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BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

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IN THE MATTER OF: :  
PROPOSED RULEMAKING FOR HYDROELECTRIC : Docket Number  
POST-WORKSHOP STAKEHOLDER DRAFTING : RM02-16-000  
SESSION :  
- - - - - x

Commission Meeting Room  
Federal Energy Regulatory  
Commission  
888 First Street, N.E.  
Washington, D. C.  
Friday, May 2, 2003

The above-entitled matter came on for a meeting,  
pursuant to notice at 11:05 a.m. before Ken Kearns  
(moderator) presiding.

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

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(11:05 a.m.)

MR. WELCH: Okay, everybody, it's 11:00, and time for the final phase, the culmination of our four days of effort in our stakeholder drafting sessions.

On behalf of FERC and FERC staff, I'd really like to thank everyone here for their hard work. I know Group 3 did a lot of hard work.

(Laughter.)

MR. WELCH: You know, the rest of you, in the next couple of hours here, are going to have to demonstrate for me that you did hard work, too, but I did sit in on a lot of the sessions, some of the of the caucuses and sub-caucuses and those types of things.

I really would like to express my appreciation to everybody for all the hard work that you've done this week, all the thinking and the negotiating and the caucusing. And I just want to say that I'm hoping we're going to hear about a lot of recommendations and group agreements and that, and that's really great.

But also know that just your efforts in working and the conversations that I heard and Ann heard and Liz heard, really -- it's going to go a long way in helping us really understand where people are coming from and a lot of great ideas are going to come out of just the conversations

1 themselves.

2 I mean, it's one thing to read somebody's comment  
3 letter, but it's another thing to actually hear them explain  
4 themselves, hear them talk, hear them react to other people  
5 and what they say. That, to me, is the most valuable part,  
6 just listening to the way you've developed your  
7 recommendations. So that has been extremely valuable to us  
8 at FERC staff in putting this rule together.

9 So, having said that, I'm going to turn things over to  
10 Ken, who is going to sort of oversee and facilitate this  
11 final session. Again, thank you to Kearns and West, and  
12 your entire staff.

13 (Applause.)

14 MR. WELCH: They're doing a great job, and, thank god,  
15 I didn't have to do it, so I could actually concentrate on  
16 my work. So here you go, Ken.

17 MR. KEARNS: When we started last Tuesday, you may  
18 remember that I said that on behalf of myself and my  
19 colleagues, that we were delighted to have the opportunity  
20 to work with you all. We took a vote again this morning,  
21 and we're still delighted.

22 (Laughter.)

23 MR. KEARNS: In fact, we're very delighted. We didn't  
24 vote last night at 10:00, however. Let me kind of describe  
25 what we intend to do today, and maybe add a couple of ground

1 rules.

2 And one of the ground rules is, just to note that this  
3 session is being transcribed by David. David and I have  
4 worked together a number of times, and that means that when  
5 you have something to say, please identify yourself, like  
6 Ken Kearns, so that David knows who is speaking, and then go  
7 ahead with your comments. So that's one of the ground  
8 rules.

9 Secondly, what we intend to do is to try and give  
10 summaries of each of the breakout sessions' discussions.  
11 And as Tim mentioned, in some cases, we'll have  
12 recommendations to show you; in others, we want to give you  
13 some flavor of the discussions, even when we were not able  
14 to get the recommendations.

15 We have PowerPoint slides to help guide the presenters,  
16 and after the presentation, we would hope that other members  
17 of that same breakout session, if they have some  
18 clarifications or we haven't said it quite right in the  
19 initial summary, get an opportunity to again just add and  
20 help us understand the flavor of the conversations.

21 If there are then questions from people who were not  
22 participants in the breakout sessions, we'll spend a little  
23 bit of time trying to answer questions. But I do want to  
24 make sure that this is not a time to offer your comments one  
25 more round, and it really isn't a time to continue the

1 debate.

2 It is just to ask questions of clarification for the  
3 breakout sessions. So I hope that's fairly clear.

4 And now I need to ask, do I need to stall anymore? So  
5 we need to get Session I's Powerpoint.

6 MS. KEIL: May I ask a question?

7 MR. KEARNS: Yes, you may.

8 MS. KEIL: The agenda, as written, shows us breaking  
9 for lunch and then reconvening. Since people -- I'm sorry,  
10 this is Julie Keil, Portland General Electric.

11 If people have enough energy here, I'd recommend that  
12 we just motor on through this and then pat each other on the  
13 back and go home, rather than taking a lunch break.

14 (Applause.)

15 MR. KEARNS: Sensing a lot of -- that, in fact, may  
16 encourage us to be a little quicker about it, as well. We'd  
17 actually thought about assessing that around noon, but it  
18 seems like that's where you want to go.

19 So, Julie, you get to -- we're going to talk about  
20 dispute resolution first, and Julie gets to set the example  
21 for how quickly we can do this.

22 (Slide.)

23 MS. KEIL: Maybe just two seconds to set this in  
24 context. This is one of the topics that of the study group.  
25 We had five topics; we only got to three of them, so if

1       you're expecting us to talk about changes to the TOP, we  
2       didn't get there. And we didn't get to this other survey,  
3       other study-related issues. Maybe there weren't any, but,  
4       in any event, we didn't get there.

5               So we did cover study criteria, the study dispute  
6       resolution process, and conduct of studies. So, Christina,  
7       let's go to the second one.

8               (Slide.)

9               MS. KEIL: One of the big things we were able to agree  
10       on or -- I guess I'd say agree on. We have to use these  
11       words somewhat cautiously -- was the advisability, the  
12       benefits of a technical advisory meeting to help inform the  
13       dispute resolution panel.

14               Recall that this is set in the context of the rules  
15       proposal that study disputes at the end game, will be  
16       resolved by a panel that then makes a recommendation to the  
17       Director. I guess one other thing to set this in context,  
18       the group's overall preference, overall guidance to the FERC  
19       rule-writers, is that we want this to be a process of last  
20       resort.

21               That is to say that we want appropriate incentives to  
22       do the study process well, early on in the process between  
23       the parties, without invoking this process, and appropriate  
24       disincentives to using it. That is to say, it shouldn't be  
25       an easy thing to invoke or use, but once you do it, it

1       should be functional and should provide the right  
2       information to make a good decision.

3               Our review of this technical advisory meeting was a  
4       good tool to do that.  Again, its function is to inform the  
5       dispute resolution panel.  It is open to all participants in  
6       the proceeding; anyone can come to this meeting, make a  
7       short presentation, and be available for questions and  
8       answers from the panel.

9               And the panel will really be in control of how they run  
10       that meeting, but the emphasis for us was very brief  
11       presentations, understanding that everyone had already made  
12       written submissions, but really allow an interchange between  
13       the parties and the panel.

14              And our goal, although FERC was not as pleased about  
15       this recommendation as they might have been about some  
16       others, was that the meeting should be held in some local  
17       area close to the project in question.

18              That would help facilitate participation by all  
19       parties, if you got it sort of closer to home.

20              I think we're ready, Christine.

21              (Slide.)

22              MS. KEIL:  Another list of recommendations:  This was  
23       one was with relationship to the dispute resolution panel  
24       itself and how it operates.

25              We had an extensive discussion of the rule of how you

1 would apply ex parte to this panel, and whether or not they  
2 were allowed to go outside of the process and seek guidance  
3 from others. Our collective answer to that was no; we  
4 wanted them to be in the -- in the name of transparency in  
5 the process, we wanted them to be limited to what was  
6 provided for them under the regulations that we're crafting.

7  
8 We talked extensively about concepts that would allow  
9 issues to be clumped, so that one panel would deal with --  
10 for instance, if there were multiple issues about fisheries,  
11 one panel would deal with all of the fisheries issues, one  
12 panel would deal with all of the cultural resources issues  
13 and so on, assuming that you had a project with multiple  
14 disputes over studies.

15 We also discussed at some length, although this wasn't  
16 a big issue for us, who would sort of organize the panel.  
17 We needed sort of a regulatory hook, and FERC's clearly the  
18 panel organizer at the end of the day, and FERC would get to  
19 designate the Chair, but would not necessarily chair the  
20 panel itself.

21 And so that would be more of a negotiation between FERC  
22 and the panel members about who would get to run the show.  
23 Christine, the next one.

24 (Slide.)

25 MS. KEIL: Other topics discussed: You might imagine

1 that the ones I just showed you were among the easier ones,  
2 although they did take us some time. We had a lot of very  
3 good discussion about this list of issues.

4 The first one there is who will abide by -- we tried to  
5 get away from the words, "be bound by," since that seemed to  
6 have connotations that people were very uncomfortable about,  
7 so we tried to have an open discussion about the  
8 consequences of a dispute resolution decision, and what it  
9 meant to people's ability to act in certain ways, as you go  
10 through the process.

11 And what the mandatory conditioning agencies were  
12 willing to say and I think what the group was comfortable  
13 with, was that their agreement to abide by the panel  
14 decision, and you will notice that there is a caveat there,  
15 if affirmed by the Director, which we will get to in a  
16 moment.

17 They would abide by it for purposes of studies used to  
18 develop the license application; that is to say, through the  
19 licensing process, for the issue of are the right studies  
20 being done to develop the license application fulfill the  
21 agency's statutory responsibilities to have substantial  
22 evidence standing behind their conditions, that agencies  
23 would agree to be bound to that extent.

24 It's a Federal Power Act authority issue, though, so it  
25 will -- there's a couple of caveats there. We talked at

1 some length about the issue of studies appearing in the  
2 conditions themselves, and agreed that we could, to the  
3 extent we had an issue about that, it could not be resolved  
4 as a part of this dispute resolution process.

5 We could not bind the agencies to not request studies  
6 as 4(e) or 18 or Section 401, Water Quality Certification  
7 conditions as a result of this dispute resolution process.  
8 Many of us got more comfortable with that, understanding  
9 that a record would have been built as a function of this  
10 dispute resolution process which practically raises the bar  
11 for someone who wants to come back in later and again try  
12 and mandate a study.

13 Agencies also wanted to be clear that we were not  
14 discussing their non-Federal Power Act authorities here.  
15 There's a very partial list there, but the two that were  
16 highlighted were the Endangered Species Act and the Clean  
17 Water Act.

18 You might recall that the rule has a provision at the  
19 end that the Director basically affirms or overturns or  
20 modifies the panel decision. Agencies were somewhat  
21 uncomfortable with that final authority resting with the  
22 Director.

23 We had a couple of options about how to deal with that.  
24 We did not reach resolution about how to do that.

25 One of the options was to have the Commission make that

1 decision, rather than the Director, and the other option was  
2 to rewrite the rule so that it had more explicit criteria  
3 about what the Director could consider and how he would have  
4 to justify his decision to overturn the panel decision.

5 So that one, we did not -- and here's the language,  
6 actually. We actually had explicit language about what it  
7 would take to move this to a Commission decision.

8 And the basic concept was, if no action was taken  
9 within a particular timeframe, the panel decision would go  
10 into effect by effect of the regulation. But the Commission  
11 could sort of raise a flag and say they were going to  
12 reconsider this one, and then it would go up to Commission  
13 decision and be decided as a modification to the study plan.

14 Again, you see that we didn't actually have very much  
15 discussion about the last one, which is why there is no  
16 language, but there was discussion about this alternative of  
17 making -- basically drawing a tighter circle around the  
18 Director's decisional discretion as to whether or not they  
19 were going to overturn a panel decision. Next.

20 (Slide.)

21 MS. KEIL: Here's a big one. It's big, but it doesn't  
22 give much language here, because we couldn't reach  
23 resolution.

24 You know, the rule is currently drafted so that only  
25 federal agencies with mandatory conditioning authority and

1 401 agencies can trigger the dispute resolution process. We  
2 had an extended discussion about the role of 10(a) agencies  
3 and tribes and 10(j) agencies and tribes in this context,  
4 and simply could not reach resolution of it.

5 I think we undertook what was called a working  
6 assumption that 10(a)s and 10(j)s would be allowed to  
7 trigger. That turned out to mean slightly different things  
8 to different people, and so I think it's fair to say we had  
9 a good discussion about this.

10 People understand the needs of the 10(a) and 10(j)  
11 agencies. They also have faced a substantial evidence test  
12 in making recommendations to the Commission, but we were not  
13 able to reach resolution about whether or not they should be  
14 permitted to trigger the dispute resolution process.

15 Similarly, we had a long discussion about whether  
16 applicants and non-governmental organizations should be  
17 permitted to trigger. That falls in a slightly different  
18 context, however, because, of course, we don't face a  
19 substantial evidence test in the same way that recommending  
20 or conditioning agencies do.

21 And so that issue, that is, NGO and applicant  
22 participation, was interrelated, interconnected, as my ESA  
23 agencies like to say, to who gets to participate in dispute  
24 resolution and what that looks like in the actual process.

25 And so there were two pieces to that. Again, as we

1 talked about before, everyone gets to come to the technical  
2 advisory meeting and make their case.

3 We also broadened the ability of people to submit  
4 written comments to the panel. The rule, as crafted, has a  
5 fairly narrow limitation on that, and so our recommendation  
6 is that the rule provide that all participants in the  
7 process be allowed to make written submissions to the panel,  
8 on the theory that at this stage, more information to the  
9 panel is better than less.

10 MS. KEIL: I have two seconds for questions, if anybody  
11 has questions.

12 (No response.)

13 MR. KEARNS: Thank you very much, Julie.

14 MR. JOSEPH: Okay, moving on to the study criteria, we  
15 spent the better part of the first day dealing with this.

16 MR. KEARNS: Brett, could you identify yourself?

17 MR. JOSEPH: Yes, Brett Joseph with the NOAA General  
18 Counsel for the National Marine Fisheries Service.

19 I think we started out on a good footing with the study  
20 criteria issue, because there seemed to be general consensus  
21 around the table regarding the underlying purpose of why we  
22 have criteria, which is to ensure, you know, that the study  
23 dispute resolution process, as well as hopefully the process  
24 leading up to avoiding study disputes is based on the very  
25 transparent set of criteria that will ensure objectivity to

1 the decisionmaking and that it covers all bases.

2 So this immediately got us into an issue regarding how  
3 the criteria should be applied as to whether or not we're  
4 talking about a checklist where each criterion is either met  
5 or not met, or how to deal with gray areas in terms of  
6 decisions, especially when you get to the context of dispute  
7 resolution, as to whether or not the criteria had been met.

8 And beyond that, we also got into specific language  
9 changes to the criteria to address specific concerns that  
10 were raised by the parties.

