

JOINT AGENCY TRIBAL MEETING

November 13, 2002 - 9:00 a.m.

Bedford, New Hampshire

RE: RM02-16-000

HYDROPOWER RULEMAKING

PANEL MEMBERS: Ronald McKittrick - FERC, Chair

Timothy Welch - FERC

Kathryn Conant - National Marine Fisheries

Nancy Skancke - GKRSE

Jeffrey Vail - USDA - OSG

Tom Dewitt - FERC

Andrew Sims - Kleinschmidt Associates

Mona Janopaul- USDA - Forest Service

Ken Hogan - FERC

James Kardatzke - Bureau of Indian Affairs

Court Reporter: Brenda J. DiMatteo, CERT

P R O C E E D I N G S

S. RONALD MCKITRICK, Federal Energy Regulatory Commission:

Let's get started. Since we have a fairly small crowd, I think it may be beneficial just to go around the table and introduce ourselves, tell us maybe who we are with and maybe a brief statement of your background.

Again. My name is Ron McKitrick. I am with the Federal Energy Regulatory Commission. I'm staff with them. I have been with them for over twenty years and I work in the ecology field.

TIMOTHY J. WELCH, Fishery Biologist, FERC: I'm Tim Welch, also with the FERC staff. I'm a fishery biologist. I've been with FERC for about twelve years.

KATHRYN CONANT, National Marine Fisheries Service: I'm Kathryn Conant with the National Marine Fisheries Service. I work in our headquarters office in Silver Springs, Maryland and I work on wetlands and fisheries.

ANDREW SIMS, Kleinschmidt, Energy & Water Resource Consult.:

I am Andy Sims. I'm with Kleinschmidt Associates. We're consulting engineers and scientists. I am from our office in Pittsfield, Maine and we are members of

the NRG and I am here today representing our program.

JEFFREY VAIL, USDA-OGC: I'm Jeffrey Vail of the General Counsel's Office at the Department of Agriculture, based in Washington D.C. and I advise the Forest Service and Secretary on their authorities under the Federal Power Act.

MONA JANOPAUL, USDA/Forest Service: My name is Mona Janopaul. I am with the Forest Service.

KEN HOGAN,FERC: I am Ken Hogan and I work for the Federal Energy Regulatory Commission in hydro-electricity and I'm a fishery biologist.

CATHERINE E. SHIVELY, Northeast Utilities System: I'm Catherine Shively from Northeast Utilities. I work in hydroelectricity and I just finished up doing the Holyoke hydro licensing and we're working at this time on Merrimack relicensing right now.

JOHN HOWARD, Northeast Utilities System: I'm John Howard from Northeast Utilities. I'm the plant manager of the North Hill Mountain Pump Storage Project in western Massachusetts.

TOM DEWITT, FERC: Tom Dewitt from the Federal Regulatory Commission in Washington D.C.. I'm the Branch Chief of the Hydro East Branch and I have been with the Commission for twenty-seven, something like that, years.

A. FRANCIS BOOTS, THPO/NAGPRA, St. Regis Mohawk Tribe:

My name the A. Francis Boots. I am with the Saint
Regis Mohawk Tribe. I am the Tribal Historian
Preservation Officer and I am here to gather
information on behalf of the tribe. Thank you for
being here.

KIM OWENS, US DOI: I'm Kim Owens with the
Department of Interior, Solicitors Office in
Washington D.C.. I work largely on hydropower issues
that are on or near Indian reservations and advise and
represent the Bureau of Indian Affairs.

JAMES KARDATZKE, Bureau of Indian Affairs: I'm
Jim Kardatzke. I am with the Bureau of Indian
Affairs, Eastern Regional. I'm the FERC coordinator
for the Bureau.

MR. MCKITRICK: Jim and I are working as
co-facilitators for this. So if you would allow us
the ability to kind of manage this process, we would
appreciate it.

Francis, we are here today because of potential
changes in some hydropower regulations that are coming
up and we are looking for specific comments both from
the public and from the tribes and it is co-sponsored
by the Federal Regulatory Commission, Department of
Agriculture, Department of Commerce, and the

Department of Interior. And the reason we have co-sponsorship is because of the Federal Power Act that gives FERC specific authority to license non-federal hydropower projects, and within the Federal Power Act there is special consideration given to both Agriculture, Commerce, and Interior, responsibility to set specific conditions and prescriptions and so we are working together on these potential changes for relicensing regulations.

To give you a little bit of chronology, where we started and where we are going: Back on September 12th of this year we issued a notice of these public forums. We have already conducted three of them, one in Milwaukee, one in Atlanta, and one in Washington D.C.. Of course, we're here today in Bedford and then we're going out west to Sacramento and Tacoma.

A very important date that you were talking about, your official comments for this meeting are due December 6. So, any comments that you have today will be on the record, but if there are specific comments you want to file with us, they are due at the Commission no later than December 6. We will follow that up very quickly with a stakeholder meeting in Washington D.C. in December. There will be a stakeholder meeting in Washington D.C. December 10, 11

and 12. You are welcome to attend. It will be a general overview of the comments that we have received and try to move forward, so that we can then put out a notice of proposed rulemaking by February of 2003.

After the proposed rulemaking we will hold a series of regional conferences in March and April to discuss those rulemakings, followed then in April with a stakeholder meeting, again in Washington D.C., to discuss the comments and then put together then the final rule of any proposed changes for hydropower licensing by July 2003. So, we have a pretty aggressive schedule to complete in a timely fashion.

Just to give you a brief overview of the presentations you will be hearing today, we will have a brief overview about the process from Tim of why we are here. Kathryn will then give a presentation about one of the proposals that was submitted or put together for different changes in our regulations both from the Interagency Hydropower Committee, IHC, by Kathryn Conant, followed by the National Review Group, or NRG, proposal from Andy Sims. We will then open this up and it is really your meeting, so that we can understand any kind of changes that you would like to submit to us or ask any questions about the two proposals. We can do that as long as there are

questions to be asked. And let's let Tim talk about why we are here. Thanks.

MR. WELCH: Thanks, Ron. Francis, I am just here to just quickly talk about why we're here and how we got here.

