notice of proposed rule-making. We had started with a public notice in September. We met with resource agencies, public and tribal forums and tried to talk about various issues and come up with an approach to licensing and relicensing that would be an improvement on what we've been doing.

We had a stakeholder drafting meeting in December for two days where they came up with the concepts and language where they could. And from December into January FERC worked with other agencies to draft part of the rule or as much of the rule as possible.

On February 20th, FERC issued this notice of proposed rule and sent it out, and we've been having these regional workshops in Sacramento and Portland; Manchester, New Hampshire; Charlotte, North Carolina and here. And we have one next week in D.C. And we've set a deadline of April 21st for written comments on the rule, and we're hoping everyone will file comments.

And I am letting people know that if they want to file earlier than the 21st, that's okay. There's no penalty. And we get to start looking at them sooner. From April 29th through May 2nd, we're having four days of drafting. It's been affectionately referred to as hydro hell week, and we invite anyone who wants to come to come. There's a registration period that starts -- do we know when?

MR. CLEMENTS: It's on the website.

MS. MOLLOY: It's on the website, but it will open up for registration on the website I think next week.

MR. THANNUM: That will be in D.C.?

MS. MOLLOY: Yep. After that, FERC and the resource agencies will be again drafting and working out language, and then FERC will be

preparing the final rule that we were aiming for July -- the last meeting in July to issue.

The proposed rule, in it we've designed a new process that we call an integrated licensing process where we have set out sort of a process that incorporates both the pre-filing of the old days and the NEPA process we used to do after a license application was filed.

In it we looked to do the process plan and study plan in the first year after a licensee has notified FERC and others of its intent to file for new license. This next year and the year after would be for studies and application development, and then the application processing, we believe, would be about a year-and-a-half. We feel that this will cut down considerably on the length of time and some inefficiencies that we've had in the past.

We've also proposed changes to our traditional process where there would be increased public participation and early dispute resolution for studies, both of which have been concerns in the old process.

As I was saying, that the integrated licensing process we hope will improve efficiency. Since we're going to be doing the application

preparation with the NEPA process, we hope to make sort of occurring at the same time a process that used to be linear. It used to be the first part was the preparation of the application, and then there was the NEPA process, and we hope we can work well in an integrated fashion.

We also want to coordinate with other participants processes to the extent possible. So we're sort of focusing on doing that in the new process, and again we're increasing public participation. We're also hoping that while we have tried to eliminate duplication, we're also going to make it timelier by having a staff involved earlier and having an actual plan and schedule established that keeps everything on track and trying to resolve disputes and make sure plans are developed with a lot of participation early on.

A big concern people have had with the prior application process is that it takes too long, and the commission has to issue annual licenses. With this approach, we're hoping we will have to issue annual licenses far less. We have on the table that's on slide seven the traditional process.

Once an application's filed which is the mark of zero, it can take between 40 and 50 months

to get -- for the average processing time. In the integrated process we believe it's going to be 18 months. That should allow us to issue a license before the old license expires; and thus, we won't have to issue annual licenses.

Some other significant aspects of the notice of proposed rule-making is that we are allowing a process selection among three processes. We have been allowing cooperating agencies, federal agencies to also intervene. We are establishing or improving our tribal consultation. We're providing advanced notification of license expiration. We are establishing the development of a preapplication document. We have established processes for study dispute resolution, and we've changed some of the application contents.

On the process selection, there are three. There's the integrated which is this new process. There's the traditional which we're modifying in this rule, and there's the alternative that we established several years ago.

The integrated process will be the default, and we are hopeful that most people will use it. We are allowing the other two processes to remain for the situations where they may be more

appropriate.

The alternative process has an established process for choosing it, and we're not changing that. But the traditional, the applicant would have to request it, and FERC would determine whether there was good cause and have to allow the licensee to use that process rather than the integrated.

Right now when we have a federal agency cooperate with us and work together with us creating a NEPA document, we do not allow interventions by that agency. So they can't become a party. We're changing that policy. We're proposing changing that policy in this NOPR to permit intervention by federal agencies cooperating on the NEPA, and we're going to modify our ex parte rule to require disclosure of study information provided by agencies.

So if an agency that we're working with provides information that they want considered on the record in preparing the NEPA document, we will file it in the public record and make sure everyone is able to see it. We will not reveal internal discussions on drafting the NEPA document.

We also to improve tribal consultation

have proposed that commission staff would initiate early discussions with tribes that are affected or may be affected by projects to discuss and develop consultation procedures because we recognize that different tribes have different procedures involved in that, and we want to try to help coordinate as possible with the process, so we want to meet early and try to work all that out.

And we are establishing a position of tribal liaison. And one thing we'd like to hear from is what roles or responsibilities someone in that position or an office would need to have or tribes would desire such a position to have.

Advanced notification of license expiration, while most licensees are aware that their license expires and they need to prepare a relicense -- a new license application, we feel it would probably help if we reminded them before it was due that it was coming up and what in general would be entailed. Therefore, while not all licensees require that, it would help out those who maybe weren't as familiar, and it would help get them started on the right track.

And in this notice we would let them know of the requirements of the notice of intent,

the preapplication document, and the process selection. That brings us to the preapplication document. We're hoping that a process that starts with a good foundation is going to be very successful, so we've added some requirements to a preapplication document.

It's a document that would provide participants with available environmental information, and it would provide a basis for issue identification, study requests, and as a NEPA scoping document help prepare a NEPA scoping document. And we are trying to set it up so that it would be a precursor to the Exhibit E that would eventually need to be filed as part of the application by kind of thinking it would be easier if the form didn't change a whole lot from one document to another.

One question we've asked -- the commission has asked is in our proposed rule we've identified things that should be in this preapplication document, and we want to know, are we asking for too much, too little, too much specific information, not enough, sort of where are we on what we're requesting, and is this information something that could be usable by participants, or

is it too much? And there's only certain things they're interested in.

On the study dispute resolution, the -- for studies we've established a set of criteria; and when people are requesting studies, they -- we've set out in this proposed rule what they have to set out about the studies, what the goals and management objectives are for the rule, what's the nexus for the project, what it's attempting to show, various things like that. So we've tried to set that out so that everyone is playing with the same format.

The applicant will file a draft study plan for comment. Participants will meet informally to resolve differences, and FERC will be participating in that. Staff will already be assigned and be working with participants to try to resolve differences on study plans. Then it will be filed with FERC, and FERC will approve the study plan or make modifications to it, if necessary.

Resource agencies that have mandatory licensing conditioning authority including the State and Tribal Water Quality Certification agencies have a second level of dispute resolution with FERC, and they can -- if they are not happy with the order that FERC issues, they can seek to use this dispute

resolution process in which FERC would convene a panel with one FERC staff who was not directly related with the project, one resource agency staff from the resource agency who is raising the dispute, and a third-party neutral will be keeping a list of people that we can choose to be third-party neutrals. And it would be from this list the third party would be named.

If a third party was not available, it would proceed with the two, the FERC staff and the resource agency staff person. And the applicant would provide comments and information to this panel. The panel's going to look at the dispute and make a finding as to whether the study criteria are or are not met. The panel would then provide the finding to FERC, and the OEP director would make a decision on the dispute with respect to the study criteria and any applicable law of FERC policy. So then the director would issue an order on the dispute.

The application content has also changed, and we've identified what changes we have. We've changed it for the new integrated process and the traditional process. There's been some information that FERC staff has usually had to go

back and ask the applicant for. So we went to staff and said, what is this information, and let's get it in the regs and ask for it right up front.

And one of it is -- a couple of examples, minimum and maximum hydraulic capacity. I believe we already asked for maximum, but we don't have in the regs a minimum, and we usually find we need to know. So we've changed that. And the cost to develop the license application.

We also have asked for boundary information for both licenses and exemptions. Currently we don't have a requirement for boundaries for exemptions or minor licenses. And because we feel it's now -- we feel it's necessary and we notice that when we have this lack, we usually want to know what the boundary would be. We've now changed that so that we do have boundary information for those two and for major licenses.

We also have a revised Exhibit E which we're trying -- we're putting in the form of an environmental document to look at the effective environment, the environmental analysis, proposed environmental measures, unavoidable adverse impacts and developmental analysis. That way it's set up in the form of a NEPA document that we can then use as

we get to issuing the NEPA document. And again, sort of keeping everything in sort of the same form as a progressive process.

The commission in doing this rule had some areas they needed some more information on and wanted input and actually specifically identified questions in the back of the rule -- in the back of the preamble to the rule. And some of those questions we've included in the slide show or PowerPoint presentation. I guess that's the updated phrase.

They include, are the contents of the preapplication document appropriate, as I mentioned before. What, if any, criteria should be considered in determining the use of the traditional licensing process? That's on -- in lieu of the integrated license process. Are the proposed study criteria adequate? Have we covered everything in there? And what modifications, if any, should be made to the study dispute resolution process?

Should resource agencies provide preliminary recommendations and conditions prior to the draft or final license application? Right now we ask in the rule for them at the time we should be ready for the environmental assessment time.

MR. CLEMENTS: Ready for environmental analysis.

MS. MOLLOY: Right. Are the recommended time frames associated with the proposed integrated process adequate? Is a draft license application necessary? Are the recommended deadlines for filing 401 water quality certification application appropriate? And are there any suggestions on how the regulations could be modified further to accommodate small projects?

Then we have two questions in particular on tribal consultation. Is the proposal for early contact with Indian tribes adequate to ensure approved tribal consultation? And what recommendations are there regarding the roles and responsibility of the proposed FERC tribal liaison? And that's our presentation. That was kind of the quick form.

Those are our questions that we've put out. And if you guys have any questions on the rule itself to have any questions on it, what we intended or what certain sections are about, I'm going to turn it over to you guys to ask those questions, and we can focus on what issues we need for discussion. First part is clarification. I'm going to turn to

Doug first.

MR. COX: What we did is we looked at the language and broke our questions or comments into both the preamble and the rule itself, the regulatory text. However we want to do it, I guess. I made notes on the sides of our comments and separated those into particular issues, and I don't know if you want me to read through our comments on regulatory text. We have about a dozen bullets.

MR. CLEMENTS: Are there things you think you don't understand and you need clarified first? I'd like to make sure we're all understanding what we're talking about. If it's just comments, that's fine. But if you have uncertainties, we'd like to clear those up before we start talking merits and nuts and bolts.

MR. ZORN: This is Zorn. Can I ask a couple of clarifying questions?

MS. MOLLOY: Sure.

MR. ZORN: In terms of the NEPA cooperating agency question and the intervention, can anyone else other than the federal agency be a cooperating agency in preparing an EIF?

MR. CLEMENTS: Any other agency or as I understand it a tribe can be a cooperating agency,

but the policy for state agencies and Indian tribes is that you have to choose between being a cooperating agency and an intervenor because of the ex parte rule.

The reason we're changing the rule for federal agencies is because we've determined after examining the Federal Administrative Procedures Act which governs everything we do in the regulatory field, that there is a specific exception in there for federal agencies, and that's why we're able to change the policy with respect to them.

MR. ZORN: This is APA or FACA?

MR. CLEMENTS: It's APA. And if anybody has got any good legal theories for us to use, the commissioners would be just as pleased to have state agencies and Indian tribes be able to participate and still be an intervenor too, but we haven't figured out a way legally to get there.

MR. COX: We had the same question on co-op agency and have looked at that issue not so much in relation to this proposal but for other agency activities. And we may be able to provide you some more information, and we'll plan on doing that before the 21st.

MR. CLEMENTS: Great.

MR. ZORN: Doug, I think we're talking about the Crandon mine in relationship to the Army Corp. of Engineers. Is Menominee a cooperating agency there?