11 And you can see up here that these are the changes  
12 that, from a conceptual standpoint -- and then I'll get into  
13 the specific language that we proposed, with the caveat that  
14 we didn't exhaust all the concerns. There were a couple of  
15 further changes that were put on the table but not agreed  
16 to.

17 But in terms of that first issue, how the criteria are  
18 to be applied, pretty much the way we discussed it was that  
19 -- and, again, you know, we get into this idea of the issues  
20 being interrelated or interconnected, that between the  
21 criteria themselves, they really need to be taken as a  
22 package, not --

23 In other words, there seemed to be general rejection of  
24 a checklist approach to applying the criteria. You know,  
25 how you meet one criterion may have a bearing on what level

1 of consideration needs to be given to the other criteria,  
2 but all of the criteria have to be considered in a given  
3 case, based on the facts.

4 And so when we get to the question that the Director --  
5 well, the dispute resolution panel, then ultimately the  
6 Commission needs to decide as to whether the criteria are  
7 met in a specific study proposal.

8 We would look for some clarifying language or some  
9 guidance that could go into the preamble that explains, you  
10 know, what the intent is. We felt it was not necessary to  
11 add more language to the regs on that particular point, but  
12 certainly some guidance in the preamble would be helpful to  
13 clarify the intent regarding how criteria should be applied.

14 Now, on to the specific changes: Under the second  
15 criteria, which appears in 5.10(b)(2), there was concern  
16 raised by the tribes regarding the implication, the way it's  
17 currently worded in the NOPR, that only tribes that have  
18 exclusive jurisdiction would, you know, have their issues  
19 considered in terms of effects, and that that needed to be  
20 broadened out to include all affected tribes.

21 And I'll just tick off the major concepts, and then  
22 we'll kind of go back and look at the language that we came  
23 up with.

24 The second concept was pertaining to the issue of the  
25 nexus. There's language currently in Criteria No. 5 that

1       refers to a nexus.

2               It was felt, particularly by the industry reps, that  
3       there needed to be some further elaboration of that in terms  
4       of specifically relating criteria to the potential license  
5       conditions that would be molded or shaped by the studies  
6       that are proposed.

7               And then the third concept had to do with what we heard  
8       consistently, you know, from the industry, again, going into  
9       the workshop. And we had considerable discussion about  
10      that, and that has to do with really the rule of reason.  
11      How much level of effort is being called for in a particular  
12      study request?

13              And this ties into another issue that had to do with,  
14      you know, the incremental value of the particular study.  
15      Where we ended up is, I think we had conceptual agreement  
16      that language that reflected that there would be  
17      consideration of the level of effort of the study -- and  
18      this is aside, apart, or in addition to considerations of  
19      cost.

20              It really pertains to both cost and non-cost factors,  
21      just how much time, effort, resources, are going to be put  
22      into obtaining that last little piece of information, that  
23      that should be reflected in the 7th study criteria.

24              And then the last was -- perhaps I'm kind of jumping  
25      ahead of myself -- is the first issue that I discussed; how

1 the criteria would be used.

2 Now, I'll just go in the order that they are up here.  
3 The 5th Criteria, the language we came up with is as you see  
4 in the italics, we would add on to the nexus language that -  
5 - well, you can read it. The criteria would explain the  
6 nexus between operation and effects on the resources to be  
7 studied, and how study results would inform the development  
8 of license conditions.

9 We thought that was a good formulation, because it  
10 didn't -- everyone could agree that there had to be some  
11 explanation of how -- it's really the operational  
12 explanation of how the information obtained through the  
13 studies would be used in the development of license  
14 conditions, without saying precisely what those conditions  
15 would be, which would go beyond the scope.

16 Next, on the issue of level of effort, simply putting  
17 in words, and/or level of effort, in addition to cost and  
18 practicality, we thought was a good fix.

19 And that's pretty much it.

20 MR. KEARNS: Any questions or elaborations from other  
21 members of our group?

22 (No response.)

23 MR. KEARNS: It's going to be hungry crew.

24 (Laughter.)

25 MS. MURRAY: I'm Nancee Murray, representing California

1 Department of Fish and Game.

2 It's amazing that we spent a whole day on two slides.

3 I think we spent a whole day on what will be three slides.

4 (Slide.)

5 MS. MURRAY: But conduct of studies did get a lot of  
6 discussion, and we, of course, are taking on faith that the  
7 process folks gave us lots of time to develop the study  
8 plan.

9 (Laughter.)

10 MS. MURRAY: A very important -- the first two bullets  
11 are very interrelated. A status report is changed to be  
12 more of a summary document, and the reason for that change  
13 is really the second bullet, which is the status report is  
14 distinguished from what we now call status updates in 5.8.

15 And there was a lot of discussion about the need for  
16 lumping particular studies together and having meetings and  
17 updates during the study period time that is built into the  
18 study plan.

19 It does really count on there being and we allow for a  
20 tailored study plan for each project. And we are pretty  
21 much counting on that with the status report not to be --  
22 well, to be there. It's not a fallback, but it is just a  
23 summary, with much more emphasis on the status updates that  
24 will occur during the conduct of the studies.

25 The requirement for sharing study information and

1 reports pursuant to the approved study plan, the idea is  
2 that we are just getting a summary document in 5.14, but  
3 during updates, if there is something at the update that you  
4 want to then see the data behind it, there is an anomaly.

5 Here we see this outcome; we don't understand that.  
6 The idea is that it's sharing, because it's both from -- if  
7 the agencies or tribes have information in addition to the  
8 applicant, we will share what information we have.

9 Study reports available to any stakeholders on request,  
10 if they have been provided to any other stakeholder as  
11 described in the study plan; Brett just kept hitting this  
12 part hard and hard and Erica Rivers, she just didn't let up.

13 So, basically if somebody comes in and missed a meeting  
14 for any reason, and for anybody, and it's already been  
15 disseminated, that would then be available again.

16 We extended the review times in two of them. We left -  
17 - FERC, you're still at 15.

18 (Laughter.)

19 MS. MURRAY: We extended them for us, for three days.  
20 That's up to you to give yourselves more time.

21 We added a "not later than" statement to the time for  
22 filing the initial status report, and this is -- in the  
23 current NOPR, there is no timeframe between the initial  
24 status report and the updated status report. We're leaving  
25 it to you, FERC, to -- the concept that we're communicating

1 to you is that there needs to be time, that the initial  
2 status report has to be filed before the updated status  
3 report, and in time to inform the second season of studies.

4 And that will depend on the particular study and the  
5 season when your license is due or the timing, but the  
6 concept is that you need to have the status report and then  
7 some time for meeting, time to change the second season, if  
8 possible, AIRs, and, of course, the process group has given  
9 us all that time.

10 And, again, we have included the notion of reciprocity  
11 of information sharing in 5.83.

12 (Pause.)

13 The concept here on this change to 5.14(a)(1) is that  
14 there is -- again, it's being changed to be summary, but  
15 they will describe study progress and data collected to  
16 date, and confirm that the studies are being implemented  
17 according to the study plan or explained variation from the  
18 study plan.

19 And we had some discussion about actually putting in  
20 language in 514.(b)(1) through (7), because AIRs, you need  
21 to inform the AIRs. If the study plan is not being done  
22 exactly according to plan, you need to have enough  
23 explanation for that so that if the agencies or whoever feel  
24 they still need that study or information, we can -- we have  
25 enough information to inform our AIR.

1           MR. BYRNES: Question. I'm L.G. Byrnes. Did I  
2 understand correctly in your line 5, where you said describe  
3 the study progress and data collected --

4           (Laughter.)

5           MR. BYRNES: On line 5, where it says describe the  
6 study progress and data collected, on the data collection  
7 section, that is a summary of the data?

8           MS. MURRAY: Described, correct. We have had the  
9 opportunity to request the raw data, but in the actual  
10 report that is disseminated and filed to everyone, you get a  
11 summary, and then you get the chance to ask for the actual  
12 data.

13           And I think that --

14           MR. KEARNS: There's a question over here from John.

15           MR. CLEMENS: I spoke --

16           MR. KEARNS: Identify yourself, sir.

17           MR. CLEMENS: I'm sorry, John Clemens, FERC.

18           I thought the group was at the -- was going in the  
19 direction that there would not be an initial status report  
20 at the end of the first year of studies, but that there  
21 would be more than one status report based on the nature of  
22 the studies being conducted.

23           To amplify that, for instance, if there was a  
24 recreation use study that didn't require, you know, a full  
25 year's worth of data, that was based on a survey or

1 something like that, that could be done fairly quickly, that  
2 you would include whatever you're doing, and get a report  
3 out on that, rather than wait and collect all of the reports  
4 related to each particular study and do them at once.

5 Is that incorrect?

6 MS. MURRAY: You are correct that we spent a long time  
7 talking about that.

8 (Laughter.)

9 MS. MURRAY: And then we changed our minds. We decided  
10 that it was important to have an initial status report, but  
11 to take away the -- to diminish or to make it more of a  
12 summary document, and, instead, put into the study plan, the  
13 emphasis there on the status updates; that those would be  
14 where -- those meetings and updates would be where you would  
15 have the detail or not, if you're not done with that series  
16 or study season.

17 And that the status report was important for notice,  
18 and to let us know if not only the public, but to know if we  
19 need AIRs.

20 But we spent a long time on whether or not this would  
21 go away. And we decided as a group that it was necessary to  
22 keep it.

23 And here is kind of somewhat of the tradeoff which is  
24 we're beefing up the updates, provisions for status updates  
25 and opportunities for a meeting or periodic meetings to

1 evaluate the data being collected, including the manner and  
2 extent to which information will be shared and sufficient  
3 allowance of technical review of the analysis and results.

4 Again, we're sharing data, we're getting -- evaluating  
5 the data collected, and getting any raw data that we ask  
6 for. That's it. Are there other questions?

7 (No response.)

8 (Slide.)

9 MS. WEST: Anna West, Kearns and West, the Group II  
10 facilitator. I obviously failed, because I'm the one  
11 presenting.

12 (Laughter.)

13 MS. WEST: Two failures, only one success here.

14 Okay, let's see. I'm going to get it wrong, I'm sure,  
15 Group. I'll do my best and you can help clarify.

16 One of the important things is that these are  
17 agreements, the sense of agreement from our group is that  
18 that means a general consensus.

19 That means that there were sometimes abstentions; there  
20 were definitely still concerns, but we kind of more or less  
21 followed the can-live-with rule or can-pretty-much-almost-  
22 live-with. That does not mean I love it.

23 And the tables have noted concerns and those are part  
24 of it, but all this is -- that we're going to review is the  
25 agreement or the consensus.

1           Okay, first up is the process for selecting the TLP or  
2 ALP, then we'll have the revised boxes recommendations, and  
3 at the very end, the recommendations on transition.

4           So, we presented this briefly to you before, but in  
5 general, the criteria for requesting the TLP, we agreed and  
6 affirmed that there are three goals and why: One is to be  
7 timely; two is a better decision; three is protecting the  
8 public interest.

9           And now we've got a series of guidance or factors to  
10 consider, and what everybody thought was really important is  
11 that these are not prescriptive criteria that you have to  
12 check all the boxes and submit all the information, but we  
13 have a nice long laundry list of important things to  
14 consider, and FERC is going to consolidate down to a  
15 manageable, more coherent set, but here's our input to them:

16           First concepts embedded in ECPA and FPA would be  
17 included, and here are some examples. Others are size of  
18 projects, if you have multiple dams in the basin. Next.

19           (Slide.)

20           MS. WEST: Level of controversy, level of  
21 involvement/interest by the resource agencies. Another way  
22 to put that is their intent to exercise mandatory  
23 conditioning authority or anticipated resource issues.

24           Also, if there is potential significant disputes on  
25 studies; tribal ESA issues; project characteristics;

1 physical and biological; stakeholder input; licensee-  
2 stakeholder history; staff resource constraints -- and that  
3 means everybody's constraints in all the sectors; amount of  
4 available information and compliance history. That was it  
5 for three slide of guidance factors to consider.

6 MR. BARTHOLOMOT: Now, there's just an observation --  
7 Henry Bartholomot -- be exclusive, so there might be  
8 additional factors that would be relevant that an applicant  
9 might request.

10 MS. WEST: Yes, there could be other additional factors  
11 that, with a list and in the spirit of guidance, you could  
12 always add more.

13 In the requesting the ALP, we just affirmed that the  
14 current regulations still apply, and that was a  
15 clarification.

16 Okay now we're on to the back of the yellow book in the  
17 boxes, and we'll just summarize the changes. I hope we got  
18 them in the right order.

19 So in the process steps, first of all, we reported this  
20 earlier. We agreed that it's okay that the licensee may  
21 file the NOI early, at their option, and then at that point,  
22 the formal proceeding would commence.

23 We also agreed that the PAD would include study plan  
24 outlines. The intent is that these are brief bulleted study  
25 plan outlines.

1           The intent is a way to give something substantive to  
2 start the discussion and exchange, and the hope is that that  
3 would not start a positional back-and-forth game, but it's  
4 really to give people to start digging in on in the very  
5 early stages.

6           We also agreed that the revised PAD would be  
7 eliminated, which means take out the first half of Box 6.

8           SD-1 would move forward. It's currently in Box 7 and  
9 we moved it to Box 3(a), and that eliminates Box 7 entirely,  
10 because the other item mentioned in Box 7 actually is  
11 occurring in Box 6, so you don't need Box 7 anymore. We're  
12 not sure we saved time, but we did save process steps to  
13 Group I's interests.

14           We all supported moving SD-2 sooner. There was some  
15 conversation about whether that should occur between 5 and 6  
16 or occur in 11. There were different points of view and  
17 those are mentioned in the Concerns column, but it was a  
18 full agreement that we move SD-2 sooner.

19           We agreed that after study plans come out, there are  
20 two boxes now. One -- I think, as it's now written, there's  
21 a comment and then a meeting.

22           We inverted Boxes 8 and 9. There was some discussion  
23 about some wanting a meeting after, so you would meet,  
24 comment, and meet again. Some didn't want that second  
25 meeting, because it adds steps in the process and they

1 certainly didn't want it required, so there was debate about  
2 it, but we definitely agreed that 8 and 9 should be  
3 switched.

4 Okay, I think this is a several-slide agreement on the  
5 draft license application, and I should point out that these  
6 bullets really hang together as a package, so let me review  
7 them all. They have some intricate, interrelated thoughts  
8 here.

9 First is that Box 16(b) is renamed Applicant's  
10 Preliminary Proposal. And it's instead of the draft license  
11 application. It would include a range of PM&Es, proposed  
12 operations, a summary of environmental analysis supporting  
13 the proposed operations and PM&Es.