I don't know how aware you are of all these things, but back in 1991 the Commission received about 157 applications to relicense hydro-electric projects and of those 157, very few of those the licenses were actually issued in two years prior to the expiration date. Some of those projects are even still before the Commission today. So, that sort of got everybody thinking, not only at FERC, at the resource agencies, and in the hydro-electric industry as well; kind of like, why does it take so long for this to happen.

So, the first step was to kind of look at a series of administrative reforms and what can we do without doing the rulemaking, what are some changes that we can make in our procedures and sort of how we go through this, what is called, the traditional licensing process.

So, one of the first things that happened was we formed an interagency task force, called the Interagency Task Force, and that was a consortium of federal agencies, Interior, Commerce, EPA and

Agriculture. And the task of the ITF, once again, was to look at some administrative reforms and how better the agencies could work together in the hydroelectric licensing process and the ITF came up with a series of seven reports. They looked at NEPA, NEPA documents, how we consult on the Endangered Species Act, and a myriad of other things; a guidebook on how to get through the alternative licensing process, the ALP. So, that is sort of the first step for the federal agencies.

Now, at the same time the Electric Power Research Institute formed a committee, the NRG, the National Review Group, and that was a consortium of industry folks and conservation groups that also got together with the federal agencies as advisors and they also produced a series of reports, sort of a best practices report of how to get through the traditional process to help future folks to get through the traditional process. So, those are the parallel processes with the ITF.

Last December the Commission, FERC itself, held a hydroelectric licensing status workshop back in December 2001, where we looked at a lot of those projects that I mentioned earlier, that had been before the Commission for more than five years to

certainly examine the reasons, you know, why is this taking so long. We sort of had a public forum. So, out of that grew -- what we did was, we had regional workshops with the state agencies. One of the problems that was identified as you may or may not know, the state has to issue water quality certificates, as do tribes in some cases, and so we wanted to meet with those state agencies to find out how better we can work together. And I will say a little bit more about those regional workshops in a few minutes.

Now, the resource agencies themselves have worked on some internal administrative reforms, most notably the Departments of Interior and Commerce came up with what is call the MCRP, Mandatory Condition Review Process, which is very similar to the Forest Service 4-A appeals process. And what it does is, it subjects Interior and Commerce's Mandatory Licensing Divisions to public review.

So, I would like to say just really quickly about some of the things that we heard when we went to visit the states. We went all around the country. We were here in Manchester at one point and we went out to the northwest, out to Seattle. We were out in California. And one of the things we heard from the states was

that they felt that incomplete license applications were sort of one of their impediments. They felt like when the licensee or the applicant applied for the 401 using it in the hydro license application, a lot of times they had a lot of incomplete information. So, the states felt if we could have better or more complete license applications, they could more easily do their process. So, we examined some of the ways that license applications should be more complete and what we heard was that the states thought that the earlier identification of issues or a need for scoping would be a good idea.

Now, under the traditional process, you do the scoping after the application is filed. Some of the states felt that if we did it before the applications were filed that would be better. So, sort of going along with that, we could resolve disputes over certain studies at an earlier point in the process; we could establish a licensing schedule early, so all of the stakeholders, tribes included, would understand exactly what is going to be happening, what all the agency and stakeholder responsibilities are going to be. They also felt that the beginning, when a licensee or an applicant is filing its notice of intent to relicense a project, that the initial

consultation package should sort of go along with that as well. And they felt, many of the states felt that would lead to a more complete license application.

So, what brings us to today? Well, the administrative reforms, I thought that they did a lot to improve communications in FERC and some of the other resource agencies, as evidenced by the fact that we are all co-sponsoring these forums. But the feeling was that that wasn't enough; we needed to take the next step and enter into a big journey which is regulatory reform; actually go in and look at the regulations and say hey, how can we change this and make the process cheaper and more efficient.

So, sort of our theme here is that improvements in the current regulations are needed to decrease the time and the cost of licensing, while continuing to provide for environmental protection and fulfill state and federal statutory and Indian Trust responsibilities. So, we want to do those two things simultaneously. And this is consistent with the nation's energy policy, which calls for a more efficient hydroelectric licensing process.

So, as Ron mentioned, we sort of kicked this whole thing off with a notice on September 12 that went out to all of our licensees, about 600 tribes,

and it provided opportunities for discussions for these public and tribal forums, established a schedule for written comments and recommendations on the need to structure a new hydroelectric licensing process, the notice included the Interagency Hydropower Committee proposal. This was sort of the successor to the Interagency Task Force that I just mentioned earlier that also includes Interior, Commerce, and Agriculture, and FERC, and that group has come up with a proposal that Kathryn is going to be presenting here in a couple of minutes.

The NRG group that I also mentioned earlier, the industry folks and the conservation organizations, also put together a proposal and Andy is going to present that proposal in a few minutes.

The notice also included a series of nine questions that were posed to the public to sort of shape their comments and let you know the types and kinds of information that we are looking for.

So the goals for today's forum are, you know, we would like to listen to your ideas about the licensing process, what works, what doesn't, identify specific problems in current regulations, discuss any possible solutions that anybody might have and hopefully translate those solutions, at least into concepts that

we can then put in our notice of proposed rulemaking. So, the nine questions that I mentioned earlier, Francis, they sort of all are sort of centered around these discussion topics. We wanted to know what people thought about the integrated licensing process and that would be identified by Kathryn. In other words, the NEPA process up front and together, so it can operate more efficiently. We want to know about study development, how to resolve the disputes over which studies need to be been done, settlement, time periods, how much time does it take to go from point A to point B, how we can best coordinate state and federal agencies, tribal, and FERC processes. And then another important question is, what is the relationship to the review process being developed and the ones that are currently on the books, the traditional and the ALP? Should we retain both of those or should we get rid of those and put in a whole new process? So, those are the types of questions posed.

So, thank you. That's all I have.

MR. MCKITRICK: We will have a discussion about the IHC proposal from Kathryn. I might mention, before you leave, if you happen to have a card and you haven't already given it to the Court Reporter, it

might be helpful to do that, just so that she can get your name spelled correctly. Of course in the back of the room we lost the microphones and it is a little hard to hear a few folks, so speak up. Kathryn.

MS. CONANT: Good morning. As I mentioned earlier, I am Kathryn Conant with the National Marine Fisheries Service, but I am here today to represent the Interagency Hydropower Committee that has developed this proposal for an integrated licensing process that I am going to talk about. I appreciate everyone coming today.

