

BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

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IN THE MATTER OF: :

HYDROELECTRIC LICENSE REGULATIONS :

STUDY PLAN DEVELOPMENT SESSION :

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Hearing Room 3m2 A & B
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C.
Thursday, December 12, 2002

The above-entitled matter commenced at 4:17 p.m.

APPEARANCES:

TIMOTHY WELCH

S. RONALD McKITRICK

MARK ROBINSON

KATHRYN CONANT

JOHN SULOWAY

JOHN CLEMMINS

APPEARANCES CONTINUED:

BRANDI BRADFORD

JOHN BLAIR

DAN ADAMSON

CATHY MESSERSCHMITT

STUDY PLAN DEVELOPMENT SESSION

MR. WELCH: So the purpose of us coming together now is we have all worked very hard for the last two days developing various aspects of the process, so that our purpose here now is to hear the final product that you have come up with. We have a court reporter here today. So what is said here today will be read into the record and submitted to the rulemaking docket. So having said that, if there are questions or if you are a speaker, please identify yourself and who you are with. And also if you ask a question at any time, once again we would ask you to speak loudly and say your name and who you are with.

I guess some of the groups are planning to submit some documents to the record and so I would ask whatever documents you have, that you would give them to our court reporter and then that will be included with the transcript of this meeting.

Before we go much further, I would like to invite the director of the Office of Energy Projects, Mark Robinson, to say a few words.

MR. ROBINSON: Who?

MR. WELCH: That is not your name anymore?

MR. ROBINSON: First, a couple of things. Can you all hear me? If I talk like that, you can't hear me?

All right, these things make me nervous.

I asked John Clemmons if we are better off today than we were two days ago, and he emphatically said, yes, that we have made great progress. And I was thankful for that.

Just a couple of things I wanted to talk about.

This is, and I have said this before, and I certainly mean it, it is an ongoing process. We are not done. It is not one of those old FERC NOPERS where when we issue, that is what we think and that is it. We are going to try to put this together with the assistance that you all have given us to date and with the help of the agencies and come up with a NOPER that will be a work in progress. There is a lot more work to be done. That is why we are taking it on the road again once we get that NOPER out there. So no one should feel that the die is cast, and even with the NOPER comes out and the Commission votes it out, that that is the way it is going to be. That is not the way this is designed and isn't the way it has been sold to the Commissioners, that it is going to be done that way. We are very earnest in wanting to take this and then true it with you all and see what progress and improvements we can make in the next phase of this.

The second thing I wanted to mention is I had a chance today to sit down with some of the Tribal

representatives. And we are going to do a couple of things in the remainder of this to try to make it more responsive to Tribal concerns. One of those things is that Ann is going to figure out who to designate as sort of the Tribal liaison. And that will be an individual that they can deal with and then that person can act as -- I hesitate to use the word advocate within FERC but at least someone within FERC who has a very direct relationship with tribes and their concerns and can make sure that those get expressed and a full airing here at the Commission. And I don't know how we are going to let people know who that person is, but we will certainly figure that out and Ann will take care of that and make sure it happens. I am putting, and have always put a lot of confidence in Ann to make sure this happens. And if you haven't noticed, she is doing a great job with it so far and will make sure this all gets done.

That was the other thing I wanted to make sure and personally say. I want to reiterate Tim's thanks for coming here. Everybody looks a little bit worse for wear and that is a good sign. I would hate to see a lot of fresh faces right now. And we are not there yet. Just hang with us. Keep an open mind about it and let's see if we can get this thing wrapped up by July. Even if some folks don't think we can, I think we can get it done. Thank you all so much. I appreciate it.

MR. WELCH: Thanks, Mark. So to begin our final reports, I guess we will just go in sort of order of the process. And so we will begin with group number one, the early application development. And before that group gives their final report, I wanted to call Kathryn wants to say a few words.

MS. MESSERSCHMITT: Thanks, Tim. I am here as an environmental planner and trying to ensure that North Fork Motto Ranch is represented properly, and hopefully I have done that. But I wanted to talk a little bit about group one, the people I have worked with the last couple of days. So I am going to take off my North Fork Motto Ranch that because I don't speak for tribal council at North Fork Motto Ranch, I only represent their wishes. And this is a personal thing. So I am going to take that hat off.

Group one has worked very hard, maybe doesn't have as much to show as group two, but the intent -- the diligence is there. They have worked very, very hard. And I just thought it was important to commend them for their interest and their commitment to make sure that Native American issues are addressed. I mean we battled back and forth in a good way about consultation, what it means, and where to put it in the process. But the fact it is even going into the process shows that they wanted to think outside the box because that hasn't been done. It is not in

the traditional process and it is in this new process, this integrated process where we hope it will stay.

And the group has worked very, very hard to address those issues. And it has been a learning process. They have asked questions about how to address a tribe and all those very germane questions that have to deal with Native American issues.

As Mark was saying, with the tribal liaison, I agree with him. I think Ann is doing the best she can and is working with a pure heart to try to incorporate Native American issues. But with group one, I think they are trying to implement that and put it into an integrated process. And it is a difficult thing to do, which is why I wanted to commend them.

So, thanks to group one. You did a great job with that.

MR. WELCH: Okay, so as far as group one, the early application development, I will invite John Suloway up to give the group final report.

MR. SULOWAY: I would also like to thank the representatives from group one. We started out kind of rocky, and I think that is typical of any collaborative process. But I think we have wound up in a great place. To give you an example of how well we are doing, Kathryn wrote my notes from NMPF so that is a pretty good indication that

we are on the same page. And in those places that we are not, we have agreed to disagree and also to basically show where we disagree for you guys to show that as well as we are.

So, basically, what I am going to do is emphasizing that quality is more important than quantity, we have few pages but they are very high quality. What we did is we put together a process that basically goes -- I am sorry, Julie, this is the box format as opposed to the text that goes from the very beginning of the process through the study phase. And group two, of course, is going to take over in the study phase.

So the first step, pre-notice of intent is the applicant receives a letter from FERC and that letter is basically a wake up letter and says your license is expiring in "X" number of years, and we want you to take some action with regard to that. And FERC has identified a list of stakeholders that is copied on that letter.

Now, on your handout there is a page, and it is the second to the last page that basically says the details of the pre-NOI letter. So I am not going to review that right now. We will review that a little later, but I just wanted to make you aware that we do have a little more thought besides the fact that it is just a wake-up letter. And I will go over that in a minute but basically it is

kicking off the process, FERC kicking the applicant, if you will.

The applicant then prepares what we are calling document A. And document A is basically a project description package. It describes the package, where it is, and in a simple way how it operates. It also explains that the licensee is going to be kicking off this re-licensing process and is going to be inviting the stakeholders to a site visit and a meeting. In fact, the next step in the process is that meeting and the site visit with all the stakeholders, and I underline all the stakeholders. And we define all the stakeholders as including the applicant, FERC, the federal and state agencies, the NGOs, and the general public.

AUDIENCE SPEAKER: And the tribes.

MR. SULOWAY: And the tribes, I apologize. Thank you.

At that meeting, the purpose of that meeting is to basically describe the project and how it has operated to kind of serve as background. But also it is very important to describe for all of the stakeholders, because there will be a range of experience, what the FERC re-licensing process is all about and, specifically, if there is a single process that has different tracks in it, what the advantages and disadvantages are of a particular track and what they are

kind of tailored to.

I would also at that meeting describe the roles of various stakeholders within the process, what FERC does, what the mandatory conditioning agencies do, what the tribes do, what the general public does. So that again kind of kicks off the process.

The applicant is interested in getting a lot of information. If there is existing environment information that the agencies have, they can contribute that. If there are specific issues that the agencies already know about or the general public knows about with regard to that project, that gets raised as well. Because one of the things that the applicant wants to do is get feedback of what it is going to be like to re-license that process because the applicant ultimately has to move forward with a particular process to be determined who approves or doesn't approve what process the applicant be using. But the applicant wants that information, at least in part, to make their choice with regard to the path.

Did I do that okay, Kathryn? That wasn't too biased?