MR. COX: We decided to not be there, Jim, and we looked at that closely over the years and built, I'm sure as you have, being a cooperating agency some language and are aware of many other cases where tribes are cooperating agencies. So I think we can --

MR. ZORN: In any event, FERC wouldn't mind it if tribes could somehow have it both ways as well. That's what you mentioned, right, John?

MR. CLEMENTS: That's true.

MR. ZORN: Nothing jumps out at me. Because of the uniqueness of the FERC -- I mean, it's quasi judicial. It's got an interesting role to play here, doesn't it?

MR. CLEMENTS: We find it interesting.

MR. ZORN: I say FACA explicitly exempt tribes, but I guess what FERC does isn't necessarily a rule-making, is it, when it decides on licensing applications?

MR. CLEMENTS: No, that's not a rule-making. That's an adjudication.

MR. ZORN: So it's like asking a court how we can have a side-bar participation and still be a party to the case?

MR. CLEMENTS: Yeah, that's the dilemma.

MR. ZORN: That's a clarifying question.

And then maybe this eloquence is a substantive one or a procedural one, but the five to five-and-a-half requirement to file the NO in relation to the advanced notification, my sense is there's no such time for the advanced notification that would go both to the licensee and the tribes and some other parties. How are you thinking that would work ahead of that five and five-and-a-half year deadline?

MR. CLEMENTS: We really haven't got a specific time in mind at this point. It's kind of a tension between if you do it too early -- here's the problem. The commission believes the parties working in good faith together can accomplish the licensing proceeding in five to five-and-a-half years. And they are not willing to impose in the regs any requirements for license applicants to do anything prior to the NO.

There's no specific mandates to do something under their -- the legislative construct. That's the commencement of the process. But that

doesn't stop us from doing these notifications. And so we're internally trying to figure out when is the best time to do that. We just haven't got a time yet. Some people have said a year. Some people have said three years.

The tension is that the farther -- prior to the NOI that that notification is given, there's a concern that that would signal to license applicants that they have to actually begin their process before the official NOI deadline date, and there's a strong desire not to do that.

MR. ZORN: What was the thinking about the advanced notification in the context where there may be multiple relicensing applications coming up saying the same river or relative proximity sort of at the same time where there's a whole bunch of things coming together once, and there might be a need for -- a good reason is for people to do things in advance. Could that be some sort of -- not necessarily quantitative but more qualitative criteria in terms of encouraging earlier notification rather than later?

MR. CLEMENTS: It would certainly encourage us to do that. My conception is that the notification would -- if we were doing this

correctly, you wouldn't necessarily just notify the license applicant that their license is going to expire because they know that, and everybody else knows that that's on the website.

But that your notification might include something to the effect that by the way, as you prepare to issue your NOI and you prepare your preliminary application document, you should know that there are other projects in the river basin, for instance, that have licenses that will expire in a contemporaneous period, and just kind of throw that out on the table. I can see something like that that kind of gives everybody an appropriate heads up.

MR. ZORN: We kind of looked ahead to see when these licenses were going to be expiring, and at least for the Greater Fish & Wildlife Commission deals with the off-reservation ceded territory treaty rights, and a lot of these projects in the ceded territories a lot of them come due in the same year, and I just -- it's not like you're only interested in one particular project that affects your reservation, at least the Chippewa tribes and Menominee, they would be in the same boat, have a number that will come up in the same

year, and I don't know if there's some sort -- some way to write it up. Maybe it's not one year or three years.

But the idea that the more that are involved in the same area and same year, the more advanced encouragement that FERC will provide to the parties to start working together and think about what they might need to do for studies. I think that would be helpful to make that next five, five-and-a-half years go better.

MR. CLEMENTS: One thing we're doing internally is we've established what we're calling an implementation team. That's a group of people that will look at what's in the final rule and determine what we need to do internally on an administrative level to make it work.

And in that context we'll be considering in talking to other people, it's going to be a continuing dialogue, about what should be in a notice of a notification, the preNOI notice and what the implications of that are and how each project is going to fit into maybe a bigger puzzle.

MR. ZORN: Doug, I don't know if Menominee has thought at all about the idea of a specific required time frame for preNOI notice.

Have you guys at all?

MR. COX: Not in the way of time frames, but for us not being -- not having the off reservation -- at least the adjudicated off-reservation ability, we are concentrating on on-reservation impacts, and our comment says that for at least projects that impact reservation plans that there should be a process for prenotification on those at a minimum. Certainly that doesn't help -- it doesn't address GLIFWC's concerns.

MR. ZORN: I guess my gut reaction is that it might be hard to do a required time but maybe as part of the implementation plan, the type of criteria that would counsel for more advanced notice could include the types of things that I was talking about.

MR. COX: Yes, I agree.

MR. ZORN: John, does that make sense as a type of comment --

MR. CLEMENTS: Yeah, it sure does.

MR. COX: You look at the stuff they're doing now with multi-project issues on river systems, I think folks at this point are doing some of the pre -- I mean, during the process, up in groups of projects that they're assessing at least

environmentally, I would think there would be a process with the team to look at.

MR. CLEMENTS: It would be silly to have the whole thing put in place and sabotage it when you've got four or five projects in the same river.

MR. ZORN: And especially when, for example, like the state or the state Wisconsin DNR document where there's a great need for baseline studies in that basin. The sooner we get going on that in advance of the five, five-and-a-half year period, the better off the study is going to be.

MR. THANNUM: This is Jim Thannum. I remember some of the discussions we had at the first meeting with a lot of the licensees had kind of an expectation that there was a vast amount of data just sitting out there. There's water quality data and a vast amount of studies already undertaken, and their role was pulling this together and publishing it when in reality a lot of times certain sites might have had some good data and a long-term study and others had little.

It varied from water body to water body, and the expectation that the industry had about the amount of scientific data that had been collected and analyzed a lot of times just wasn't there.

MS. MOLLOY: All right.

MR. ZORN: One more clarifying question about the advanced notification. John, if FERC is not really willing to set a requirement for any preNOI's activity by the licensee, is it still -- would FERC still encourage the staff to be involved with the licensee and other participants prior to that NOI requirement?

MR. CLEMENTS: Well, that's the delicate question. My personal sort of -- even though it's on the record, my off-the-record expectation is that most wise licensees will realize that they're going to have to do something before the NOI, if for no other reason, because at the same time they file that, they're going to have to have their preapplication document ready.

Although that only requires them to sort of assemble and deal with existing information, they can't just start that week before. They have to do a lot of work assembling stuff. And in the context of doing that, they'll start to get an idea of what they do have and don't have. And my expectation is that in doing that, they'll have to have some kind of contacts with resource agencies and Indian tribes to find out what else is out there that they don't

necessarily know about.

MR. ZORN: So there's going to be some sort of a nice clear, bright line there, right, where staff involvement becomes too much too soon for property involvement?

MR. CLEMENTS: On the regs there's going to be a nice bright line.

MR. ZORN: Okay. I think that helps give some background for some of the comments. I think one of the things here is that while I think you always have to be careful about too friendly of a rule-making contact with the regulating agency, we all know as taxpayers when the IRS can help us out before we get ourselves in trouble, we love it. I think the idea of getting FERC staff involved sooner rather than later especially to the tribal liaison-type position, I think that helps.

MR. CLEMENTS: I never had the IRS help me out beforehand.

MR. ZORN: That's true. We have some treaty fishing rights statute issues where we've met some wonderful IRS people that kept us out of a lot of trouble.

MS. MOLLOY: Any other clarifying questions?

MR. COX: The last thing I guess on that is you mentioned again the implementation team, and maybe it would be a good place for exploration of the issue on notification to Indian tribes. But otherwise, tribal liaison.

We talked about making comments toward what we think would improve tribal liaison's positioning, and that may be one additionally for a preNOI notification that they can handle. Because our question was just that, it was how the commission intended to determine when it's appropriate to notify the tribe. Those are just a couple more things.

MR. CLEMENTS: Again, there's another thing that's going to be worked through. Liz is kind of the tribal liaison for this, so she's better able to answer what our intentions might be.

MS. MOLLOY: And that is one question we've had. We have been asking tribes for their own internal processes, sort of how much time ahead it would be appropriate because we're trying to get a sense. And we know that in different tribes there's different sort of lead times on meetings or decisions. So we are looking for feedback on sort of a range that would be appropriate. Any other

clarifying questions?

MR. ZORN: Not on this end. But Liz, I thought your last statement there might be a good starting point unless, Doug, you have some other suggestion for doing it. But maybe that might be a good way to launch into the tribal liaison issue and get thoughts out on that. Does that make sense or not?

MR. COX: Sure.

MS. MOLLOY: Do you have any thoughts you want to get out on the table?

MR. ZORN: I do. But, Doug, if you want to go first, it's up to you.

MR. COX: I'd like to read the thought we had on tribal liaison, and maybe that will additionally -- there's some questions related to it that we have. So whether that helps to lead into some other discussions.

We've noted that the regulation did not address establishing a tribal liaison or its role as tribal liaison's consultation with an Indian tribe consistent with the rules against ex parte communication would be one question. How can tribal liaison respond to tribal concerns without first discussing the issue with the commission is another

question we have.

Does the commission believe that the tribal liaison can satisfy the commission's government-to-government consultation requirement?

The tribe asserts that this question specifically related to government-to-government consultation.

The tribe asserts that a liaison cannot satisfy the commission's government-to-government consultation requirement but possibly our only aid in facilitation of such consultations. So there was a few things there.

MS. MOLLOY: On the ex parte thing -- and this is described in the preamble in the section on tribal consultation. Because this meeting would be set up before a proceeding started, there would not be an ex parte problem in the initial consultation or the initial meetings. So that was one thing we considered in establishing sort of before things started a meeting to discuss things.

Once the process starts, we do have ex parte considerations we have to work with on meetings. We still -- on historic properties, cultural properties, there are various confidential rules that we have our on our books and that things would remain confidential that were appropriate to

remain confidential, but we could not meet and discuss the merits of proceedings with any party in a proceeding.

MR. CLEMENTS: But there is an out here as a new process. That is that the ex parte rule only kicks in when you've got a contested proceeding. And in this construct you won't have a contested proceeding until after the application is filed and comments are requested on the application. And that won't begin until three to three-and-a-half years after the NOI.

So you've got all this time between the commission and the tribe preNOI, and then everything from NOI to license application being filed and comments on where there is no ex parte rule. And so any communication between a tribe and the commission staff is permissible.

MR. COX: So anything in this section really?

MR. CLEMENTS: Until you get to the application filing date, there's no ex parte concern even though a proceeding has begun, so that gives a lot of time to work on things.

MS. MOLLOY: On the role of the tribal liaison, it has been expressed in other forms that

we have that the expectation is that a liaison could be someone who facilitates meetings, gets information out to tribes, answers questions for tribes on things. Though there has also been a question out on whether it could be -- just what the perception was on what level a tribal liaison would be best to be established in the commission. And it goes to what roles and responsibilities the tribal liaison would have.

So one reason we haven't filled it -- that was another question is does it need to go along with this rule; could it be established outside of the rule? I think it is being established outside of the rule, but it's not being established quite yet because we do want to get a sense of what the job would be, what the skills would need -- be needed for before we fill the rule. So we're trying to flesh that out as well as we can, and then it would be officially established and filled.

In the meantime, they wanted someone on the ground running, as it were, and that was me.

MS. LEPPERT: And that you're doing.

MS. MOLLOY: That's what I'm doing. I'm running. So that's still sort of in development,

but it will be sort of standing separate from the rule.

MR. CLEMENTS: Yeah, the regulation itself won't establish a position or define its responsibilities. That's purely done on an administrative level.

MR. ZORN: John, it will define that's the liaison's responsibilities in a particular context of the license renewal or new application, right?