What I am going to talk about today is a little bit of background on the Interagency Hydropower Committee. Though given that Tim had a pretty extensive background about the Interagency Hydropower Committee, I won't spend too much time on that. I will also discuss the objectives and the details of the Interagency Hydropower Committee proposal, the IHC proposal, but I will try not to get into too much detail, because it can be pretty overwhelming, because I get confused, and then I will also highlight some of the benefits that we anticipate from this.

And to let you know, the Interagency Hydropower Committee proposal, as well as what Andy Sims will be talking about with the National Review Group proposal,

was attached to the Federal Registry notice that FERC issued in September and attachment A, which starts on page B-13, is the Interagency Hydropower Committee proposal that has a lot more detail and then -- and that starts on page C-13. On page C-26 is actually a flowchart which I might highlight some of the boxes, but I won't spend too much time on it, because you can just look at it yourself and follow along with it if you want to or ask question later on. So, as Tim mentioned, the Interagency Hydropower Committee consisted of the Federal Energy Regulatory Commission and three departments under the executive branch that have specific authorities and interest in the licensing process, so Agriculture, mostly from the Forest Service; Commerce, with National Marine Fisheries Service, which is where I work; as well as the Department of the Interior, which had a wide range of the services and bureaus, including the Bureau of Indian Affairs, Fish and Wildlife Service, the Bureau of Land Management and the Solicitor's Office. One of the things that I did want to let everyone know is that the Interagency Hydropower Committee developed this proposal and has now put it out for public comment, but we don't intend to revise it. Any comments that are going to be related to the proposal

will go to FERC as they develop the rulemaking process. We don't intend on making revisions to the proposal itself. When we developed it, we realized that there were a lot of holes in it and it needed work, but we felt that it would be better off just to be inserted as part of the public comment for the rulemaking.

The main objectives and some of the themes that we talked about when we were looking at trying to improve and develop an integrated licensing process is, we really think that there needs to be better coordination between FERC, the resource agencies, the federal as well as the state resource agencies, between the tribes and other stakeholders and just to try to improve coordination earlier in the process. We also wanted to try to eliminate duplication and it seemed like with the traditional process and to some extent the alternative licensing process, there is a lot of activities that the applicant does early on before the application is filed that then seems to be redundant with when FERC does its scoping and for environmental analysis under the National Energy Policy Act. So, we thought that there was some redundancy that should be eliminated.

We also thought that one of the big conflicts

that often arises during the licensing process is related to studies that classify resource agencies and then there is disagreement between the agencies and the applicant on whether or not the study is needed and the methodology for the study. So, we were trying to look at seeing if there are ways of reducing that conflict or addressing it earlier in the process.

We also thought that there are two components that are really important when trying to develop an integrated licensing process, one of which was to reduce the time and the cost of the licensing, but also to ensure that the end license has a lot of volume and support and reduces the amount of requests for rehearings, and challenges, and lawsuits later on, so that ultimately, at least in an ideal world, you end up with the licenses issued earlier and cheaper and also everyone has more buy-in for it. So that might be an unrealistic goal, but at least these were the points we were trying to keep in mind.

So the Interagency Hydropower Committee proposal has -- we broke it down into four components and I will go into a little bit more detail later on about each of these components. But in a nutshell, the early consultation, when an applicant says yeah, I am going to develop an application, there is early

consultation that happens between the applicant and other stakeholders. So, that's the first part that leads to a study plan. Our proposal is that will take 275 days. Then as an option, we have also developed a study resolution process, which as I mentioned earlier, sometimes studies can be a source of dispute between the applicant and the resource agencies. So, we have a resolution process that would be applied for only those studies that are actually in dispute. Then there is a period where you implement the study plan, that I'll get into earlier (sic) has a lot more coordination and interaction between stakeholders.

Then finally, once the application is filed, FERC accepts it for having sufficient information, then they develop their NEPA document and the proposal has two tracks, two options. Track A is where the NEPA document actually has a draft public comments period time, that then they reissue the NEPA document as a final based on the public comments. Track B is a little more accelerated, in that they issue an environmental assessment with a comment period, but the comments are then addressed when FERC issues the license order, rather than reissuing a final NEPA document. So, both have public comment period but they save time not issuing a final EA.

So, the first part that I talked about, as I mentioned, in the early consultation that starts as the process initiated earlier and the proposal that we developed has what we are calling an advance notice of license expiration. The idea with this is that this really only applies to where there is an existing license that is going to be going through a relicensing process. As you are aware, the applicant has to issue a notice of intent to file a reapplication five to five and a half years before that license expires. What we thought is it would be nice if -- most applicants are proactive and realize, oh, that time frame is coming up, but sometimes they might forget about it or not be thinking about it until the five year mark. So, the idea is that three years before they have to issue this notice for intent, FERC will send out a letter that says, okay, don't forget your license is going to be expiring in eight years, you need to be thinking about this and here is some of the information you need to consider gathering. It is not requiring anybody to do anything, it is just a heads-up.

So then, once that happens at the five, five and a half year mark, the applicant is developing their prescoping document, what we are call a prescoping

document. The idea is that the prescoping document, which actually replaces the initial consultation package which is currently in the process now, the prescoping document is the format that FERC will need to issue their NEPA scoping document. And so, one of the themes that you will actually see throughout is that the format of the document, whether it is the applicant or FERC doing it, is very similar or the same. As more information gets in or gets available, that document builds and builds upon itself.

So, then there is the prescoping document work and then that is given to FERC which then issues their scoping document and this is needed for their NEPA requirements. Then, and as part of that is actually the development of the study plan and throughout this process there is some back and forth where the applicant identifies studies they feel are needed, resource agencies and other stakeholders identify studies that they feel are needed, and then there is coordination on that study plan and that is ultimately presented to FERC. If there are disputes regarding some specific components of the plan, then they can pursue the dispute resolution process, which I will talk about next, but if there are studies that there not specific disputes, they just go forward like they

would anyway.

So, the dispute resolution process that we have identified or we developed, it focuses on two specific issues of what a study would be disputed about, whether or not -- issue one is whether or not the study is actually needed. Issue two is whether or not the methodology that has been proposed is adequate. So, those are the two points that the study would be disputed about. The idea is that a panel made up of three people, one representing the agency that requested the study, one representing FERC, and then a neutral third party.