After that meeting, but in very close proximity, the FERC would contact the tribe or tribes in the area of the project and initiate consultation. And what we mean by initiate consultation is this is the step in which FERC

basically says to them the applicant is starting to re-license this project, you are within the project area or nearby or whatever, and we are interested in getting the tribe involved. And one of the primary questions that we need to deal with is from a government-to-government point of view are you interested in meeting only directly with FERC or do you want to meet with the applicant or both. That is what starts off the 106 consultation.

In the next step, the applicant would file its Notice of Intent, we are out a step there, request 106 consultation and ESA designation. It would also provide all the stakeholders with document B, which I think we are in agreement is basically the initial consultation document. And it would also include a description of the process with a schedule and milestones.

With regard to the contents of document B, we did a rough cut, which is about the third page in your handout, and it would include a listing of the stakeholders; a basic general description of existing environment; a request for available information from the stakeholder; history of the project; project description and operation; preliminary issues as identified by the applicant; preliminary information needs on current conditions, on impacts, and that can be both positive and negative impacts; a summary of relevant management plans, that is a listing of the

management plans and may be a listing underneath each one of those sections of the management plans that were relevant; listing of the draft milestones in the schedule; additional studies that the applicant needs to describe existing conditions. And one thing that we did not resolve was whether or not it should include a summary of the consultations that the applicant had basically done, and we can talk about that.

So the applicant has distributed document B to all the stakeholders, and FERC initiates 106 -- that is out of place, we will have to fix that, and ESA designation. It notices the stakeholder meeting, which is coming up, which is essentially the scoping meeting. It is the scoping meeting. And asks for comments and also tells the folks about the criteria that are necessary in order to deem a study request necessary.

AUDIENCE SPEAKER: I am sorry, John. Did you say that was out of place?

MR. SULOWAY: Well, it seems to me that if -- the reason I have said this twice now is we have got FERC initiating tribal consultation up there.

AUDIENCE SPEAKER: I see what you are saying.

MR. SULOWAY: It is two different things.

AUDIENCE SPEAKER: Yes.

AUDIENCE SPEAKER: It is in the right place.

MR. SULOWAY: Okay, then somebody is going to have to explain it to me.

Then there is the scoping meeting, which is the middle box in the second row there, where you identify the issues that need to be addressed by the applicant. If there are any questions that the stakeholders have on the initial consultation document, that is also done. And also if there is any missing information in the document, that is also identified. And that is a physical meeting, if you will.

After that meeting, the stakeholders submit comments on the adequacy of document B, that is is there enough existing or is there enough information in that document to describe the existing environment; what issues the applicant needs to address in the re-licensing; and what information needs to be gathered to address those issues. And we include in that information the information that the 401 agencies and the mandatory conditioning agencies need, and for preliminary study needs.

And we were kind of careful about how we worded this with regard to preliminary study needs. We understand that information comes in a variety of different ways. It could be information that comes directly out of a book or it could be information that is actually gathered in a field study. We were being careful about listing preliminary study needs to as to avoid any positional type, arguing is

the wrong word, confrontations where, for instance, and NGO or a stakeholder could suggest that a particular study be done with a particular methodology that gives the applicant heartburn. We ask the stakeholders to take that into consideration when they have put in their study request because after all the folks in the process are interested in getting the information gathered and they may have to work out later exactly the methodology that is used.

In addition, FERC would submit comments on the issues that need to be addressed, the information that needs to be gathered to address the issues, and the preliminary study needs. And if document B needed some additional information in FERC's eyes, that that would also be included.

After the applicant received these comments, they would provide FERC with the draft SD-1 and would also respond to the comments that were received in the previous box and again would provide a draft schedule, if you will, of the process, the milestones, and the things that need to be accomplished.

In addition, the applicant would be distributing its draft study plan, which would include any disagreements that the applicant has with information or studies that had been requested by the stakeholders and also any supplemental information that it could gather right away that folks said

was missing from document B.

These processes, if you will, are running in parallel. That is the applicant has put together the first draft of scoping document number one and at the same time has put together the draft study plan. Since scoping document number one ultimately is going to be a FERC document and the study plan is basically being prepared by the applicant, there are two documents that are linked that are separate.

FERC evaluates scoping document number one and issues it on its own. It may decide that what was prepared by the applicant was adequate. If not, then it could make some changes in there. There would be an opportunity for the stakeholders if they disagreed with FERC about what it was requiring of the applicant to provide comments. And then there would be an opportunity, if necessary, to revise SD-1. We are not anticipating that this is going to happen. We figure that most of the time that FERC will have gotten it right but there were some examples that we discussed in the meeting where there were some omissions that were just mistakes and those corrections could be made.

Just standing back for one minute, what we envisioned in scoping document number one was that each of the issues would be written up in the following manner. At the top of the sheet would basically be a description of

what the issue was. It would also include what the management goals were that were related to that particular issue. There would be a description of the information that was necessary to address that issue. And also there would be the inclusion of statements about what the geographic scope should be, what the temporal scope should be, et cetera. So there would be a pretty good idea of exactly what kind of information would need to be acquired in the study plan.

With regard to the study plan itself, after the applicant distributed the draft study plan, FERC and the stakeholders would provide comments on that draft plan and also if there were things that were missing, if there was a study that should have been in there that wasn't, then that would be included as well. The applicant would revise the study plan and then FERC would issue the study plan and the schedule. And we keep saying "schedule" but basically it is a summary of the process and the milestone dates in there.

The last line has to do with if there was an information request, the applicant would prepare -- where is our dispute resolution on the studies, guys?

AUDIENCE SPEAKER: I think we missed it.

AUDIENCE SPEAKER: It didn't get on there.

AUDIENCE SPEAKER: We took off anything that could be used another place.

AUDIENCE SPEAKER: That is right. We needed to see the dispute resolution process before we figured out where to --

MR. SULOWAY: Oh, that is right. Okay, thank you.

If there was some information, "IR" is information request, that the applicant couldn't provide right away with regard to document B there, the third pathway, if you will, is that the applicant would provide that information to the stakeholders later on in the process so that, again, document B, the description of the existing environment would be in the format of a EA or EIS and so that additional information would be added to the document some time in the path sooner rather than later but ultimately it could actually be in the application itself.

So that is a description of the process. Can we go to the next slide? Should I ask for questions at this point? No?

Document A, I have already described. That is basically the letter that FERC sends wakening up -- or the document the applicant sends out inviting people to the site visit. I have reviewed what is in document B so go to the next slide.

Now, there are a number of issues that we did not resolve. One of the issues had to do with who picks the

process and whether or not there should be more than one. I think you all know that that is a big issue. If there is going to be more than one process, which certain people believe is very important, we did all agree that the stakeholders should have input or comments on that decision. When the decision took place, which process would be used, if there was more than one process, we did not resolve. I think there was general interest in having it early so that things did not get delayed, but we could not point to a particular, if you will, in the diagram. And who decides is definitely unresolved. So let's go to the next slide.

Yes, this I didn't go over. I think this is important, details of the pre-NOI letter. This is the letter that FERC sends to the applicant, the wake-up letter; an outline of document B would be the initial consultation document; a list of known stakeholders, which would be copied on the letter but basically telling the applicant when you send out your letter inviting people, these are the stakeholders at a minimum you should contact; a summary of the available processes for doing re-licensing; a request for identification of additional stakeholders, that is, applicant, just don't take this list, reach out to other folks and see if you can find more people or ask the stakeholders that you have got on this list if they know anybody else. Requiring the applicant to contact

stakeholders and set up a site visit and the meeting, I am going to skip that for a second and come back to it. Also, included in the letter would be the general project description and also tribal consultation information, that is, generally, what is going to have to take place with regard to consultation.

One of the big issues that we struggled with, and we are going to need some clarification legally is, I think everybody in the group thought it was a good idea -- can we go back to the box slide? I think everybody agreed that the meeting and site visit with all stakeholders should take place, that it should basically be required. The problem was if FERC requires us to do that, does that mean that the proceeding has started, and the ex parte starts or just even if the proceeding has started, when we looked at the proceeding starting at the NOI. And we are just going to need some feedback, probably from John Clemmons -- hi, John, and other folks, to clarify that. But I think there was general agreement that it should be required, but we just didn't know if that could actually be done.