MR. CLEMENTS: Well, Liz can speak to this too, but it occurs to me that there's no reason why a tribal liaison position needs to be limited to the licensing context.

MR. ZORN: That's my point.

MS. MOLLOY: I don't think it's intended to be from our end.

MR. CLEMENTS: I expect it will have sort of general implications as well, amendments, basically sort of -- I would think it would apply to any issue between a tribe and the commission.

MR. ZORN: Whether it's a subsequent general rule-making process or a question about how a license is being operated or things like that?

MR. CLEMENTS: Right. It should be a

soup to nuts kind of thing.

MR. ZORN: Doug, can I go ahead with a couple of thoughts on this too now?

MR. COX: Go ahead.

MR. ZORN: I guess a couple things about the tribal liaison. First of all, in these days of burning budgets, obviously the money and the amount of staff that's committed to the tribal liaison will directly relate to its success and its ability to perform functions with tribes all over the country.

And I don't know how we began to address that, but the tribes do have some experience with Fish and Wildlife Service liaisons, or EPA liaisons, or state DNR liaisons, and some of it is positive, and some of it isn't.

When you tend to regionalize tribal liaisons, some regions have a lot of tribes and a lot of issues relating to the agency jurisdiction and make that job much tougher. But if there's only one tribal liaison, they can't necessarily cover the whole range of issues that come up. I don't know what the commission has in mind in terms of how it intends -- the amount of resources and the amount of staff that would be devoted to the liaison office.

MS. MOLLOY: Well, as John said yesterday on a similar budget question, there are some things outside of our control.

MR. ZORN: But the thought there is that understanding the reality that you face. But if we could sort of think more like the authorizing committee of Congress as to how much we would like to authorize as to how much they have in their pocket, maybe we should brainstorm the liaison as if we had a vision of what it really should be, and then we could deal with some of the factual issues later on.

MR. CLEMENTS: It's conceivable that this is something that could also evolve. Because the tribal liaison is not going to be -- at least as I'm thinking of it, not that I have any influence, it's not going to be the person you are dealing with only for all the relicenses.

Every relicense is going to have a team of FERC staff that have to do the NEPA document and everything else. So the tribal liaison should be the person, at least as I'm thinking of it, that makes sure that the tribe is getting its due and proper consultation in that context.

MR. ZORN: That would be my next

comment.

MS. MOLLOY: Right now when we do -- on each relicense and on each license there's a team of technical staff and legal staff assigned. And one of those is someone who handles cultural resources, either an archeologist or some related field that gets assigned to each project. And since many of the issues are cultural properties or cultural areas, I think we were thinking that for a lot of the on-the-ground work and everything, it may be that person. But that would also be sort of the tribal liaison, sort of overseeing or making sure that things are occurring that need to occur and in a way that is appropriate.

MR. ZORN: I'd like to echo that. I think that is one comment that we'll figure out how to make in the written comments. Our experience with some of the liaisons is that when our biologists have a question, Liz, they could call you, but your answer is going to be, holy cow, go talk to John Smith, our wildlife biologist.

MS. MOLLOY: I don't know if I'd say holy cow.

MR. ZORN: Yeah, but I guess our experience has been when our biologist has developed

a relationship with their counterparts in the agencies, that's who they tend to call first. And if things go awry in the process or if you need some help working through an issue, then you bring in a tribal liaison. But I like the idea that the liaison doesn't necessarily perform. He's not a substitute for that substantive staff contact with their substantive counterparts.

MR. THANNUM: One of the experiences we've had with NRCF that was real important to have the liaison in the education role would have been the agency itself. You're going to have various staff that come and go, and suddenly they're dealing with tribes and that might not be familiar with such concepts as treatment of the state, how to interact with tribes in those legal processes or the BIA.

And one of the key concerns that we've heard, and Doug, you alluded to this at the meeting, was the concern that the Department of Interior, in particular BIA, missed the opportunity for filing such mandatory conditions. I think on one hand you've got an educational role in that position, but then FERC is an agency to improve the effectiveness of the team.

But at the same time I could see a

crisis managing the situation too because one of the big concerns we had was what type of resources are the agencies going to have to participate in getting the mandatory conditions.

MS. MOLLOY: From the education point, we were thinking that to be able to have an emphasis on education within FERC, but also we were thinking that for some tribes in some areas that an education of the FERC process would probably be helpful.

So we were thinking that it might also include a component of that, that sort of facilitating or arranging for either regional or specific training where appropriate. Because some tribes have not had as much experience as others in a relicense or a licensing process and are not as familiar as others. There's a wide range of experience across the country in knowledge about the FERC process.

MR. ZORN: That makes perfect sense, exactly. So I guess in terms of the tribal liaison at this point I think our gut reaction here at GLIFWC is that, John, like you said and Liz, that this is a developing, evolving office with the functions that are going to be set as you move ahead, and that certainly should be done as part of

a dynamic process in consultation with tribes.

But at least for the purpose of this rule, it seems like the functions of the liaison in terms of helping to get tribes informed and involved earlier rather than later seems to be at least in the broad -- the four corner's perspective of a good layout of what the liaison should be doing.

MS. MOLLOY: Good. We're glad to hear that.

MR. COX: I think there will be time also for the tribes to participate in the educational part of it -- the aspect also depending on how the tribal liaison position is awarded.

Our concern is the same as Jim opened with. In other agencies we're dealing with regional liaisons in a lot of cases, even more refined than that and our CS for us has tribal liaisons associated in Wisconsin, there are a number of them that take groups of tribes, but there's a number of those stationed around.

But in listening to the discussion that we're having, it sort of alleviates some of those concerns when you relay that to staff involvement in certain licensing parts of the proceedings. In our example, we've had a lot of discussion on the

pragmatic agreement and the cultural management plan, and in fact have had a number of meetings on the regs regarding that plan and the agreement.

And we had FERC staff come to Menominee to participate in those two meetings that we had in Keshena. So that really, in my opinion, aided the process greatly. It wasn't a tribal liaison. It was the archeological person. But nonetheless, it aided that process greatly whereas if we had to just keep filing and exchanging these comments, e-mail phone calls, whatever, it would have been -- we'd be much less further along than we are. So yeah, that was a good suggestion.

MR. CLEMENTS: We do more of that now. We travel more.

MR. COX: You heard my comment yesterday when we were talking about staffing and our worry about FERC's perception of keeping staff involved in the licensing proceedings and how are you going to carry the burden of that. That's still a concern, and we're still very concerned about how FERC is going to carry out keeping staff involved throughout the process, and that includes the tribal liaison position, but it's a concern we need to express for the record.

MR. ZORN: A little empathy from this end too for the tribal liaison getting out and hitting the pavement and talking to tribes is really important, and the travel is a necessary part of the job. You're learning that.

MS. MOLLOY: This is my fourth week of straight travel.

MR. ZORN: As much as it's easier to say it's easier for you guys to get from D.C. to Milwaukee than it is for us to get to Milwaukee, that doesn't help your situation where you really want to be home a little bit more often.

MS. MOLLOY: We haven't made it home yet.

MR. ZORN: There may be some merit to the idea of a regionalized basis or a more local basis where there are a multitude of projects or a multitude of tribes that have some focus liaison functions or duties by particular people so that you don't expect one person from the central office to do it. I don't know how that would work. You guys know your agencies a lot better than we do.

Again, some of the other agencies that do have those people closer to tribes and closer to the ground, it seems like you can develop pretty

good relationships.

MR. COX: I think if you put criteria to that issue, you could pick up things like where 10E applies or 4E applies and really get the tribal liaison involved more on those types of license issuances than the more general ones. Even though that doesn't address GLIFWC's concerns directly, it does specify on reservation projects.

MS. MOLLOY: Any other issues?

MR. ZORN: The only question I had is that I hope the reporter is taking good notes, because I have a hunch things we say here could be made in written comments if you happen to write them down better than I am.

MR. CLEMENTS: They will be for internal purposes where I'm going to go over the transcripts line by line and make a comment summary that identifies who said what and where they said it.

MR. ZORN: I would like to make that comment at least from my personal perspective in getting involved a little bit later here with some of our other staff. This most recent NOPR, I really appreciate the effort that FERC staff made in looking at the comments received, summarizing them, identifying who made them, categorizing them. I

thought that was very helpful, and I think it added credibility to the document you put out especially from our end, and we appreciate the attention that it looks like you paid to our particular comments.

MR. CLEMENTS: Thank you.

MS. MOLLOY: All right. What other issues can we talk about?

MR. THANNUM: This is Jim Thannum. When you talk about the various brief processes, it's my understanding that the integrated process would be a default process, however, an applicant could still go to the traditional process of the proof. I was wondering, has any criteria been established when a licensee could utilize that traditional process?

MR. CLEMENTS: We spent a long time on this yesterday. We spent a lot of time on it in the other regional workshops. All the regulation says in draft is for good cause. A lot of parties have said we want specific criteria in there to guide that decision. But so far we haven't -- I expect we'll get these more in the written comments.

We've had very few specific recommendations as to what criteria ought to apply, and we're hoping that we'll get some that we can work with. I know it's the desire that the

traditional process be the exception rather than the rule. They don't want the exception to swallow the rule, and that the great majority of processes are intended to be the integrated process. How you exactly come up with criteria to put bounds around that we're hoping to hear from people on.

Some people have said only small projects perhaps should be able to use the traditional process, and other people have said that's not a good idea because that doesn't have anything to do with the kinds of issues that will arise. Others have talked about less controversial projects being appropriate for this.

And then, of course, the rejoinder to that is you don't know if it's a less controversial project when you have the NEPA scoping and the study disputes are resolved or not resolved and all those things. So there's a lot of tensions there. Give us your good thoughts.

MR. ZORN: I'm sort of at a loss as to the advantages and disadvantages of an applicant or someone seeking the traditional or the alternative over the integrated at this point.

MR. CLEMENTS: The only thing we've really kind of heard is from the industry sort of

that they want flexibility. They want I think as much as they can control the process selection, and that was their sort of -- the National Hydropower Association's initial recommendation was that they should just -- the commission should just let them pick the process. We said we don't think so. So help us with criteria.

MR. ZORN: My sense is the traditional process involves a little bit more formality, a little bit more of like a litigation-type thing rather than the integrated as more of a cooperative --

MR. CLEMENTS: Well, it's intended to foster cooperation, but there's no assumption that it's treated as a collaborative thing. There's provisions to resolve disputes and keep the train on the track. The big thing with the integration is to not repeat steps. It's to get things done early so that you can move along as opposed to the traditional process where you have your study disputes during pre-filing consultation, and then the application's filed, and it starts all over again. So that you don't really establish what the record's going to be until you're two or three years after the application's filed.

That's the big thing we're trying to get rid of so that we can issue new licenses when we do that before the old one expires wherever we can. Some licensees have said they like the old process or the traditional process because they think it's cheaper for them and easier that they can do the pre-filing consultation their way, throw the application over the transom, and then kind of wait for things to shake out in due course.

MR. ZORN: Sit and wait for the comers who happen to be on the spot to do something, right?

MR. CLEMENTS: Yeah, and they're willing to stretch it out. As you know, there's no incentive for them to rush along because every new license is going to be more expensive for them than the existing one.

MR. ZORN: Liz, if I could, back to the travel time frames. Let me give you a couple factual things about how GLIFWC works with its member tribes in helping them make decisions about the ceded territory rights.

We have a board of directors or board of commissioners that runs us. They meet five times a year, every other month starting the fourth Tuesday in January. And then we have another body, a

constituent subcommittee of that board that meets monthly that gives us a little more particular direction for on-the-ground things in the ceded territories, in particular Minnesota, Wisconsin and the UP in Michigan.