And let me just point out that the agency rep and the Commission rep are both going to be different people than who had been at the negotiating table earlier on in the process. So the idea is that it -- I mean it would be the official staff that FERC has, but it would be a different person, so that you are not having the same people trying to resolve the dispute that they were not able to resolve earlier.

Our proposal identifies criteria that would be used by this panel on evaluating whether or not the study proposal is adequate. This panel then, based on their review of the study and the defined criteria, they also have the opportunity to gather information

from the applicant and other stakeholders that are involved in the process that have an interest in the study. So, based on all this information, the panel makes a recommendation or finding that is then given to FERC staff, to the Office on Energy Projects and then FERC makes a final decision. Then the idea is that FERC makes the decision, everyone may not be happy with it, but at least the dispute ends and we can proceed forward.

The next part is actually implementing the study plan and we anticipated that on average that two seasons, two field seasons, two years, would be sufficient for most projects, recognizing that some projects might only need one season or less than that for studies. But some projects, some of the bigger ones that maybe require big complex fish passage, three or four years may not even be enough. So the proposal identifies two as being the typical time frame, though we recognize it is not ideal for all of them.

But in a nutshell, the way that we anticipate that these studies would be implemented is that there be coordination with the parties that requested the study, with other stakeholders that are interested in the study, to be sure that it is being implemented as

everyone expected, as well as it is getting the results that everyone was expecting. And the idea is that if needed, mid-course corrections could be implemented and not to wait until after the two years and you find out, oops, we just didn't get what we were envisioning or this new issue came up that no one anticipated, so we need to factor that in as well.

So, the idea is that there should be coordination throughout the process. And if needed, the dispute resolution process that I just spoke about could be implemented if it is needed. And then based on this information, the applicant develops their draft application that would be a similar format as the NEPA document that FERC is going to issue, some components of the NEPA documented, specifically some of the baseline information and environmental analysis.

So then, once the application has been finalized and FERC agrees that there is sufficient information, they do the typical issuing the notice asking for intervention, comments, and recommendations. But one other thing that I actually didn't mention earlier is that at box one, step one of the process, FERC is considering the proceeding as open, so everything would be filed under the standard process that you would do under post filing activity right now. Right

now most of the stuff that happens pre-filing, there is no standard way of communicating among stakeholders and that would actually change under our process. But here, the issue for recommendations, terms and conditions, and then this is where we get into what I mentioned about earlier, the track A or track B, the different options for implementing the NEPA document. And track A is, as I mentioned, has a draft and final NEPA document and track B has only a final NEPA document, but still a comment period with those comments being addressed in the license order and both processes allow the federal agencies that have mandatory conditioning and authority whether or not it is federal land, federal reservation, or a fish passage, the idea for both track A and track B is that the federal agencies would be issuing their preliminary and their final conditions at the same time, which currently does not have.

And one of the things to let you know, we also, we are trying to put some time frames on when the draft and the final NEPA document would be issued, which currently there is not a specific deadline or time frame of when FERC will issue that.

So in a nutshell, and of course I probably just overwhelmed everyone, but in a nutshell, the idea is

that you will have one NEPA scoping process that includes the applicant process for pre-filing, as well as FERC's NEPA process, that happens at the same time, that would get early involvement of all of the stakeholders to help identify issues up front, recognizing that you can't predict the future but you can at least try to anticipate some of the things that might come down the road; try to work on resolving some of those study disputes earlier based on the criteria that everyone is aware of, there is standard criteria that everyone will be using; that all participants, including FERC, have time frames of when things have to be done, which helps anticipate workload and future needs of what is going to happen coming up; as I mentioned earlier, that the agencies positions when we file them would be consistent and coordinated; and that if there is the desire by the stakeholders to try to pursue a settlement agreement, that we feel that the process would allow for that.

So that is it.

MR. MCKITRICK: Andy Sims will give us an overview of what the National Review Group has been putting together. I might mention that these are two ideas about changing our process and why we're holding these meetings is to really get what your concerns are

and inputs. It is very unlikely that any rule change will end up looking like either one of these. So, it is just kind of some initial ideas.

MR. SIMS: As Ron mentioned, I am Andy Sims. I am with Kleinschmidt Associates, a consulting firm located in Pittsfield, Maine and we were members of both the NRG and then the most recent incarnation of when it worked to develop the proposal that included the first notice of rulemaking and I am going to review that for you today. I am going to be giving sort of an overview, as Kathryn pointed out, the proposal by the IHC and the NRG is available and was handed out today and was also attached to the Commission's notice. So, this is somewhat of an overview and if you would like, we can go into a little more detail afterwards.

I like the IHC proposal, it has a lot of detail in it in some places. Unlike the IHC proposal, it does not assign quite as many time lines. I think they worked a little harder on that than NRG did, so I don't have to explain some of that stuff to you on the first slide.

The NRG is a task of volunteers, both licensees and a number of conservation organizations. If I try to name them all, I'll get in trouble, but America

Rivers, American Whitewater, Hydropower Reform Coalition, Natural Heritage Institute and various others were involved, Appalachian Mountain Club and a number of licensees. The licensees were, as I said, were volunteers, they didn't represent any particular organization.

The mission of the group was similar to IHC and in sort of a parallel universe. We work on improvements in the relicensing process, mainly to improve the way the outcomes are designed, so that there is, similar to what Kathryn mentioned, less chance of later dispute over whether the license really reflected, you know, good decision making.

The voluntary guidelines that we produced, the NRG produced a year earlier are on FERC's website and that was the first product of the NRG. And the current proposal that we are looking at today actually goes a little beyond voluntary, we are suggesting changes, all the changes proposed in here are regulatory changes; none of them are statutory.

Next slide, these are the participants. Kearns & West were the facilitators. They have done an excellent job of keeping this program going. We met roughly every three months or so for a period of over a year. Those are the industry participants

representing a fairly large number of licensees. So there is a lot of experience on that side of the table.

Next slide. These were our federal advisors. Now, they largely didn't participate in any document preparation or even review, but when they were able to, they would sit in on meetings and offer general advice and considerations from their viewpoint. They really did not participate in producing the final document.