So can I go to the next slide, which I think are the unresolved issues? One of the issues we did not resolve was when the notice of intent goes out. I think most applicants want to have as a fall-back position for the projects that don't need as much up-front work, the five

year. Then there was the question of when should the other -- and even there was some disagreement, a gentleman from California, that it shouldn't be five, it should be earlier.

So we couldn't resolve exactly when the NOI should be, but I think most folks thought it wouldn't be a bad idea to have a range.

Okay, unresolved issues, the FERC's role, is it regulatory? Does it engage the formal process? That is what I was talking about earlier as far as that site visit and requiring that site visit. Another unresolved issue is how do milestones get enforced. I wouldn't call it an unresolved issue, but we did not have time to put days, durations in between the different boxes. The cooperating agency/intervener status is an issue that we did not have time to resolve.

One or two folks suggested that maybe the time line should be adjusted by region and workload, that is, if some region's mandatory conditioning agencies or other agencies had very few people, that that should be taken into consideration. What we have termed a "super intervener status," the idea is that certain agencies, like DOI and NIMS, are always going to be part of these processes and yet they have to file several -- as I understand it, several letters stating their need to be interveners. So there was a question if they were just known as interveners once for a

particular project, that would be enough.

AUDIENCE SPEAKER: John, that applies to the states as well.

MR. SULOWAY: And the states as well.

AUDIENCE SPEAKER: John, how much more do you have?

MR. SULOWAY: I am almost done. Seasonal and watershed considerations for licensing times in coordination within the watersheds. One is the Alabama issue. Another issue is a water quality certificate needed for a specific project. How study requests by states or mandatory conditioning agencies are handled if they are not in the study plan. This is a big issue, obviously. And where to fit the dispute resolution process into our process.

MR. WELCH: We are kind of running pretty short on time. It is quarter to 5:00, and we are scheduled to go to 5:00 today. I am hoping people can stay a little bit after 5:00. Why don't we say for now we will hold questions just so we can get the groups' reports and then maybe at the end, if there is some time left, we can ask questions as a group or informally afterwards.

Brandi, you can't have a question because you were in the group.

MS. BRADFORD: He is not a question. He missed something. No, he missed something. We forgot to add

something on one of the lists. So I wanted to add it, it is one of the unresolved issues.

MR. WELCH: Okay, so group two is the study group, and I am sure they have a very detailed dispute resolution process that we are all dying to hear from. So, John Clemmons?

MR. CLEMMONS: In line with Tim's direction, I am going to try to go through this real lickety split. Are we going to put the screens up?

AUDIENCE SPEAKER: If you want to.

MR. CLEMMONS: Or does everybody have a copy. Oh, okay, well we better put it up here.

AUDIENCE SPEAKER: John, you can start.

MR. CLEMMONS: The way we did this was we took the thing that we had yesterday and talked about, and we kept working on that. We just started with the issues that we hadn't reached and went through them. And then we went back through the thing again, and we looked for things that we could call areas of agreement, and we highlighted those on here. And what we thought would be the thing to do would be to just highlight in the summary here those areas where we did reach agreement, and we had a lot of stuff that is not in boldface where we discussed things and they are unresolved or we just sort of ran out of things. And the fact that we were unresolved on some things doesn't mean

that we were at loggerheads. We had a lot of things that kind of came to an inconclusive end. We didn't really have an impasse, but we knew we weren't going to get any further so we just kept moving.

Is the one of the things I can move? Yes. We start again -- you saw this yesterday, study goals. We did not change that at all. We just left that where it was. It is the same thing you saw yesterday. Why should we have this? It is to understand project impacts and evaluation potential PME measures so that all the agencies can do their jobs.

The four things that we thought were necessary in broad-scope to achieve the goal: Standard study plan elements. We didn't change that all, I think with one exception. Down at the bottom, we tried to clarify, "FERC will issue an interlocutory order requiring implementation of an approved study plan." And that was just people wanted to make sure that there was a sense that when a study plan was approved, we weren't just saying to the license applicant, this is a good plan. We wanted people to understand that FERC is saying to the applicant, "Do it. Go do the studies." Kind of like what you get when you have an AIR letter.

If you go to the next page there, this is the criteria that we talked about yesterday. Nothing really has

changed there except a little bit, I believe we changed A and B. And they are minor changes. The first one had to do with showing that nexus and what kind of studies would be done. And when we got to that, we sort of backed our way into the baseline issue. So we didn't resolve the baseline issue but if you go down the page, it will say, "Issues to address in Section A," there is A through D there, those are four things that we talked about in terms of how you would evaluate impacts in the nexus and whether you would do a pre-project baseline and what all those things mean. There were various considerations that people thought needed to be brought out, special situations that may have applied to Native Americans, the differences between maybe our baseline and the baselines for other agencies.

The trouble that we had a FERC, this is B, and some others, with the notion of the purpose of doing a study is what went wrong in the past and to compensate for that with things that happen with the previous license rather than be forward-looking. And also we had some discussion about what are reasonably foreseeable conditions in the future that you might want to study as opposed to some idly speculative thing that someone wants a study done but the decision-maker or other parties don't think is realistic in terms of what is actually likely to happen over the terms of the license.

I don't know if you can tell it or not but these are not in bold. So we had a lot of discussion around these but we really didn't draw any great conclusions.

Let me see if I can go back up. I don't think we changed D. I think we just added that gloss to A from yesterday. And then we went into timing issues --

AUDIENCE SPEAKER: John?

MR. CLEMMONS: Yes?

AUDIENCE SPEAKER: Isn't it fair to say though that we are largely agreed on those criteria, that the baseline issue is sort of a nagging one that people couldn't quite bring to resolution. But despite the fact that it is not bolded, I guess I wanted people to know that those criteria are pretty close to consensus.

MR. CLEMMONS: I would be a little more cautious and say we didn't disagree on them, but we weren't sufficiently together that we felt comfortable -- that all of us felt comfortable putting them in bold.

AUDIENCE SPEAKER: John, did you want to mention that we did change C and D though, the criteria?

MR. CLEMMONS: If I had remembered, yes, I would. Yes. Now, I have to figure out how we changed C and D.

AUDIENCE SPEAKER: Objectively quantified information and statutory responsibilities.

MR. CLEMMONS: Can you address that because I

sort of lost that discussion?

AUDIENCE SPEAKER: Jess was actually the one that really wanted to discuss it.

MR. CLEMMONS: That is another reason I am sort of glossing these over because they got kind of harpy at times.

AUDIENCE SPEAKER: I think this actually went to the baseline issue a little bit. We were saying that under the Clean Water Act and the ESA, that the Federal Power Act baseline wouldn't always be applicable, that we would acknowledge that there was the others.

MR. CLEMMONS: But without really settling on what that might imply or mean, what consequences it might have.

AUDIENCE SPEAKER: I think C was the addition of the parenthetical at the end there to clarify that the study objectives would -- or the information needs pertaining to the studies would be inclusive of other statutory authority beyond the FERC license that would come into play in the FERC license.

AUDIENCE SPEAKER: And they would be identified as such.

AUDIENCE SPEAKER: Correct.

AUDIENCE SPEAKER: But there wasn't agreement on that, presumably.

MR. CLEMMONS: Oh, it was murky and it wasn't enough to be bold there. That is sort of our litmus test.

On timing, I am not sure how far we got on that. We sort of broke it down to the purpose of this whole thing is to have early knowledge about whether the licensee is going to conduct a study or not. That was sort of the big timing thing. And it wasn't really an issue, it was just something that we all agreed is why we need to have some sense of what the timing is going to be on when the studies are going to be done and started and completed and how that process is going to work.

And then if you go up to the next page, we started actually sort of writing a novel. This one had to do with the issue of when is a good time to issue what I will call the REA notice, assuming something like that survives. And I think we all pretty much agreed that that shouldn't be done until the information that is necessary for the entities with conditioning authority to do their jobs is in the record but that there might in some exceptional circumstances, the Commission might say it is time to get your preliminary terms and conditions or, conceivably, your final terms and conditions. But if there was outstanding relevant, important information, that we wouldn't ask for final conditions at the very least at that point. So the point was to make sure that we are not asking

for conditions before the time is ripe to receive them and to do the analysis that we have to do.

