UNITED STATES OF AMERICA
Before the
FEDERAL ENERGY REGULATORY COMMISSION

Hydroelectric License Regulations)	**Docket No. RM02-16-000**
Under the Federal Power Act)	

COMMENTS OF THE NATIONAL HYDROPOWER ASSOCIATION ON THE FEBRUARY 20, 2003, NOTICE OF PROPOSED RULEMAKING

I. INTRODUCTION

On February 20, 2003, the Federal Energy Regulatory Commission ("FERC" or "Commission") issued a "Notice of Proposed Rulemaking" in Docket No. RM02-16-000 ("NOPR") [IV FERC Stats. & Regs. ¶ 61,185; 68 FR 13988 (March 21, 2003)]. In that Notice, the Commission asked for comments on a new hydropower licensing process under the Federal Power Act ("FPA") and on additional proposed revisions to the Commission's hydropower licensing rules.

The National Hydropower Association ("NHA" or "Association") applauds the Commission for its leadership in undertaking this rulemaking. NHA believes the administrative reforms contained in the rulemaking are a first step in creating a licensing process that is efficient, is cost effective and provides clarity to applicants and all stakeholders. NHA also commends the other Federal agencies for their cooperation in this effort. The Association hereby submits its comments in support of the Commission's NOPR amending, as necessary, its hydropower licensing process and associated rules.

NHA is the national trade association committed exclusively to representing the interests of the hydroelectric power industry. NHA's members represent over 61 percent of domestic, non-federal hydroelectric capacity and nearly 80,000 megawatts overall in North America. NHA's membership consists of more than 130 companies including; public utilities, investor owned utilities, independent power producers, equipment manufacturers, environmental and engineering consultants and attorneys.

The Administration's National Energy Policy recognizes hydropower as a valuable renewable energy resource and recommends administrative improvements to the licensing process, stating that there "is a need to reduce the time and cost of the hydropower licensing process" and that the process be "more clear and efficient." NHA has long sought administrative reforms in order to create a better process that is more balanced and transparent, provides more certainty to applicants, and better preserves our nation's leading renewable resource. As such, NHA has played an active role in this important rulemaking. The Association supports, and will continue to support, efforts to reduce costs and time in the licensing process; but more importantly, NHA encourages the Commission to take actions that ultimately improve licensing outcomes.

II. EXECUTIVE SUMMARY

For the Commission's convenience, the following highlights some of the important points made by NHA in these comments:

- A new integrated process ("ILP") is needed – NHA agrees that an integrated process will likely reduce the time and confusion occurring in the existing

processes. NHA supports the primary benefits of the integrated process – early involvement of Commission staff, early consultation and coordination with other federal and state agencies, schedule enforcement, final and binding dispute resolution on all parties, and study requests that meet specific criteria.

- The Traditional Licensing Process ("TLP") and Alternative Licensing Process ("ALP") should be retained – NHA supports the Commission's decision to retain the existing, well-established traditional and alternative licensing processes.
- Applicant should have the ability to choose the most appropriate process – NHA strongly believes that the applicant, who has the most knowledge regarding project issues, as well as the opinions and resources of stakeholders, should have the ability to choose among the three processes without the need for FERC approval. NHA also recommends that the ILP should not be designated as a default. However, as an alternative, NHA suggests FERC allow five to six years of use of the ILP before deciding which process, if any, is designated the default.
- Proposed Pre-Application Document ("PAD") needs revision – NHA supports a PAD that is appropriate in the amount and quality of information to support a well thought out scoping process. Because we believe that the PAD as proposed, goes beyond the necessary level of information, NHA is proposing a three tiered structure for information that provides the necessary information in a more targeted and efficient way.
- Study criteria should be adopted – NHA encourages the adoption of the Commission's proposed seven criteria for study requests as well as the NHA proposed criterion (3) and two additional criteria, while emphasizing that all

criteria must be addressed for approval of a study request. NHA also strongly endorses the Commission's plan to eliminate additional study requests after filing of the license application.

- NOPR study dispute resolution process needs modification – NHA believes that there are problems with implementing the proposal in the context of maintaining a timely licensing process. NHA proposes a different approach that builds off of the process proposed in the NOPR. NHA suggests an Advisory Technical Conference, which would include the applicant, be included in the process. This would allow the applicant to help ensure that the Advisory Panel has all necessary technical information to makes its recommendation, and allow the applicant to correct any potential misunderstandings or errors of fact.
- Role of Cooperating Agencies – NHA strongly believes that the proposed changes with regard to the role of cooperating agencies, if adopted, should not take effect immediately. The Commission should apply the same transition provisions to this revision of the regulations as it applies to other revisions to its regulations in this proceeding.
- Competition issues need to be addressed – NHA believes that, as a matter of fairness, the new process must be crafted in a way that treats licensee and non-licensees equally. In particular, NHA recommends that FERC require a PAD from a competitor for an existing license to be filed no later than five years before expiration of the existing license for the project.
- Proposed revisions to the TLP need modification – NHA believes that the TLP currently provides reasonable opportunity for public participation. Applicants

should be permitted to include additional consultation under the TLP at their discretion, cognizant of the time and cost it could add to the process. NHA supports the inclusion of binding study dispute resolution to the TLP with the elimination of post-filing study requests.

- Other Important Policy Issues – NHA recognizes that FERC has limited this rulemaking to process improvements, and the Association confines its comments to these aspects. However, NHA reiterates its support of the policy issues raised in its December 6, 2002, filing. These issues still present challenges to the licensing process and will need to be addressed even after adoption of this rule.

III. NHA COMMENTS ON NOPR

NHA provides its comments below, following the topic headings as required by ¶233 of the NOPR. Responses to specific questions on which the Commission requested comments (found in Appendix B of the NOPR) are included in this response with the respective paragraphs from the NOPR noted in the subsection titles.

A. Need for a New Integrated Process [¶¶23-28]

NHA agrees that the proposed ILP provides a process that should ensure better coordination between the participants in a licensing proceeding and, therefore, is likely to reduce the time and conflicting efforts under the existing TLP and ALP. In particular, NHA believes that the primary benefits of the proposed ILP are the early involvement of the Commission staff, the establishment and enforcement of schedules, the implementation of a final, binding dispute resolution by the

Commission with respect to study requests, and the adoption of appropriate study criteria which limit unnecessary and inappropriate studies. If the ILP when implemented in case-specific project proceedings does provide these benefits, NHA believes that the overall license procedings at the Commission will become much more efficient for all participants.