So what we have viewed, what the NRG has viewed as the value of the substance of this proposal as just a source of ideas to what we think will help inform the public debate and public discourse as well as FERC's rulemaking process and at no time did we ever think this was going to be a perfect mousetrap and be the solution to everything, but it is a compellation of some very well thought out plans and suggestions.

There were two things that started us on this trail and they were born of some experience and it probably would be safe to say some frustration with the system as everybody has experienced, and they are both listed there. We saw a lot of repetitive study activity, repetitive analysis, and sometimes incomplete or inconsistent analysis, and we went

through the various trails either in the traditional or the alternative licensing process.

We also found that FERC and the federal agencies tended not to cooperate as much as we would like -- could in streamlining things without tripping over each other. Putting this proposal together, you could see it's largely organized around more coordination among the federal agencies, which we, not being a federal agency, think is a good idea.

The whole basis of this whole thing is a coordinated environmental review process; one that starts with participation by the federal agencies and all of the stakeholders, the state agencies, all the mandatory condition programs, and goes through an early process to make sure there is as much information available as possible later. That outset participation by the agency, we felt, really was the best way to keep this thing organized and focused. We also wanted to eliminate late discovery of issues. That, as you know, happens all too frequently. Sometimes you get halfway through a license and issues come up that really either had not been thought of or just there was insufficient information to be thought up or perceived earlier. The key part of this, probably from a structural viewpoint, is to find a

single NEPA process that all the consulting agencies, they can participate in anything. They can, in fact, in certain areas write sections of analysis and thereby hopefully get to a final NEPA product that can be used equally by the agencies for decision making. It may also be possible to be used by 401 agencies. We wanted to obviously eliminate any redundancy and conflicts in documentation and to get rid of a perpetual problem that we all see where sometimes up to and even after the license is filed there may be debate as to whether the applicant has taken care of all of the study requirements that are fair and reasonable and needed.

Next slide, please. We also felt that the dispute resolution, which was a big item on the IHC's hit parade, needed some careful attention largely to prevent duplication of studies that have been done and to submit them properly and appropriately and we wanted to make sure that each agency had its hand in determining what information was needed and how it was put together in the environmental documents.

The next slide is an introduction to some of the key elements of the proposal. This is where I will give you a lot of detail, because this is really a major overview.

I did want to back up for a minute and mention, because it is covered in the handout which you got today, the NRG actually published its proposal back in I think early July and put it out for as broad a public comment as we could get and the comments that came in were multiple. The majority of the important ones are actually summarized in the document or in the handout that you have. We never were able to, there wasn't time frankly to try to go back and try to revise the things. The comments were robust to say the least, there were lots of them, and it was not the NRG's intention to try to go back and try to revise this proposal. So, much like the IHC proposal, it is a work in progress and it is meant really to be a, you know, a document to inform, potentials for reform.

One of the key components that I mentioned earlier was early consultation. We have that uniform sense that that is where if a relicensing is going to go off track that was where it was going to start to go off track if it wasn't done well. There are a number of opinions as to what should be done but we think the licensee really has the incentive and the obligation to kick off the process with a really good basis of information that everyone could use to determine what their concerns are and what their

issues are.

We recommended, NRG recommended that there be informal consultation with agencies and stakeholders prior to even filing the notice of intent to relicense, five to five and a half years before the license expires. We also, with the filing of the notice of intent, wanted to see the licensee produce just as early information but in reality ask that they produce the equivalent of what is now an initial consultation document, much more robust than it is now, essentially in the format of a license application, not just the same level of detail but much more hefty than what we have now. That was intended to develop a basis for scoping issues.

Right after issuing the initial consultation document for comment, the fundamental part of this proposal was that federal agencies get together and sign what is referred to as an MOU, Memorandum of Understanding, and MOA, Memorandum of Agreement. A Memorandum of Understanding would be general to this whole approach, setting out major understandings. And the MOA would be project specific for a licensing where the agencies would agree among themselves on how we were going to develop these documents and who is going to take care of what part.

Again, the important components that we felt needed to be in the process were adequate study development and dispute resolution. Similar to the IHC proposal, we focused a lot on dispute resolution. A lot of people felt that the current regulations aren't quite there. Some others felt that they were there but not used well. That aside, we all felt that more specificity will make the dispute resolution process really stick.

Similar to IHC, we want to have a dispute resolution panel. In the NRG proposal there was opportunity if there was disagreement to try to bump it to the higher level, to the chairman or secretary level. We felt that it was very important, and everyone agreed, that if the licensee and everyone consulted and resolved the disputes and the licensee then implemented the resulting study plans as determined by the process, there would be a presumption that the licensee would not need to do additional studies into those topics. There were obviously a couple of off ramps to that, if new information came up or other specific circumstances did, but that gave the licensees a lot of certainty that if we they agreed to follow the panel's agreement or recommendation that they would not need more

studies later on the same topics.

Another major component is the NEPA document.

Now, in the NRG proposal at about a point no later than three years before the license expires or one year before the application is due, the licensee produces what is called a preliminary environmental document which summarizes all the studies done to date. It summarizes the issues, the alternatives, and essentially looks and feels a lot like the draft NEPA document, but it is not. That is put out for public comment and then when the application is filed, that document needs to reflect what public comment came in and then it gets filed along with the application.

After the application is filed FERC is the lead agency and then undertakes its own, actually formally the documents, ordinarily a draft EIS and a draft final EIS.

We think that by putting this process together the way that it is, the agencies by cooperating in this will actually have joint ownership in both the production of the document and in the soundness of the analysis. The NEPA document was intended to be an analytical document, not a decisional document, and that would allow the individual agencies, such as DOI and the Forest Service and FERC of course, to make

their decision based on a common foundation of information and analysis. Obviously FERC produces the license, that's what they are there for, and also in this proposal they produce draft license articles to be able to show people before it's final that they have in fact captured these decisions in accordance with these documents.

One last point, we tried to make sure that this would fit into existing statutory requirements and time lines. Again, it should, there are always surprises, some of these take longer to do, but we work not as hard as IHC, but we did work hard to some degree to try to make sure that this does fit into the five and a half year window that applies to the overall allotted time for the licensing and in that we include two seasons of studies and this obviously came to a conclusion that all of us, especially the cooperating agencies, really needed to make this work by devoting the time and energy to do that.

That's my summary. I would be more than happy to answer questions.