14 We expect it would be 20 to 40 pages long, the default  
15 for filing, so this is the automatic thing that you would  
16 file, unless we'll give to others, and it relates to study  
17 results. It's noted that study results are available  
18 through other steps.

19 Group I gave us a lot of that information, so you  
20 already have the study results. This document is described  
21 there.

22 There is a consensus, as we left it yesterday, that the  
23 process -- if the group agrees that the process is better  
24 served without this document, the licensee and participants  
25 can request a waiver.

1           Next slide.

2           (Slide.)

3           MS. WEST: The schedule for this newly-titled document  
4 I've already forgotten is in Step 4, and it should include  
5 the proposed approach and plans to file the document and  
6 when.

7           If the applicant wants to provide more information than  
8 the previous 20 to 40 page document, or prepare a draft  
9 license application, that's A-okay, perfectly fine.

10          And if there is not a draft license application for  
11 that, then AIRs, under extraordinary circumstances, may be  
12 allowed in the final application stage, and there is a  
13 recognition that timing needs to be worked out so that there  
14 is adequate time, and ideally it's keeping things on  
15 schedule.

16          So we didn't get to the timing details. We know they  
17 need to be addressed. FERC is going to do a great job at  
18 fixing that.

19          Back up.

20          (Slide.)

21          MS. WEST: Okay, so far, folks?

22          MS. KEIL: I have a question.

23          MS. WEST: Yes?

24          MS. KEIL: Julie Keil. If an applicant files the  
25 document that's required by the regs, this 20- to 40-page

1        thing, then the process would permit AIRs at the final  
2        application stage, in extraordinary circumstances?

3            MS. WEST:    Yes, because the current extraordinary  
4        circumstances under the draft moves there.

5            MS. OWENS:    Kim Owens.    Just to clarify, because I  
6        think there was some confusion, I think, in our group about  
7        this.    What we're proposing is that there not be an AIR  
8        opportunity on the applicant's preliminary proposal, but  
9        there would only be one opportunity.    It would just move to  
10       a different part of the process.

11           MS. WEST:    Next.

12           (Slide.)

13           Okay, this is to clear things up.    The 401  
14       Certification language was mentioned in three different  
15       places, and we wanted it said once, clearly.

16           I'm sorry, that's the second bullet.    Cross references  
17       in Parts 4 and 16 should have consistent language throughout  
18       the rule, and preferably say it once and cross reference it  
19       thereafter; that was the agreement.

20           The other agreement was that the applicant should file  
21       the paperwork consistent with what is required in each  
22       state.    We're trying to create the flexibility to reflect  
23       that we have a lot of different states and a lot of  
24       different requirements, and what they do is to be consistent  
25       with their state.

1           Okay, we have two slides on 401 Certification timing  
2           which also kind of hang together, so let me give you the two  
3           slides first.

4           (Slide.)

5           MS. WEST: There's a preamble. We recognize for this  
6           overall approach for this whole rule to work, it is  
7           essential, it is really, really important that the states  
8           recognize and are actively involved in working in this  
9           process throughout.

10          That means studies, scoping issues, initially, study  
11          requests, all those steps, they have to be engaged in the  
12          beginning. They also need to make -- participate in the as-  
13          described Step 21, issuing their preliminary conditions as  
14          it's currently envisioned in Step 21.

15          They also -- and a part of their being actively  
16          involved throughout, it starts at Step 3(a) and 4, where  
17          they meet with FERC and with the applicant to review  
18          schedules and procedures, and coordinate and are very clear  
19          on how they're going to work together and lay out that  
20          licensing plan, and that's also essential for success.

21          So, this is a really important point that all the  
22          states agree needs, everybody agrees needs to have active  
23          committed state involvement from the get-go.

24          The second part is with the final application, final  
25          license application, you can have one of four things and

1 then the last bullet is the default if you don't have one of  
2 these four, so you can either have -- and the first three  
3 are as-written in the draft rule now: The certification, a  
4 copy of the certification request or a waiver; the new  
5 addition is, you could also potentially have an agreement  
6 between the applicant and the state for the certification  
7 request date.

8 So if you get that agreement in your license  
9 application, you would say and we agree; here's the date  
10 when we are going to file it.

11 If you don't get one of those four things, then the new  
12 proposed default is 60 days from the REA notice.

13 Get it right, group?

14 MS. KEIL: I have another question. So, what would you  
15 file at the default? One of the first three?

16 MS. WEST: You'd either be filing your application or  
17 request for certification.

18 MS. KEIL: Okay.

19 MS. WEST: Well, this is the fallback. It's really  
20 five options, but that is what you do if you didn't do the  
21 other four. John?

22 Okay, next slide.

23 (Slide.)

24 MS. WEST: Right, settlement agreement: Group I said  
25 add, that parties should be allowed -- this is post-

1       licensing and I'm not sure that's clear here, but post-  
2       licensing, parties may request to post filing. Parties may  
3       request a stay in the proceeding to accommodate settlement  
4       negotiations with checkpoints with the Commission every 60  
5       days. By "checkpoints," we mean it would be brief  
6       acknowledgement that they're doing well, let them continue,  
7       or it's a bust and maybe we need to stop, but not an  
8       elaborate description of what's going on in the course of  
9       the settlement discussions.

10               And that those settlements could continue for not  
11       longer than 180 days for the total negotiation period. What  
12       they mean here is that you stop the presses, hold things up,  
13       and proceed to negotiate effectively for 180 days.

14               After that time, you could still negotiate, but things  
15       proceed. You might be receiving draft EAs, et cetera, et  
16       cetera, and you'll have to begin to deal with things  
17       simultaneously.

18               Plans for the settlement negotiations should be  
19       discussed at any point, and as early as 3(a). The intent,  
20       if it is known at 3(a), should be expressed and discussed  
21       early on, and in any other step, it could be raised. Did I  
22       get it all right, group?

23               (Slide.)

24               MR. BARTHOLOMOT: This was actually a comment on the  
25       prior slide. I'm sorry.

1           It's on the sort of new bullet in the default. There  
2 is a lot of discussion about that and some anxiety, and I  
3 certainly share it. We don't want, on the 401 timing, to  
4 encourage states that may now be doing 401s before an  
5 application comes in, and be able to attach the  
6 certification to the application from continuing to do that.

7           There is not group consensus that it ought to occur  
8 here or there, but we certainly aren't trying to send a  
9 signal by this that it should occur later. It's trying to  
10 accommodate states, really, where they need to come later  
11 for certification, post-application.

12           Okay, last are some thoughts about the transition  
13 periods. We just finished the rearranging of the boxes.

14           (Slide.)

15           MS. WEST: Okay, this is another package. I think we  
16 need to look at it all together. We can allow the ILP and  
17 changes to the TLP and ALP, including the PAD used by the  
18 applicant immediately after the rule is adopted.

19           The minute the rule is in, anybody can sign up and take  
20 these changes and run with them. For applicants who choose  
21 an early implementation of the ILP, we have to acknowledge  
22 they are really paving the way; they're the pioneers we need  
23 to recognize.

24           FERC and other stakeholders should offer extra  
25 assistance and flexibility in achieving success. We all

1 need to acknowledge that it will take extra effort by  
2 everyone.

3 The intent is that we really want to make the ILP  
4 successful. The guinea pigs are the early testers. It's  
5 going to take a lot of work by everybody.

6 They should be rewarded and encouraged, and that means  
7 forgiving of mistakes, flexible understanding, so we can  
8 really try and figure out the kinks and make it work  
9 together.

10 With that, the ILP and all the rule default language,  
11 as drafted, the new default would be implementation of the  
12 ILP in one to two years. In the transition, if the  
13 applicant chooses the ILP or TLP or ALP, that's up to the  
14 applicant.

15 During that transition period of one to two years, all  
16 five options are still available. That means the new TLP,  
17 ALP, ILP that would be in the rule and the old current TLP  
18 and ALP.

19 And if the applicant chooses the TLP, the applicant  
20 notifies the stakeholders so that they've got a heads-up.  
21 Question?

22 MS. VERVILLE: Sarah Verville, Longview Associates.  
23 Clarification on the first bullet, the language including  
24 the PAD, is that suggesting that if the applicant chooses  
25 the TLP, they can issue a PAD, as opposed to an ITD; is that

1 what that means?

2 MS. WEST: If they so choose, yes. John?

3 MR. CLEMENS: As I look at that, I'm actually getting  
4 concerned about Bullet 1, because I'm not sure I understood  
5 that correctly. I'm just asking for a clarification.

6 Is the idea that the applicant would be able to choose  
7 any element of the revised TLP or any element of the ILP and  
8 apply it to an ongoing TLP?

9 MS. WEST: I don't think we meant that. It was just  
10 sort of for new folks about to file the NOI and having to  
11 choose. They could choose new processes immediately after  
12 the rule is adopted.

13 MR. CLEMENS: On September 1, you can say I want to do  
14 the ILD?

15 MS. WEST: Is that right? Yes. So it's not for things  
16 already underway. John?

17 MR. SULOWAY: John Suloway, New York Power Authority.  
18 In addition to what Anna was saying, though, I think we did  
19 mean there were certain specific changes that were proposed  
20 in the rule to the TLP.

21 We said, for instance, that the PAD was the obvious  
22 example and dispute resolution is another. We thought that  
23 if an applicant wanted to use that in the process that was  
24 going on, that they could do that, but they were the  
25 specific changes that were mentioned in the rule.

1 MR. FAHLUND: Andrew Fahlund, American Rivers.

2 I don't quite think of it that way, especially for an  
3 ongoing proceeding. When you talk about putting the dispute  
4 resolution process and dumping it in the middle of a  
5 proceeding that has not sort of been going from start to  
6 finish, step-wise, with people understanding that, I'm not  
7 very comfortable with that.

8 I thought it meant for a new proceeding.

9 MR. BARTHOLOMOT: Henry Bartholomot, EEI. I think that  
10 the group's focus was on an NOI that hasn't yet been filed,  
11 but we also talked off and on about our discussions,  
12 broadly, that the Commission has flexibility, for example,  
13 right now. You can get a modified TLP.

14 The element of the new rule looks attractive, not only  
15 to the applicant, but to the other stakeholders. And they  
16 would like to try that dispute resolution process.

17 The other comment I would like to make is, preceding  
18 this transition discussion, was the discussion on should the  
19 ILP need a default, and, if so, when?

20 You won't see it reflected here, but there was  
21 certainly a lot of robust discussion on that. We did not  
22 reach agreement, but certainly, on the licensee side, there  
23 was a concern.

24 MS. WEST: Just to clarify, the agreement is embedded  
25 in here with a longer transition time.

1           MR. BARTHOLOMOT: Right, but we had a concern that we  
2 pushed to the Concern column about that.

3           MS. WEST: There are a lot of concerns that have a lot  
4 of stakeholders, so I think we shouldn't repeat them all  
5 here, if we can help it.

6           I think it's in the record.

7           MS. SALZMAN: I think Bullet 1 means effective  
8 immediately. If people choose to use it, they can do so  
9 immediately.

10          MR. DIAMOND: David Diamond, Department of the  
11 Interior. I think it might help just to let people know  
12 that we were pretty narrowly focused in this discussion on  
13 those applicants who were going to be needing to put in NOIs  
14 during that transition period.

15          There was a real consensus in the group because there  
16 was a lot of uncertainty about what the new rules might be,  
17 that they would have a chance to essentially have these  
18 various options available to them. It was a discrete number  
19 of projects for a short period of time.

20          MS. WEST: Does that clarify it, John?

21          MR. MOORE: David Moore, Troutman Sanders.

22          I was concerned when we were going through this slide  
23 before, that we might not have had consensus on the  
24 language, and it looks like maybe we didn't.

25          But I think that one thing we wanted to provide for was

1       what David just mentioned, the opportunity to use a new  
2       process, if a licensee chose to.

3               I did also want to mention that one of the big issues  
4       was applicants who were being forced to produce significant  
5       documents like a P-80 in a very short timeframe.

6               There was a discussion regarding when an appropriate  
7       timeframe should be given, and there was a range from one  
8       year to five years that was given by the group.

9               MS. WEST: Last slide. That's it.

10              (Slide.)

11              MS. WEST: If the ALP has already begun and is approved  
12       by FERC, you're not required to go back and get new  
13       approval, even if the NOI has yet to be filed.

14              All right, there we go.

15              MR. KEARNS: Questions?

16              MR. SAWYER: Andy Sawyer, California State Water  
17       Resources Control Board.

18              We decided this was so much fun, we just couldn't stop  
19       when Anna had the break and put the slides together, so we  
20       continued to discuss another issue and actually reached what  
21       we call consensus on one other issue, and consistent with  
22       our practice, agreed that none of us can be trusted to  
23       present it, so we asked Ann Miles to present it.

24              (Laughter.)

25              MS. MILES: Thank you, Anna.

1 (Laughter.)

2 MS. MILES: We didn't have time for a slide, so this is  
3 it. This was the discussion in the extra half hour that we  
4 had. It was too late for the slide.

5 The recommendation that came out of it was to add  
6 language to the Section 10(j) process portion of the rule,  
7 which is in Section 5.25, to make it clear that Fish and  
8 Wildlife agencies can provide modified recommendations in  
9 response to the preliminary determination of inconsistency  
10 in the environmental document.

11 The exact language is to add at the end of 5.25(c) on  
12 page D-83, at the end of Sentence 1, and the language would  
13 be: Including any modified recommendations.

14 The intent is that this addition would not trigger a  
15 secondary preliminary determination of inconsistency. It's  
16 really making clear what is the existing practice. Any  
17 questions?

18 MS. WEST: Go group.

19 MR. JOSEPH: Just one clarification. I'm Brett Joseph,  
20 NOAA General Counsel. By providing the modified  
21 recommendations, according to current practice, that this  
22 would not be in lieu of modified recommendations that would  
23 be made, apart from the 10(j) process, in other words,  
24 following the draft NEPA document.

25 MS. MILES: Correct. This is just dealing with 10(j)

1 fish and wildlife agency recommendations, not any mandatory  
2 conditions.

3 MS. WEST: Thank you.

4 MR. KEARNS: For the next group of three, the Documents  
5 Group, I think Ann has things to hand out while we're trying  
6 to fix the microphones here.

7 MS. GUNNING: Ann Gunning with Kearns and West. I was  
8 the leader of the Documents Group.

9 I have two sets here, just so you know. Okay. This  
10 first set, I'm going to pass out on this side. You can just  
11 take one. We also decided to put this stuff on the record,  
12 so I will give one to the transcriber.