The way things work with the monthly body, what we call the voice inner tribal task force. You really need a two-meeting turnaround to really get them -- the tribal reps, get them the information, let them go home and talk to their tribes, and then come back and maybe make some decision.

So when we think about these types of time frames, I think we'll get to them in a little while here, that's how we can look at it is that you sort of need a couple month's process there. If we're going to get the type of info and feedback that we need from our representatives and for them to go back and bring it back to us from an inner tribal ceded territory section. And that's given our staff levels.

From an individual tribe's perspective at home, some tribes maybe have one biologist, if that, and it becomes -- you don't have the separation of powers or functions like you do like

the state agencies where you have administrative agencies have a legislature that's clearly defined and given authority to.

Tribes tend to run things to the tribal council that the Bad River, for example, I think the regular meeting is the first Wednesday of every month. So general in Indian country, our experience is you need a little more time to massage the system and let it work, and that haste might make waste.

So I offer that as a backdrop for the tribal liaison's job and probably for some thoughts and comments you might be offering on some of the specific time frames and deadlines as the process runs through.

MS. MOLLOY: I appreciate that, and I know the deadlines in the rule and on the flowchart are tight, and everyone has told us they're tight. The trouble is in setting -- it's a very tight time frame all together to get the study information -- the study seasons done to try to come up with a study plan and all.

To the extent we can find a way to most effectively allow participation in that and one of my thoughts would be to the extent that we have the meeting -- the tribal outreach before the NOI and

stuff, if there's any way we can do some advanced work with the tribe on identifying stuff or establishing a plan that somehow enables working with the tight time frames, any kind of comments on that would be appreciated. I know and we've heard from everyone that the deadlines are tight.

MR. ZORN: You heard from industry and everybody else as well, I assume?

MS. MOLLOY: Oh, yeah.

MR. ZORN: I think is it timely fair for your instincts to go to, look, the more advanced tribal outreach we do, the more we might be able to deal with the time frame dilemma that tribes might face. And that's a good thought.

The only comment I would offer on that is that in terms of sort of -- Doug, you may experience this. As staff, we might be in a position to have to put draft comments together or something to submit. But sometimes we can't get the sanctions to submit on time through the proper authorizing tribal council or other body. That's just a dilemma we're going to face as we go along here.

MS. MOLLOY: Do you think there's any way to work with -- I know it's individual tribes

and individual groups and all, but any kind of concept with draft -- I mean if there are any types of ways that anyone has -- that we might be able to make that we can best make this work other than stretching out the process?

MR. ZORN: Let me tell you one other reality in tribe that we experience. When there's a tribal election, you may have sort of a hiatus of tribal governing board or council functioning for 30 to 60 days while the elections are taking place a week or two or whatever, post elections until a new council is ceded, and that's a dilemma you face with some of our tribes.

And some tribes will have tribal council members like they have for the tribal councils every year. We have one tribe from the time of the tribal caucus in April or May until the time the tribal election in June and the new tribal council in July, it's tough to get matters before that tribal council.

That's just a fact of life, and I don't know how we deal with that other than to have some sensitivity and advanced outreach. We have to keep that in mind somehow.

MR. COX: And that issue in itself is

even above and beyond the issue that I raised yesterday on staffing. You look around in Indian country, at least the ones I'm more familiar with in the East, we're lucky when we have environmental and biologist staffs that exceed a couple of people.

So it takes us time to get things turned out of our offices just to get them to our tribal leaders to make decisions and give us okays to forward this stuff especially when it comes to other governments.

MS. MOLLOY: And one thing I guess I was thinking again, and I know it doesn't totally answer the question, but one hope is that with schedules -- here we're trying to establish that there will be schedules for the study and for things occurring, that that would hopefully help because you'd know in advance when something was targeted for and may be able to -- as I said, it's not perfect, but may be able to somehow -- if knowing when something was coming or would be expected, that that may in some way help. Am I too hopeful?

MR. ZORN: I think in theory you're correct, but that doesn't help when, say, Doug is sitting there and we're sitting here, and there's a tribal council election and tribal council is not

going to meet for three or four weeks. And one of the deadlines falls in there and we have comments ready, and nobody said go ahead and send them out in the name of our tribe or inner tribal.

MR. CLEMENTS: We recognize the tension there.

MR. ZORN: It's an every day life -- Doug, we try to talk over beer, or tea, or whatever about how our life is in that regard. But I guess, Liz, I think what that council is for the preapplication activity that FERC liaison or FERC staff can do with tribes, that preapplication activity, that the greater extent is tied to what actually will be happening during the post NOI filing or during the application process itself, I think that will go along way to help meeting those other deadlines so there's advanced thought into, look you guys, whatever you think you need about studies, let's try to get more specific now. Let's not wait until the last minute. Let's do some preplanning.

MS. MOLLOY: That has been the thought that's crossed our minds is that if we can do some focus earlier, that hopefully will help.

MR. ZORN: And I know the applicants are

concerned or the licensees about requirements to do things before they actually have to. But it might be helpful to encourage some dialogue at that point between the tribal folks and the applicant folks just to get a head start on the study issue, for example, or something like that just so that you can -- any head start on the game I think would be tremendously helpful.

And maybe folks like the DNR are going to have the same type of problem. What I hear from the Wisconsin DNR is that there's a 38 percent budget cut proposed for its water program and they're looking for the whole DNR 145 staff positions being cut.

MR. CLEMENTS: We're hearing that kind of thing nationwide.

MR. ZORN: I guess my concern is -- it's not a political statement or whatever. I'm really concerned that the whole budget crisis that we're all facing does not grant the ability to do the environmental protection function during the FERC relicensing process where it's a cakewalk by an applicant because the agencies -- their ability to participate is because of the amount of your people. I think given that reality we can't lose the

environment by default in this process.

MR. COX: That's a good point, Jim. In our couple of cases that we've worked on licensing issues on, we've depended on somewhat DNR and more so U.S. Fish and Wildlife Department of Interior to aid us in both evaluation of studies that were already done, natural development of conditions.

Those points you're making are a real concern for us when agencies start talking about budget cuts. It's evident here. The last meeting we had and this one, there's not any Department of Interior folks sitting here. So we've got some legitimate concerns there.

MS. MOLLOY: We did have yesterday the National Park Service.

MR. COX: I'm sorry. Today they're not here.

MS. MOLLOY: We recognize these; but again, it's outside of our control, so we can only work with sort of the scheme and the framework, and then we just have to do what we can do with whatever happens down the road.

MR. ZORN: Then, Liz, let me ask the question in this way. I guess I don't know enough of the history of how bad or good the annual

licenses are, once you get to the point and holy cow, you expired the annual license. I don't have enough background to know the pro's and con's in that.

I do see in this proposal the ability of participants or parties to waive time deadlines to make sure that things get done right. How do you envision that, or how is that intended to work? Does somebody request it, and does somebody else make a decision, or is it sort of an automatic-type thing? John, is it more like a pretrial thing that lawyers do, look, I need a little more time to answer interrogatories, is there any problem with that kind of thing?

MR. CLEMENTS: There's two ways it could happen. One, it could be initiated by a party or parties to the proceeding, sort of a request for an extension of the time to file something usually.

MR. ZORN: That would be a formal request then.

MR. CLEMENTS: That could be on paper. The other way it could happen is it may be apparent to everyone that for some external reason a particular schedule date just doesn't make any sense anymore and the commission could -- of its own

volition issue an extension of time and say that's set back 60 days or whatever it is.

It could be something going on in the water quality certification application program that makes it kind of pointless to move forward with a particular part of the licensing process, or there may be that the time the application is filed there's some critical piece of information that's not in the record yet because a study for good reason could not be completed in time to make it into the license application.

That would probably, I would assume, delay the issuance of the REA notice at which time comments would be due. So there's a number of ways that these practical extensions of time could come about.

MR. ZORN: And then the other dilemma that we would face as an agency or at least I remember tribes individually, again, the sheer number of projects that might come due in a particular year, there might be four or five, I guess I don't know how we cross that bridge.

I got to believe Wisconsin DNR and others face that situation. You're on the path that's been good work between the Tribe and the DNR

on some of those issues. I guess obviously from a tribal perspective the more buffer and more room that I think tribes would have, the better. And understanding the dilemma that FERC faces about the desire not to do annual licenses, that's not to say that annual licenses can't be done under appropriate circumstances though, right?

MS. MOLLOY: Two things. One of the real driving things is that an application has to be filed two years prior to expiration of the license. We cannot waive that because that's statutory.

MR. ZORN: The application filing date is set in stone?

MS. MOLLOY: Yes. That is a major milestone that we can't alter. Annual license, if we are not ready to issue a license or act on an application, we will issue an annual license. We just are seeking to have that happen less often.

MR. ZORN: So what you're saying, if I read it correctly, the application filing date since it's set in stone if there's going to be any room on any of the deadlines especially through the integrated process about working things out in the study, you have to find room on the front end rather than the back end. You have to find it before that

two-year?

MR. CLEMENTS: No, I don't think so. I think you're just as likely to find practical extensions of time on the back end. The thing I just mentioned about maybe a critical piece of water quality data is not there yet or something like that is more likely to influence it.

So you'll have applications filed that we would consider not ready for prime time, but nonetheless, the statute says file them.

MR. ZORN: I hear you. Those are the real hard-core type. You can't issue a license without that certification being resolved type thing, right?

MR. CLEMENTS: Yeah. And if we don't get the new license out within two years, we automatically issue the annual license automatically by statute.

MR. ZORN: I was thinking not necessarily in terms of those types of kneecappers, John, where you can't issue the license without that certification. I was thinking more of the study design and study implementation where time to make sure that that's done right. And maybe again the answers are resolved more through the preNOI type

interactions between the parties. Maybe that's how you solve it.

MR. CLEMENTS: I think that's where we're kind of placing putting most of our chips on this prefiling process.

MR. ZORN: By prefiling, you include post NOI in that, John?

MR. CLEMENTS: It's everything from the NOI to the application.

MR. ZORN: I'm thinking even preNOI. You're not interested in moving the five to five-and-a-half period out any farther, are you?

MR. CLEMENTS: The commissioners have told us explicitly that they're not interested in that.

MR. ZORN: You may think it's a good idea, but the case is closed, right?

MR. CLEMENTS: The commissioners have spoken.

MR. ZORN: We're free to make that comment obviously.

MR. CLEMENTS: Obviously.

MR. ZORN: And there might be something that we just might need to do is to say, look, in a certain context where there's a whole bunch of

licenses coming up, that five to five-and-a-half year time line may be moved out farther to let agencies who are facing a great deal of budget crisis or whatever, more time to work with the applicant. We can always make that comment.

MR. COX: We are going to do the same thing.

MR. THANNUM: So much depends on the quality of those documents going on in. If you've got high quality documents that have adequate information talking about sampling plans and quality assurance and those type of things, then it's pretty much easier in the amount of comments you're going to have coming back from the tribes and other scientists are to be much less than if you've got a very general document that's ambiguous, and you're trying to tease out where the studies are going. That's one of the comments I wanted to make.

Another of the comments that kind of ties back to the information availability. In the proposed rule, it talks about the establishing of websites. I guess what I was thinking about is not letting every company have a website but having the information, the PDF files, or WordPerfect files, or Microsoft Word files are very helpful.

We downloaded your proposed rule and were able to do -- support those files and do analysis and word searches and those type of things. That helped our efficiency. I think if you've got 30 days to make comments on a document, if you could pull that document into a Microsoft Word file and they could type in wild rice and go right to the areas of that document talking about wild rice, that's going to really improve our ability to make comments which are sound, and rational, and based on good science.