MR. MCKITRICK: For those of you who may have come in a little late, just to let you know, my name is Ron McKitrick and I am staff who has come from the Federal Regulatory Commission helping to facilitate

the meeting. I am not sure --

DUNCAN HAY, National Park Service: I'm Duncan Hay with the National Park Service.

MR. MCKITRICK: National Park Service, okay, thank you. There are a couple of ways we can proceed here. I would like to give you an opportunity to, you know, if there are any clarification questions about what you have heard, feel free to ask those. The information, as the two presenters indicated, is more fully explained in the handout. But if there is any clarification you would like to ask now we could certainly do that. If not, we could proceed. Is there any specific?

MR. BOOTS: No, I don't have any comments or questions on the presentation.

MR. MCKITRICK: Okay, good. My understanding is that you might have some comments to make, some oral comments. So maybe rather than take a break now we can just proceed or would you like to -- if anybody needs to take a break we could do that and come back.

MR. BOOTS: I would like to ask for a couple of minutes.

MR. MCKITRICK: Sure. Let's take maybe a ten minute break and then come back.

(Recess)

MR. MCKITRICK: If we could go ahead with the rest of the meeting now. Francis, I understand that you have a few comments that you would like to make to us and start in your native language and then proceed to address any concerns or comments to us. Go ahead.

(Introductory greetings by Mr. Boots in his native language)

MR. BOOTS: I am just sending you greetings from the Mohawk Nation. My tribal leaders and people of the Mohawk Nation consider this an important meeting and we appreciate the opportunity to have a word or two in this new development. As some of you are aware, up north in New York State on the beautiful St. Lawrence River there is a major relicensing going on there and it has been going on for a long time. The Mohawk people have had a lot of difficulty with this process because we have felt that our voice is not being heard at all.

First of all, we consider the whole river a cultural prestigious resource to us. It is our whole way of life. That river and our people are so uniquely connected that we are inseparable. However, in the original time that they built the dam there was never any consultation in them days. There was not a lot of rulemaking when it came to building dams but

today we have a second opportunity perhaps. We as a people are very concerned. We are very concerned on a few issues.

And so I would like to say that here today came quickly. I just got some notes prepared for us by some of our legal people, but we are going to formally submit a written comment to these processes later on. So, my comment today is more just a brief concern.

So, as I am listening this morning, some of the things that are covered in these discussion papers, internal discussion papers, are already covered. We are very concerned about the time lines of the relicensing also. Sometimes we don't understand when we make a request or we submit some documents it is like a void. It doesn't get a reply. It doesn't get an acknowledgment. So, we are very appreciative that everyone else is concerned about this difficult issue.

So, I just want to say that there are certain parts of the laws that effect us differently than consulting or effected agencies. The tribe is sovereign. We are to be discussing these matters on a government to government basis; not just an agency or a committee or things like that. We consider our government in relationship with the United States as a government to government relationship and no less.

The proposal for this new licensing process states that there is a need for licensing procedures more cost effective and time effective to the applicant. Because the applicant stands to profit significantly from the FERC's issuance of a fifty year license to generate and market hydropower, convenience to the applicant should be a secondary concern. In addition, the FERC Power Act demands equal consideration of environmental issues, that there needs to be equal consideration of environmental issues and the need for power. The focus of the current process should be to improve the quality of FERC's decision making in light of statutory requirements that give equal consideration to environmental values, not just a response to the perceived need to be more responsive to the applicant.

Each of the proposals contain significant preapplication consultation and information gathering based on the idea that this information can simply be dumped into the administrative record to facilitate a quick turn around by the FERC. FERC, however, may not delegate the statutory decision making duties and or authority to an applicant and a group of interested parties. The current -- this is our process up home, the current CC process on the FDR power dam

illustrates the dangers of this process. However, whenever there is a dispute FERC always sided with the applicant, even where the CCP parties made valid comments, such as the applicant's total failure to address Mohawk cultural issues. FERC simply allowed the applicant to cure the defect after it deemed the application complete. The proper determination would have been to deem the application incomplete until such time as the applicant discharged its obligations to FERC and the tribe under the Historic Preservation Act and the NEPA to fully analyze the cumulative and other impacts on tribal natural resources.

The only way to ensure adequate consideration of tribal interests in a hydropower license process is to require early good faith contact between the applicant and the effected tribe. This requirement is not satisfied by a mere public notice in an off reservation newspaper of a scoping meeting at some off reservation local. Indeed, the federal courts recognize that the meaningful contact with tribal government means an in-depth government to government, face to face, consultation in which the parties discuss and analyze the process and the parties' expectations of that process. This has really effected us. We have attempted to have this initial

consultation meeting three times up home and it always just ends up as a public meeting.

To the extent that the applicant complains about the additional time and effort required to fully define tribal concerns, they always have the option of building their dams at a location where there are no tribes or not seek a relicense. In other words, we deem that area very significant to our government and to our legal position as a tribal entity.

There are additional comments concerning the NRG process, but I am not going to read them because of what I heard today.

I am going to talk about post license compliance. Post license compliance with the federal law is an issue that is not addressed in the proposals. For instance, applicants generally seek to defer compliance with section 106 of the Historic Preservation Act until after the license is issued. Since section 106 is designed to identify and protect traditional cultural properties, delaying the process until after the license is in appropriate. Compliance with section 106 and CZMA and other federal laws must occur during the application process to ensure that the matters identified during these processes are folded into the NEPA documentation. This would bar

applicants from simply putting placeholders in their NEPA documents that allows them to defer compliance until some future date.

Again, this NRG discussion, I have hand notes from our attorney of course and I don't understand it enough. I listened to it this morning and again I am going to reserve my comments to the formal written submissions that we will be making.

Let me just add additional study requests must receive greater and more meaningful consideration than they do under the traditional or CCP processes as illustrated by the New York State Power Authority relicensing process. The applicant now controls the scope and the need for additional studies. Again, even where FERC identifies the need for additional information, it fails to call for additional studies. The applicant must be required to perform all reasonable needed additional studies without regard to cost. The sole test of the value of additional studies requests should be rather it adds to the body of information FERC requires to make its decision under the FPA, NEPA, NHPA and the CMA cost should not be an issue unless the applicant can demonstrate why dollars and cents evidence that the requested is prohibitively expensive in proportion to the

information it will provide. Simply put, cost is no defense to complying with federal law. If it costs an applicant one million dollars to perform a study of an impact of a license on tribal cultural studies, it is a requirement of federal law, then that is the cost of relicensing, which has been an issue.