And, again, these are not issues, the two little ones down at the bottom. We just generally agreed that getting agreement on study plans may take a lot of time and it needs to be considered in the overall schedule, so you want to try to get any disputes and dispute resolutions completed in a timely manner so that you have time for the two full years or the two full study seasons that is sort of the assumed baseline, if you will, for that. And trying to achieve consensus on studies, plans is a good thing but you can't let that process get out of controls such that the time you need to actually do the studies before the application is filed gets eaten up. And there is probably not a lot of disputes on that.

If you go down to the next page, this is all -- everything you saw and heard about yesterday, on this page and the following page, nothing really changes until you get to the page after that where it is bold again. Keep going. There you go. Yes, there, FERC dispute resolutions advisory. We had agreed yesterday, and I think I may have said this, that whatever FERC dispute resolution process applies is not going to bind a state water quality agency with 401 certification authority. And I think today we added the fact that CZMA ought to go in there as well. And

then the issue was raised of whether or not it would be binding with respect to Indian tribes, with respect to whatever authority or rights they may have pursuant to treaties or some other authority, but we had a hard time coming up with what that might be since there is no -- at least that any of us were aware of any prescriptive authority that comes from treaty rights. So you can see that little clause at the end of that sentence was put in regular type instead of bold.

One thing we spent a good bit of time on was trying to define a binding process because the theory of this dispute resolution process is that when there is a dispute resolution delivered, that the resource agencies have agreed that they will for interlocutory purposes, for the purposes of this proceeding or to get to the end of the license, they will abide by that. And they will do whatever they need to do based on the record that comes out of the studies with the dispute resolution. But we had quite a bit of discussion about what that means. Again, there is the assumption in there that the licensee is going to be required to do the studies.

Of course, this definition of what binding means we added today but it is conceptual. And it is contingent on the parties being happy with the rest of the process and the dispute resolution process overall. This is sort of a

conditional sign-on.

And then you go down below that, this next mini-paragraph here is not in bold. And that is where we kind of -- we almost took the bold off the definition of binding process there because there was a question, the old additional studies question and whether the fact that there has been a study plan approved and dispute resolution completed, to what extent does that limit resource agencies or other entities from requesting additional information. And we went around and around a little bit about whether it will be limited to information requests that apply to that specific issue or the possibility of changed circumstances and where all that goes. And we didn't get very far with that so we decided to just put that one in, not in bold, and keep moving.

I am not going to talk about -- decisions. Go to the next page. The only thing I think that you may have not seen yesterday is right up here at the top, "FERC's criteria guidance on tribal and government-to-government trust responsibility and consultation defined and to address that relationship." We had some discussion about how that guidance would be developed and where it would come from. Would it be done in a rulemaking, would it be done later, would it result in some kind of guidance document. And there was no resolution of that, but we all agreed that

something needed to be done to bring that to the floor and clarify it.

The next part, dispute resolution. We wanted to clarify that that is an option of last resort. It should be preceded by informal proceedings, if possible, so we can apply the criteria and get through it without doing a lot of dispute resolution processes.

A little further down the page, the last -- most of the morning we spent on what the dispute resolution process might look like. We got into is it going to be a panel? Is it going to be something else? Are you going to have neutrals? What kind of person is a neutral? And this first set of -- go back up to characteristics. Yes, we talked a lot about who would be a good neutral. And we only agreed in principle on things like it should be an expert, somebody familiar with the licensing process or with the body of science that is applicable to this, somebody who is unbiased, able to travel, efficient, leaps tall buildings in single bounds, the whole thing. And then there was a long discussion about whether -- not a long discussion but some discussion about it. There was a lot of discussion about whether an academic is appropriate for this position or whether people who consult for a living are appropriate. Skip the bottom of that because we didn't say much.

Then the rest of it we didn't agree on but it

starts at the bottom of seven, "Advisory Options." We are going to call that process options. This just lists a bunch of things that people threw out on the table that might be some kind of a dispute resolution process incorporating in neutral. The IHC proposal, I am on page 8 now, the IHC proposal is at the top. Yes, there you go. Another one was should there be like a standing panel of FERC experts that would be separate from the rest of the staff and that would come out with these opinions, these advisory opinions only, whether we should try to use the FERC administrative law judges and what that might imply. The other, third party contractors, who are already contracted to FERC, would be good candidates. Whether we should use facilitators and mediators as neutrals rather than -- experts. Whether we should try to call on the FERC existing AID -- or pardon me, AIR -- let's try it one more time, ADR process and staff and how they might be able to help us.

We had discussions about how much expertise do you need, and we really didn't get very far with this. We had a lot of things out on the table, and we finally decided to call it a day and move on. But people cared very much.

Okay, the next page. And this is actually the last thing I want to talk about. You get to the bold part, you move out to the top, who initiates the thing was a big discussion. As you know, the IHC process had it as a

dispute between a federal resource agency and the Commission. That was widely thought not to be appropriate. And what we agreed on is that it ought to be, in terms of eligibility to bring a dispute resolution, it could be the applicant, of course, the requestor of the study, and then a third one was a stakeholder that had some concerns about the impacts of the study on resources. But we wanted to in a sense make sure that there was some kind of nexus between who was asking for the study and what the study is about.

Who would participate in this thing and that is a little different than who initiates it. Of course, the disputing parties would but there could be other people who are already involved in the proceeding who might bring some expertise to bear, say a NGO or an Indian tribe that has related expertise to a dispute say between the licensee and the Commission or the staff of the licensee and another federal agency. So we didn't want to keep people out that might be helpful to the process, but we didn't want officious inter-meddlers coming into it either.

Finally, how to participate, this is probably not too controversial. There was a recognition I guess first and foremost that we had to have a method of participation that produces some kind of a record on which the dispute resolving entity can make a decision and rationalize that decision, maybe that is the wrong word, explain that

decision so that the person or persons that ultimately make the decision are able to show what the record is, what the support is. And that would establish a record for other purposes later on.

There was general agreement that there ought to be at least some kind of conference or face-to-face discussion element to it rather than it being just a paper proceeding. The notion was captured that there needs to be, again, paper for a record.

And then there was some concern of tribal interests that dispute resolution might need to be a government-to-government or one-on-one sort of process for the purpose of protecting cultural resources that need to be held confidential.

And, finally, there was a notion that stakeholders who are participating need to use the criteria as part of their justification for what it is they are asking for, that they need to relate their needs to the criteria for whether a study is needed. And that is what we got to today.

Wait a minute, Brad wanted to add something.

AUDIENCE SPEAKER: To clarify one point under the who initiates bullet where it says, "Stakeholders concerned about impact of the study on the resources," really what we are talking about there is the impact of conducting the

study itself, not that it would be people concerned with where studying the issue may lead in terms of ultimate decisions.

AUDIENCE SPEAKER: Okay, so an environmental group could do it but not a chamber of commerce?

AUDIENCE SPEAKER: No, no, Dan, it is like -- this last one is like -- the two examples we came up with is were if a tribe had concern about an archaeological study, they didn't want particular sites disturbed but FERC had ordered the study anyway, the tribe ought to have an opportunity to initiate dispute resolution on that study.

AUDIENCE SPEAKER: Well, tribes are governments so I don't have any issue with the sovereign aspect.

AUDIENCE SPEAKER: Right.

AUDIENCE SPEAKER: I just have an issue with a --

AUDIENCE SPEAKER: The other issue was let's say a state fisheries agency asked for a tag study. The National Marine Fisheries says, no, we don't want you gathering that many wild fish this year. FERC orders it anyway. National Marine Fisheries, even though they are not the requestor of the study, should have the opportunity to initiate dispute resolutions and bring that issue forward. It is thought of as a fairly narrow opening, at least in my mind.

MR. WELCH: Okay, thanks very much. Our final

group, group three, post-application development. And I turn it over to John Blair.