13 On this side, if you could just take one of each?

14 (Pause.)

15 Going on the left is one full package, and going on the  
16 right, it's two pieces, but it's the same thing. It was  
17 just copied at separate times.

18 (Pause.)

19 MS. GUNNING: We had some great conversation in our  
20 group, and I think came to some good consensus.

21 (Slide.)

22 MS. GUNNING: One of the key things our group wanted to  
23 reflect was that the composition of the group was not  
24 necessarily 100-percent reflective of the industry, and so  
25 the statement was made that we didn't have every kind of

1 hydro operator in there, every kind of NGO.

2 We had a good representation from states, however, and  
3 that was noted, but our group decided to describe themselves  
4 in this way: Essentially a group of stakeholders with some  
5 description, with an interest in hydro relicensing, and so  
6 just to clarify who came to the decisions that we came to.

7 The primary amount of our few days here were spent  
8 talking about the PAD, and we provided recommendations, both  
9 on guidance, specific language, and organization. The  
10 document that you have -- and some people have it in  
11 different ways, but the first few pages is a PowerPoint  
12 document, and attached to that are two pages of specific  
13 language.

14 The first page, called Suggested Language for Rule to  
15 Guide PAD Development, recommends to FERC, how they should  
16 suggest applicants prepare the PAD. I'll let you read it  
17 yourself, but what we've done is define what's expected of  
18 the applicant, things like due diligence, the amount of work  
19 they need to do.

20 We also recommended that there be early discussions  
21 with all stakeholders and tribes. We recommended that --  
22 and I'm not going, necessarily, in the order, but that a  
23 good, robust PAD will allow for more targeted study  
24 requests; a PAD that is not as quite high quality might see  
25 broader study requests.

1           We talked about the fact that there would be no  
2           expectation that new studies would be required for the PAD,  
3           but it was understood that additional resources would be  
4           required.

5           We also indicated that it was important that tribal  
6           interests and related federal laws be considered across all  
7           resource areas. And one other thing that I neglected to  
8           mention in the second bullet, is that it was also understood  
9           that stakeholders and tribes would have some understanding  
10          of what they were looking for in those early conversations,  
11          to help guide the PAD development, so that it's a joint  
12          group working closely together, trying to get a nice, solid  
13          document that was described by one of our group members as a  
14          cushion that we can all start with to go forward.

15          The second page attached -- and, again, some of you  
16          have it differently, but it should be right after -- we're  
17          still on the second; there we go -- was one of the key  
18          things we talked about -- and I mentioned this in our  
19          morning discussions -- was volume versus value and need.

20          And what the group determined is that different  
21          stakeholders are going to need different kinds of  
22          information, but that doesn't mean that the PAD should be,  
23          you know, 20 feet high so that everybody gets everything.

24          The thought was that those early conversations would  
25          help guide what people wanted. The summarization and

1 distribution protocol recommendations provided specific  
2 recommendations to FERC about how would the information be  
3 summarized or what kinds of information could be summarized  
4 in the PAD, with backup information inside, and then the  
5 backup information provided when you would like to have it.

6 The distribution protocol specifically explains how  
7 that information will get to people. The assumption is that  
8 it will be sent with the PAD to the stakeholders that  
9 requested it, but if not, there is a 20-calendar-day limit.  
10 If you're asked for it -- if it wasn't in the PAD and you're  
11 asked for it as an applicant, it should be provided within  
12 20 calendar days.

13 We also talked about the information and how it would  
14 be presented. There was discussion, lots of discussion of  
15 there are lots and lots of log books in different formats,  
16 tables, that kind of stuff.

17 The intent of the group, I think, was to make the  
18 information usable to the person who needs it, but not  
19 necessarily require the information provider -- I guess, in  
20 most cases, the applicant -- to have to do tons and tons and  
21 tones of work getting the data into some Excel spreadsheet  
22 or whatever.

23 And so it was understood that that would be discussed  
24 early on. We also clarified that not everybody has access  
25 to electronic format, so that there would always be an

1 opportunity for people to get a hard copy, if they wanted  
2 it.

3 Next.

4 (Slide.)

5 MS. GUNNING: We talked a lot about a bad PAD -- Tim  
6 hates that -- but we talked a lot about if a PAD is  
7 deficient or isn't going to meet the needs of the  
8 stakeholders, what happens?

9 And there were lots of different recommendations made.  
10 Later in the process, the bar would be lowered for  
11 additional information requests, other kinds of suggestions  
12 were made.

13 The group was able to agree -- and we put it back into  
14 the process, if the PAD was deficient, then FERC should  
15 require or could require -- should require the applicant to  
16 prepare a revised PAD, so that was the agreement of the  
17 group.

18 (Slide.)

19 We're giving you lots of documents here, because we are  
20 the Documents Group, after all. This

21 MS. GUNNING: This table, which maybe other groups have  
22 seen, reflects a series of specific edits that were agreed  
23 upon. Where they were agreed upon, the word, "Agreement,"  
24 appears. There's a lot of stuff we're throwing at you, but  
25 putting all of this -- you know, if we added tributary here,

1 and stream there, would have been just way too much for you  
2 to even stomach at this point in our process.

3 So you can take a look through, if you like. Our group  
4 members are here to ask questions of, but if the agreement  
5 was there, then it was agreed upon by the group to make that  
6 change.

7 Yes?

8 MR. BYRNES: L.G. Byrnes. I think it's important to  
9 bring up that the documents, the tabular documents that you  
10 have, essentially reflects -- it's a history of where we  
11 were.

12 And what you will see is that some of those things got  
13 resolved as you went on. So it's not -- you have to look at  
14 it as a history.

15 MS. GUNNING: Yes. Basically, this is the series of  
16 conversation throughout the few days we've been here, so you  
17 might see something early on, but we actually were able to  
18 come to agreement or not later on.

19 We also recommended that some of the redundant sections  
20 -- and there was specifically map requests and project  
21 description sections within the PAD requirements that had  
22 very similar requests, so the group asked FERC to  
23 specifically incorporate those. It was I into C and H into  
24 E, but the group also recommends that FERC take a look at  
25 the overall PAD requirements and reorganize it to reflect

1 similar requests and types of requests and different times.

2 One more slide. Next slide. You can go to the next  
3 one, thanks.

4 (Slide.)

5 MS. GUNNING: This document also reflects, as L.G. was  
6 good enough to point out, lots of discussion, conversation,  
7 and even recommendations by various group members that were  
8 not agreed upon, so you can look through this and see where  
9 people recommended specific language changes, general  
10 thought processes, that kind of thing. That will give you  
11 all something to do on the plane on the way home.

12 And that's it on PAD. Any questions, interests,  
13 concerns? Yes, John?

14 MR. CLEMENS: This is a real simple technical question.  
15 I'm looking at the transcript summary. This is the thing  
16 where there are a number of places where you have letters in  
17 paren like L or M or whatever. I wondered what those meant.

18

19 MS. GUNNING: We will need to probably write that on  
20 here for the record. We indicated the sector from which  
21 comments came, so L would be licensee, S would be state  
22 agency, F is federal agency, T is tribe, and N is NGO. I  
23 think that's all of them.

24 Anything else on PADs?

25 (No response.)

1 (Slide.)

2 MS. GUNNING: We had a short but good conversation  
3 around the cooperating agency's policy. What we have done  
4 here is list some of the items that were brought up and  
5 discussed.

6 There were lots of folks in the room who were very  
7 interested in combined processes, primarily to ensure  
8 integration, efficiency, and cooperation by parties.

9 However, there were questions of legality with regard  
10 to what FERC has proposed in regard to folks who are  
11 cooperating also being intervenors. As a matter of fact,  
12 the agency said they will maintain their intervenor status  
13 and so there was certainly no ability to come to agreement  
14 on a yes or no for this.

15 But there was lots of support for an opportunity to  
16 develop joint NEPA documents. That was at both the federal  
17 and state level.

18 One suggestion, in order to try to get an agreement on  
19 this, was that there could be some kind of a firewall set up  
20 where FERC decisional staff would be separate from analysis  
21 staff.

22 There were concerns from some about maybe that would  
23 impact the process. That was one of the things brought up  
24 as a suggestion, but no final agreement or recommendation on  
25 that.

1           MR. LINDERMAN: Ann, where are those slides, those last  
2 two?

3           MS. GUNNING: They're not in the package you have?  
4 They should be right after the PAD slides. If not, we'll  
5 get you some, Chuck. Perhaps the copier was having some  
6 issues, as I understand it, but -- you do have them?

7           MR. LINDERMAN: Yes.

8           MS. GUNNING: Anybody else?

9           (No response.)

10          MS. GUNNING: Great.

11          MS. MALLOY: There was a suggestion earlier that the  
12 facilitator -- it was a failure when the facilitator was  
13 presenting. I see it as fulfilling my role as tribal  
14 liaison, so you see that I have a success here.

15          (Slide.)

16          MS. MALLOY: We had an excellent meeting and came up  
17 with several things.

18          (Slide.)

19          MS. MALLOY: We discussed that there was concern that  
20 sometimes there is confusion between general consultation  
21 and the consultation required by FERC with tribes.

22                 So we proposed that we consistently refer to the  
23 consultation that FERC is required to do as tribal  
24 consultation, and other consultation as consultation, public  
25 consultation and general consultation.

1 (Slide.)

2 MS. MALLOY: We looked at tribal consultation beginning  
3 early, at the time FERC sends the letter of to the licensee  
4 of upcoming license expiration. FERC would also reach out  
5 to tribes and let them know that the license was expiring  
6 and this process was starting, and that we should not use  
7 just one source to find this information, that we should try  
8 multiple sources, including sending letters as we start to  
9 implement this new policy.

10 We need to find out if there are tribes out there that  
11 think they are affected by a project. We want to know so  
12 that we can make sure our records are complete as possible  
13 and that we know about them.

14 (Slide.)

15 MS. MALLOY: The process envisioned should be set out  
16 in the preamble, but there is a desire that the early tribal  
17 consultation process also be recognized in the regs early  
18 on, sometime between Box 0 and Box 3, and that there be a  
19 meeting and that this would sort of recognize that the  
20 consultation has begun.

21 So it is envisioned that it will have begun sometime  
22 before that.

23 (Slide.)

24 MS. MALLOY: There should be checkpoint throughout the  
25 process to ensure that this consultation is continuing, and

1 that there is a sensitivity to potential ex parte problems  
2 that would have to be done with that in mind in avoiding  
3 such problems.

4 (Slide.)

5 MS. MALLOY: We actually came up with language to be  
6 put in at the beginning of the process, in between 0 and 3  
7 on the little box. This is the language. We also developed  
8 language for what should be done in that meeting. We have a  
9 handout that has that language.

10 (Slide.)

11 MS. MALLOY: We also talked about a tribal liaison.  
12 There is general agreement that with the amount of projects  
13 that are coming up with tribal interests, that they should  
14 be regional.

15 The coordinators in D.C., as part of their jobs, they  
16 would work as facilitators between the tribes and FERC, and  
17 they would work as facilitators between tribes and  
18 applicants. They would act as a doorway for the Commission  
19 for the tribal consultation envisioned between FERC and the  
20 tribes.

21 It would be a mid-level staff member. It wouldn't be a  
22 clerical person; it wouldn't be a Commissioner; it would be  
23 somewhere in the middle with facilitation skills, the  
24 ability to know what's going on and how things would affect  
25 the different participants, not have decisionmaking

1 abilities, so it wouldn't be a project. Again, it wouldn't  
2 be a Commissioner type of thing, but it would be someone  
3 basically facilitating discussions and getting people  
4 together and making sure different areas know what's going  
5 on. It would not replace government-to-government  
6 consultation, but could be a part thereof, and it would work  
7 also with other agency tribal liaisons, and where other  
8 federal agencies would have tribal liaisons, they'd  
9 certainly talk and involve them, if necessary. Question?

10 MR. BYRNES: Yes, ma'am, this is L.G. Byrnes. I have a  
11 real quick question here: Bear with my ignorance here. On  
12 your next to the last bullet there, it says not replace  
13 government-to-government consultation.

14 Am I to understand that essentially with the tribes,  
15 there would be two sets of consultation, one that is  
16 occurring with the licensee, and then a separate that is  
17 occurring as one sovereign to another sovereign, and if  
18 that's the case, how does the licensee figure that into its  
19 relicensing process?

20 MS. MALLOY: The group discussed that there are sort of  
21 two kinds of consultations going on. The group discussed  
22 that FERC needs to recognize obligations it has, trust  
23 responsibilities and various obligations under statutes and  
24 treaties, and that there is also a general consultation.

25 There does have to be coordination in that as we go

1 through studies and processes, looking at the different  
2 concerns and areas of concern and issues and such, they have  
3 to be done in the general process, because it can't be done  
4 separately.

5 But there are certain areas that would not fit into  
6 that, and would need to be addressed in a different area.  
7 What the responsibility seems to look for is that FERC, with  
8 the tribes, would identify where there were areas that  
9 needed perhaps special attention or would help involve  
10 tribes and applicants in incorporating this into the general  
11 process. Am I getting that? Any time anyone thinks I'm not  
12 characterizing it properly, jump up and tell me. Yes?

13 MR. MASCOLO: Nino Mascolo, Southern California Edison  
14 Company. Is it anticipated that the license applicant would  
15 not be sitting in and listening to the government-to-  
16 government consultation? I'm assuming that all those  
17 consultations could still deal with project-related issues,  
18 since the project would be what is driving the government-  
19 to-government consultation or causing it to occur.

20 Would a license applicant be able to sit in and listen,  
21 so we understand what's happening?

22 MS. MALLOY: This particular meeting that's set up here  
23 is the touchpoint or just the placeholder type of thing.  
24 It's set up to be with the Commission, federal agencies and  
25 the tribe as the initial discussion on what the process

1 would be throughout.

2 The group did discuss that it's essential to involve  
3 the applicant and include in the general process, a lot of  
4 the steps that have to be undertaken, but there are certain  
5 things that the group felt that need to be identified,  
6 perhaps separately first, but that it not be an exclusive  
7 track that does not involve everything else. Does that  
8 answer your question?

9 MR. MASCOLO: Not really. The question is, is the  
10 applicant going to be able to sit in and listen during that  
11 government-to-government consultation and any government-to-  
12 government consultation meetings that take place after that?  
13 I'm not asking to participate.

14 MS. OWENS: Kim Owens, Department of Interior. I'll  
15 step into this.

16 There was a lot of discussion in the group about the  
17 fact that what is appropriate or adequate consultation may  
18 vary significantly from tribe to tribe. The important thing  
19 to recognize about this is that it is a meeting and a  
20 consultation between two sovereign governments.