B. Traditional Process and ALP to be Retained [¶¶29-36]

NHA believes that the Commission has taken the right approach in retaining the existing ALP and TLP licensing processes. This recognizes the earlier comments of NHA and many licensees. The Commission correctly understands the fact that there is a wide diversity of projects, issues and stakeholders, and that the existing TLP and ALP provide tested options for licensing.

NHA strongly believes that the applicant should have the choice of the license process to be used (ALP, TLP or ILP). The license applicant is the one to bear the burden of the costs of whichever process is chosen. The applicant has the most knowledge on the complexity of a project, the level of potential stakeholder involvement, and the resources available to the applicant and stakeholders with respect to the project. Most importantly, if the Commission wants a license applicant to make the commitment and investment in the success of the applicant's licensing process, the Commission should not hold out the prospect that the applicant's choice of process could be denied and that the applicant could be forced into a process it feels is inappropriate.

It is important to have the cooperation and understanding of agencies, tribes and general public early in a licensing process. But that cooperation can be achieved without requiring that the applicant seek Commission approval of its choice if the applicant seeks to use the TLP or ALP. However, NHA agrees with the Commission that it is appropriate for the applicant to develop a plan and schedule for licensing activities, when selecting the TLP or ALP (as opposed to the ILP). The applicant would be free to consult with stakeholders prior to the applicant's decision on process.

NHA recommends that, at a minimum, the Commission allow for a five to six year period of experience with choice by the applicant among the ILP, TLP and ALP before determining whether or not to make the ILP the default process. This period would allow for a fair number of licensees with different types of projects to select the ILP and have the it completed to demonstrate the benefits of the new process.

With respect to the TLP specifically, NHA objects to the need to obtain Commission approval for a process that previously never required Commission approval to use. A license applicant should not be prevented from using the TLP where the applicant believes that is the most appropriate process. The Commission's NOPR discusses (¶29) a number of reasons why license applicants believe the TLP should be retained. These are the same reasons why a license

applicant may choose to use the TLP, rather than the new ILP. The Commission should not second guess a license applicant's decision. Therefore, the Commission should delete proposed section 5.1(e) of the proposed rules and revise proposed section 5.1(f) to remove the requirement that a license applicant obtain Commission approval to use the TLP by changing "request" to "notification that it intends."

If the Commission does not delete the requirement for approval to use the TLP, as NHA recommends above, the requirement in proposed section 5.1(f)(3)(A) to include written comments and a response thereto in a license applicant's request to use the TLP should be clarified.[1] The first time a license applicant may publicly make an announcement of which licensing process it will use is when the Notice of Intent ("NOI") is filed. If that is the case, then the applicant will be unable to provide written comments on the proposal submitted by stakeholders. NHA requests that the Commission indicate that this provision only applies if the license applicant has obtained such written comments during pre-NOI consultation, but that the license applicant is not required to engage in such consultation.

Proposed section 5.1(f)(5) imposes the additional requirement of "good cause shown" upon license applicants who request Commission permission to use the ALP. The proposed regulation does not explain why a "good cause" showing is

[1] Proposed section 5.1(f)(4) implies this provision also applies to a request to use the ALP. NHA requests the Commission clarify this issue.

needed. The Commission is not proposing to change the existing criteria necessary to support Commission approval of the ALP.[2] Furthermore, NHA is not aware of any serious claims that the Commission has inappropriately approved the ALP in the past. NHA believes that once a consensus is obtained among stakeholders regarding the use of the ALP, as required by existing section 4.34(i), no further information or showing should be required by the Commission, and the Commission should approve the use of the ALP in a licensing proceeding as it has since the ALP was created.

D[sic]. Key Issues and Goals for an Integrated Licensing Process [¶¶23-229]

1. Early Identification of Issues and Study Needs [¶38]

NHA agrees that the new ILP should be designed to engage stakeholders early, and to establish schedules and constraints on late involvement.

a. Advance Notification of License Expiration [¶¶39-44]

NHA believes that the Commission's intent to issue a notice of an expiring license to the licensee should be in the regulations, as opposed to a statement in the preamble of the NOPR that the Commission would handle the notice as an administrative matter outside the regulations. Contact with tribes by the Commission at the same time as this expiration notice should also be included in the regulation so that the Commission's process

[2] NHA recommends that the Commission delete proposed section 5.1(f)(3)(B). A request to use the ALP must comply with section 4.34(i); repeating that criteria in section 5.1(f)(3)(B) is unnecessary.

is clearly defined and handled uniformly. Including this two-part step in the regulations would provide clarity and certainty to all participants.

b. Integrating Pre-Filing Consultation with NEPA Scoping [¶¶45-49; Question #1]

NHA agrees that information regarding the project should be made available early in the process to facilitate the scoping of environmental and other issues, the engagement of stakeholders early, and the early development of study plans. NHA believes that the Commission has properly and logically organized the early steps in information development, National Environmental Protection Act ("NEPA") scoping and study plan development. However, it may be very difficult for some applicants, especially those with large and complex projects, to accomplish all of the study planning and study execution if they are not able to commence licensing activities earlier than the 5 – 5 ½ years prior to license expiration as contemplated by the NOPR. NHA recommends that the Commission consider revisions to proposed section 5.4 in the final rule to make it clear that applicants may formally initiate the relicensing process including submittal of the PAD in advance of the 5-1/2 years prior to license expiration..

NHA concurs with the Commission that the PAD should provide available information about the project and the potentially affected environment. It

is important to reinforce, however, that the PAD need only assemble and describe *existing* information. Presentation of existing information in a cohesive manner should facilitate the identification of project-related issues and the development of study plans. However, NHA is concerned that the information to be included in the PAD is, in certain areas, too extensive. Furthermore, any new regulations should coordinate closely with the Commission's policies and regulations on protecting Critical Energy Infrastructure Information ("CEII"), in particular Order No. 630 (issued February 21, 2003, "CEII #1") and any new regulations adopted in Docket No. RM03-6, addressing additional CEII issues (notice of proposed rulemaking issued April 9, 2003, "CEII #2"). The requirements in the NOPR in this proceeding to file and make public some of the information to be included in the PAD may violate the spirit and content of the Commission's CEII policies.