MR. BLAIR: For the record, I am John Blair.

Again, today, I lost on making the presentation. I couldn't convince anybody in my group to do so. Yesterday, we were most impressed with what the study group did, and we are equally impressed with what group one did with this nice new flow chart. So in keeping with the spirit of that, we bound up all of our comments in this body of work. For the unofficial record, I am handing this to the chairman.

MR. WELCH: Thank you.

MR. BLAIR: As I mentioned yesterday, we followed what I am going to call the traditional approach where we are given a series of questions on a worksheet so our group elected to work ourselves through the worksheet, answering questions.

Yesterday, I had noted that we, if you look at your handout on the very first page, that we had a series of assumptions that we assumed that the groups before us would have answered such that we could address what it was we would have or would receive in the post-filing document. And rather than highlight what we did yesterday, I am going to ask you turn to page number three of your handout, I am not going to use any slides for the sake of brevity this afternoon. So refer strictly to your handout. If you will

notice, it says page 30 on your handout. That is actually where we begin in the IHC blocks, the issuance of the NEPA document. And the question asked was is it appropriate for states to file draft 401 conditions at the time that interventions, comments, recommendations are filed. And the group felt that most states and tribes need to weigh in on this issue. It wasn't cut and dry on whether it was appropriate at this time when the interventions, comments, or recommendations are filed by other agencies, whether states should file their draft 401 conditions.

We got in the course of the discussion, if you file then, if in fact legally they could be filed, if there is not a proceeding before the Commission at that time, how do you instigate that process. And the group felt that, well, one way may be to send a letter to each state as part of this note for proceeding, soliciting their input as to whether they felt they could file early 401 conditions. So that was one way or one suggestion that came up today.

Skipping to the next page, we discussed -- and this precipitated an awful lot of conversation -- is a non-decisional NEPA document consistent with CEQ requirements for preferred alternatives. And so then we got into a lengthy discussion as to what should the NEPA document be. Should it have some value judgments, some conclusions, recommendations in the NEPA document compared

to what other agencies around the country do and their preparation of the NEPA document, and discussed FERC's NEPA document seems to be an animal that stands alone by itself and that we are making value judgments in our NEPA document that should be in a separate record of decision. And that the NEPA document should strictly be a document that is analytical with no value judgments. Others took exception and felt that the NEPA documents would produce the necessary criteria.

So as one solution it was suggested that we produce one document with two parts. One would be an analytical and the other would be a decisional document. And we didn't reach unanimity on what that document would contain. But I think the common thread is that we need to go back and re-examine, at least the -- group take a look at the NEPA document in its present form.

Still talking about NEPA documents on the next page. One final NEPA document versus issuing a draft and final NEPA document. The discussion was that, well, some of these projects that we have before us, they are small projects. The issues are non-controversial. Should we just go straight to the final document without having any draft. And, again, we had no real common ground on this amongst the group. It was thought that, well, sometimes drafts might be helpful and need to be seen even though the project is

non-controversial, the issues were basically non-issues. So it was suggested that one way to determine whether we could go straight to a final NEPA document without preliminary drafts was to announce our intent to prepare only one NEPA document at the time of the REA notice and then receive comments on that proposal as to whether a draft is necessary. So that seemed to be one possible solution.

We had some discussion on 10-J negotiations and when should that start. One suggestion was that you should begin shortly after the study completion but we had no real resolution on that issue.

Skip over to the next page. The reason I am skipping some pages is I know people want brevity. We spent an awful lot of the conversation today on special issues, not related to the worksheet. And I think I probably spent a little more time on those than the questions you were asking on the worksheet. There was some discussion on mandatory conditions and how do you say re-visit those, I guess is the best word to describe it. And if an applicant doesn't think that they can live with a mandatory conditions, is there any kind of an appeal process, some kind of mini-trial, some kind of special hearing. Should there be a provision in the license or should there be a provision in the regulations that the license be stayed pending some kind of resource agency appeal process. As you

can see, there was no common ground agreed to but at least the group decided that the issue or issues will be presented to the drafting group for consideration.

Ex parte cooperator intervener. We had the question of when does the proceeding begin. Is there a need to change our ex parte rules with regard to a cooperating agency status in light of the integrative process. Some ideas came up, as you can see in point number one. We talked about the separation the staff of the resource agencies as well as FERC, do we have the capability from a resource standpoint to actually separate staff so that we have analytical staff and we have decisional staff so that we don't get into the problem of when a cooperating agency then is in the intervener mode, how do you separate that and do we have actually separate staff to do the analytical portion of the preparation of environmental documents and then we have decisional staff. No resolution really came out of that process.

Post-filing schedules. It was suggested that the FERC issue the NEPA schedule with the first post-filing notice. That is we make certain that once the application is filed, we know what the process is going to be from that point on. And, more importantly, it was suggested that FERC adhered to established schedule except for extenuating circumstances. And it was discussed as to whether we would

define in a proposed rulemaking what were the extenuating circumstances, what are the criteria for extending schedules. And it was decided that it was getting into probably more detail than a rulemaking should. So it was suggested that we make it known that we want to adhere to established schedules.

Issuance of draft license articles along with the NEPA document. I guess we all agreed that the issuance of draft, again the term was "draft" license articles was desirable so parties get a feel for the flavor of what is going to come out of the process besides the NEPA analysis. That could be problematic, is it really implementable. And the only consensus or common ground that we could agree to was that it is desirable to have draft license articles issued somewhere in the process such that we do have a chance to get comments on the draft license articles.

Continuing annual licenses. The underlying theme here is that in any licensing process, sometimes the process goes on and on and on and we have licenses that require annual issuance for years and years and years. And how do we correct that situation. And, as you can see on the sheet, it was suggested by some that we have interim conditions imposed. We reduce the terms of the subsequent license commensurate with the amount of time expended on the process and so on. There was no really common ground on

that issue. We felt that whatever method was used to correct that deficiency, that it should be in sort of a positive form of carrots as opposed to penalties.

And, lastly, we had some discussion on dispute resolutions. And I think the common ground was it may be easier to use dispute resolution, again this is post-filing and license issuance, instead of the court of appeals. And we suggested that maybe this rulemaking include a provision allowing applicants to dispute mandatory conditions with the particular agency that is in question.

So that is sort of the highlights of what we did this afternoon. Any questions? I would like to thank team number three for their diligence and thank you very much.

MR. WELCH: Thanks, John. It has been a very long day but John Suloway has a question. Make sure you identify yourselves.

MR. SULOWAY: John Suloway, member of team one. Team one has a concern -- well, let me back up. Team one feels that we accomplished a lot today. And based on what we have seen from teams two and three, I think I can speak for our group, that we think that the whole group has accomplished a lot. Our concern is for the quality of the NOPER that comes out in February. We want to continue to help John Clemmons and the rest of the team to make that a NOPER in February as strong and as high quality as possible.

And we are asking if there is a way or if there are ways that we could help you do that. I am speaking for team one.

AUDIENCE SPEAKER: But does all of team one agree with you?

AUDIENCE SPEAKER: Yes.

AUDIENCE SPEAKER: Yes, we have a consensus.

MR. ADAMSON: Speaking for myself --

MR. WELCH: And you are?

MR. ADAMSON: Dan Adamson, member of team three.

But not speaking for team three, I sense, John, that you may be going in the direction of some additional sessions like this. And while I found this to be very useful, I am sure that it would be useful to continue to do this. I feel like we have provided a great deal of information and insight and perspectives to the Commission staff. But it is quite burdensome to do this. So that is just my perspective.

MR. SULOWAY: John Suloway. I was not suggesting that we have another session like this one.

MR. ADAMSON: Oh, good.

MR. SULOWAY: I was basically putting the question out there to the folks that are going to write this NOPER or volunteering to try to help them. One of the things that was suggested in our discussion is maybe that there could be conference calls set up for areas that need additional discussion, that might provide help to the group

that is drafted, that there would have to be -- since I think we all experienced that a smaller group is more effective than a larger group, the various stakeholders' groups would have to be represented in these conference calls or other vehicle so that everybody felt that they were being represented. But that we weren't pre-judging that it should be a session like this.