21 It could be that in a particular instance, the  
22 governments may decide that it's appropriate to have the  
23 applicant sit in, but I don't think that as a general rule  
24 that we can say at the outset that the applicant would  
25 always have an opportunity to be in attendance, particularly

1 at the initial meeting.

2 MR. McMANUS: Brian McManus of Jones Day.

3 The regional liaisons, are they to be the same as the  
4 regional office presently is for hydro licensing?

5 MS. MALLOY: I think the group thought, at a minimum,  
6 that would work. There was a discussion that really even a  
7 smaller region would be preferable.

8 One thing we did discuss is actually looking at  
9 projects that are upcoming, that it may not be throughout  
10 the country, that there is a large group of them that would  
11 still be looking into -- we did discuss that the more you  
12 add, the more complicated it can become.

13 MR. BYRNES: L.G. Byrnes again. Let me ask this  
14 question: As representative of a sovereign, you go and talk  
15 to your brother sovereign. Would that record of discussion  
16 be put in the FERC public documents?

17 MS. MALLOY: The group actually didn't discuss that.  
18 Any other questions?

19 MR. SPRINGER: Fred Springer with Troutman Sanders.  
20 Let me, I guess, ask the continuing question that L.G.,  
21 Nino, and a couple of others asked:

22 The sovereign-to-sovereign discussions, would they in  
23 any way be able to affect the Commission's decision to the  
24 extent they are not in the record?

25 MS. MALLOY: Kim would like to answer that.

1 MS. OWENS: I think maybe what we're getting at here is  
2 some ex parte concerns, and I would point out that this is  
3 very early on in the proceeding when there are no  
4 interventions, there is not a contested proceeding. The ex  
5 parte rules are not triggered.

6 It is a point in the process where any party is free to  
7 talk to the Commission about anything. I don't know whether  
8 that alleviates folks' concerns, but I think that's what I'm  
9 hearing here.

10 MS. MALLOY: And I will tell you there was a lot of  
11 discussion in the group, and then I think we're being  
12 flagged here, but there was a lot of discussion in the group  
13 that what this is looking to do is establish the process of  
14 sort of a consultation, but it's not decisionmaking on  
15 issues.

16 FERC is ultimately going to make decisions, but this  
17 would be how to ensure that there's input of information and  
18 sharing of information and discussions of that. With that,  
19 I'll turn it over -- oh, we have one more slide.

20 (Slide.)

21 MS. MALLOY: Earlier, you couldn't help but notice that  
22 another group had on their slide as an accomplishment, that  
23 they referred something to our section.

24 (Laughter.)

25 MS. MURRAY: We took great pride in that.

1 MS. MALLOY: Our accomplishment is that we actually  
2 looked at it and agreed that this may fit the bill. So  
3 we've taken their accomplishment and added to it to make a  
4 success, really.

5 The language now would read: If applicable, explain  
6 the relevant resource management goals of the agencies or  
7 tribes with jurisdiction over or tribal treaty rights with  
8 respect to the resource to be studied.

9 We felt that covered it. Now, I'll turn it over.

10 MR. KEARNS: I think we need to do just a couple of  
11 more things before I turn it back to Tim. We need to talk  
12 just a little bit about the documents here, and I think -- I  
13 don't know what's going around. Session I is going around,  
14 my session? All right, it's going around.

15 That means that I need to say that for Session I, that  
16 is, while we did have a review, it was not finally edited  
17 and we were supposed to get that on the document itself.  
18 I'll also say that I think we spent most of our time on our  
19 overheads, and I think we feel really good about the  
20 overheads.

21 I need to qualify that. So I didn't know that was  
22 going around, so maybe I don't need to say any more about  
23 the documents, if they are all going around. For those who  
24 want them and have not yet gotten them, the piles are right  
25 here in front of John Katz.

1           Just a couple more things: I don't want to steal Tim's  
2           thunder here, but I think I can speak for most of you and  
3           maybe all of you, that I'd really like to compliment the  
4           Commission for this whole entire process. I think, just as  
5           an observer, it's been a very valuable opportunity for a lot  
6           of different interests to talk to FERC and to help them  
7           understand our interests and how better to accommodate those  
8           in any new rules.

9           I think that, on behalf of all of us, that we really,  
10          really appreciate that opportunity.

11          MR. WELCH: I was going to compliment FERC.

12          (Laughter.)

13          MR. KEARNS: The other thing I'd like to say, sort of  
14          from a facilitator's perspective, is that this has been a  
15          terrific group. What's the criteria for a terrific group?  
16          Well, one is really smart people -- check that off; people  
17          who will speak up in a group -- check that off; people who  
18          are courteous, particularly to the facilitator -- check that  
19          off.

20          (Laughter.)

21          MR. KEARNS: Certainly one that's very important are  
22          people who are very constructive in trying to accommodate,  
23          not only their own interests, but the interest of other  
24          people.

25          I'd like to recommend that we as a group, as we did in

1 Group I, give ourselves all a hand on how wonderfully we did  
2 in these past four days.

3 (Applause.)

4 MR. WELCH: Thank you very much, Ken. Once again, on  
5 behalf of FERC, I'd like to thank everyone for your hard  
6 work. After seeing these slides, it's become fairly evident  
7 that all the groups did a substantial amount of difficult  
8 and hard work, although Group III was probably a little bit  
9 more above everyone else.

10 (Laughter.)

11 MR. WELCH: But anyway, this sort of concludes our kind  
12 of second to the last phase of the rulemaking. As we said  
13 on Tuesday, we're going to take all this information that  
14 you have given us here in these last four days, the written  
15 comments, things from the transcripts of the public forums -  
16 - we're in the process. John is compiling all of this  
17 information.

18 Next week, we'll begin some of our discussions with our  
19 sister federal agencies, where we will be using a lot of  
20 this information to come up with specific language for the  
21 final rule.

22 Then, Commission Staff will spend the month of June or  
23 so, getting the rule or the draft of the final rule ready  
24 for the Commission, so that in July we're hopefully still on  
25 track for that.

1           You'll be looking for the final rule and then we're  
2 done. So, again, thank you for your hard work.

3           Then we actually have to do this stuff, so once again,  
4 thank you very much and everyone have a safe trip home.

5           (Whereupon, at 12:35 p.m., the meeting was adjourned.)

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## Dispute Resolution

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## Technical Advisory Meeting

- Recommended
  - To inform the dispute resolution panel
  - Open to all participants
  - Topics restricted to the dispute topic and reference to study criteria
  - Panel controlling on how they get info – emphasis on questions and answers
  - The meeting should be local (to facilitate attendance by state agencies and local stakeholders) but not in regulation
  - Held after written submittals and just before panel deliberations

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## Dispute Resolution Panel

- Recommended
  - Strict application of ex-parte rules
  - One panel could address multiple disputes grouped by topic areas (e.g., fish issues)
  - For multiple disputes in one panel, regulation indicates an agency representative but silent on how agency representative selected for panel
  - FERC would be the panel organizer and designate the chair

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## Other Topics Discussed



- Federal agencies will "abide by" the dispute resolution outcome if affirmed by Director.
  - Used only for the purpose of developing studies necessary for a license application, to pass substantial evidence test, related to their authorities under the FPA
  - Post license, could continue to impose conditions that could require more studies
  - Agencies reserve non-Federal Power Act responsibilities such as ESA, CWA
- Eliminating Director Role
  - Agencies more comfortable if panel decision reversible only by Commission

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## Other Topics Discussed



### Options discussed relating to FERC review of advisory panel recommendation (not agreed to):

- 5.13(k) The Commission will review and consider the recommendations of the panel with reference to the study criteria set forth in 5.10. If within 70 days from the date of filing notice of dispute the Commission does not issue a notice stating it will resolve the dispute, the findings and recommendations of the panel will be deemed adopted, including any recommended amendments to the study plan. If the Commission decides not to adopt the panel recommendations, in whole or in part, the Commission will issue a written decision that includes a detailed explanation of the basis of its decisions."
- Include additional detailed criteria for Director's decision

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## Other Issues



- Entities Capable of Initiating Dispute Resolution
  - No recommendation developed
- Participation in dispute resolution
  - Technical advisory meeting ameliorated some applicants and NGO's concerns
  - All participants can submit written materials to the panel

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## Study Criteria

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## Study Criteria

- Recommended improvements to criteria as currently proposed; not exhaustive of all concerns
  - 5.10(b)(2) changes referred to Tribal session
  - 5.10(b)(5) added phrase to relate study results to potential license conditions
  - 5.10(b)(7) added "level of effort" if cost was not appropriate
  - Preamble wording to indicate how the criteria were intended to be used.
    - Not a check list
    - All needed to be addressed

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## Recommend Criteria Changes

- 5.10(b)(5) Explain any nexus between project operations and effects (direct, indirect, and/or cumulative) on the resource to be studied; and *how study results would inform the development of license conditions*
- 5.10(b)(7) Describe considerations of costs *and/or level of effort*, and practicality, and why any proposed alternatives would not be sufficient to meet the stated information needs.

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## Conduct of Studies

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## Recommended

- Status report (5.14) is changed to a more summary document
- Status report (5.14) distinguished from status updates (5.8)
- Requirement for sharing study information and reports pursuant to approved study plan
- Study reports available to any stakeholders on request if have been provided to any other stakeholder as prescribed in study plan

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## Recommended

- Extend review times in 5.14(a)(4-5) from 15 to 30 days
- Add a "not later than" statement to time for filing initial status report
- Include the notion of reciprocity of information sharing (see 5.8(3) change)

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## Recommended



- 5.14(a) Initial Status Report (1) At an appropriate time following the first season of studies, the applicant shall prepare and file with the Commission an initial status report describing study progress and data collected to date and confirm that the approved studies are being implemented according to the study plan or explain any variation from the study plan.

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## Recommended



- 5.8(a)(3) Provisions for status *updates* and opportunities for a meeting or periodic meetings to evaluate the data being collected, *including the manner and extent to which information will be shared, and sufficient to allow technical review of the analysis and results.*

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# Hydroelectric Licensing Regulations



## Session: 2 Overall Process Agreements

Federal Energy Regulatory Commission  
Office of Energy Projects  
Office of the General Counsel

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# Licensing



Proposed TLP/ALP Criteria

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# Criteria For Requesting TLP



Guidance /Factors to Consider:

- ▶ Goals:
  - timely
  - better decision
  - protects public interest

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### Criteria For Requesting TLP



Guidance /Factors to Consider:

- Concepts embedded in ECPA/FPA
  - protect public interest
  - protect environment
  - keep costs reasonable
  - etc.
- Size of project
- Multiple dams in the basin

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### Criteria For Requesting TLP



Guidance /Factors to Consider:

- Level of controversy
- Level of involvement/interest by resource agencies, intent to exercise mandatory conditioning authority; anticipated resource issues
- Potential for significant disputes on studies

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### Criteria For Requesting TLP



Guidance /Factors to Consider:

- Tribal /ESA issues
- Project characteristics physical and biological
- Stakeholder input
- Licensee /stakeholder history
- Staff resource constraints (all)
- Amount of available information
- Compliance history

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## Criteria For Requesting ALP



- ▶ Current regulations still apply

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## Overall Timing, Schedules, and Time Frame



Proposed New Process Steps

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## NOI



- ▶ Licensee may file NOI early at their option and then formal proceeding commences

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## PAD



- PAD includes study plan outline
- Remove the revised PAD, strike first half box 6

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## Scoping Document #1



- Timing of SD #1, move 7 to 3a
- Box 7 was eliminated because SD #1 was moved and remainder of box is already included in box 6

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## Scoping Document #2



- All supported moving SD #2 sooner

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## Study Plan Comment and Meeting



- ▶ Box 8 and 9 will switch

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## Draft License Application



- ▶ Box 16.b-applicant files an "Applicant's Preliminary Proposal" document instead of DLA:
  - a range of PM&Es
  - proposed operations and
  - summary of environmental analysis supporting proposed operations and PM&Es
  - expect to be 20-40 pages
  - this is the default for filing
  - relates to study results
- ▶ Study results are available through other steps
- ▶ If there is a consensus that the process is better served without this document the licensee and participants can request a waiver.

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## Draft License Application



- ▶ Schedule included in step 4 includes proposed approach, plans to file document and when.
- ▶ If applicant wants to provide more information than the previous 20-40 page document or prepare a draft license application then it is ok.
- ▶ If there is not a DLA then AIRs, under extraordinary circumstances, may be allowed in the final application stage. Timing needs to be resolved.

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## 401 Certification Rule Language



- Applicant should file the paperwork consistent with what is required in each state (page D-78) 5.17 f.1.b
- Cross references in parts 4 & 16 should be consistent language throughout the rule preferably say it once and cross reference thereafter

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## 401 Certification Timing



### Pre-Amble

- For overall approach to work states need to recognize and be actively involved in work throughout. (studies/scoping/study requests)
- Issue preliminary conditions as planned in step 21
- Step 3a and 4 where the commission and state will discuss schedules and procedures face to face and with applicant to determine how to coordinate –essential for success.

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## 401 Certification Timing



- Final license application will include 1 of 4 options:
  - certification
  - copy of 401 certification request
  - waiver
  - agreement between applicant and state for certification request date
- If 1-4 options not included then default is 60 days from REA notice-

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# Settlement Agreement



- Allow parties to request a stay in the proceeding to accommodate settlement negotiations with check-in points to the Commission every 60 days (brief acknowledging parties agree it is succeeding) for not longer than 180 days for the total negotiation period.
- Plans and schedule for potential settlement negotiations could be discussed at any point as early as 3a

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# Transition



## Steps and Process

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# Transition



- Allow the ILP and changes to the TLP and ALP, including the PAD to be used by the applicant immediately after the rule is adopted.
- For applicants who choose to use ILP early, acknowledge they will be paving the way; FERC and other stakeholders should offer extra assistance and flexibility to help achieve success. Acknowledge it will take extra effort by all. (be forgiving on mistakes)
- Make ILP and rule default as drafted in the rule 1-2 years. In transition the applicant chooses the ILP or TLP or ALP. During the transition period of 1-2 years all five options are available, TLP/ALP/ILP, and new versions of TLP/ALP.
- Applicant notifies stakeholders if it chooses TLP.

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## Transition



- ▶ If the ALP has already begun and its approved by FERC you are not required to go back and get new approval even if the NOI has yet to be filed.