MR. CLEMENTS: I think we're hoping and expecting that most license applicants will take advantage of websites to do that very kind of thing. They have a very similar interest to you. They don't want to have to, for purposes of the preapplication document, send out hundreds of copies of preapplication document that if entirely on paper would fill a couple of Xerox boxes because it's all studies.

MR. ZORN: We have a room full of these things that we get we don't have time to look at, and the ones that are really dear to a tribe's heart or an area that tribes use, then we'll focus in on. I don't know if it's worth sending out boxes of

paper.

MR. CLEMENTS: As a practical matter, we hope that's not going to happen. I also hope there's going to be more discussion in the final rule about practical ways when working with the preapplication document to make that kind of thing happen. It was just when we were in the NOPR, we had a recommendation that every applicant be required to have a website where everything would be on the website.

And there was some reluctance on the part of the commission to be prescriptive there because there are quite a lot more than you would think of little licensees who are running sort of basically shoe-string projects, and they don't have perhaps the money and/or the expertise to do something as sophisticated as say WEPCO would.

MR. ZORN: We've got those around here. That's exactly what we have around here, sort of a mom and pop operation.

MR. THANNUM: Is there any way that FERC has institutions that could get those electronic versions and put them on their website?

MR. CLEMENTS: If they were filed with us, they would be. And the NOI and the

preapplication document are going to be filed with us, and they would be -- even if they came in in paper only would be converted -- they would be scanned, and they would be available on the FERRIS which is our come one, come all public dig around in the files website. So the stuff would be there, but it might not have to be distributed every little bit of paper.

MR. THANNUM: One of the comments I have tying back to the liaison position, I think integrating inner training with tribes how to access that website and how to effectively hold down information and search it, I think, would be a good benefit for tribes.

MR. CLEMENTS: We'd like to know the same thing.

MR. ZORN: Doug, we don't mean to monopolize on this end. Are we stepping on your toes?

MR. COX: No, that's fine. Keep getting done what you need to. You just have to listen to me some after.

MR. ZORN: That's fine. Do you want to take a crack at one of your issues?

MR. COX: No. The flow is going good

here. I'll say something if it overlaps with what you guys are raising.

MR. ZORN: I'm going to raise more on an issue of substance. It relates to the role of tribes in the studies and the dispute resolution for the study and the notion that the disputants can only be tribes that have passed Clean Water Act certification authority.

I guess from GLIFWC's ceded territory rights perspective where these rights apply beyond reservation boundaries in areas where the tribes in no way can get that type of certification authority unless I get a nonreservation body of water perhaps like Menominee and the Wolf River and the Crandon mine. I'm just concerned about tribes to being relegated to an NGO status.

These are treaty-reserved rights. There's -- the federal government is the guarantor of those rights. And it's a direct relationship there between the federal government of the tribes and being put into this NGO no-man's land when it comes to the study when how that project is going to be operated could directly affect the tribe's access to particular resources that have been reserved under the treaties or they have in fact produced

those resources.

And particularly from our role on behalf our member tribes that's exactly the area where we can provide the most help is technical-type scientific studies. Sometimes in areas where the -- we work well with the state and we do parts that they don't do and vice versa. I'm thinking about our mercury and fish studies. I also think about the unique relationship to resources such as wild rice or additional wild plants.

So, John, I don't know if it's a legal or policy question, but I guess it seems to me that where there are treaty reserved rights either on or off reservation, those tribes should be able to participate as government in the study determination and study resolution process, that they should not be relegated to the NGO NEPA type process.

MR. CLEMENTS: Point taken. Let me try to back up a little bit and explain and clarify. I don't think what we proposed here relegates you to the same status as an NGO. What we've set up in this new part five is a two-tier process.

MR. ZORN: I'm sorry, I did see in the part one you're in the ring with everybody swinging away, right?

MR. CLEMENTS: Yeah, but you're also in the ring with the state and federal agencies to the extent that they're acting under authority or with responsibilities other than where they have conditioning authority.

So, for instance, the formal dispute resolution process would be available to the Fish and Wildlife Service if it was exercising -- if the matter related to its exercise of its Section 18 fishway prescription authority.

But to the extent they were making 10J recommendations, their dispute resolution for that would conclude with the preliminary decision on the study plan.

MR. ZORN: So basically then tribes' federal agencies up to that point are in the same position except in the nonmandatory requirement context?

MR. CLEMENTS: Yeah, and the rationale for distinguishing between the mandatory and nonmandatory is if you were as an Indian tribe doing a 401 certification or you're a state or trying to defend a Section 18, you have a statutory responsibility to defend your -- to be able to defend your conditions in court under whatever

standard applies. It's usually substantial evidence.

And the purpose of this is that entities that had that conditioning authority could defend their decisions by going into court and saying we had a dispute resolution process, and the commission through this mechanism that we've all agreed is appropriate establishes the evidentiary record on which we can all do what we need to do, and so that they can defend their decision.

If you were a tribe, you could defend your decision in the face of -- presumably it would be an appeal by a licensee allegedly if there was a lack of substantial evidence. So because of those entities' statutory responsibility to support their decision which no one else has, they've got that second tier of dispute resolution.

MR. ZORN: So in other words, my saying that if you're relegating an NGO status, the answer is you're no different than any other state or federal agency in the nonmandatory context?

MR. CLEMENTS: I think that's a correct statement.

MR. ZORN: That's what I understood you to be saying. Let me ask a couple other questions

relating to that. In terms of the binding affect of the resolution. Say there's a dispute, those that can do the formal dispute resolution there go ahead. Does that mean that those who were not disputants are bound by that and cannot then challenge that through whatever means are available by law either at that time or in review of the whole process?

MR. CLEMENTS: Anyone who is a party to the proceeding could, of course, challenge the commission's final order in court. That doesn't change. For purposes of the moving forward in the commission proceeding, that would be the end of the game.

But let me put a gloss on the binding nature of it. And this again goes to 401. There's a distinction between a federal agency here and a state agency. If we have the formal dispute resolution process say on a Section 18 related issue, the decision is final and binding on everyone including the agency that has the Section 18 authority at least for purposes of completing the FERC proceeding.

It's different for 401 with the state or tribe that has 401 because that process is a separate process under a separate statute. So that

if you went through the informal dispute resolution process on a water quality issue and you didn't get everything you were looking for and you went to the formal dispute resolution process and you still didn't get everything you were looking for, you could exercise your authority under 401 to deny a water quality certification application and make the applicant refile and say we're not going to go forward with that until we get the information that we think we need to exercise our 401 authority.

MR. ZORN: That's another hammer.

MR. CLEMENTS: Yeah, that's a hammer that states and tribes with that authority have.

MR. COX: That wasn't clear in the preamble where we looked it indicated that -- the opposite when you read the preamble. But the explanation you made yesterday, John, and just now is really clearer as far as 401 goes.

MR. CLEMENTS: I thought it was clear in the preamble because it was in my mind. I've given this answer at every session so far.

MR. COX: No. 83 says commission --

MR. ZORN: The rule is -- I'll offer a thought about this binding affecting -- this relates to another question I had about something in the

preamble about how Interior is developing its mandatory recommendation appeal processing, and I had the sense that like you're saying, John, if somebody is dissatisfied with what a state or tribe is doing under 401 or what a federal agency is doing under the mandatory conditioning authority, that there has to be separate ways of challenging those particular determinations outside of the FERC licensing process.

MR. CLEMENTS: At this point that's not always the case. If you want to challenge a fishway prescription, you have to do it through an appeal of the FERC license order.

MR. ZORN: So, for example, let's take my treaty rights example where we're feeling like the poor lost cousin where no federal agency is looking at the treaty rights the way we are, FERC isn't, and we go to Interior and say, dog gonnit, you guys, how come you aren't doing more to protect the rights there? They say, sorry, we made our cut. Our recourse against Interior might be to appeal the whole FERC thing.

MR. CLEMENTS: That happened once in the fishway prescription context, but the case is, I think, Banger Hydro. And the Fish and Wildlife

Service made a fishway prescription, and the licensee went to court and said, excuse me, there's no substantial evidence. And the Court looked at it and said, you're right, there's nothing behind it. So they remanded the case to the commission.

MR. ZORN: Then go back to the federal agency to say, what did you guys say without knowing what you're doing?

MR. CLEMENTS: Unfortunately or fortunately, depending on your perspective, the commission then had mercy on Interior and gave them another opportunity to supplement the record.

MR. ZORN: They could have shut them down and said, sorry, it's arbitrary capricious recommendation, you're off the book.

MR. CLEMENTS: Yeah, but we had a different chairman that had different agendas, and she wanted to assist. And then the licensee went back to court, and the second time around the licensee lost because there was a record this time. But that's all sort of history.

MR. ZORN: So in the 401 context there might be other legal means to challenge or review that 401 decision. But in terms of the federal agency or state agency mandatory, they may not be

accepted in the FERC process.

MR. CLEMENTS: Yeah. What's going on now with Interior and the mandatory conditions review processes there, they say they're coming up, although we haven't seen any paper with this appeal process which would be an administrative internal appeal, and the issue that's kind of between us and them is how would we work that into -- how would we coordinate that with what we're proposing here.

MR. ZORN: That was my question was that if we couldn't be part of a formal dispute and we didn't think the Interior was going far enough and we had to push them through their process, your process doesn't sit by and wait for that to be resolved.

MR. CLEMENTS: Excuse me, that's correct.

MR. ZORN: Big one to swallow, isn't it?

MR. COX: I think you got him, Jim.

MR. ZORN: There's that issue we've been looking for, Doug.

MR. CLEMENTS: On the other hand, the Forest Service has an appeal process for its 4E conditions, but they're proposing to eliminate that.

MR. ZORN: Really?

MR. CLEMENTS: Yeah. Although they don't prefer to characterize it that way, but that's what they're intending. There's side-bar discussions going on about that now too.

MR. ZORN: Now you're giving us more work to do and we're not even done with the first stuff. Now we have to go through the Forest Service, holy cow.

MR. COX: We've been watching the Interior stuff pretty close. Our situation with our project, Jim, is just that our 4E -- our appeal to the 4E conditions is in court right now.

MR. ZORN: With Interior or with FERC?

MR. COX: With FERC. We're on the side of Interior in court on the 4E conditions. It's being mediated.

MR. ZORN: Does Menominee have a 401 status --

MR. COX: No, not yet.

MR. ZORN: -- under the Clean Water Act?

MR. COX: No.

MR. ZORN: Mole Lake is the only local tribe, right?

MR. COX: Right. But our comment in regard to that is that the dispute resolution

process has to take into account tribes' projects that are impacting reservation waters even for tribes without 401 certification tribes have to be allowed as part -- as the tribes that are treated with the mandatory authority under 401 that are at a minimum for the projects within reservation boundaries.

There are tribes that have the opportunity to have federally approved water quality standards by EPA but not have 401 certification authority. So you can have one without the other. It's possible.

Regardless of the water quality standards issue, our comment is just that, that for projects affecting minimum reservation lands, the tribe should be treated the same as the mandatory agencies, the agencies with mandatory authority. But most of that results that the problems we've had with the current situation -- and we won't get into that right now, but that whole discussion that we just had on the 4E requirements and our abilities to appeal that, that's where we're at in the whole situation at Menominee, Jim.

MR. ZORN: I think that's underlining my thoughts, Doug. That's why I ask the question about

the binding affect. The question, John, say at the end of the day that the study disputes or the resolution of the study dispute is done, you've got this binding order on the parties by the director or the administrator, and then somebody who wasn't a party to that dispute, in effect, is sort of bound by it until the whole license is issued, and then you have to go back and challenge back to that other point. That seems to bring in inefficiencies.

It goes against the idea of trying to resolve the preapplication type disputes among all the parties involved rather than put them off to another day.

MR. CLEMENTS: We look at it from a different perspective which is that it gives the parties a powerful incentive to be there at the beginning.