MR. WELCH: Any other comments?

MR. ADAMSON: Well, my concern would still apply to that, the conference calls. I think it is an admirable idea but I think it is a resource issue, at least for me and the people that I represent. And I prefer not to go down that road.

MR. CLEMMONS: All I am prepared to say, speaking for myself --

MR. WELCH: And you are?

MR. CLEMMONS: John Clemmons, this morning, member of team two. Is that we note the offer, and we will think about it and respond but we need to think. I am in no condition to think now.

AUDIENCE SPEAKER: Also fair.

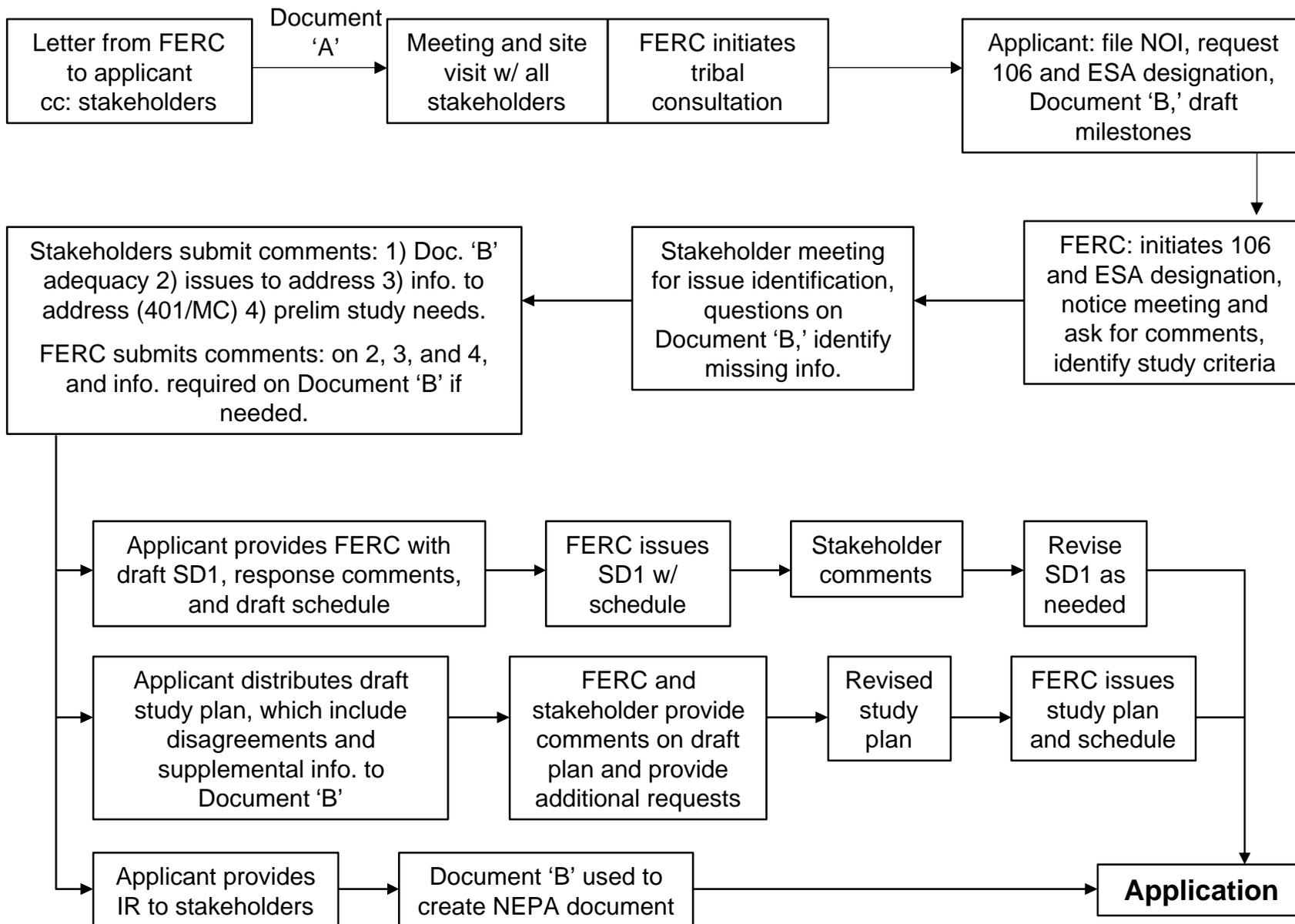
MR. WELCH: Okay, again, thank you everyone. I think we have done a lot of great work today, over the last two days. And thanks. You have helped us think about some of our drafting sessions that are going to become -- over as

well and I think we can get a lot of work done then too.

(Whereupon, the Study Plan Development Session
was adjourned.)

Stakeholder Early Application Development Drafting Session
FERC, Washington, D.C. December 11-12, 2002

Pre-NOI



Document 'A'

- invitation letter and orientation package for pre-NOI site visit/meeting.

What's in Document 'B'?

- Identified stakeholders
- Existing conditions
- Request for available info from stakeholders
- History of project
- Project description and operation
- Prelim issues
- Prelim info needs on current conditions on impacts (+/-)
- Summary of relevant management plans
- Draft milestones
- Summary of consultations (unresolved)
- Additional studies needed for existing conditions and timing

Who picks the process and when (if more than one)?

- Stakeholder input on decision
- When? (unresolved)
- Who decides? (unresolved)

Details of Pre-NOI letter

- Outline of Document 'B'
- List of known stakeholders copied to list
- Summary of available processes
- Request for identification of additional stakeholders
- Require applicant to contact stakeholders and set up site visit/meeting (assuming formal proceeding not triggered for purpose of ex-parte)
- General project description (location)
- Tribal consultation information

Unresolved Issues

- 5-7 year issue
- FERC's role? Is it regulatory? Does it engage the formal process?
- Enforcement of milestones?
- All timelines
- Cooperative/intervener status
- Alternative timelines by region and workload
- Super-intervener status
- Seasonal/watershed consideration for licensing times
- Is a water quality certificate needed for a specific project? When should this issue be discussed in the process?
- How study request by states or mandatory conditioning agencies are handled if not in study plan?
- Where to fit dispute resolution into process? (need to see it first)

Study Plan Development Discussion: Agreements and Disagreements

[**consensus in bold**; regular print was discussed but not resolved]

Study Goal

Provide reasonable and necessary information to understand project impacts and evaluate potential PM&E measures for the purpose of FERC, agencies, and tribes decisions.

How:

In order to achieve the goal:

- **Identify issues that are relevant**
 - **Identify sets of information needed**
 - **Identify available/existing information to address the issues**
 - **Identify remaining information needed.**
-

Standard Study Plan Elements

- **Study Objective (s)**
- **Studies justification (how studies meets information needs)**
- **Methodologies (data collection and data analysis)**
- **Justify methodology for the study (independent review in appropriate circumstances)**
- **Schedule including contingencies (revision 2 methodologies)**
- **Specify who does study**
- **Going forward procedures to interpret and apply study results**
 - **Include in guidance: Acknowledge, in many instances tribes prefer to do their own ethnographic work.**

FERC will issue an interlocutory order requiring implementation of an approved study plan.

(Enforceability to study schedule needs further discussion.)

Criteria to Evaluate if a Study is Needed or Not

IHC study request criteria (4.3) with the following amendments:

Criteria intended to provide guidance to all parties to hopefully avoid disputes.

Criteria (neutral, objective decision criteria):

- a) Whether the request describes available, relevant existing (preferably project-specific) information, and provides a nexus between project operation and effects (direct, indirect, and cumulative) on the resource to be studied.
- b) Whether the request includes an explanation of the relevant resource management goals of the agencies, tribes and other stakeholders explaining ties to statutory authorities, including public interest goals, with respect to the resource to be studied. Recognize there may be conflicting goals. Purpose is to link resource goal to information needed.
- c) Whether the study objectives are adequately explained in terms of new information to be yielded by the study and its significance relative to the performance of agency and tribal roles and responsibilities in connection with the licensing proceeding and other statutory responsibilities (eg. under CWA, ESA).
- d) If a study methodology is recommended, whether the methodology (including any preferred data collection and analysis techniques, or objectively quantified information) is consistent with generally accepted practice in the scientific community. Whether the proposed study methodology appropriately considers Native American values and knowledge.
- e) Whether the requestor has considered cost and practicality, and recommended a study or study design that would avoid unnecessary costs while still fully achieving the stated objectives.
- f) If the license applicant has provided a lower cost alternative, whether the requester has considered this alternative, and if not adopted, explained why the lower cost alternative would not be sufficient to achieve the stated study objectives.