Those are the comments I would like to offer today. And like I say, there are additional notes in front of me, but the presentations made those things a little bit more clearer. I thank you for your time.

MR. MCKITRICK: Thank you very much, Francis. We look forward to your formal comments on or before December 6. Keep in mind, I think you brought up some very good points in the consultation of the government to government, we have heard that before in some of the tribal meetings that we have had. I think we are very interested in that being a problem and we are looking for solutions in your comments about how we could actually go about doing that and how that would be part of the formal process. So, if you could frame the issues that you brought to us dealing with consultations and dealing with studies, those are very important issues and problems that you have seen and what we are looking for in formal comments are solutions and how we can put that in the regulatory

language, that would be extremely helpful for us.

MR. BOOTS: If I may, I have two additional comments.

MR. MCKITRICK: Absolutely.

MR. BOOTS: One of them concerns this information that we have been putting out and relative to the concern in these United States on security. For example, the FDR project became a very sensitive security site because of what happened on 9-11 and we live immediately down river to that place. So, it was a security shutdown and it effected our community directly. I know that it is not part of this discussion, but we are saying to you that some of the material that will be discussed may often be sensitive. There needs to be some consideration on this issue.

Also in our community and in our traditional territory there are other small hydroelectric dams that are in the process of relicensing and it is prohibitive. I mean the tribe does not have a lot of money to constantly respond to all of these requirements. I am just saying that the tribe has not really been that active. It's in the last three or four years that we got involved, but there is so much material that we need, like in this discussion this

morning they are talking about a five year window frame for the applicant. I just want to say that this material that you are developing here, the tribe needs a comprehensive understanding of these things so that we can be on the same page. A lot of times we don't receive these notices. For example, we didn't receive notice about this particular process until -- not that long ago.

The other concern that we have is in the license application, has FERC considered what happens if there is a decommission of a hydroelectric project, even a major one, like the FDR one, what happens to the effected communities and governments like Saint Regis Mohawk tribe? Because you understand, that dam altered our very lifestyle, our total way of life was altered by that development. We are not asking that that be put back; we are just saying we paid the highest price for that development. We continue to pay the high price for the generation and production of hydroelectric power to the masses. We understand the price that we are paying. As a child, I told this to my community, I remember the time before there was an FDR. I remember the tranquil lifestyle that my people lived. I remember fish life. I remember sturgeon in the river. I remember eels in the river.

Today they exist in a very smaller -- you can't harvest these things, this lifestyle, you can't be part of -- you can't live part of the river anymore.

That is not simply because of the dam, but it went a long way. That is what was the main effect. So, some of the things that we are concerned about are discussion on decommission, what are the regulations on that, maybe we simply just need to do more research on our end.

There is a small hydroelectric dam right in the middle of the reservation that is not being used any more. Every time we asked about it the district is -- we get a response where they don't tell us. It started out as a mill and then it was developed into a hydroelectric generating plant and it sits there in the middle of our community and it doesn't generate any electricity.

Lastly, the tribe has always commented on every occasion that one of the primary issues in your licensing for us is low cost electricity for the community, because it is unique, and I am not speaking for any tribal group anywhere in the United States except the Mohawks when I say this: That dam was built in response to industry and if you go up there, some of you have been, you see on the border of our

community are major industries that benefit a lot from that power plant there on the river, but the price that we pay for electricity is prohibitive in our community. So, the tribe has always insisted that we want to talk about, and I understand that that is not a license issue, but it is important and we will always bring it up, because that's what effects us is what we pay people who are delivering this power we are licensing to generate. So, I just want to say that part of it. I know that my leaders will always bring that up.

I believe I have covered the concerns that I have this morning. And again, I will make sure that you have the formal written submission before your deadline and we appreciate being informed of these upcoming meetings and hope that we can be an active participant in this relicensing and other relicensing issues in the United States.

Because of our involvement, many of the tribes are asking us, and certainly we are no experts, we are feeling our way through this ourselves, but a lot of the tribes have asked us how it is with us. And the truth of the matter is, sir, we can't tell a nice story. It has been a difficult process all the way through. So, that is what we tell the tribes, is that

you really have to be diligent and you have to kind of ask, and you kind of have to take their responses on at half measure; you do not get a straight answer from them, because that has been our experience.

MR. MCKITRICK: Thank you, Francis. Your first point you talked about the security issue and I want to make sure I understand that. You said some of the things may have to be treated in a sensitive fashion and I wasn't sure if that was dealing with your comments that were coming to us or if that was something separate.

MR. BOOTS: Well, when we participate in this relicensing and it is in the Federal Register and everyone knows about it, and we understand that in the United States that these became targets of somebody, not of us. We don't feel that the threat is towards us as a people, but a major hydroelectric plant generating electricity for a large population is directly up river from us, so it will effect us. I don't know -- I guess the clarity that I need to put is how do we protect this information, so that -- I haven't had enough time to figure out how to say it. We realize the need that this information has to be in the public domain, yes. But when it becomes information available to for anybody or everybody,

then it becomes a little bit dangerous for us. So I don't know if I am -- Maybe I'm not clear in what I am trying to say.

MR. MCKITRICK: Is it information specifically dealing with the project itself? Is that what --

MR. BOOTS: Well, that's the experience I come from is that right after 9-11 they shutdown. It is the uniqueness of where we live. Understand that we live on the St. Lawrence River, the majestic St. Lawrence River. It is a beautiful place and it is on international water and that the target I guess was because of this generating the power but also because of the influx of people back and forth through international -- right after, moments after it was determined about the terrorist activity in the United States, they shut our community down, not because of the dam, but because of the international boarder there, and we understand that it is a very sensitive security matter and we are just saying that we are hoping that FERC has -- that their due diligence on this matter will protect everybody and not leave open. The reason I say this is because many times when regulations and laws are made in the general sense in the United States, our territories, the Indian reservations always seem to be the last to be

considered of what effect that will have in our territories. We are not high on their priority and all I am saying is, if anything happens then that dam is going to totally destroy the community if something ever happens and I hope it never will. But that is a major concern of people where I come from.

MR. MCKITRICK: I understand. Just a couple more things, you mentioned some post licensing things.