MR. ZORN: That's true. I just wonder if letting tribes without task status at the beginning, you give them the same incentive if you may not take care of some of the back-end challenges. I don't know. I hadn't thought that through. That was one of my questions, John, from a lawyer's thinking end. To what extent does this dispute resolution result that is binding on the

disputants? I got to believe that's to be given great deference by a reviewing court as to how the dispute should have been resolved.

MR. CLEMENTS: Well, I guess the reason that I look at it from the perspective that I do is if someone takes us to court on substantial evidence grounds or a lack thereof, we haven't lost one of those cases in about 20 years.

MR. ZORN: Yeah. If we lose a case, it's on procedure, it's not on substance, right?

MR. CLEMENTS: The last time we lost a NEPA case was 1986.

MR. ZORN: That's from the Forest Service. That's why they hammer out the process as important as the result from a judicial review perspective.

MR. CLEMENTS: I'm very comfortable from that perspective.

MR. ZORN: I guess that comes back to the idea of then who really is -- who is the federal trustee, who is federal treaty signatory that's going to banter the tribes in that type of dispute context? If it's not FERC and the tribes can't be there themselves, how do you leverage the other agencies to sort of live up to at least what

the tribes use or the treaty obligations are?

MS. MOLLOY: We're hoping the second tier dispute resolution doesn't come up very often. We are trying to design it that everything is resolved in this first meeting with everyone.

MR. CLEMENTS: Or at least by the time that you get to the preliminary decision, we're hoping it will be the rare exception.

MR. ZORN: John, as you said, the thought is there's sort of a hammer there. Look, if you guys can't work it out, mom or dad will come here and set you kids straight, and you're stuck with it.

MR. CLEMENTS: There's a risk for everybody of going forward with the dispute resolution, the trouble, and the expense, and the uncertainty of the outcome. In the traditional process it's been nonbinding and nonmandatory, so there was no risk to anyone, so nobody used it.

They would just defer it. But now the rubber meets the road at the beginning. So we're hoping that dynamic will force people to get together, and the licensees will say, okay, I don't want to but I will do it, and the tribes and agencies will say, I guess I can live with that.

MR. ZORN: I'm sensitive to the responses I think to the issues that Doug and us have raised here about nontribes being able to participate. I have a hunch we still have to make that kind of comment. You know where it's coming from.

MS. MOLLOY: We certainly appreciate that you need to make the comment, and we encourage you to do so.

MR. COX: One other thing on 401 authority and this kind of relates back to the NOI and PAD that I didn't raise when we were talking about that issue is it looks like in the text in 5.03 and .04 that the commission in our opinion needs to clarify when the tribe will receive the notice and the PAD.

As currently written, the proposed reg is clear that the tribe must be contacted if it has a THPO, Tribal Historic Preservation Officer, or 401 authority. Otherwise, it's not specific on when we -- when notification is required.

MS. MOLLOY: Which section?

MR. COX: 5.03 and 5.04.

MR. CLEMENTS: 5.3 and 5.4.

MR. COX: That might be a typo.

MR. CLEMENTS: We went through this yesterday at length, and we discovered that there are some uncertainties in when things need to be served and filed and how all those -- we need to better clarify exactly what paper needs to be in whose hand and exactly when it needs to be there. So our intention is to do that on the second round. So again, get these things down on paper too, because that will help that we don't miss anything.

MR. ZORN: And in addressing your comments, those are your draft comments, that one?

MR. COX: Yes. Those are things we bullated in our first review of the text, and we wanted to bring them here and do intend to file most of these as written comments.

MR. ZORN: That's something we hadn't picked up.

MR. COX: It was a mistake that that was a typo in my bullet point. It was 5.3 and 5.4, not 03 and 04.

MS. MOLLOY: We're double-checking through here because we've seen a few.

MR. ZORN: I think we picked up one typo referenced in 510 when it should have been 512 or something like that.

MR. COX: The typo was on my part.

MR. ZORN: In that proposed rule itself.

MS. MOLLOY: One typo? I'm shocked.

MR. ZORN: Somebody picked it out. Holy cow, we got the right mind thinking about it. Doug, did you have anything else to say about that study and that dispute resolution type thing?

MR. COX: Yeah, a couple of things on dispute resolution that's a bit unclear to me at least, disputable items in the process itself on studies. Are those conflicting when submitting studies if the tribe submits a proposed study, a licensee submits a similar proposed study; but if they're conflicting, how are those disputes resolved? Is that something that would go through dispute resolution as well?

MR. CLEMENTS: Let me see. I'm not sure I'm getting the question exactly.

MR. COX: If the tribe would propose a specific study, fish and trade as an example, the licensee would propose something in an alternative to that or maybe a trade study that they feel would be more appropriate but different. Is that an example of a dispute that would be carried through the dispute resolution process?

MR. CLEMENTS: Yeah, I think we're basically talking kind of -- this is -- I guess you don't have the yellow book, do you?

MS. MOLLOY: We can mail it to you.

MR. ZORN: What's the yellow book?

MR. COX: Do you guys have the chart?

MR. CLEMENTS: Do you have the flowchart?

MR. ZORN: The thing on the back of the notice with all the time formats.

MR. CLEMENTS: If I take off my glasses, I can read it. We're talking about boxes seven through 10. Box seven, after you started the scoping thing, we have the graph study that comes in, that's box six. Then we issue a scoping document and then we get comments on the study plan and in the context of commenting on that you would either say, licensee, we think your study plan needs to be improved, here's what we think needs to be in there and hopefully with reference to the study criteria. And then everybody would get together for the study plan meeting, and you would try to resolve these things at the meeting. That meeting would include commission staff too.

The commission staff would also be

providing a study request itself or agreeing with other peoples' study requests or making suggestions on those. Then the application would file the revised study plan after you've had the meeting and discussion which would reflect any consensus that you've reached. Then you would get in the box 11 a preliminary decision. So that's where the director would make his cut on the study plan issues.

MR. COX: That then wouldn't -- up to that point it doesn't consist of a dispute. It consists of the study process or the development process.

MR. CLEMENTS: It's a form of dispute resolution because we assume that the licensees and commentors aren't always going to agree, if history is any guide.

MR. COX: And in fact, my other dispute resolution comment referred to the discussion we had already on binding, and we'll submit that written. So I had two others -- one was the binding and one was on the 401 certification for the ability to be involved in dispute resolutions, and we discussed both of those. So that was my last one on dispute.

What was the other study plan development?

MS. MOLLOY: We've been talking about that. We sort of segwayed into that. It's interrelated.

MR. COX: I heard discussion related to this yesterday. As far as costs and the commission's concerns about costs of development of our studies, we feel that when tribal trust resources are at stake and are being studied, that it's really the obligation of the commission to protect those resources and not balance property rights, and generation capacity, and economic revenues against those interests. And in those cases costs shouldn't be as relevant.

MS. MOLLOY: What if there's two ways to study something and both have similar -- I mean you have one way that's very expensive, and you have a way that costs less and will get you information but maybe not as precise or exact or in the same way as one study, do you think costs in that context is something to consider?

MR. COX: I think that in our case we'd be quite open to the process of determining if those things are going to work for us through this -- the way it's developed, and we're definitely open to looking at the process and how that will get us the

relevant data we need or is needed. So, yeah.

MS. MOLLOY: I think that some of the costs in the study plan sort of development is sort of if there's another way to do it that you'd look at the different ways that you could do it and maybe choose one that would cost less.

MR. CLEMENTS: We've had discussions where we've been talking about this for months with agencies and stuff. In one of the inner agency task group versions of study criteria they had said that if there's a less expensive way to do it, then get the same data that's preferable. But in the end, it sort of got massaged out and became this criterion seven which is we're going to look at the role of cost, I forgot how it is. What did we say? Conditions of cost and practicality and why alternatives wouldn't be sufficient to meet the stated information needs.

So it's just squishier, it's more subjective, but that was where people felt more comfortable being on that. We're expecting lots of comments on this criterion which is actually the only one anyone has said anything about in the workshop. It's the money that's really driving the comment.

MS. MOLLOY: I've also seen in working with the groups who are working collaboratively together that an initial study might be proposed that envisions taking samples in a certain location or something. And when they start talking about it, the difficulty in getting to a certain location versus taking something in a slightly different location that isn't as prime as the first but it's a lot easier to get to and actually have something in the water or wherever and get it out again or do various things on that is something where you're balancing again the ability to do it, the accessibility or how hard it would be to actually perform the study.

So that's another consideration as you're looking at different studies what people are looking for and what information you're going to gain and how much it will either cost or how much work will be entailed in doing it a particular way and what can you do to kind of accommodate different needs on that.

MR. THANNUM: One of the concerns that we've had is if there would be a balance between looking at the costs of the studies and also the statistical validity. The case you gave there, Liz,

for example, you might have a cheaper sampling site, but the same number of samples are going to be taken.

That's one of the concerns I have is when you start writing the statistics, looking at the confidence intervals and being able to see and have that statistical basis that you can effectively measure change in environment, it will be really critical in assessing impacts in the future.

We've been very active in the Crandon mine in doing baseline studies. One of the key factors we looked at is how much information do you need to have a sound statistical basis that you could later assess the role of impact.

MS. MOLLOY: It's kind of a fine balance to get enough but not sort of overdue.

MR. ZORN: This is Zorn. Maybe I could approach it from a different angle and see if it helps our thinking on this in terms of balancing costs versus again the fiduciary duty of the federal government to fulfill the provisions and purposes of particular treaties or other statutes or executive orders that establish reservation.

Let's take an instance of data that might relate to fish contaminants and how different

governments may look at that. We've learned in the course of our being with tribal members that they will eat certain types of fish in greater quantities at certain times of year. For example, Walleyes in spring when tribal fishing peaks and then again in the fall when it peaks again for Walleyes.

What we found is state-based consumption advisories based upon mercury content, for example, in fish may satisfy the needs of the general Angler that might catch a fish here or there throughout the course of the year and eat a meal or two whenever. But they're not -- they don't help protect the tribal member who might eat during a certain period of time a whole bunch of meals during the week.

We've undertaken studies that are very late specific to analyze the fish in that particular lake where people say they fish and they eat fish from so we can tell, for example, young mothers or women who want to have children or children that, look, watch out for fish bigger than 22 inches. You shouldn't eat those.

So I guess the relationship to sort of the way that tribes are dependent upon and use the natural resources that might be different than other stakeholders or other interests. I guess the

concern that we're trying to articulate is that if money is an issue, sure it's a lot more expensive to test fish and do it the way we're doing it, but that's the only way it can be done to protect the tribal members.

I don't know how that comes into play here. But I think that's the type of -- I don't know if that gives an extra weight on the scale if we're talking about the Michigan law school type case or whatever, but there's something substantively different and a fiduciary obligation that is not on a par with a general cost analysis type thing.

MR. CLEMENTS: I'm personally having a little trouble with that one because you know how us lawyers think. I'm going if there's mercury in the fish, what does that have to do with the project?

MR. ZORN: It's held back and relieved. We find that the watering and dewatering of wetlands and the shore lines of flowages and rivers -- when you water and dewater, you tend to methylase the mercury which puts it in the bad organic form, and that's taken up into the biota and bioaccumulates and goes up the food chain and gets into the muscle of the Walleyes that the tribal members eat.

MR. THANNUM: We've got a whole research project we'll be publishing on that.

MR. CLEMENTS: There is a relationship between project operation and the --

MR. ZORN: The whole nexus issue. I understand the comments that you guys responded to about the nexus, and I'm entirely comfortable that we can always establish the nexus between this type of issue. It's not an intellectual or academic thing.