If during AIRs process add:

- g) has this already been done? (If we have asked the question before, what was the answer?)

(Guidance following the rule should be developed through a consensus based process and should be drafted and should include examples or explanations for criteria.)

Issues to address:

In section a):

- a. How would you look at impacts viewed against reasonably foreseeable conditions within the timeframe of the license term?
- b. Trouble comes in the mathematics: asking for compensation in other mitigation for losses accrued over the past license term. There is no mitigation for impacts over the past license – rather, mitigation and/or restoration for existing, on-going impacts.
- c. Tribal position: traditional, cultural, and resource losses over time are unacceptable and must be compensated or restored. Pre-project baseline is necessary for this position. Is the issue restoration or compensation? Tribes want fair treatment (eg. bring salmon back). Often these impacts are on-going impacts, and are not a matter of baseline.
- d. Baseline for 401 certification agencies: what it takes to bring the project's waters into compliance with WQS. Eg. Bring flows back into a bypassed reach.

In section c), address incremental value – of information and of cost – added. Can we rely on existing information? Is this a cost effective way to get the information? Do we need this now? Or is it better addressed through adaptive management?

Timing

Issues

- **Need early knowledge whether licensee is going to conduct study or not**
- Need to engage peer review prior to disputes
- We need information gathering early so that information is available prior to decision making. Also, need a clear decision point on whether information sought was provided before moving on to the next step.

Solutions?

- **This group advises that FERC not issue the REA if information needed to issue terms and conditions is not yet available. There are certain circumstances where it may be appropriate to proceed. Exceptions should be rare; plan/schedule to complete studies should be provided; in cases where the study takes a long time one might convert to adaptive management provisions. This may, in turn, allow more tentative draft terms and conditions from the agencies. An underlying principle is that if information is identified as needed for decision making then collecting the study information will be pursued expeditiously and the information shall be in prior to decisions being made.**
- **Attaining agreement on study plans may be time consuming and needs to be considered in the overall schedule.**
- **Try to achieve consensus informally, but don't take up all available time.**
- The rulemaking needs to allow 2 field seasons of study within the licensing timeframe. (will be included in the NOPR discussion)

Issues in timing were identified, solutions not yet discussed.

Dispute Resolution

Issues

- Study plan disputes tend not to be resolved at this phase of the proceeding, and complicates the rest of the proceeding (resolved too late)
- When it is referred to FERC it often is late in the process
- When it is referred to FERC, it often takes long to resolve
- FERC has no criteria used to make the decision (therefore, need criteria)
- AIRs come in way late for decision making in the proceeding
- There are often disputes over whether or not the study is sufficient. Also, questions come up not only during initial study design, but sometimes also later in the process. When these later disputes arise, often on implementation methodology issues, it's not clear who decides or resolves the issue)

- Implications of a dispute resolution decision are not clear – what are the impacts on licensee responsibilities, impacts on additional information requests, what is the binding nature of dispute resolution?
- (Dispute resolution is needed throughout the process as well as here; rulemaking should address, although this is not addressed here.)
- We currently lack a mechanism to assure objectivity in dispute resolution (who applies the criteria? Who makes the decision? At what level – technical, policy level?)
- There's no clear definition of who are the parties of the dispute?
- It's not clear how informal dispute resolution is used. Are there informal steps before formal dispute resolution?
- It's not clear when informal and formal dispute resolution begin?
- It's not clear how tribal trust responsibilities and consultation are addressed if there is a study dispute.
- See p 15 of worksheets
- What is the location of the dispute resolution process (local to case)?

Hopes/Expectations for Dispute Resolution

- Need to identify disputes as soon as possible
- Need a good DR process that gets used
- Need to review, consider and encourage steps, actions, and active use of the criteria to ideally resolve as many disputes as possible prior to using the formal dispute resolution process. For example, would a review of study plan criteria lead to clearer decisions

Dispute resolution process, needs to be used early in the process

- So people understand what's being done
- So information is collected in a timely manner
- The process needs incentives to encourage resolution

Steps (not agreed to or complete)

- Participants request studies (agencies, tribes, NGOs, other stakeholders)
- FERC approves study plans, considering criteria
- A stakeholder or participant doesn't like the approved study plans

When to use dispute resolution of studies.

- o Before studies begin
- o End of first year check in with initial results in hand (?)

- Other?

Issue identified, but not addressed: When is an existing study too old?

Existing mechanisms under current relicensing

- FERC
- between states, tribes, or states and tribes under CWA
- within a state or tribe with 401 authority
- (these last 2 mechanisms are independent of the FERC process, respecting state and tribal authorities)

FERC dispute resolution is advisory, not binding, to the states/tribes with 401/CZMA authority or treaty rights.

Definition of “Binding process”: Federal resource agencies will be bound by the decision on which studies will be conducting and what methodology will be used, will assign prescriptions based on information available. Applicant will be required to do studies either based on FERC approval of study plans or based on FERC order/letter (interlocutory decision) which is based on dispute resolution decision. (conceptual agreement contingent on dispute resolution process and that other parts of the overall process are OK)

(binding, if FERC a means that the federal agency will not request an additional study for which a decision has been rendered either by FERC’s acceptance of the study plans, and/or through the dispute resolution process)

Another option: Bifurcated Decision

- The FERC decision is advisory unless all of the parties agree to be bound
-

A concern about this process is that the licensee may still be at risk of seeing study requests in mandatory conditions?

FERC needs criteria/guidance on tribal government-to-government trust responsibilities, consultation defined. It needs to address relationship of trust responsibility to study requests.

Dispute Resolution discussion continued:

Purpose of Dispute Resolution

- **To evaluate if a proposed study meets the criteria?**
- **Dispute resolution: (option of last resort – ideally previous steps including early FERC involvement; using informal procedures first, using and applying the criteria effectively, and through all these steps creating a body of good information will minimize the need for formal dispute resolution)**
 - **Characteristics (of set of ppl available to cover all the resource areas and of the desired process)**
 - **Experts (scientific, resource expertise)**
 - **Familiar with existing body of science on body of impacts, and tribal trust issues (familiar with regional tribes)**
 - **Unbiased, neutral**
 - **Able to travel to the area**
 - **Efficient**
 - **Available, prompt**
 - **Increases chances of finality of decision because process is credible**
 - **Transparency (process governed by guidance, visible on the record, supported by rationale/reasoning)**
 - **A fair decision will come from the process, people need to trust it (reliable, valid, credible)**
 - **Advisory Body Options Discussed**
 - **Panel with 2 resource experts, 1 neutral/mediator type?**

- IHC Proposal – one from FERC, one from disputing federal/state resource agency (not from the case), plus a neutral (not policy ppl)
- Standing panel of FERC experts?

- Use FERC Administrative Law Judges? Stakeholders would convene their experts as part of the process. ALJs timing concerns – would they be available in the 60 day window? Would they be threatening as a wild card causing settlement prior to formal dispute resolution? Consider using consultants as expert witnesses, or staff to ALJ? Have pre-lined up experts (fisheries, aquatics) to be there in a timely fashion? There is concern on ALJ neutrality.
- Use FERC third party contractors? (already approved)
- Use facilitators/mediators as the neutral?
- Use FERC ADR process? Why not currently being used much? Should this be a proceeding step?

- What is the range of expertise to manage any dispute; some narrower, specific scientific experts; mediator
- Whether it's a panel or ALP option, be sure to create a record with an explanation of why/rationale for decisions
- Are neutrality standards too high?
- Concerns – find a true neutral with expertise, timing, and geography. Prefer simple, direct approaches. Needs to be transparent to the licensee and other participants.
- Likes – objectivity, credibility it brings, serves as an incentive which we hope won't be used, need a mechanism to strike the balance.
- Make the panel scary enough from both sides that informal processes work, but make it credible, predictable

- Who selects advisory entity?
 - All stakeholders?