Based on the extensive first-hand experience of NHA members in developing both Initial Consultation Documents ("ICDs") and Initial Consultation Packages ("IIPs") and Section 16.7(d) information, and in using that information in pre-application activities, NHA recommends that the Commission revise proposed section 5.4 to organize the information currently proposed for the PAD into three categories (as noted below), with some information deferred until later in the process. These categories will facilitate stakeholder access to necessary information, and at the same

time, relieve some of the burden on applicants for the cost of compiling information which is not going to be used by most stakeholders. As has been discussed at a number of the FERC workshops in this rulemaking process, many stakeholders do not need all of the data which would be included in the proposed PAD. While NHA's members are committed to making available to stakeholders the information needed for effective and efficient participation, NHA does not believe it is a wise use of resources for the license applicant to have to distribute materials which are not going to be used by stakeholders at this early stage in the licensing process. Rather, NHA recommends that such information be made available for stakeholders upon request or be provided in the license application.

Therefore, NHA recommends that information be divided into the following three categories:

- The PAD itself would contain only the information identified in proposed section 5.4(c)(2)(A)-(B), (D)-(G), (J) and (P), except as noted below. The PAD would contain a summary of the materials to be available at the project files, as described below. Stakeholders receiving the PAD would be given instructions on how to request copies of materials included in the project files; upon such a request, materials maintained in the project files would be mailed to stakeholders in lieu of visiting the project files.

- Project files would be organized by the applicant for the type of information currently required by Section 16.7(b) of the regulations, except as noted below. The project files would contain the information identified in proposed sections 5.4(c)(2)(H), (I,) (K) and (L). As noted above, the PAD should contain a summary of the materials in the project files and stakeholders should be able to request information which the applicant would copy and ship to them at a reasonable cost for reproduction. This would not apply to CEII information, which could only be viewed on-site and not copied.
- The final license application would contain the information identified in proposed sections 5.4(c)(2) (M) and (O), as well as proposed section 5.4(c)(2)(G)(xi). [Note that there is no (N) in the proposed section 5.4(c)(2).]

Information proposed for the PAD: Specific comments on the form and content of the PAD by NHA, as discussed above, are amplified below.

Proposed section 5.4(c)(2)(B): An applicant should not be required to prepare and document all communications voluntarily made with stakeholders prior to filing the PAD. Such a requirement could stifle informal discussions and merely add an additional burden that does not now exist. Moreover, not all communications are substantive, relevant or

helpful to stakeholders becoming engaged in a licensing process, nor do license applicants routinely keep meeting minutes from informal discussions.

Proposed section 5.4(c)(2)(E): The physical description of the project facilities and associated components should be consistent with the Commission's CEII #1 (Order No. 630). Furthermore, the new regulations will need to be coordinated with any new regulations adopted pursuant to the CEII #2 notice of proposed rulemaking in Docket No. RM03-6. To be consistent with the Commission's CEII policies, a location map and site plans would be provided, but specific information such as the location of control rooms, engineering designs and information typically found in Exhibits F and G should not be included in the publicly filed PAD, but would be included in the project files. Additionally, cross sectional information should not be provided in the PAD.

Proposed section 5.4(c)(2)(G): NHA firmly believes that the environmental data required in the PAD should be relevant to and commensurate with the scope of the project. For example, the PAD required for a small run-of-river project with no endangered species in the project area should only involve a brief description of the environmental resources that are not likely to be affected and a greater, but still not expansive, discussion on resources potentially affected. Further, the

terrestrial resources information required for the PAD on such a run-of-river project where there are essentially no project lands should be a characterization only. Water quality and fishery resources should be described in more detail if existing information is available, but not exhaustively discussed if resource effects are not significant. Additionally, many existing studies in the project area may be unrelated to the project and unnecessary to be compiled. Further, construction impacts and issues should only be addressed for proposed construction. Information on previous construction activities should not be included in the PAD as they are not pertinent to the Commission's baseline policy.

Consequently, for each of the resource sections described for the PAD (proposed sections 5.4(c)(2)(G)(i) through (xii)), NHA strongly recommends that the language limiting information "to the extent known and available" be revised to say "to the extent known, available and relevant to the project".

Proposed section 5.4(c)(2)(G)(ii): The geology and soils information required for earthquakes, faults, seepage, subsidence, solution cavities, active and abandoned mines, erosion, mass soil movement, and disposal sites appears to be at a level of effort not justified at this stage of the licensing process. Requiring information on each of these items would necessitate a significant literature review. Much of the requested

information appears irrelevant to the operation and maintenance of an existing hydroelectric project. To the extent the information exists or is important, it is likely already covered in a project's Part 12 reports on file with the Commission and available in the project files. Thus, there should be no specific requirement for providing this information, unless the applicant elects to do so to address a potential issue.

Proposed section 5.4(c)(2)(G)(iii): Pursuant to the NOPR, the Commission would require considerable information to be included in the water resources section of the PAD. Although, according to the proposal, this information is to be developed based on existing data, NHA is concerned that since much of this data is generally not available at hydropower projects, applicants may feel pressured to collect baseline water quality data on parameters such as chlorophyll *a* and nutrients before the licensing process begins. The NOPR should specify that an applicant is not required to collect such data expressly for the purposes of including it in the PAD, but should provide the data if already available. Additionally, the hydraulic interconnection of surface water and groundwater is not typically known prior to the start of a licensing process and the connection may not be an issue with respect to many projects.

Proposed section 5.4(c)(2)(G)(xi): Information on socio-economic resources below the county level may be difficult to collect and should not

be required at the initial stage of a licensing proceeding. NHA agrees with the comment in the NOPR that information on employment, population, housing, income, government services and tax revenues may easily be obtained from websites. However, such information may not be relevant to all projects and should only be required for projects that have the potential to affect the community.

Proposed section 5.4(c)(2)(H) and (I): NHA recommends that previously approved Exhibits F and G information be placed in the project files only, as described above. This will facilitate the license applicant controlling access to such information under the Commission's CEII policies. As Order No. 630 provides, this information is generally considered to be CEII and should not be made publicly available. With the other requirements, the PAD should contain sufficient overview maps and drawings to allow reviewers to orient themselves to the site and the project without filing publicly detailed and sensitive project information.

Proposed section 5.4(c)(2)(K): NHA recommends that the original license application, the order issuing license, subsequent license applications and orders, and license amendments not be required in the PAD. Such documents can more efficiently be made available in the project files, to the extent they are available and not CEII. Including these documents in the PAD would unnecessarily expand its size and be of little use to the

vast majority of stakeholders. Further, rather than requiring detailed compliance information with respect to the project, NHA recommends that the applicants be required only to identify in the project files those situations where the Commission has determined that the project has not operated in compliance with the license requirements. NHA also believes that providing generation information at a one-hour time increment for a five-year period is burdensome and of questionable relevance. Instead, the project files could contain a summary of annual generation. NHA also believes that the total value of generation is irrelevant for stakeholders to understand the potential impacts of the licensing and is not useful until Exhibit D is prepared. Similarly, reports on original project costs, current net investments, and available funds in the amortization reserve account are more appropriately covered in Exhibit D of the license application, rather than included as part of the PAD. This information is not currently used in the TLP or ALP pre-application process and the proposed ILP does not explain how it will be used.