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FERC Workshop, Proposed Rulemaking  
Stakeholder Drafting Session  
April 29-May 2, 2003

**Session 2: Overall Process**

| Criteria for Requesting TLP  |                    |   |
|--|--------------------|---|
| Agreement  | Proposed Solutions | Recap Concerns/ Issues/ Comments  |
| <p>Guidance /factors to consider/set of considerations</p> <ul style="list-style-type: none"> <li>• Goals:               <ul style="list-style-type: none"> <li>-timely</li> <li>-better decision</li> <li>-protects public interest</li> </ul> </li> <li>• Concepts /guidance to consider               <ul style="list-style-type: none"> <li>○ Concepts embedded in ECPA/FPA                   <ul style="list-style-type: none"> <li>-protect public interest</li> <li>-protect environment</li> <li>-keep costs reasonable</li> <li>-etc.</li> </ul> </li> <li>○ Size of project</li> <li>○ Multiple dams in the basin</li> <li>○ Level of controversy</li> <li>○ Level of involvement/interest by resource agencies, intent to exercise mandatory conditioning authority; anticipated resource issues</li> </ul> </li> </ul> |                    | <ul style="list-style-type: none"> <li>• Industry- Some feel ILP/TLP/ALP all ultimately achieve the same results. Others don't.</li> <li>• New Projects-amount of information available not high</li> <li>• States, NGOs concerned TLP leads to more annual licenses.</li> <li>• Licensee noted annual license may not be bad. It does lead to later resource mitigation, but that leads to better local economic conditions and time can lead to better solutions.</li> <li>• Industry is concerned about higher level of public involvement in ILP</li> <li>• Other factors could be used as well.</li> <li>• Some industry do not believe that the TLP needs FERC approval, or if there is FERC approval that the use of guidelines other than meeting the public interest is not needed.</li> </ul> |

| <ul style="list-style-type: none"> <li>○ Potential for significant disputes on studies</li> <li>○ Tribal /ESA issues</li> <li>○ Project characteristics physical and biological</li> <li>○ Stakeholder input</li> <li>○ Licensee /stakeholder history</li> <li>○ Staff resource constraints (all)</li> <li>○ Amount of available information</li> <li>○ Compliance history</li> </ul> |                           |   |
|---|---------------------------|---|
| <b>Criteria for Requesting ALP Agreement</b>  |                           |   |
| <b>Agreement</b>  | <b>Proposed Solutions</b> | <b>Recap Concerns/ Issues/ Comments</b>   |
| <ul style="list-style-type: none"> <li>• Current regulations still apply</li> </ul>   |                           | <ul style="list-style-type: none"> <li>• Clarify that we are using current ALP selection process</li> <li>• All agree</li> </ul>  |
| <b>NOI</b>  |                           |   |
| <b>Agreement</b>  | <b>Proposed Solutions</b> | <b>Recap Concerns/ Issues/ Comments</b>   |
| <ul style="list-style-type: none"> <li>• Licensee may file NOI early at their option and then formal proceeding commences</li> </ul>  |                           | <ul style="list-style-type: none"> <li>• Benefit of ILP is imposed deadlines and need to be sure that any revisions retain deadlines.</li> <li>• Need tribal input from their breakout session</li> </ul> |
| <b>PAD</b>  |                           |   |
| <b>Agreement</b>  | <b>Proposed Solutions</b> | <b>Recap Concerns/ Issues/ Comments</b>   |
| Agent <ul style="list-style-type: none"> <li>• Add study plan outlines to the PAD</li> <li>• Remove the revised PAD, strike first half of box 6</li> </ul>  |                           |   |
| <b>SD 1</b>   |                           |   |

| Agreement   | Proposed Solutions   | Recap Concerns/ Issues/ Comments   |
|---|--|--|
| <ul style="list-style-type: none"> <li>Timing of SD 1,-move 7 to 3a</li> <li>Box 7 was eliminated because SD 1 was moved and remainder of box is already included in box 6</li> </ul> |  | <ul style="list-style-type: none"> <li>Resource agency said it is ok to move SD1 if SD2 remains.</li> <li>Licensee said SD 2 should still be optional.</li> <li>State agency proposed keeping current schedule since rearranging boxes will not save time or improve quality.</li> </ul>   |
| <b>SD2 (#14-old)</b>  |  |  |
| Agreement   | Proposed Solutions   | Recap Concerns/ Issues/ Comments   |
| <ul style="list-style-type: none"> <li>All supported moving it sooner</li> </ul>  | <ul style="list-style-type: none"> <li>Majority support moving it between 5-6</li> <li>1 person supports moving it to 11</li> <li>Some are ok if it is either 5 or 6 or 11</li> </ul>  |  |
| <b>Study Plans</b>  |  |  |
| Agreement   | Proposed Solutions   | Recap Concerns/ Issues/ Comments   |
| <ul style="list-style-type: none"> <li>Boxes 8 and 9 switch</li> </ul>  | <p>Two proposed solutions but did not fully agree on either:</p> <p>-Licensee proposed swapping 9 and 8 from yellow book schedule, without a second meeting.</p> <p>-Resource agencies /NGOs preferred having a meeting, comment period and then another meeting</p> | <ul style="list-style-type: none"> <li>Licensee thinks regulations should require only one meeting although additional meetings are encouraged</li> <li>The additional meeting allows informal time in first meeting to understand study plans which would reduce need for comments, then file comments and then hold a meeting to reconcile comments between stakeholders and applicant.</li> <li>Licensees question if comment period could be 45 days instead of 60</li> <li>Some stakeholders question if this saves us any time.</li> <li>Applicant needs time to prepare revised study plans.</li> <li>Resource agency-one wanted as long as possible</li> </ul> |

|  |  |   |
|--|--|---|
|  |  | <p>to collaboratively develop study plans and thinks that a collaborative development will be best. Suggested filing comments at the same time as the revised study plan.</p> <ul style="list-style-type: none"><li>• Others raised concern that they would not be able to properly comment on the revised study plans, which would lead to extra steps later in the process.</li><li>• Some licensees said that the ILP does not assume collaboration.</li></ul> |
|--|--|---|

| <b>Overall Timing, Schedules, and Time Frame-Draft License Application</b>  |  |  |
|---|--|--|
| <b>Agreement</b>  | <b>Proposed Solutions</b>  | <b>Recap Concerns/ Issues/ Comments</b>  |
| <ul style="list-style-type: none"> <li>• 16.b: applicant files a document: an “Applicant’s Preliminary Proposal” document instead of DLA <ul style="list-style-type: none"> <li>-range of PM&amp;Es</li> <li>-proposed operations and</li> <li>-summary of environmental analysis supporting proposed operations and PM&amp;Es.</li> <li>-expect to be 20-40 pages</li> <li>-this is the default for filing</li> <li>-relates to study results</li> </ul> </li> <li>• Study results are available through other steps</li> <li>• If there is a consensus that the process is better served without this document then the licensee and participants can request a waiver</li> <li>• Schedule included in step 4 includes proposed approach, plans to file document and when.</li> <li>• If applicant wants to provide more information than the previous 20-40 page document or prepare a draft license application then it is ok.</li> <li>• If it is not a DLA then AIRs, under extraordinary circumstances, may be allowed in the final application stage. Timing needs to be resolved.</li> </ul> | <ul style="list-style-type: none"> <li>• Licensee proposes eliminating the draft application as a requirement –group did not agree</li> <li>• Industry proposed issuing PM&amp;E and analysis but not unrelated exhibits –not group agreement.</li> <li>• NGO-proposed a revised PAD with PM&amp;Es instead of draft app.</li> </ul> | <ul style="list-style-type: none"> <li>• Licensee said that the draft application is an unnecessary document and takes time that could be spent on study plans or other important and necessary information or activities.</li> <li>• Some state agencies require a draft application ahead of filing final.</li> <li>• NGO likes iterative process but could live without a draft app if AIR filing could be moved to final application stage.</li> <li>• State says the draft application defines the project. PM&amp;Es and analysis and clearly stating the project ahead of time in the process increased efficiency and quality. Saves work from later down the road. Helps focus and therefore increases efficiency and quality post filing final app.</li> <li>• Licensee-a draft application is not helpful if studies are not complete.</li> <li>• Fed agency finds value in draft application because it invites early conditions from agencies.</li> <li>• Licensees concerned; want to be sure that AIRs with the final application are only allowed under extraordinary circumstances.</li> <li>• It is recognized that the recommendation to have extraordinary AIRs allowed at the final application poses timing questions that need to be addressed (where it occurs; comment period, etc.).</li> <li>• Supported by all.</li> </ul> |

| <b>401 Certification -Rule Language Agreement</b>  | <b>Proposed Solutions</b> | <b>Recap Concerns/ Issues/ Comments</b>   |
|--|---------------------------|---|
| <ul style="list-style-type: none"> <li>• Applicant should file the paperwork consistent with what is required in each state (page d-78) 5.17 f.1.b</li> <li>• Cross reference in parts 4 by 16 should be consistent language throughout the rule preferably say it once and cross reference thereafter</li> <li>• Some prefer the language to be in section 5</li> <li>• Others prefer that it not be in section 5, 3.2 and 3.8 are other areas where it should be.</li> </ul>   |                           |   |
| <b>401 Certificate Timing. Agreement</b>   | <b>Proposed Solutions</b> | <b>Recap Concerns/ Issues/ Comments</b>   |
| <p>Pre-Amble</p> <ul style="list-style-type: none"> <li>• For overall approach to work states need to recognize and be actively involved in work throughout. (studies/scoping/study requests)</li> <li>• Issue preliminary conditions as planned in step 21</li> <li>• Step 3a and 4 where the commission and state will discuss schedules and procedures face to face and with applicant to determine how to coordinate –essential for success.</li> </ul> <p>Agreement</p> <ul style="list-style-type: none"> <li>• Final license application will include 1 of 4 options:<br/>-certification</li> </ul> |                           | <ul style="list-style-type: none"> <li>• Concern about need to respect state procedures for each 401 issuance.</li> <li>• Some do not want to discourage states from pre-application 401 certification.</li> <li>• Others do not like early 401 certification since all information is not in and determining conditions could be premature.</li> <li>• Many support, 1 does not, several abstained.</li> </ul> |

|  |                           |  |
|--|---------------------------|--|
| <ul style="list-style-type: none"> <li>-copy of 401 certification request</li> <li>-waiver</li> <li>-agreement between applicant and state for certification application date</li> <li>• If 1-4 options not included then default is 60 days from REA notice</li> </ul>  |                           |  |
| <b>Settlement</b>  |                           |  |
| <b>Agreement</b>   | <b>Proposed Solutions</b> | <b>Recap Concerns/ Issues/ Comments</b>  |
| <ul style="list-style-type: none"> <li>• Application for post-filing: Allow parties to request a stay in the proceeding to accommodate settlement negotiations with check-in points to the Commission every 60 days (brief, acknowledging parties agree it is succeeding or not) for not longer than 180 days for the total negotiation period.</li> <li>• Plans and schedule for potential settlement negotiations could be discussed at any point as early as 3a.</li> </ul> |                           | <ul style="list-style-type: none"> <li>• All supported, 1 abstained wanting to leave open time for extra negotiation.</li> </ul>   |
| <b>Transition</b>  |                           |  |
| <b>Agreement</b>   | <b>Proposed Solutions</b> | <b>Recap Concerns/ Issues/ Comments</b>  |
| <ul style="list-style-type: none"> <li>• If the ALP has already begun and its approved by FERC you are not required to go back and get new approval even if the NOI has yet to be filed.</li> <li>• -Allow the ILP and changes to the TLP and ALP, including the PAD, to be used by the applicant immediately</li> </ul>   |                           | <ul style="list-style-type: none"> <li>• Original license for unconstructed projects has transition ISSUES which are different from relicensing such as the original permit study and this needs to be dealt with by FERC.</li> <li>• Some provisions to apply immediately were requested, but did not identify which ones.</li> <li>• Recommendations ranged for time frames for preparation of NOI with PAD from 1-5 year transition period before PAD requirements</li> </ul> |

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|---|--|--|
| <p>after the rule is adopted<br/>         -For applicants who choose to use ILP early acknowledge they will be paving the way; FERC and other stakeholders should offer extra assistance and flexibility to help achieve success. Acknowledge it will take extra effort by all. (be forgiving on mistakes)<br/>         -Make ILP and rule default as drafted in the rule 1-2 years. During the transaction period of 1-2 years all five options are available TLP/ALP/ILP, and new versions of TLP/ALP.</p> <ul style="list-style-type: none"> <li>• Applicant notifies stakeholders if it chooses TLP.</li> </ul> |  | <p>applicable.</p> <ul style="list-style-type: none"> <li>• Licensee spoke to benefit of road testing prior to full implementation.</li> <li>• -All approved except one who abstained due to length of transition time.</li> </ul> |
|---|--|--|

**10(j)**

| <b>Agreement</b>   | <b>Proposed Solutions</b>   | <b>Recap Concerns/ Issues/ Comments</b>  |
|--|---|--|
| <ul style="list-style-type: none"> <li>• Final agreement reached. See record from 5/02 session.</li> </ul> | <ul style="list-style-type: none"> <li>• Proposed solution D-83 5.25C end of sentence add: “include any revised recommendation.”</li> </ul> | <ul style="list-style-type: none"> <li>• Purpose is to address inconsistencies across recommendations and conditions and information from the environmental analysis</li> <li>• Concern, would it lengthen the process causing two rounds?</li> <li>• Benefit allows recommending agencies to see mandatory conditions at the same time and gives them time to review the environmental document.</li> </ul> |

**Combine Final Application with FERC DEIS/DEA**

| <b>Agreement</b> | <b>Proposed Solutions</b> | <b>Recap Concerns/ Issues/ Comments</b> |
|------------------|---------------------------|---|
|------------------|---------------------------|---|

|   |   |   |
|---|---|---|
| (No agreement)  | <ul style="list-style-type: none"> <li>Some suggested eliminating 22b</li> </ul>  | <ul style="list-style-type: none"> <li>Proponent suggests that equivalent information is in license application, APEA or Third party EIS</li> <li>Want FERC to issue draft EA/EIS</li> <li>Question timing since need REA and then issue DEA/DEIS</li> <li>Best benefit is to issue a joint environmental document (Fed and state agencies); can't do it if licensee prepares APEA</li> <li>Not sure it saves time since still need public notice; accept application and issue REA; need #21 to inform the EA</li> <li>It may save time after filing, but this isn't the crunch</li> <li>NGOs don't like #22a</li> </ul> |
| <b>401 Certification and CZMA Coordination-State Transition Agreement</b> | <b>Proposed Solutions</b>   | <b>Recap Concerns/ Issues/ Comments</b>   |
| (No agreement)  | <ul style="list-style-type: none"> <li>If application is filed X days after the new rule then new 401 certificate provisions apply (proposed not agreed)</li> <li>Needs to acknowledge it's an option.</li> </ul> |   |
| <b>TLP/ILP/ALP -Who Chooses Agreement</b>                                 | <b>Proposed Solutions</b>   | <b>Recap Concerns/ Issues/ Comments</b>   |
|   | <ul style="list-style-type: none"> <li>Some want FERC to decide.</li> <li>Some want licensee to decide.</li> </ul>  | <ul style="list-style-type: none"> <li>WHY FERC</li> <li>State agency-FERC should decide because fear that licensee would use TLP, licensee choosing TLP often delays studies. Existing process doesn't work well. It's a public resource and not only the licensee and therefore FERC needs to decide. Licensee resistant to change.</li> <li>NGO-FERC takes responsibility for what the</li> </ul>  |

|  |  |  |
|--|--|--|
|  |  | <p>process will be and makes the process work, while listening to the licensee.</p> <ul style="list-style-type: none"><li>• WHY LICENSEE</li><li>• Licensee-used to using it, familiar, comfort level with mgmt. Licensee bears the burden. Time-tested. Constructed to address studies and concerns</li></ul> |
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## Documents Group

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## Group Composition

- Document group was a group of stakeholders (including applicants, federal agencies, state agencies, tribes and NGOs) with an interest in hydro relicensing

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## Preliminary Application Document

- Agreements
  - Recommendation that FERC include additional language to guide the development of the PAD. (See Suggested language for rule to guide PAD development)
  - Language recommendation to FERC for a summarization and distribution protocol. (See Summarization & Distribution Protocols)

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## Preliminary Application Document



- Agreements (continued)
  - If FERC decides that a PAD is deficient FERC should require the applicant to develop a revised PAD.
  - Series of specific edits to some sections of the PAD. (See Draft Discussion Transcript Summary)

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## Preliminary Application Document



- Agreements (continued)
  - Combine redundant sections related to map requests (incorporate section I into C) and project descriptions (incorporate section H into E).
  - Group recommends that FERC reorganize PAD to reflect similar subject areas and priorities.