- Select in advance?/at the beginning of the proceeding identify likely resource topics and appropriate experts/panel participants?

- **Who initiates?**
 - **Applicant**
 - **Requestor of the study that is under dispute (any participants - tribes, state or federal resource agencies, NGOs, others involved in relicensing)**
 - **Stakeholders (e.g. tribes, F&WS) concerned about the impacts of the study on resources?**
- **Who participates?**
 - **Disputing parties participate**
 - **Other participants already involved in the proceeding should be able to participate, they can act as technical experts – would need to explain their need for the information (use the criteria). Participants should relate their interests to the study issue under dispute.**
- **How participate**
 - **Paper submitted in advance**
 - **Conference, face-to-face hearing in some way (not only paper) (like 10(j))**
 - **A record of evidence would be created, and a record of the decision with rationale for decision**
 - **If tribal concerns, need to have a way to meet 1-on-1 (need confidentiality established)**
 - **Stakeholders participating need to use the criteria for the decision as their basis for justification**

- Should there be multiple teams for different topics?
- Source for neutrals?
 - Each region identify a list? Don't put ppl on with a conflict
- Timeframes? (proposed 60 days)
- If panel, who convenes?
- Discretion in building the record; meet with everyone?

- Where resolved? OEP Office Director?
- Time period?

GROUP 3 - POST LICENSE APPLICATION FILING

Assumptions

- 1) NOI are filed w/ pre-ICD
- 2) Pre-Scoping has occurred
- 3) Studies are complete except for extraordinary circumstances and/or dispute resolution on studies are completed
- 4) Opportunities for public meeting and involvement

p 21.

Is a draft license application necessary? Would it suffice to circulate only a draft environmental analysis in lieu of Exhibit E?

Draft License Application is unnecessary in current form, DLA replaced with a Environmental Document which will include a project description and will include sufficient environmental analysis that will allow agencies to make preliminary determinations (401, CZMA, HPMP, ESA, etc).

p 23.

Is it appropriate to get comments on the PDED while information is still outstanding?

Yes, comments on Alternative Draft License Application (ADLA) are appropriate. ADLA to be sent to all parties (including interested public).

Would a public meeting on the DLA or PDED be useful at this point?

A public meeting at this time not required, but optional; should be addressed in the scheduling. This assumes full public notice and comment on DLA or PDED.

Is it appropriate for resource agencies to file preliminary recommendations, T&C's at this point (ADLA)?

Yes, when possible and if sufficient information is available, agencies would provide draft preliminary T & C. Ask this question in the NOPR: Are the states able to provide draft conditions at this point; would a letter to the states requesting comments be feasible?

p 24.

How would contents of a license application change as a result of using an integrated process?

The license application will include environmental section in form of NEPA, HPMP, and draft BA.

Exhibits?

Ask this question in the NOPR: What exhibits should be changed, reduced, and/or eliminated?

Is this an appropriate time for the applicant to apply for a 401? Could that be done earlier, as soon as relevant studies are complete?

No common ground on if the 401 should be filed with application or no later than 1 year before expiration.

p 25.

Could the Tendering Notice be combined with other notices?

Between the three notices (Tendering, Adequacy, and REA) some can be combined into two documents.

p 27.

When the REA notice is issued, is it appropriate to ask for T&C's in the event that all studies are not complete?

Not relevant, because the REA notice should not be issued until the studies are completed.

p 28.

Is it appropriate for states to file draft 401 conditions?

Insufficient information at this time. Some states may be hesitant to issue drafts, because doing so may conflict with state law (e.g. public involvement processes). Group felt that more states et al. and tribes need to weigh in on the issue. FERC may want to send a letter to each state (as part of NOPR) to solicit input. Applicants could discuss with states during pre-filing about whether to issue draft 401s.

What is an appropriate time frame following notice of acceptance (IHC) or REA (California) to file recommendations, terms, and conditions?

60 days may work assuming integrated process is outcome of rule-making. Some support for extension of time for “extraordinary cause.” Tribes/NGOs, due to resource limitations, have concerns with a 60-day limit.

P 30.

Is a non-decisional NEPA document consistent with CEQ requirement for a preferred alternative?

Some believe that FERC NEPA documents are currently sufficient with regards to content. Others identified the following problems with FERC documents: (1) presence of value statements in analysis; (2) presence of value statements with regards to mandatory conditions; and (3) lack of adequate information. As one solution, someone suggested that FERC produce one document with two parts or two separate documents: one would be an “analytical” NEPA part or document and the other would be a draft record of decision. Another person believes that it’s not possible to completely separate the analytical from the decisional, because the simple statement of facts can be a value statement (“one person’s opinion could be another’s fact”).

One final NEPA document versus issuing a draft and final NEPA document.

No common ground. Drafts helpful, because the drafts provide an added opportunity to comment. One potential way of avoiding disputes lack of opportunity to comment on a draft would be for FERC to announce intent to prepare only one NEPA document at the time of the REA notice and receive comments on the proposal.

P 33.

Should time frames be adjusted to be consistent with ESA regulations for issuance of a biological opinion at this time?

Common ground: For the integrated process, the BiOp will be completed at the time of issuance of the final terms and conditions.

Should FERC and resource agencies use a dispute resolution process to resolve conflicts over license conditions?

Special Issues

Mandatory Conditions

Some suggested FERC take the following steps:

- the Commission should rebalance the license after receiving mandatory conditions
- there should be mini “trial-type” hearings for conditions at issue (appeal process)
- there should be a provision for stay of license pending resource agencies appeal processes

No common ground. Issues will be presented to NOPR drafting group.

Ex Parte: Cooperator vs. Intervener

- The group identified the overall goal of producing one NEPA document that would be used by all decisional parties.
- Unanswered questions are: When does a proceeding begin? Is there a need to change the Ex Parte Rule with regards to “cooperating agency” status and in light of the integrated process?
- Options/Ideas for resolving cooperation vs. Intervener could include: 1) No “cooperating agency” status, but instead agency consults with FERC on the NEPA document on the record; 2) Require “cooperating agencies” to make a decision at some point as to whether to continue to “cooperate” or to intervene; and 3) Separate staff into analytical and decisional.

State Cooperation

***Whenever possible the states utilize the NEPA document in the license application with possible supplements to meet their environmental statutes? ***

Post-Filing Schedules

- Suggestion that FERC issue the NEPA schedule with the first post-filing notice.

- Suggestion that FERC adhere to established schedule except for extenuating circumstances.

Draft License Articles

- Suggestion that FERC issue draft license articles with the draft NEPA document.
 - Could be problematic to issue the draft articles at the time of the draft NEPA document because final terms and conditions not known
- All agreed that issuance of draft license articles is desirable.

Continuing Annual Licenses

- Some suggested ways of dissuading purposeful delay of licensing process: (1) insert interim conditions in the annual license; (2) reduce term of subsequent license commensurate with number of annual licenses; (3) FERC impose civil penalties on uncooperative applicants (if law allows).
- Some suggested that there could be incentives aimed at encouraging efficient licensing process.
- Issue will be presented to drafting group, because no common ground.

Settlements (Pre- and Post-NEPA)

- question posed as to what is the appropriate time for entering settlement discussions, whether all studies need to be completed before entering into settlement discussions, whether parties need to declare intent to settle, and whether FERC should allow time for settlement.
- Suggestion that current FERC regulations pertaining to settlements do not properly accommodate settlement discussion needs in hydro licensing proceedings.
- Common Ground: (1) there should be a provision for staying the licensing process to allow time for settlement discussions; (2) there should be accountability for meeting a settlement schedule; and (3) if parties enter into

settlement discussions, progress reports should be prepared to keep discussions on track.

Dispute Resolution

- may be easier to use dispute resolution instead of agency appeals process
- some suggested that the rule-making include a provision allowing applicants to dispute mandatory conditions with the particular agency