Proposed section 5.4(c)(2)(L): NHA recommends that the safety and structural information, including Emergency Action Plans, described in this section be included in the project files rather than the PAD. NHA further recommends that access to such information be limited to agencies and other parties who are charged with responsibilities in this subject area (safety and structural adequacy), and who are willing to sign appropriate

non disclosure-commitments. Inclusion of the most recent emergency action plan and the independent consultant's reports in the PAD (and, therefore, making such information public) would violate the Commission's CEII policies and would provide little relevant information in a licensing process. In addition, these Part 12 reports are highly technical and voluminous and would unnecessarily lengthen the PAD, reducing its usefulness to stakeholders.

Proposed section 5.4(c)(2)(M): NHA believes that the energy conservation information required under the proposed rule would further unnecessarily burden the PAD, is irrelevant to assessing potential project impacts, and should be included only in the final license application.

In summary, NHA believes that the Commission should reduce the requirements of the PAD as recommended above so that it becomes a useful tool for initiating the licensing process.

As a further consideration, NHA strongly recommends that the Commission reconsider the requirement at proposed section 5.7 that the applicant issue a revised PAD and proposed study plan within 45 days of receiving comments on the PAD. Even with the improvements to the PAD recommended by NHA above, it is likely to be a voluminous document, and, as a compilation of existing, available information,

unlikely to need substantial revision. To issue a revised PAD would be an unnecessary burden on applicants and stakeholders alike. Instead, the Commission should require the filing of a supplement to the PAD wherein any necessary corrections to the PAD could be noted, information supplemented if necessary, and the list of issues updated based on comments received. The applicant would also file its proposed study plan, as required by proposed section 5.7 with the PAD supplement.

c. Study Plan Development [¶¶50-72; Question #2]

As proposed in the NOPR, NHA strongly supports Commission adoption of criteria for study requests, and further urges that such criteria apply to resolution of study disputes, emphasizing that all criteria must be addressed and considered for a study request to be approved, or to resolve a study dispute. NHA also strongly endorses the Commission's plan to eliminate additional study requests after a license application is filed based on the rigorous study plan and study dispute resolution process.

In addition, consistent with its comments in this proceeding in December 2002, NHA is proposing that two additional criteria be added to the seven criteria identified in the NOPR, as further discussed below. NHA further believes that its proposed criterion (3) addresses more than is contained in the Commission's criterion (7) regarding "cost and practicality"; NHA

notes that it appears that the NOPR mistakenly refers to criterion (6) for comparison purposes.

NHA also believes that objective criteria should be applied both in developing the study plan and in resolving disputes pertaining to the study plan. NHA agrees with the conclusion in the NOPR that there must be a clear nexus between project operations and effects on the resources for which a study is requested (¶ 59). The criteria outlined in the NOPR go a long way to addressing NHA's concerns.

Therefore, NHA supports the criteria proposed in ¶ 64, subject to the following comments. These comments are focused on insuring that the criteria adopted in the final regulations not only require that a requestor explain the reasoning behind a study request (the primary focus of the criteria proposed by IHC), but also require that study requests and dispute resolution squarely address the merits of the request in the context of the subject license proceeding and the requirements of the FPA.

1. The Commission's Criterion (7) and NHA Criterion (3) should both be included.

NHA believes that its criterion (3) offers a valuable consideration that NOPR criterion (7) does not cover. Therefore, NHA believes that the Commission's Criterion (7) should be retained and that NHA's Criterion

(3) should be added. Specifically, NOPR study criterion (7) references the issue of the cost and practicality of a study, with a focus on alternative and perhaps less costly ways of obtaining the subject information. NHA agrees that the issue of cost should be considered as part of evaluating such alternatives; however, NHA's recommended criterion (3) is focused on a different consideration, *i.e.*, whether the anticipated value of the information to be gained warrants the effort (including cost) required to conduct the proposed study. The NOPR states that "the proposed criteria *implicitly require* that study requests not be frivolous and add some appreciable evidentiary value to the record." NHA believes this concept is so important that it should be *explicitly stated* rather than *implicitly required*. The goal of NHA's criterion (3) is to avoid low-value, high-effort studies. This is an important component in the analysis of the appropriateness of a study request.

In order to clarify the usefulness of NHA criterion (3), NHA proposes that it be reworded as follows: "Assess the relative value of the anticipated incremental information compared to the effort, including cost, required to obtain it."

2. Two additional criteria should be added.

In addition to its reworded criterion (3), NHA supports the addition of two criteria which have been previously recommended in comments filed in

this proceeding by Pacific Gas & Electric Company ("PG&E") for study plans (and for study dispute resolution as discussed below in Section III.D.1.d). NHA believes that these two additional criteria, in conjunction with NHA's criterion (3) will constructively contribute to the study planning and dispute resolution processes, and ensure that the studies performed will be those anticipated to add value to the evidentiary record. These two criteria are:

- Is there an indication of a resource problem that the requested study will address?
- How will the requested information be used in the context of the proceeding?

3. Additional study issues

NHA agrees with the NOPR's conclusion in ¶ 69 that standard study plan formats may not be feasible. Potential license applicants have a number of resources for locating examples of study plans, including FERRIS.

NHA strongly endorses the concept proposed in NOPR ¶ 71 that as information-gathering and studies proceed, the standard for Commission approval of new requests must also increase. NHA further endorses the Commission's proposal to eliminate the opportunity for stakeholders to request additional studies and information after the application is filed, based on this incremental development of information during the pre-

filing stages of the process. The license applicant's willingness to use the ILP is significantly dependent on this aspect of the Commission-approved study plan process.