We've done surveys of our members on how they consume fish. We know where they harvest them, and now we're learning more about how those fish or wild rice take up heavy metals. So I guess I don't know -- I want to throw that out there, the idea of the trust or the treaty obligation and the trust resources. There's a different type of obligation involved. It's not just the issue of getting one more bit of data this way versus one more bit of data that way. It's like, holy cow, the whole question is different because of that tribal interest involved.

MR. CLEMENTS: That's kind of like the \$64 question here, how much bigger is the thumb on the scale?

MR. ZORN: I guess my question is I'm assuming that -- is that really -- in terms of the seven criteria is that more of a nexus question, or is it a cost question? Or maybe it's both.

MS. MOLLOY: It's probably -- it probably factors into the factor. Specifically how, we can't give you an answer that applies to everything. It would probably depend on the issues on each project how it fits in.

We've set out the criteria and clearly as you described, you're able to describe how the criteria are met, and then it would just be looking at it on a case-by-case basis.

MR. CLEMENTS: You might also want to suggest that a different or an additional criteria --

MR. ZORN: That's what I was fishing for. Would it help to offer a comment about particular recognition of the fiduciary duties or treaty objections of the federal government?

MR. CLEMENTS: That's why we're asking for comment.

MR. ZORN: You guys have some practical read on that too. Is that a useful way to phrase things? I'm not asking how to do the comments, but

you may say, look, it's one way versus another, it fits into a cubby-hole that we already have in place.

MR. CLEMENTS: I don't think we're that sophisticated.

MR. ZORN: But when you see that, you know where it's coming from. John, I thought it was helpful that you asked the question how does it relate to project operation because that's exactly what we've been able to learn over the last 15 years is, holy cow, we look at these things and we learned a lot more than we ever thought we did.

MR. CLEMENTS: We keep hearing on the other end from license applicants that every time we go into one of these things, we get a laundry list of studies that agencies would love to have done, but they don't have anything to do with us.

MR. ZORN: Exactly. I understand -- Doug, I hope I'm not undercutting anything that Menominee is thinking here, but I understand the nexus concern. I don't know if it's fair public policy to make an applicant do the work of the government, that the government should do anything under public trust or whatever theory you want to do.

MS. MOLLOY: Doug, do you have anything?

MR. COX: No, that's all we had. The stuff Jim added is more of the same discussion we had leading up to our comment that we made, and we appreciate the response. So we additionally in the written comments add some discussions on criteria development.

MS. MOLLOY: Do you have any other issues?

MR. ZORN: Yes, I've got a few more that it shouldn't keep us very much longer. John, I am interested in your reaction to this. Under the -- the applicable law page 222 of my copy.

MR. CLEMENTS: Can you give me a paragraph number?

MR. ZORN: It's the proposed regular. It's something C.

MS. MOLLOY: We have a lot of C's.

MR. ZORN: Application content section 517 sub B, the applicable laws. Included discussion of status or compliance with or consultation under the following laws if applicable. I know those are very specific things. Any possibility, do you think, of putting in there applicable laws including Indian treaties, tribal treaties, anything like

that? Or is that more -- this is something the applicant is doing, not that the federal government is doing?

MR. CLEMENTS: This is something the applicant is doing. Any deficiencies, if you will, in that regard don't excuse us from anything. I'm sort of personally hesitant to -- maybe I'm not.

MR. ZORN: Here's the practical reality that we face. For example, National Park Service, that the lakeshore is going to undertake the wilderness study. They start out in the beginning of the study saying, look, here's the laws that apply no matter what, and we can't get around whatever.

There's generally a paragraph that says Indian treaties, whether they're on or off reservation, those are laws, they're there, however they're interpreted, they're interpreted. But it's a fact of life we have to contend with. I don't know if that was an appropriate thing to put in this provision or not as sort of a backdrop applicable law that's there.

MR. CLEMENTS: I don't think theoretically or structurally it's inappropriate. I guess as a practical matter, I'm concerned about

that kind of thing. Because when I look at our laundry list of statutes here, these are things that people sort of work with on a day-to-day basis. And the nuts and bolts of the statutory obligations are pretty well understood.

When you get into things like, what does a treaty mean, those things, I think, tend to be much less well defined in a lot of contexts.

MR. ZORN: And that's been the dilemma. The agency will say we don't know how to interpret that treaty, but we'll agree whatever it's supposed to mean, we're bound by what it says.

MR. CLEMENTS: I think everybody could agree to that, but I think it's more difficult for the applicant and even for us sometimes to discuss -- to try to characterize specifics of treaty obligations in this kind of context. It seems to me that's something that the commission is going to have to respond to.

MR. ZORN: So maybe my next comment sort of along this line is maybe then the better way to handle that type of concern would be what studies could or should be covered. I got to find my paragraph on that. I've got three different things here.

There's the whole laundry list of what studies are supposed to have. It says aquatic resources, wildlife resources. It's the preapplication document, Section 5.4. Then there's the last one that says tribal resources. Obviously, cultural resources are a separate and distinct thing, but I notice there's a section that says recreation and land use, and I didn't know if the tribal resources -- if that certainly includes something like tribal uses.

MR. CLEMENTS: That's not how we think of that. We think of that as being how many boat docks are you going to allow and that sort of thing. I can see there's a lot of opportunity for overlap between that and cultural resources or tribal resources.

MR. ZORN: So in other words, the recreation and land use are those types of things when you build the reservoir guide you got to let people fish there, how do you plan to do it.

MR. CLEMENTS: Right, it's that kind of thing.

MR. ZORN: From the tribal resources perspective, part of it is that you know tribes use that area or not. That's what we're thinking about.

Maybe it's covered as it is. We might have some comments on that.

MR. CLEMENTS: To me it's kind of a cross-referencing thing.

MS. MOLLOY: And you might -- if you could look at the tribal resources section and see if there would be anything that could be added to that.

MR. ZORN: I think there's a potential comment in the margin before she dumped this on my desk.

MS. MOLLOY: But you're not bitter.

MR. ZORN: No, no. She's been working too hard with the Crandon mine. There's a specific mention of treaty reserve rights, something like that.

MS. MOLLOY: That could be a spot there for that.

MR. COX: In some cases projects that impact tribal waters -- and I made this comment the last time we met and written also was inclusion of reference to tribes' plans. It says local. Under the third point, recreation and land use aesthetic resources. At least Menominee has a land use and a recreation plan for waters within the reservation.

MS. MOLLOY: What page are you on?

MR. COX: D50, 5.4 number three. It's kind of where we were just talking about.

MS. MOLLOY: So you think tribal should be added there?

MR. COX: Sure. We think it would be appropriate. In our case again we have not only plans but ordinances that impact how recreation including fishing is carried out within our boundaries on that -- in that project.

MR. ZORN: Doug, this is Zorn. And one thought that -- Jim and I just looked at each other -- in that IRMP, Integrated Resource Management Plan, does Menominee have one of those?

MR. COX: Working on it. We just got a BIA grant this year, and we're beginning work on our IRMP.

MR. ZORN: That's something that might be worthwhile in the tribal perspective. I don't know if it comes out of recreation and land use, but I know Bad River which is downstream from the White River dam does have an IRMP, and maybe that's in the tribal resources section. There they mention whether treaty rights and whether or not there's any tribal management plans, IRMP's or anything else

that might come into play.

MR. COX: I think it would work well in the tribal resources or reference to planning document sections there.

MR. THANNUM: That's one of my comments too. There's talk -- referring back to the tribal liaison. You've got the listing of various plans, the revised list of comprehensive plans that you publish. In working with tribes to get their plans added to that list would be a beneficial thing.

MS. MOLLOY: Excellent idea.

MR. CLEMENTS: There's nothing that precludes us from maintaining lists of those or having them on file. It's just there's a statutory provision. We have to look for consistency with federal and state water management plans or something like that. But I'm distinguishing them from tribal.

There's no reason we shouldn't look at tribal plans. But for purposes of how we got to this, we were complying with a statutory provision from the 1986 Act that said, go look at those plans. But it says specifically federal and state.

MR. ZORN: And I wonder, John, if under the guides of, boy, we have to live up to our treaty

obligations, we better check into whether the tribes have any plan like that, that might be the sort of unwritten law that's out there about trust responsibility and how you live up to treaties.

MS. MOLLOY: This is the applicant content, so it's 5.17.

MR. CLEMENTS: D73. They should have that page. That's the same.

MS. MOLLOY: Do you have page D73?

MR. ZORN: No, I have 5.17. This is applicant content?

MS. MOLLOY: Yep, B1F, standing firm on that.

MR. ZORN: Is there a little --

MS. MOLLOY: It's consistency with comprehensive plans.

MR. CLEMENTS: In the redline strikeout it's D73.

MS. MOLLOY: It says identify relevant comprehensive plans and explain how and why the proposed project would, would not or should not comply with such plans and a description of any relevant resource agency or Indian tribe determination regarding the consistency of a project with any such comprehensive plan.

MR. ZORN: I saw that before, and I do remember that part.

MR. CLEMENTS: That doesn't say tribal plans.

MS. MOLLOY: Right. As John said, there's nothing that precludes us from listing it. It may not be listed as technically --

MS. LEPPERT: But we have to make the determination whether or not it is a comprehensive plan under our --

MS. MOLLOY: Under that particular -- but this may not be under that particular thing. We can still probably --

MR. CLEMENTS: We can look at plans that don't fit the non -- that don't fit the comprehensive plan description.

MR. ZORN: You mean the statutory definition?

MR. CLEMENTS: Right. It's a public interest thing. A plan is a plan.

MR. COX: As long as we're in 5.17, I have one more point in the statute language on D71 for National Historic Preservation Act. It should list the THPO. It doesn't list the THPO at all. D71 where it lists all the statutes doesn't

reference the THPO there in that section.

MS. MOLLOY: Yet, I think we do elsewhere. I think this was just --

MR. COX: It comes up in places elsewhere, but it's still absent in other places, and we have that as a comment, but we'll submit that in writing.

MR. CLEMENTS: Put it in writing. Because when we put this together for the benefit of you guys on the phone, we took existing requirements from other existing regs. We sort of threw them all together, and they reflect the last big go-around in 1989. So there's been a lot of water under the bridge since then.

MR. COX: Water over the dam.

MS. MOLLOY: We try not to bring that stuff up.

MS. LEPPERT: This is Patti Leppert with the commission and just to help Doug and all of us here as well with regard to the National Historic Preservation Act and a listing of the THPO, we do recognize that some tribes do not have a designated THPO. So that is why I think the language is as broad as it is, but that's just a clarification. We can still put the THPO in, but I just want that to

be understood that not all tribes do have a designated THPO.

MS. MOLLOY: But wherever you see that it looks like it's missing, please mention it, and we'll double-check.

MR. COX: We will because we had it as a bullet item here, and we'll just make that a written comment.

MS. MOLLOY: Anything else?

MR. ZORN: I just have like three or four more real quick ones. I just wanted to mention something I liked, and I don't know if anybody shared this, but I liked working in that periodic review of the study while it's in progress to see whether or not any adjustments had to be made. I thought that was a good way to deal with the idea of somebody being satisfied of how it's going and to weigh in on that and try to get that changed.

I'm assuming if there's a disagreement whether a study needs to be changed, is that subject to dispute resolution as well?

MR. CLEMENTS: It's not the same dispute resolution process, but there is a provision for bringing a disagreement, we're calling it at this point, to the director for a decision on that. We

figured the panel construct was too sort of intensive and bulky to try to keep doing again and again for everything that might come up. But we did want to make sure that there's some vehicle for resolving these disputes. So there is a provision in there.

MR. ZORN: And then whenever -- I like the idea that there's a fair amount of meetings and opportunities to participate. When there's meetings, is there a way to encourage or allow participation by other than face-to-face like we're doing today or video conferencing, should that be worked in here as encouragement?