MR. WELCH: I just wanted to tell Francis that the Commission has gone to great length to block access to certain, on public record, to block access to schematic and blueprint diagrams showing the internal structures of many of our projects. So, it is not blocked, I mean you can still gain access but you have to go through a long Freedom of Information Act to get it. So, the Commission has taken some effort to do that.

MR. BOOTS: We appreciate that very much. I mean simply didn't know. We didn't know.

MS. OWENS: This is Kim Owens with the Department of the Interior. Francis and I discussed the issue earlier. It was sort of in a general sense as we laid out a process for developing information and all this exchange and consultation on projects and it wasn't clear I think from Francis's reading of it and the

tribe's reading of it how or did the IHC consider security concerns in the development of this new information for this new proposal and I am not sure I have a good answer for that. Raising that in the comments will then help us do that for the rulemaking. Was that pretty much it?

MR. BOOTS: Yes, thank you very much. I think you captured that.

MR. MCKITRICK: And you mentioned some issues dealing with consultation on the National Historic Preservation Act section 106 as being post licensing and if you believe that the resolution of that should be done in the NEPA process and during licensing that is not out of bounds for you to comment on and it is a very good comment.

Dealing with decommissioning there is some policy dealing with that and we could talk to you about where you might find that. It may not answer your question but it would be a good place to start.

MR. BOOTS: We appreciate it very much because we understand -- we understand our place and because of our particular preference in the way that we make our tribal laws, we try to be considerate of outside laws very much so, but we deem it to be in our authority that these laws that we make that effect -- for

example, water quality, we don't do it, we haven't made these rules just so we have rules, it is for the protection of our people. What happens when you have a high standard of water quality, for example, and your neighbor's standard is not as high and the river flows down to you? You see, there is no machine that could change that water in an instant. There has to be cooperation. We have to work with everybody in order that the standards that we deem to be a quality that is good for all of creation, not just human consumption. You see, water, some of you may be a little bit familiar that our whole life ways and our whole philosophy and our laws reflect this is of a deep spiritual understanding of our connectedness to all of creation, including the river.

The river to us is a living body. It speaks to us. We pray to it. So we don't make a law to govern it; we make a law to be cooperative with our relatives in the universe.

MR. MCKITRICK: Thank you, Francis.

MR. HOGAN: Francis, I have a couple of quick clarification questions. In your statement you mentioned an acronym that I'm not familiar with, it's CGMA.

MR. BOOTS: CZMA, that's lawyer talk. I don't

understand it either.

MR. HOGAN: Secondly, you said that you just found out about this public process just a short period ago. These notices were mailed between September 12 and September 19 or so and I'm wondering --

MR. BOOTS: Of this year or last year?

MR. HOGAN: Of 2002.

MR. BOOTS: Well, that is very recent to us. We did not anticipate it.

MR. HOGAN: My question is, what kind of time line does the tribe look at for a notice?

MR. BOOTS: Well, the discussion earlier about this issue of time line is appropriate for us during the relicensing and these meetings. It may be that it was not on our particular radar screen. Maybe it was not a priority to us.

You have to understand that we have a very small office and the tribe has, like everybody else, are busy covering all aspects of administration. It is possible it got on one of the chief's desk and didn't get forwarded to the appropriate department on time, but we have a very small staff. And so my answer to the question is, we appreciate it if we get put on the list along with everybody else and we will try to be

responding in the appropriate time.

MR. MCKITRICK: Thank you. We have heard that also before, that we may not be sending the notices to the people who may be the staff people that are taking action and any help along those lines to help us get to the right people would certainly be beneficial. So, we appreciate that comment.

Are there any other points of discussion that anyone would like to bring up here specifically dealing with what we have been talking about? Mona Janopaul.

MS. JANOPAUL: Just for the record, I wanted to point out that on page C-25 the last page of the IHC proposal contained in the blue book, there is my name, my phone number, and my e-mail address, and I would just like to encourage those who are submitting comments to FERC in the rulemaking, if it is possible to send me your comments by e-mail that would be appreciated. The Forest Service is active and working in this licensing with FERC and Interior and Commerce. It is still difficult to get mail in Washington D.C., because often it has to go through treatment elsewhere and it is getting late. So, just for the record, I would like to invite those who are submitting comments to send them to me via e-mail as well.

MR. MCKITRICK: Just in closing, Francis, you had mentioned a couple of times about time lines. On the back of the blue handout is a time line. As you can see, we plan to be finished by next July, so it is pretty aggressive. A couple of things that you may take note of, we are having obviously the meeting today, but then you move down to December 10, 11, 12, there will be a meeting in Washington D.C. to discuss the types of things that we have heard in these meetings. We certainly welcome participation as we prepare the notice of proposed rulemaking and then there will be a comment period, and then we will have three regional meetings, if you drop down to the larger box, in March and April, and the closest meeting that we have planned right now is in the midwest, in the Chicago area, but then we will actually be discussing some of the language that is in that notice and we certainly look forward to any comments you may have at that point. And then following that, toward the end of April, 22-25, there will be another workshop in Washington D.C. to discuss this and get more public comment, working towards our final rule in July.

So hopefully, this can be something that can be put on your agenda and we look forward certainly to

your specific comments.

MS. OWENS: Just curious, is there any plan to have conferencing capabilities on the 10th through the 12th for folks who may not be able to make the trip to Washington but are interested in giving input on drafting or what we've heard?

MR. MCKITRICK: Good question. I have no idea.

Tim.

MR. WELCH: There will be accommodations on the 10th but not on the 11th or 12th.

MR. MCKITRICK: Is that something that is in the notice?

MR. WELCH: Yes, it will be in the notice. We'll be doing the capital connection where you will be able to view the meeting on personal computer by subscribing to a certain website that will be in the notice.

MR. MCKITRICK: Are there any further comments?

If not, we really appreciate your insight into concerns that you have and look forward to your specific comments. Thank you very much. And I officially adjourn this meeting.

(Meeting adjourned - Off the record)

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

I Brenda J. DiMatteo, CERT, do hereby certify that the foregoing 56 pages are a verbatim transcription of the November 13, 2002 Joint Agency Tribal meeting regarding RM02-16-000, Hydropower Rulemaking.

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

Brenda J. DiMatteo, CERT