4. The study plan

While NHA supports the overall process proposed in the NOPR for development of study plans, NHA is concerned that the time frame indicated in the NOPR's proposed ILP flow chart (containing a total of 75 days from the date of the Scoping Meeting to the date on which the applicant must submit a Draft Study Plan – *i.e.*, the time allowed for the applicant to develop and revise the study plan) is inadequate. Complex proceedings may involve identification and development of scores of individual study plans – each plan requiring clear identification of issues and goals, research for existing information, and thoughtful evaluation of methodologies. Even for simpler projects it may take the license applicant more than 75 days to work through the input from stakeholders and develop a thoughtful and comprehensive study plan. Experience has shown that such process can easily require six months or more to complete, particularly for more complex projects. From the time the comments and information requests are submitted by stakeholders (proposed section 5.5) until the applicant files revised study plans with the Commission (proposed section 5.12), a total of 165 days would elapse. Of that time, as noted above, 75 days are allotted to the applicant's

development and revision of the study plan. The remaining 90 days involve public notice and comment periods on the SD1. Although a detailed reworking of these timeframes is best left to the Commission's proposed drafting sessions, NHA believes that these activities can be bifurcated such that the Commission's issuance of SD1 and comments thereon proceed in parallel with the applicant's receiving comments on the study plan and making revisions to it. Such bifurcation would permit the applicant to be able to file its revised study plan for Commission approval (proposed section 5.12) at the same point in time as anticipated in the NOPR's flow chart.

As an additional alternative, the schedule for study planning in the ILP could be improved by shortening the comment period on the draft license application. If the comment period is reduced to 60 days, as NHA recommends below, an additional 30 days could be applied to the study planning schedule. This would put the limited available time to work where it is most needed. At the very least, the NOPR should provide the option that the time periods for study plan development can be extended.

5. Implementation of study plan

As noted above, NHA strongly supports the concept described in ¶ 64 of requiring participants in the ILP to support their information-gathering and study requests with reference to the study criteria. All criteria must be

addressed for approval of a study request. This requirement (a strong benefit to using the ILP) would impose discipline on the process, making a stakeholder consider the basis for the request, and would further provide guidance to the Commission if a dispute arises.

Proposed sections 5.12 and 5.13 are silent as to the consequences of a license applicant not complying with the Commission's Preliminary Decision, as may be subsequently revised by the Director's decision, regarding the study plan. This silence could prove substantially unfair to a licensee applicant facing license competition from a non-licensee applicant. Specifically, the Commission has authority over a licensee that it does not have over a non-licensee. Among other things, a non-licensee competitor would not be subject to the Commission's civil penalty provisions since it would not be a licensee. The competitor could simply wait for the licensee to comply with the approved study plan and then, with impunity from FPA Section 31 exposure, decline to do the studies itself and borrow from the studies conducted by the licensee. NHA recommends that the remedy for failure to comply with the Commission-approved study plan be identical for licensee and non-licensee applicants. A reasonable remedy would be to use the provision already specified at Section 4.38(b)(6)(vi) of the proposed regulations for TLP proceedings: "If a potential applicant fails to obtain information or conduct a study as required by the Director pursuant to subparagraph [insert reference

paragraph] of this section, its application may be considered deficient." Note that NHA has inserted "may" for "will" to provide the Director with discretion to be used, *e.g.*, where a license applicant has, in the interim since the time the Preliminary Decision was made, agreed to implement a mitigation measure in lieu of performing a study required by the Preliminary Decision. The added text should be inserted at the ends of proposed sections 5.12 and 5.13.

d. Study Dispute Resolution Process [¶¶73-91; Question #3]

The NOPR is very helpful in clarifying the relationship between the proposed applicant-prepared study plan, the proposed Commission-approved study plan, and the scope of the proposed dispute resolution procedure. NHA generally agrees with the proposed relationship and the dispute resolution approach as described in ¶ 76.

With respect to the dispute resolution process generally, NHA agrees that such a process should be timely, fair and transparent. NHA also appreciates the thought that went into the concept of a dispute resolution panel, particularly the concept of the three-member panel (¶ 77). However, NHA has concerns about the implementation of this concept when applied to a project, particularly a complex project with many study requests. In particular, NHA has concerns about: (1) how the process would handle multiple simultaneous disputes on the same proceeding

involving different resource issues without having multiple panels working simultaneously; (2) the inability of the applicant to provide the panel with additional technical information or to correct any potential mischaracterizations or errors of fact; (3) the availability of staff of the FERC, the disputing agency or tribe and any necessary technical representatives to resolve a dispute in the specified time frame, especially if there is time needed to educate the panelists for each panel with respect to the specifics of the study dispute and the project; (4) the inability or difficulty in finding qualified third members of the panels willing to commit their time and resources to the dispute resolution without compensation for their time; and (5) the unresolved questions going into any dispute resolution process, *e.g.*, geographic location for a given dispute resolution which appear to be left open as a matter "best decided in the context of each proceeding" (¶ 91) but which could further delay or complicate the initiation of each panel.

NHA proposes that FERC retain Step 1 (¶ 85) of the two-step dispute resolution process involving the filing by applicant of a draft study plan, the convening of a meeting of the parties to attempt informal resolution of any differences, and the FERC approval of the study plan. NHA also proposes that the Commission consider providing guidance to licensing participants regarding the use of a peer review of study plans in conjunction with the informal resolution of differences. The peer review process could be conducted through written or email correspondence and

the peer reviewers would be charged with providing expert opinions on: (1) the goals and objectives of the study, (2) the technical design of the study in relation to its goals and objectives, (3) the technical design of the study in relation to the scientific state-of-the-art, and (4) the anticipated utility of the expected data in relation to the goals and objectives of the study. The parties would then use the results of the peer review process in an attempt to informally resolve the disputed study. Failing resolution, the written peer review comments would then be made available to the parties involved in the formal dispute resolution process.

With regard to Step 2 under the NOPR (which involves the formal dispute resolution process), NHA supports the concept in the NOPR that agencies and tribes with mandatory conditioning authority would be able to dispute the Commission-approved study plan *only* with respect to studies pertaining to their mandatory conditioning authorities (¶ 76). However, NHA believes that the three improvements listed below will greatly improve the efficiency and efficacy of the Commission's proposed dispute resolution process.

1. Advisory Technical Conference to precede Advisory Panel.

In addition to the Advisory Panel, NHA recommends the use of a Advisory Technical Conference as a component to the Advisory Panel with the goal of providing for a swift, efficient and binding dispute

resolution process as to all disputes in one framework. NHA recommends that the Advisory Technical Conference be convened by the FERC immediately before the Advisory Panel meeting. The Advisory Technical Conference would involve the FERC staff, the agency or tribe with mandatory conditioning authority, the applicant, and a neutral expert [*or experts*] in the relevant resource issue(s). The goal of the Advisory Technical Conference would be to provide additional guidance to the Advisory Panel immediately before the Panel begins its decisional process. FERC staff with expertise in the area(s) of the dispute(s) would moderate the Advisory Technical Conference and the Advisory Panel. As provided in the NOPR, the applicant and the agency or tribe would file with the FERC any information or argument with respect to the pending disputes before the Advisory Technical Conference is held. In this pre-Conference period, technical experts from FERC, the disputing agencies or tribe(s) and the applicant would have an opportunity to present their respective technical assessment of the information and the study request(s) in dispute.