MR. CLEMENTS: I think as a practical matter, the regulation will provide like a template. And anything that the parties want to do to supplement that with phone calls or additional meetings is great. We'll make sure that that's clear that we're not trying to limit this to a notice and comment construct.

MR. ZORN: The idea of there might be a relatively -- like a one-day or half-day meeting in D.C. on the study or something like that that say, Doug, we want to participate in. We're out of bucks to travel. If we could facilitate video

conferencing or something like that, that would be fantastic.

MR. CLEMENTS: Those are all things we hope are encouraged here.

MR. ZORN: And then just a couple practical questions about the drafting session on April 29th and May 2nd. Do you expect outside folks to be attending? Is that something that might be worthwhile to go to? What's your practical read on that?

MR. CLEMENTS: It's grueling. We did it last October for three days. And we had, I would say, between 125 and 150 people there from all the food groups. What we did -- because you can't sit down and try to come up with language with 150 people in the room. So what we do is split the people into three groups.

There was a prefiling group, and then there was a post filing group. And then because of the level of intensity of interest, there was a group that focused strictly on study development and study dispute resolution. We had those three groups separated, and they worked through the day trying to come up with consensus recommendations. In theory that was a drafting session too, but it was way too

early to get specific language.

MR. ZORN: They weren't told what they had to say when they wrote, and they said come up with the right words. They had room to talk about what should be in there.

MR. CLEMENTS: That's all they did. Nobody ever got to actual specific language except in a few instances.

MR. ZORN: They went home and made you do that, right?

MR. CLEMENTS: Yeah. After three days of this, the groups came back, and each group had like a recording secretary, if you will, and they came up with a consensus report on what they had agreed on and not agreed on and things that required further consideration. And then we all reconvened and went over those reports, and people asked questions.

And then that session was over, and then the FERC staff went back into the black box with the other federal agencies and came up with the NOPR. We went back into the black box with them for a while, and then we kicked them out. Then we internally did our kind of last effort at getting the NOPR out.

So what we're planning this time is we were hoping that when we do this, we'll be able to focus more on specific language that people would want in. I think that will be almost as difficult as it was last time. But we're getting a lot of comments at this point, and I think people will be much better prepared by then to actually offer specific language. People will walk into the session with that.

How useful it will be for you, I just don't know. A lot of it depends on the dynamics of who's there and what their personal agendas are and how much room for agreement there is on various things. But if you come, it's long days. It's very intense.

MR. ZORN: Do you expect people to work and contribute?

MR. CLEMENTS: Yes.

MR. ZORN: If not, you kick them out, right?

MR. CLEMENTS: We haven't kicked anybody out yet, although I've wanted to strangle a few, but there's a preregistration for this thing between April 18th and April 25th.

MR. ZORN: That's when you need to

register?

MR. CLEMENTS: You can do that over the Web and it's got page A-4 -- do they have this?

MS. MOLLOY: They're going to.

MR. CLEMENTS: There's a notice coming out.

MR. ZORN: That may be something -- I don't know if you had travel folks there at the previous workshop.

MR. CLEMENTS: Yeah, we did. In my group we had Shoshone Paiute, North Fork Rancheria and a guy from Nez Perce.

MR. ZORN: You did have somebody from the Columbia River basin and tribal or something?

MR. CLEMENTS: I think we might have had CRITFC people there too.

MR. ZORN: They've got some big issues up there with power right now, mostly related to money, I think. In terms of once that drafting is done, is there an opportunity to look at it one more time for final tweaking or whatever? Is it going up to FERC and down?

MR. CLEMENTS: Then we go back into the black box with the other federal agencies again for another month. And then I've managed to get them

kicked out six weeks before the draft rule --
before the final rule goes on the agenda.

MR. ZORN: You guys have to retain your
perogative as the agency to come up with the final
version.

MR. CLEMENTS: The commissioners insist.

MR. ZORN: So once you come up with the
final proposed rule, that goes on the agenda. And
if you want an opportunity to speak on that, you get
on that agenda?

MR. CLEMENTS: No. The way it works is
when it's scheduled, it will be the final rule. So
there will be a public meeting, and at that meeting
what happens is the commission staff comes up to the
table. It's all public. It's on CNN -- not CNN,
Capitol Connection.

MR. ZORN: You wish you were on CNN,
don't you?

MR. CLEMENTS: I wish. And then we give
our dog and pony show, and then they ask us their
questions, and they make their statements. And then
they discuss it among themselves in public, and then
they vote.

MR. ZORN: This is a FERC? It's like
staff taking it to the city council and the city

council says, staff, you got it right or wrong?

MR. CLEMENTS: Yeah, but we'll know whether we have it right or wrong before that. We would had have internal discussions, and they tell us where we have it wrong. Then the commission will issue an order, and we're into the rehearing phase if anyone is that dissatisfied.

MR. ZORN: I see.

MR. CLEMENTS: Then we implement. Those were, at least from what I got together on my yellow sheets, those are the final questions I think I had.

MS. MOLLOY: Doug?

MR. COX: Three more. I'll make it quick. Regarding timeliness, section -- the regulatory text 5.28 GB and GE relate to 4E and Section 18. And the language refers to filing timely. And our comment there is that the commission must recognize and adhere to the mandates imposed in the act that relate to those two sections in that timely prescriptions aren't part of that requirement.

MS. MOLLOY: Comment noted.

MR. COX: The other one is scoping related. Will there be additional scoping opportunities beyond box four, commission holds

scoping meetings, site visits, et cetera. And then when you get after license application down into development of EA or EIS, are those processes going to have scoping related to them in relation to NEPA?

MR. CLEMENTS: There shouldn't be any scoping at all after the application's filed. The scoping here is contemplated in basically box one through box 11. You see there's an SD1, and there's comments on the SD1, and I don't see it in the box in here. But I think if you look in 512 in regulation related to box 11, there's an SD2 if we need one if anything changes.

But at the time the preliminary decision is issued, that would for practical purposes be the end of the scoping for the project, and then we would be off gathering the studies and getting the data.

MR. COX: And then additionally the 30-day period, is there going to be flexibility related to that? I'm hearing that on most of these time periods now that we may end up developing flexibility and comments. Is 30 days enough time to not only address that but to draft comments on the scoping document one?

MR. CLEMENTS: We're looking for

comments on that.

MR. COX: Consultation, this, I believe comes from preamble. The commission discusses the importance of consultation between its staff and tribes, but it appears the regulation doesn't. Preamble merely makes suggestions regarding travel consultation. Commission is not required to do anything.

The example given in the preamble is staff might consider holding a high level kickoff meeting or invitation, participate on separate scoping meetings with tribal representatives. Regulation must contain specific provisions regarding consultation with tribes.

MR. CLEMENTS: One of the reasons that's kind of squishy is because we think it's evolving, and we thought the first place to start was with the tribal liaison, and then to kind of develop it because we're starting almost from zero here in some respects. And we hadn't heard much from the tribes at that point that was specific.

We had heard the government-to-government relationship and recognize the sovereignty in the appropriate way, but we were hoping to get more specific direction from the

tribes about what might work. And again, you are noticed if you look in there, we're seeing differences in perspectives from tribe to tribe about how far we need to go to satisfy our trust responsibility.

MS. MOLLOY: And what those steps would be. And so it's hard to get specific.

MR. COX: I appreciate that response. It's really, as you heard us say throughout the morning here, specific sometimes per tribe literally. In some cases it gets easier when you have an entity like GLIFWC that's handling a group or that governing board to handle those kinds of issues. But when you jump from tribe to tribe, it really varies significantly in some cases.

MR. CLEMENTS: So my guess is in the final rule, you're not going to get a recipe either. You'll see something, we hope, better evolved.

MR. COX: And we'll comment to some extent on trying to help.

MR. ZORN: With that said, would it make sense in addition to the tribal liaison in the particular project that there also be a substantive staff person who is sort of assigned the tribal soul fight here to keep track of that so that the liaison

doesn't have to cover all projects at once?

MS. MOLLOY: We're envisioning that there will be somebody on each project that handles whatever is appropriate. As we said, a lot of times it's historic and cultural areas. But it might be something else in particular cases, and we would work with that.

MR. ZORN: For us it would be more of the biologists, environmental scientists. And for individual tribes it might be more their cultural archeological type stuff.

MS. MOLLOY: So it's kind of a project by project, sort of identifying the key resource areas and who would be the appropriate person.

MR. ZORN: Okay.

MS. MOLLOY: Anything else?

MR. COX: We'd like to take the opportunity to thank FERC for giving us the opportunity to have these types of discussions, and we think that we're making progress through the ability to have these kinds of discussions, and it improves the process greatly to be able to sit down and have these kinds of meetings. So thanks.

MR. CLEMENTS: I'd like to thank all you guys for participating in this because I can see

you've really read it and thought about it which is always gratifying after you've done all this work.

MR. ZORN: John, what's more gratifying is that if a lawyer wrote it, somebody else understood it, right?

MR. CLEMENTS: I don't think of myself as a lawyer. I'm a technical writer really.

MS. MOLLOY: With a law degree.

MR. ZORN: I would share Doug's sentiment. In terms of proposed rules and things like this, this is one of those rare opportunities to have a face-to-face, albeit via phone line where people know what's going on with the rule-making process and can offer insight and feedback on the spot.

It helps us make our comments more efficient. We don't waste time and raise issues that you've already answered. It's not worth it for us to raise or whatever. We just want to express our appreciation for your efforts here.

MR. CLEMENTS: Thank you.

MS. MOLLOY: If there's nothing else, I want to thank you all. I appreciate that you put in the time and effort and got in touch with us and let us know about your flight difficulties. And we hope

to see comments from you.

Again, I will tell you, as I've told everyone, the 21st is the deadline. You can file earlier if you want.

MR. ZORN: Ann is back on the 10th.

I'll tell her right away.

MR. COX: I'm sure she'll appreciate that.

MS. MOLLOY: Give her 10 minutes.

MR. CLEMENTS: For even faster service you could even e-mail them to me although you still have to file them.

MR. ZORN: Seriously, do we have your e-mail address anywhere?

MR. CLEMENTS: It's john.clements@ferc.gov.

MR. ZORN: We'll be happy to file them formally and give them to you as well.

MR. CLEMENTS: Jump on these as well.

MR. ZORN: Then you have to cut and paste for all the good sections we're going to propose.

MR. CLEMENTS: Right. The final rule is just a template waiting for your input.

MR. ZORN: Doug, thank you too. We

appreciate you going down there and being down there
to swing at this with us.

MR. COX: No problem, Jim. I don't know
if I'll get back today, but as soon as the roads
clear up, I'm going to head back.

MR. ZORN: The good news is we're
already home. Safe travel to everyone.

MS. MOLLOY: Thank you.

(Proceedings adjourned at 11:45 a.m.)

* * *

STATE OF WISCONSIN)

) SS:

MILWAUKEE COUNTY)

I, DAWN M. LAHTI, a Notary Public in and
for the State of Wisconsin, do hereby certify that
the hearing was recorded by me and reduced to writing under
my personal direction.

I further certify that said hearing was
taken at 333 West Kilbourn Avenue, Milwaukee, Wisconsin,
on Friday, April 4, 2003, commencing at 9:10 a.m., and
concluded at 11:45 a.m.

I further certify that I am not a
relative or employee or attorney or counsel of any of
the parties, or a relative or employee of such attorney
or counsel, or financially interested directly or
indirectly in this action.

In witness whereof, I have hereunto set
my hand and affixed my Seal of Office at Milwaukee,
Wisconsin, this 7th day of April, 2003.

DAWN M. LAHTI - Notary Public

In and for the State of Wisconsin

My Commission expires: 7/4/04