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## Preliminary Application Document



- Other
  - Discussion and varying levels of agreement around a series of recommendations and proposals on specific PAD language and concepts. (See Draft Discussion Transcript Summary)

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## Cooperating Agencies Policy



- Good discussion regarding
  - Interests in combined processes, integration, efficiency and cooperation by almost all participants
  - Questions of legality of this policy by some
  - Agencies will maintain intervener status
  - General support for the opportunity for joint NEPA document (federal and state)

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## Cooperating Agencies Policy



- Suggestion that separate FERC staffs (firewall) would reduce ex parte concerns, but some also felt it would reduce the effectiveness of cooperation

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## **Suggested language for rule to guide PAD development.**

The type and amount of information in the PAD should be commensurate with the scope and impact of the project and its effects that are reasonably known, available and relevant. The applicant is expected to conduct reasonable due diligence (a reasonably calculated, documented effort to find what information exists or does not exist regarding the project and project area) in the collection and presentation of information with the understanding that individual project circumstances require flexibility in the type and amount of information provided.

Note: This should be considered overall guidance for subsection (G) and others as appropriate.

(N)- believed concept of 'due diligence needs further consideration'  
(F)-heartburn – narrowing of requirements not good  
(S)- concern: with inability to request additional info later in process.  
(L & S)- would like FERC to wordsmith these ideas. (use CWA "All readily available and existing information related to, 40 CFR part 131 303(d) list)

## **Group thoughts to guide PAD development.**

- All stakeholders will benefit from a thorough PAD. A high quality PAD will help guide targeted study requests. A poor quality PAD broadens study requests. A robust PAD provides the foundation for scoping and application & final license conditions.
- Early, robust, iterative discussions with state and federal agencies, tribes, NGOs and others can guide specifics about the type and amount of information in individual project PAD development. Agencies, tribes, NGOs and other stakeholders should inform the applicant what information they are likely to need during these early discussions.
- There is no expectation that new studies will be conducted to collect PAD related information. However, it is understood that resources will be required to compile the information for the PAD.
- Tribal interests and related federal laws need to be considered across all resource areas.

## SUMMARIZATION & DISTRIBUTION PROTOCOL

### SUMMARIZATION PROTOCOL (agreement in principle)

When appropriate, the applicant may (refer back to discussions 5.1(d)) incorporate by reference certain high-quantity information to include in this document to avoid burdening all parties with voluminous information. The goal is to target the needs of various stakeholders, agencies, and tribes.

- Such information may include volumes of raw data and existing studies.
- Such information must be summarized in the relevant section of this document.
- Such information should be summarized using various methods of summary, as appropriate and as discussed. (ex: Number data = number summary, word info = word summary)
- An appendix to this document shall include an adequate description of all materials summarized in this document. The appendix will be prefaced with instruction on the method of inquiry to obtain any material summarized.

### DISTRIBUTION PROTOCOL

Where summarized, such information must be readily available in the appropriate format upon request to the applicant by any agency, tribe, state, or other stakeholder.

- Upon receiving request, the applicant must deliver the information to the requester within 20 calendar days.
- The form of the information will be presented in a manner mutually agreed upon by the applicant and the requester. (clarification: this does not mean that the applicant must transcribe info into electronic form)
- The applicant should be prepared for this responsibility by keeping the information available and in various necessary formats.

# Draft Discussion Transcript Summary

FERC Workshop, Proposed Rulemaking  
Stakeholder Drafting Session  
April 29-May 2, 2003

## Session 3: Documents

| Topic  | Recap Concerns/ Issues  | Proposed Solutions   | Comments   |
|--|---|--|--|
| <b>Content of Pre-Application Document</b>   |   |  |  |
| Purpose, usefulness, Need                    | (S) - D-50 5.4 & part G = starting line for review of additional studies needed.<br>Question – Why not do this early if it is required? | <b>Agreement</b> Early start would be beneficial.  | (L) – Believe pre consultation is necessary for effective development.   |
| Section by section discussion of PAD content | Language clarification D-50 “reasonably available, known and available”? What does this mean?   | <b>Agreement</b> that a core amount of info for the PAD & NEPA doc is required. Need clarification on due diligence required to get this info.   | FERC explanation of ‘known & available’ Info available on request from agencies & stakeholders?                            |
|  | (L) - Proposal to change language to reduce detail of info needed within hardcopy PAD.  | Much of this info is available from other sources, must it be included in full detail in the PAD or is general description/summary reasonable for non-issue items? What about offering an additional means to receive detailed info as needed? | How do we make this info accessible?<br>How does this affect timing with other info needs within the PAD?<br>Availability? |
|  | What information is necessary within the PAD?   | Info within PAD should be commensurate with scope and impact of project  |  |
|  | What level of detailed info is required?  | Need increased specificity in requirement language   |  |

| Topic                                   | Recap Concerns/ Issues  | Proposed Solutions  | Comments   |
|---|---|---|--|
|   | Language clarification D-51 2(B)  | <b>Agreement</b> Change language to 'summary of consultation' as per 5.1 d  |  |
|   | Language clarification D-51 2(D)  | <b>Agreement (L)</b> – suggest clarification of basin to be identified, 'in the area in which the project is located'. 'Which may include'  |  |
|   | Language clarification D-51 2(D)  | <b>Agreement (L)</b> Suggestion - Dams diversions, Hazardous sites, 'in immediate area of the project basin'  |  |
|   | Language clarification D-51 2(G) (ii) (S) – Concern: line 2 'to extent known and available' major concerns re: how this phrasing will / could be interpreted. | Need stakeholder definition of 'known and available'  | FERC explanation of 'known & available' Info available on request from agencies & stakeholders |
| Roll out of new process and its effects | (L) – potential process issue: waivers, i.e. project caught in transition of license process. Plus, training for participants                                 | Propose new process should be considered, i.e. FERRIS info on new process.  |  |
| Info collection and sharing             | Concern (T) - Tribal need, awareness of treaty rights, sovereign sites, cultural resources and compliance with all pertinent laws.                            | As a federal agency, FERC should fulfill its federal law trust obligations for Tribal cultural and religious laws.  |  |
|   |   | <b>Agreement</b> – no expectation to do studies specifically for the PAD, existing info only.   |  |
|   | Concern (L) - what is the level of effort required to acquire / collect info.   | (S)- Recommendation: Require agency and stakeholder communication. FERC should include language that describes this.<br><br>(S)- FERC should provide guidance on up front communication re: info gathering. | (F)- D-56 J Issue list IDs info gaps and thus study needs thus must provide all info.          |

| Topic                                      | Recap Concerns/ Issues  | Proposed Solutions  | Comments  |
|--|---|---|---|
| Defining 'known, available and reasonable' | <p>(S)- remove this language or provide clarification</p> <p>(As noted above - Language clarification D-51 2(G) (ii) (S) – Concern: line 2 'to extent known and available' major concerns re: how this phrasing will / could be interpreted.)</p> |   | <p>(L)- keeping this language allows flexibility making rule practical. Helps process.</p> <p>(L)- Case by case issue/definition. Not generally definable.</p> <p>(S)- Consequences to not enough specificity</p> <p>(S)- Terms that make sense = due diligence, informed searches and standards for this. Suggest 'applicable' be deleted from the hydro sections, replace with 'commensurate with scope &amp; scale'</p> <p>(T)- Tribes are sovereign. These issues need to be addressed. Best available science does not always reflect spiritual beliefs. Impacts should be observed from the beginning of the project, i.e. 1st impacts.</p> <p>There was an understanding within the group that 'known, available &amp; reasonable 'will be defined differently in all cases.</p> |
| Requests for FERC                          | Need for clarity with regard to PAD process   | Provide boiler plate info for PAD process. Provide description of entire process for clarity. |   |

| Topic  | Recap Concerns/ Issues   | Proposed Solutions  | Comments  |
|--|--|---|---|
|  |  | (N)- FERC should review the reorganization suggestions provided by this group   |   |
|  |  |   | (S)- Suggestion - info need requests should be made by stakeholders & tribes in pre-consultation.<br><br>(L)- Suggestion that Stakeholders identified and included in the FERC advance notice of need to relicense. |
| Requests for Language changes re: PAD requirements |  | (S)- Background from field, 401 cert. etc. D-52 part 3 2nd line remove 'should' replace with 'will'; remove 'applicable'<br><br>In subsections (a) replace 'monthly' with '25 yr' replace 'max' with 'median daily'; (c) c) Add accepted EPA protocols and detection limits; (e) add sediment budget. | (L)- Licensees do not agree with these changes.<br><br>(S)- Important to consider and use existing protocols re: data collection and evaluation.  |
|  | (L)- concerned that 'existing' info language can create and expectation of need for study(s) for the PAD | <b>Agreement</b> - All stakeholders agree that no NEW studies are expected for the development of the PAD   |   |
|  | (S)- Need increased clarity of scope for specific sections   | <b>Agreement</b> - to change the following D-53(iv) Fish and aquatic resources. Add 'and tributaries' after 'upstream and downstream' 'existing aquatic communities such as fish, mussels & macro inverts.  |   |
|  |  | No agreement on the following change - (S)- D-53 after section (iv) add new section (c) Would like historic record of fisheries aquatic community info.   |   |

| Topic | Recap Concerns/ Issues   | Proposed Solutions  | Comments  |
|-------|--|---|---|
|       | (L)- Breadth of info requested is too wide for the socioeconomic section (xi)  | <p>(L)- This section may not always be used, would like language that makes it necessary where relevant. Have licensee describe how project affects local county, employment, taxes etc. Scale down to achieve this.</p> <p>(S)- Section is necessary for new project license and significant project improvements, i.e. dam enlargement.</p> | <p>(N)- FERC determines easily accessible info. Also when recreation economy effected by project this section is relevant.</p> <p>(T)- FERC to consider racial profiling concerns.</p> <p>(S)- This is a FERC requirement in NEPA</p> <p>(S)- This section is a CEQA requirement, thus necessary.</p> |
|       |  | <b>Agreement</b> - (S)- D-54 (vii) add words ‘candidate and special status species’ (vii) recreation & land uses – use language ‘special designation fishing areas’   |   |
|       |  | <b>Agreement</b> - (L)-Proposal:<br>-combine sections D-56(I) and D-51(C)<br>-combine sections D-56(H) and D-51(E)  | Same topics/material, put into one section.   |
|       |  | Disagree (S)- Proposal - For section (C) add ‘adjacent non project licensee owned land within project area’   |   |
|       | Section (K)(i) (S)- structure of licenses historically and present. Summary of the license provisions currently applicable with means to get all detailed info, ex: license articles, operations orders. Available upon request. | <b>Agreement</b> - (L)- would Summary of environmental compliance record/history that affects the public be sufficient? Yes.  |   |

| Topic         | Recap Concerns/ Issues   | Proposed Solutions  | Comments   |
|---------------|--|---|--|
|               | Section (K)(iii)<br>(S)- feel this does not include/complaint compliance, would like to add. Something that affects public use of land, re: recurring problem. | Agreement (L)- Interpretation of (iii) acknowledgement of situations of non-compliance that is reoccurring.   |  |
|               | Concern that bulleted study plan proposed by the process group, would be premature.  |   | (S)- Bulleted list of study plan items info state agencies anticipate issues<br><br>(S)- good to ID issues, but bulleted study plan should not be considered an exhaustive list later in the process |
|               | Concern regarding clarification of source of info for development of Scoping Document in (J)   | (S)- Re: section (iv) questions on language in (J), How is this doc created. Suggestion of language to add to (J) 'based on missing data from section (G)'  |  |
| Volume of PAD | (L)- Concern that PAD as is described contains large amounts of info/data that make creation and dissemination clumsy.   | (L)- Make statement of availability upon request for entities/agencies that need it. "available upon request within an (x) day period"<br><br>(N)- propose including an appendix that includes all docs available upon request. |  |
|               |  | <b>Agreement</b> - Section K(iii) summary of compliance record with access made available to detailed info as wanted/needed   |  |
|               |  | Section K(iv) (L)- proposal to remove hard copy 'library' requirement, replace with commitment to provide all info/data etc upon request.   | (S)- want more the 5 yrs of data and worried about time it could take to receive data.<br><br>(T)- electronic access does not meet everyone's needs.   |