During the Advisory Technical Conference, the disputing agency or tribe would briefly present its reasoning as to how their study request meets the relevant study criteria, as discussed further below. The applicant would also briefly present its reasoning as to why the study was not needed or why aspects of the study were not needed for the purpose of the license

proceeding, or why the study request did not otherwise meet the applicable study criteria.

To the extent feasible, all pending disputes could be addressed in one Advisory Technical Conference. After the Advisory Technical Conference was completed, the Advisory Panel would recess to meet without the license applicant. The Advisory Panel would then make a recommendation to the Director of Office of Energy Projects ("OEP"). The record of the Advisory Technical Conference and the Advisory Panel Meetings would be reported by FERC staff, including the opinion of the neutral expert(s), to the Director of OEP for final decision, with copies to all participants. As provided for in the NOPR, the Director would issue a dispute resolution decision within 70 days of the notice of dispute. The Director's decision would constitute an amendment to the approved study plan and would be accompanied by an order directing the applicant to carry out the study plan as amended.

2. Agency or tribe requesting dispute resolution agrees to be bound by final decision.

NHA recommends that the Commission add to the proposed regulations a stipulation that upon requesting dispute resolution through the Advisory Panel, as supplemented by the Advisory Technical Conference recommended above, the agency or tribe requesting such dispute

resolution agree that the final decision of the Director, following the Advisory Panel session, will be binding on the requesting agency. This addition to the regulations will assure licensing participants that the time, effort and cost of the Advisory Panel approach would be well invested and that the licensing process would indeed be made more efficient.

3. Criteria for dispute resolution.

As discussed above with respect to the criteria for study requests generally, NHA believes that those criteria should also be applied in resolving study disputes. Specifically, as discussed above, in resolving study disputes under this process, NHA believes that the Director should apply the criteria proposed in ¶ 64, with the addition of NHA's criterion (3) as reworded above in Section III.D.1.c. In addition, as discussed above as to study criteria, NHA believes that the process for resolving disputes will be substantially improved if the following additional two critical elements are included as review criteria:

- Is there an indication of a resource problem that the requested study will address?
- How will the requested information be used in the context of the proceeding?

These criteria should be addressed by the Advisory Technical Conference and the Advisory Panel and should be the basis of a final, binding decision by the Director on the disputes.

e. Other Recommended Uses for Dispute Resolution [¶¶92-93]

NHA commends the Commission for acknowledging that "there may be merit in using evidentiary hearings before administrative law judges in licensing proceedings" and for stating that it will "give due consideration to any requests for such hearings." (¶ 93) NHA believes, however, that the Commission should take this a step further in the final rule.

NHA proposes that in its regulations the Commission adopt a practical standard for granting evidentiary hearings – for resolving questions of material fact arising after the license application is filed. Specifically, NHA suggests the Commission adhere to the standard in the Administrative Procedure Act, wherein "[a] party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."[3] Consistent with court precedent, the Commission should convene a trial-type evidentiary hearing "when disputed facts material to the contested agency decision exist"[4] and a trial-type hearing would assist in the resolution of those disputed facts. The applicant that seeks a hearing would be required to meet a threshold burden of tendering evidence suggesting the need for a hearing – showing

[3] 5 U.S.C. § 556(d).
[4] *Sierra Ass'n for Env't v. FERC*, 744 F.2d 661, 664 (9th Cir. 1984), *citing Georgia-Pacific Corp. v. EPA*, 671 F.2d 1235 (9th Cir. 1982).

disputed questions of material fact – and the Commission would decide if the dispute was material to the license proceeding.

Where there is a question of material fact, requiring the applicant, the resource agencies and other interested parties to make the evidentiary basis for their respective license conditions (subject to expert testimony and cross examination), could help to foster settlements and limit additional litigation before the Commission and the U.S. Court of Appeals. These evidentiary hearings would also improve the quality and probative value of the record forming the basis of the license conditions imposed – which would enhance review of these issues by the Commission and, if necessary, the U.S. Court of Appeals.

NHA envisions that hearings would be set to resolve disputes over proposed license terms and conditions that were not resolved through the informal processes of the pre-filing period or through other means. Hearings would not be used to resolve study disputes or similar pre-filing disputes that are best decided through other mechanisms. Some concern has been raised that such evidentiary hearings may delay the process. However, the Commission can continue to review all other issues which are not the subject of a hearing. Furthermore, because such hearings are likely to be narrowly focused on particular disputed factual issues, they will generally be able to be conducted on an expedited schedule, *e.g.*, 180

days. The hearings should not unduly delay the Commission's licensing process and, as discussed above, may actually facilitate the process by bringing resolution to difficult issues that have held many a licensing procedure hostage at the Commission for years.

2. Consultation and Coordination with States [¶¶94-102]

NHA commends the Commission for seeking ways to engage states in consultation and coordination in the licensing process [in particular with respect to the states' Clean Water Act ("CWA") Section 401 authority], and for maintaining that any information requests supported by the Commission must meet the comprehensive development standard of the FPA. NHA supports the efforts described in the NOPR to provide for early consultation and coordination with state agencies. NHA also supports Commission's staff's efforts to discuss and develop state-specific agreements as a means of clarifying the structure within which there can be better integration between the state and federal processes, thereby encouraging license applicants to engage in early consultation (¶99). As the federal license-issuing agency, Commission needs to take the lead in developing such agreements.

a. Timing of Water Quality Certification Application [¶¶103-05; Question #4]

The NOPR contemplates different timelines for applicants to file for CWA Section 401 certifications under the three different licensing processes.

NHA and others have noted that under current regulations the applicant is often left to address any process inefficiencies or resolve any federal/state coordination conflicts on its own. NHA believes a single deadline (*i.e.*, date by which the applicant must have applied for CWA Section 401 certification) may be more prudent than multiple deadlines for the multiple process alternatives, especially if such single deadline is set sufficiently late in the process to enable the applicant to decide how best to address any potential confusion over the information requirements or how best to resolve other coordination conflicts. The license applicant can always choose: (1) to apply for Section 401 certification earlier than required by the FERC regulations, (2) to develop a pre-application process with its state certification agency, or (3) to take some other action that would support early coordination. Specifically NHA recommends that the deadline for comments on the notice that the application is ready for environmental analysis (the "REA" notice, as proposed in the NOPR) also be used as the deadline for the filing of the Section 401 certification application. NHA further recommends that this deadline apply uniformly to all of the licensing processes.

3. Consultation with Indian Tribes [¶¶106-27]

NHA believes that the Commission's commitment to appointing a Tribal Liaison and the proposed early notification to tribes that a licensing proceeding is beginning, as set forth in the NOPR, will aid in providing tribes better access to

licensing activities and information. These two improvements to the licensing process are consistent with NHA's comments filed on December 6, 2002.

However, NHA believes that the Commission could go further than the steps proposed in the NOPR. Specifically, NHA recommends that contact with affected tribes by the Commission staff be a required early step in the ILP. Such contact would not violate the Commission's *ex parte* rules. Moreover, in those instances in which the license applicant elects not to undertake National Historic Preservation Act Section 106 consultation on the Commission's behalf, the Commission staff must consult with tribal entities to fulfill its obligations under the National Historic Preservation Act. The Commission's rules should be explicit about how this required consultation meshes with the rest of its licensing process.

In addition, NHA agrees with the Commission that applicants should not be required to obtain explicit approval by tribes when engaging consultants for cultural resource analyses. NHA understands the importance of ensuring that all stakeholders involved have trust in the consultants, especially for tribes on sensitive cultural resource issues. However, the choice of consultants ultimately must rest with the license applicant – it is their license at issue and they must work most closely with the consultant as well as pay the bill.

4. Environmental Document Preparation

a. Cooperating Agencies Policy [¶¶128-34]

The Commission's proposed rule would amend the *ex parte* rule to allow federal cooperating agencies to intervene, subject to a requirement that all studies and other information provided by the cooperating agency to the Commission be submitted to the Secretary and placed in the decisional record. However, pursuant to the NOPR, decisional communications such as working drafts of NEPA documents and associated communications would be exempt from such public disclosure.

At this point, NHA elects not to take a position on this proposed change in the *ex parte* rules to allow an agency to be both an intervenor and a cooperating agency because a diversity of opinion exists within the Association's membership on this issue.

However, if the Commission does modify its regulations as proposed in the NOPR, NHA is very concerned that the change to the *ex parte* rules would be scheduled to take effect immediately, since such a significant change in the *ex parte* rules could have adverse consequences on those applicants who have already initiated a licensing process. NHA also believes that if applicants who are currently in the midst of a licensing proceeding had known that cooperating agencies would be given the

ability to intervene later in their proceeding, those applicants may have proceeded differently in their licensing process. This change in the rules for any ongoing licensing process prejudices that licensing proceeding.

A second concern is how the rule change and short transition period will affect ongoing settlement negotiations. In some instances, applicants are engaging in settlement discussions early in the licensing process. With the revisions to the *ex parte* rules as proposed in the NOPR, cooperating agencies would have access to decisional material during those negotiations, placing applicants at a distinct disadvantage. For that reason, NHA is concerned that the change in *ex parte* rules may act as a disincentive to settlement discussions.

Therefore, NHA proposes that any change to the *ex parte* rules be placed in effect consistent with the transition rules otherwise applicable (with the modification described below in Section H), *i.e.*, for projects for which the NOI is filed within 6 months of issuance of the final rule.

b. NRG Cooperating Agency Proposal [¶¶135-36]

NHA agrees with the Commission that a cooperating agency relationship may not be appropriate in all licensing cases.

c. Non-Decisional NEPA Documents [¶¶137-40]

NHA believes that the Commission's proposal to separate resource impact analysis from decisional analysis in its NEPA documents is reasonable. NHA supports this proposal as a tool for facilitating the use of the Commission's NEPA document by other agencies to avoid duplicative NEPA efforts.

However, due to the different views expressed at Commission workshops and drafting sessions, the Commission should make clear in its final rule that its discussion of alternatives and potential mitigation measures in the NEPA document is part of the resource impact analysis required by NEPA. Without this discussion, the NEPA document could be considered incomplete.

d. Draft License Articles [¶¶ 141-43]

NHA supports the Commission's proposal to attach draft license articles to its draft NEPA documents. Such a process would provide enhanced opportunity for the applicant and all stakeholders, in particular the mandatory conditioning agencies, to understand how the Commission intends to implement protection, mitigation and enhancement ('PM&E") and other measures in the final license. The Commission should also include its standard license articles in the document to address Forest

Service concerns about the Commission's administration of projects on forest lands.

e. Endangered Species Act Consultation [¶¶144-45]

NHA supports the Commission's proposal to encourage applicants to request designation as the Commission's non-federal representative for Endangered Species Act ("ESA") issues at the time of NOI filing (or PAD filing for non-license applicants). As reflected in NHA's December 2002 Comments, early applicant involvement in the ESA process should facilitate a smoother licensing proceeding.

The NOPR's proposed improvements to the ESA consultation are designed to better integrate the licensing process with the ESA consultation. The proposal: (1) encourages an applicant to request designation as the Commission's non-federal representative at the time it files its NOI or distributes its PAD, (2) recommends that the applicant include a preliminary draft Biological Assessment ("BA") in the draft license application, and (3) requires an applicant that has been designated the non-federal representative to include a draft BA in its license application. NHA supports these concepts and is pleased that the Commission intends to provide flexibility in ESA consultation.

f. Fish and Wildlife Agency Recommendations [¶146]

NHA agrees with the Commission's proposal in the NOPR to incorporate its existing practices with respect to treatment of recommendations of fish and wildlife agencies under the Fish and Wildlife Coordination Act and Section 10(j) of the FPA.

The NOPR makes minor changes to the timing of meetings that may occur during the Commission's consideration of fish and wildlife agency recommendations made pursuant to the Fish and Wildlife Coordination Act and FPA Section 10(j). NHA supports these changes.

g. National Historic Preservation Act Consultation [¶147]

NHA supports early initiation of Section 106 consultation. As with other elements of the licensing process, such early consultation and identification of issues is critical to ensure timely completion of the process.