| Topic | Recap Concerns/ Issues  | Proposed Solutions   | Comments   |
|-------|---|--|--|
|       |   | <p><b>Agreement</b> - Section (P) include information protocol, or how applicant will provide info &amp; time frame. i.e. more specificity. Must be conscious of how this is affected by non ILP license procedure.</p> <p><b>Agreement</b> - (L)- D-57 (P) add language pointing out level of info, timing and to whom. (see handout)</p> | <p>(S)- agree with need to reduce volume of PAD, however availability is a concern. Timing requirement</p> <p>(L)- From experience, public library does not get used.</p> <p>(N)- need to facilitate efficient information sharing. Want timelines that work for all stakeholders. Consultation ahead of PAD development is important, simultaneous information sharing with stakeholders.</p> <p>(L)- the import of the ‘library’ language is not realistic. Need stakeholder &amp; tribe distribution protocol with timelines.</p> |
|       | <p>Concern 5.4 D-56 section (K) (S)- issues K(v) ‘ five yrs’ some instances that &gt;5yrs info could be useful, specifically generation figures &amp; flows. Not interested in maintenance.</p> |  | <p>Concern (L)- does generation, maintenance info in (v) all need to be included/provided? Do not want to provide all this info to public. Except total annual actual generation, which will already be available. (proprietary information)</p> <p>(N &amp; S)- want to know ‘total value of annual generation and annual operation and maintenance costs’</p>  |
|       | <p>(L)- Suggestion K (vii) – delete, make sure that transmission lines are shown in other sections/mapping. FERC – has this ever been used??</p>  |  |  |

| Topic                          | Recap Concerns/ Issues  | Proposed Solutions  | Comments  |
|--------------------------------|---|---|---|
|                                | (L)- Suggestions:<br>D-56(L)(i) state date of approval emergency action plan<br>D-56(L)(ii) delete<br>D-56(L)(iii, iv & v) want summary of this info, info/data available upon request. |   | (S)- D-56(L)(iii & v) interest in this info, use to inform re: project, + a version/form of (iv) (CA & Wis.)  |
|                                | (L)- Suggestion: From end of section (M) through (O) seems unnecessary, suggest removing.   |   | (S)- Do not remove section (M) helps understand energy value, planning etc.<br><br>reference D-76 5.17 subparagraph K, i.e. above section appears in another section. |
|                                |   | <b>Agreement</b> – D-57 section (M) accept a summary of info with reference to more detail/data etc, especially b/c is a requirement for application. |   |
| Tribal concerns                | Need tribal involvement in all aspects of water resources.  | Ensure tribal issues/concerns considered/involved across all issues.  |   |
|                                | D-53 ‘and cultural value’, must be included<br>re: 25yr record of data provides statistical relevance, should be default.   |   |   |
|                                | Concern (T)- Need early tribal involvement, recommend that new rules set with regard to communication with tribes compared to stakeholders.   |   |   |
| General process/clarifications | Concern (F)- concern with movement of SD1, how will this affect later processes?  |   |   |

| Topic | Recap Concerns/ Issues   | Proposed Solutions  | Comments  |
|-------|--|---|---|
|       |  |   | (L)- Front loading of process is generally good, but diminishing returns exist  |
|       |  |   | (L)- Understanding/clarification with FERC. PAD is father of SD1, SD1 is father of SD2  |
|       | (S)- What is the penalty for late PADs? Penalties exist in FPA   |   |   |
|       | <p>(N)- What about patently deficient PADs?, this could delay process. How do we insure against this?</p> <p>(S)- Needs to be consequences for not meeting deadlines. How do you create accountability? Not only for the extreme cases.</p> <p>Where does discussion of penalties go within the doc? Where would FERC exercise penalties (5.26 or 5.28)?</p> | <p>(N &amp; S)- ideas for addressing deficient PAD, PM&amp;E on annual licenses? Broader studies?</p> <p>Proposal FERC – conditional removal of 2nd PAD, if need/requirements of PAD are met. If PAD needs not met 2nd version is required.</p> <p>Proposal (F)- Additional consequences proposed: More opt. for additional study request throughout study period. Or consultant to fill in gaps with PAD Licensee to pay for this work.</p> <p>(S)- Deficient PAD should halt relicensing process, penalty assessed.</p> <p><b>Agreement</b> - (S)- Suggestions for language and clarifications. Proposed def. for due diligence (include due diligence and following def.): “reasonably calculated, documented effort to find what info</p> | <p>(N &amp; S)- ideas for addressing deficient PAD, PME on annual licenses? Broader studies?</p> <p>(L)- Request - Agreed summary language needs to be included in each section with D-52 – D-57(all cap letter sections) reference like ‘as described in xyz...’</p> |

| Topic                                     | Recap Concerns/ Issues   | Proposed Solutions  | Comments  |
|---|--|---|---|
|   |  | <p>exists or does not exist regarding the project &amp; project area. <del>Due Diligence is intended to denote a higher standard than good faith effort.</del></p> <p>Agreement (L &amp;N &amp;S)- If FERC finds PAD deficient, then applicant will be required to submit a revised PAD. If PAD found sufficient then no revised version is required.</p> |   |
|   | <p>(L)- Concern / question are current PAD requirements necessary for state and federal agencies to meet their requirements? If FERC is the requester why is it necessary in the PAD</p> |   |   |
| <p><b>Cooperating Agencies Policy</b></p> |  |   |   |
|   | <p>No agreement on this topic, capture expression of basic concerns.</p>   |   | <p>(L)- Question of legality. i.e. NOT, concern; If agencies want to be cooperators they can do that, but not interveners as well.</p> <p>(F)- interested to see/hear further explanation of legal issues.</p> <p>(S)- See value in NOPR opportunities for combined process and integration, efficiency. Will always keep intervener status if need to choose. An informational CEQA/NEPA doc would allow for a co-op. agency policy.</p> |

| Topic | Recap Concerns/ Issues | Proposed Solutions | Comments  |
|-------|------------------------|--------------------|---|
|       |                        |                    | <p>(L)- some clients like combination of documents, signal document enables efficiency.</p> <p>(S)- firewalls in CA</p> <p>(L &amp; S)- If clear firewalls created, separated staff, could reduce issues. But could reduce effectiveness of cooperation.</p> <p>(L)- support idea of joined NEPA doc. Like idea of FERC reaching out to all state agencies to promote cooperation.</p> <p>(S)- states don't feel there is a process for being treated as equals.</p> <p>(N)- want efficiency, best results.</p> <p>(S)- Like concept for improved efficiency to enable a better prepared NEPA, combine agency would have to forgo 10j</p> <p>(L)- want efficient process, unclear how to get there.</p> |

# Hydroelectric Licensing Regulations



## SESSION 4: TRIBAL ISSUES

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# Tribal Consultation: Agreements



- ▶ Concern that there can be confusion between general consultation process and the Consultation process needed between FERC and tribes
- ▶ To minimize confusion, propose that the consultation between FERC and tribes should consistently be referred to as "Tribal Consultation"

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# Tribal Consultation: Agreements



- ▶ Tribal Consultation (government -to- government) should begin early: at the time FERC sends letter to licensee of upcoming license expiration and NOI/PAD requirements
- ▶ FERC should use multiple sources to identify potentially-affected tribes; including letters to tribes asking for information they may have

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## Tribal Consultation: Agreements



- The process envisioned for early Tribal Consultation (government -to-government) prior to NOI should be set out in Preamble to Rule, and
- This early Tribal Consultation (government -to-government) process (including but not limited to a meeting) should be recognized by reg. text somewhere between "Box 0" and Box 3 of the timeline

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## Tribal Consultation: Agreements



- There should be check points throughout the process that ensure Tribal Consultation (government -to-government) is taking place
- Tribal Consultation (government -to-government) needs to occur in such a way to not cause *ex parte* problems

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## Tribal Consultation: LANGUAGE



- A meeting to be held among the Commission, other concerned federal agencies (including, but not limited to, those agencies possessing a trust obligation to the particular tribe), and each individual Indian tribe (that may be affected by the project to the extent known) as soon as is practical, but no later than 30 days after the notice. If necessary, additional meetings may be scheduled at the request of any participant.
- Reg. language setting out details of particular meeting topics was also agreed upon (see handout)

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### Tribal Liaison: Agreements on Desired Functions



The FERC tribal liaison should:

- be regional (with a coordinator in D.C.)
- work as facilitators between tribes and FERC
- work as facilitators between tribes and applicant
- act as a doorway to the Commission
- be a mid-level staff member
- not have decision-making capabilities
- not replace gov't-gov't consultation, but can be a part thereof
- work with other agency tribal liaisons

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### Criteria for Studies Language: Agreement



Suggested modification to study request criteria re: treaty rights:

- (a)....
- (b) *Content of study request.* Any information or study request must:
  - (1) if applicable, explain the relevant resource management goals of the agencies or tribes with jurisdiction over, or tribal treaty rights with respect to, the resource to be studied;

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## **Tribal Consultation (Government-to-Government) Language—Agreements**

The Tribe proposes that the following language be added to § 5.5 (2)(B) of the Proposed Regulations:

(ix) A meeting to be held among the Commission, other concerned fed. agencies (including, but not limited to, those agencies possessing a trust obligation to the particular tribe), and each individual Indian tribe (that may be affected by the project to the extent known) as soon as is practical, but no later than 30 days after the notice. If necessary, additional meetings may be scheduled at the request of any participant.

(\*\*letters from FERC to tribes asking who is affected, use BIA and others as resources)

(\*\*earlier the better for meeting)

(\*\*preamble—tribal liaison will initiate contact prior to Box 1—same time that applicant gets letter, then set up specific consultation plan with tribe)

This language provides for the setting of a date for the meeting between the impacted tribes, FERC, and other federal agencies.

Group proposes that the following language be added as a new § 5.5 (d) and (e) of the Proposed Regulations:

(d) *Meeting with Indian Tribes.* The purpose of the tribal meeting(s) will be to consider issues relating to tribal concerns (including but not limited to culture and traditions); discuss the Tribal Consultation (government-to-government) process to ensure compliance with legal obligations (see iii) to the tribe; discuss potential project impacts upon the tribe or any tribal issue; and discuss assessment of such impacts and efforts to meet such obligations during the application process, and in conditions to the license. Issues to be considered at the meeting shall include, but shall not be limited to:

(i) *Implementation of necessary Tribal Consultation (government-to-government) procedures during this process.* The tribal, FERC, and agency representatives shall agree upon procedures for ongoing Tribal Consultation (government-to-government) during the licensing process. Such procedures shall provide the opportunity to the tribe to have input and provide recommendations on any action that may be taken that could impact the tribe's interest. Such procedures shall also provide that the tribe shall be advised of the rejection of tribal recommendations by the party making such rejection and the basis for such rejection. Unless otherwise agreed by the participants, such Tribal Consultation (government-to-government) shall occur consistent with Commission's ex parte regs throughout the licensing process.

(ii) *Discussion of trust (etc.) responsibility obligations.* At the meeting, (and any subsequent meetings required by any of the participants) the FERC representative, other agency representatives and the tribal representatives shall discuss/consider federal trust responsibility, treaty, statute, Executive Order, judicial decision, or common law as they may apply to the particular project.

(iii) *Study Issues and Conduct of Studies.* The Commission shall discuss with the tribe issues which the tribes feel are important and need to be studied and will also ensure that studies are conducted in a way that is consistent with tribal knowledge and expertise. The participants shall discuss necessary studies relating to tribal matters. These discussions shall consider studies

regarding such items as (but not be limited to) such items as fisheries, hunting rights, gathering and related uses of areas and historic and cultural resources as well as cumulative socio-cultural and economic impacts on the tribe. Such studies shall not be limited to archaeological sites or project boundaries, but shall consider total project impacts upon the tribe. The participants may discuss possible funding for the tribe to participate in such studies, as well as the procedures to be utilized for the contact of tribal members, and the involvement of the tribe in the determination of the methodology for such studies. Where possible, the applicant should be encouraged to consider retaining tribal personnel due to their unique expertise in tribal matters for studies relating to tribal matters, as is consistent with federal employment law. (move this to scoping consultation box)

(this step is wanted as early as possible, but no later than box 3)

(iv) *Historic and Cultural Resources.* The participants shall agree upon the appropriate steps required to comply with Section 106 of the NHPA and all other laws relating to preservation and protection of Native American historic and cultural resources. The participants shall also agree upon any steps necessary to maintain the confidentiality of such resources and to any procedures necessary to address the custody of artifacts, skeletal material and other cultural information (including that from prior archaeological and other research associated with the project).

(The group seemed to be in agreement that FERC shall be responsible for providing a summary of items agreed upon at meeting, and that this could include or be a draft MOU with tribe)

(e) *Summary of Agreement* Within thirty (30) days of the conclusion of the tribal meeting or meetings provided for in § 5.5 (d), FERC will provide a summary documenting agreement on the process to be undertaken. This agreement on process can subsequently be amended. The participants may enter into a Memorandum of Agreement, if they choose.

(Summary of Agreement shall be used by the parties to determine if appropriate Tribal Consultation (government-to-government) was undertaken)

DISCUSSION ENDED AT THIS POINT. PARTICIPANTS FELT THAT THERE WAS A GREAT DEGREE OF CONSENSUS ON OTHER POINTS, BUT TIME RAN OUT.

## **Tribal Liaison Desired Functions --Agreements**

We support tribal liaisons--regional, multiple, working as facilitators between tribes and FERC, between tribes and applicant, as a doorway to the Commission, mid-level, not decision-making, not replacing gov't-gov't consultation

There are a number of important tribal liaison functions, including:

- Informing potentially affected tribes about upcoming Relicensing applications in the area.
- Liaison can also provide relicensing education to tribes prior to and during the process.
- Educating tribes on FERC's mission, responsibilities and programs
- Helping to educate FERC and its staff about tribes and the federal trust responsibility and treat obligations toward tribes
- Helping to establish appropriate connections and communications between tribes and FERC staff working on particular projects or license applications as well as between licensees/applicants
- The liaison can ensure that tribes are fully aware of studies that may have cultural resource or treaty rights implications.
- The liaison could facilitate informal dispute resolution between the applicant and a Tribe
- FERC tribal liaison should assist in facilitating resolution of tribal study disputes with the license applicant.
- Facilitating FERC consultation with and tribal input during FERC rulemaking proceedings, such as with this NOPR.
- Limit to hydro for now, possibly use as a future example for other areas
- Establish contact and work with other agency tribal liaisons
- Determine which tribes are affected
- Conduit to FERC processes
- Liaison should be educated in Indian law and tribal rights
- Have one liaison for each region/watershed (with liaison coordinator in DC)
- Manage communications between tribes and Commission when *ex parte* rule is in effect
- Consider Native American with FERC/hydro process knowledge as candidate for position