NHA continues to believe that the Commission's regulations should clearly state what documents are required as part of the license application in this regard. While the guidance document regarding the appropriate content of Historic Property Management Plans ("HPMP") is useful, it does not correct the fundamental confusion regarding the appropriate elements of a license application with regard to historic

properties. Given the lack of clear direction in the regulations, the requirements vary depending on the FERC staff assigned to the project. In some instances, Commission staff has required that a draft Programmatic Agreement ("PA") be filed with the application. In others, staff has requested a final HPMP be completed prior to the final license application and prior to agreement on the terms of a PA. In still other proceedings, Commission staff has been content to allow the HPMP to be developed after the license is issued. The regulations for the ILP adequately address the inconsistency in the Commission's historic practice. NHA recommends that similar clarity be added to the regulations governing the TLP such that a draft HPMP would be required with the final application in all cases where the applicant has requested designation as the non-federal representative for consultation required by Section 106 of the National Historic Preservation Act.

5. Public Participation [¶¶148-149]

NHA agrees that an appropriate level of early public participation in the TLP would be an improvement. For further discussion, please see Section III.F.1, below.

6. Processing Schedules and Deadlines [¶¶150-58]

NHA believes that the Commission's ILP proposal is conceptually sound as a basis for obtaining timely participation of all stakeholders in the licensing process.

However, as noted in its December 6, 2002 Comments, NHA continues to have concerns about the timing of issuance of mandatory conditions imposed on a license. As a way to help alleviate such concerns, NHA believes that the Commission should provide for the issuance of final (or "modified") mandatory conditions by a set deadline in the processing schedule. NHA also believes that the Commission should continue its practice of treating late-filed mandatory conditions under sections 4(e) and 18 of the FPA as recommendations under section 10(a) of the FPA by adopting language in proposed section 5.28(g)(1)(C) similar to the last sentence in existing section 4.34(b). NHA also suggests that the Commission make clear that the term "modified" (when used in the regulations) means the "final" mandatory prescription.

NHA recommends that the Commission also revise section 4.34(b)(1) to remove the language allowing an agency with mandatory conditioning authority to delay submitting its mandatory prescriptions and terms and conditions but instead to file a schedule stating when the mandatory prescriptions and terms and conditions would be submitted. Allowing an agency only to file a schedule often results in significant licensing delays, incomplete NEPA analyses and, at times, the issuance of licenses with reserved authority to submit prescriptions and conditions after license issuance. This creates substantial problems for projects with marginal economics and is contrary to NEPA requirement to discuss alternatives and mitigation measures in an environmental review document issued prior to a licensing decision.

With regard to appeals of mandatory conditions, NHA understands the Commission's policy of granting a stay of a mandatory condition pending an appeal of the project license as stated in the NOPR; however, NHA does not believe that this policy is nearly as effective as instituting a specific provision to delay final issuance of a license until the applicant has had the opportunity to pursue an appeal of a mandatory condition through the agency responsible for the condition. Since the Department of the Interior has adopted a policy for review of mandatory conditions, it appears counterproductive for the Commission to deny an applicant the opportunity to provide information to the conditioning agency that could modify the condition and reduce its impact on the project before a license is issued. Once the Commission has issued a license, the applicant's chance to seek redress of another agency's mandatory condition through the Commission is likely to be seriously limited. Since it would appear logical for the Commission to prefer to issue licenses that are not likely to trigger rehearing requests, the final rule should include a provision for a 30-day pause in final processing after timely final or modified mandatory conditions are filed to see whether the applicant files an appeal of the condition to the issuing agency.

7. Settlement Agreements [¶159]

NHA believes that the Commission significantly enhances the strength and durability of its licensing decisions when there are settlements among the stakeholders. This should argue in favor of the Commission adding a specific

provision in the final regulations for a reasonable delay of processing an application upon a showing of good cause by the stakeholders engaged in settlement discussions.

a. Flexibility in Processing Schedules [¶¶160-61]

NHA believes that the Commission should cooperate with licensing participants to allow sufficient time for the settlement process to work, in particular, by avoiding issuing orders or documents during the settlement negotiations which affect the parties' positions. NHA appreciates the need for Commission staff to take timely action on licensing matters, but strict adherence to a schedule in the short-term may not advance the efforts to reach a settlement to the benefit of the licensing process in the long-term. To ensure that the licensing process is transparent to all stakeholders, the Commission should articulate its criteria for suspending processing in individual cases to accommodate settlements. For example, if the Commission has criteria that allow for a one-time, relatively brief pause in processing of an application when stakeholders request it, then the Commission does not lose its leverage if that time period passes without completion of settlement. Additionally, the Commission could provide for the filing of a statement by the applicant with the license application indicating the status of and anticipated duration of settlement negotiations as well as indicating contact information for the settlement participants so that Commission staff could follow up to reach a determination whether

and to what extent a deferral of processing schedules would be appropriate.

b. Timing and Conduct of Settlement Negotiations [¶¶162-66; Question #5]

In large part, NHA agrees with the Commission's statement in the NOPR that "[t]he parties themselves are in the best position to determine whether and when it makes sense to consider settlement negotiations." (¶ 163) However, NHA does not believe that a non-binding statement as proposed in the NOPR by the applicant alone (*i.e.*, on its intention to engage in settlement negotiations) provides enhanced ability to resolve matters by settlement. Settlement discussions cannot be undertaken by the applicant alone, any more than they can be unilaterally undertaken by any other licensing participant. If the Commission believes that such a statement is to be of value, it should be required of all participants; such a requirement (of all parties to submit a confidential statement of willingness to participate in settlement discussions) would be comparable to the process used by a number of courts.

c. Guidance on the Content of Settlement Agreements [¶¶167-70]

NHA agrees that the proposed rule need not contain specific endorsement of the contents of settlement agreements. Nonetheless, NHA encourages the Commission to consider preparation of a guidance document that

outlines various formats and components of acceptable settlement agreements.

E. Description of Integrated Licensing Process

1. Applicability

a. New and Original Licenses [¶¶171-72; Question #6]

NHA supports making the ILP available for original as well as new license applications.

A significant problem is raised by the need to integrate the preliminary permit process for an original license with the proposed ILP for original license proceedings. As commented by others in the NOPR proceeding, a number of preliminary permittees do not proceed to filing an application for license. Therefore, NHA recognizes that the Commission may want to limit extensive early involvement, as in an ILP process, where it is not clear that the permittee intends to seek a license. In addition, some parties have filed preliminary permit applications involving properties for which they have no ownership or right of access. To accommodate those concerns, but also establish an efficient process for preliminary permittees and original licensees, NHA proposes that the Commission modify the preliminary permit process as follows.

First, the regulations should be modified to expressly provide that an application for a preliminary permit involving an existing non-federal dam must contain evidence either of an ownership interest in the existing dam to be used or evidence of authorization from the existing dam owner to evaluate the dam for potential generation. If the applicant does not demonstrate such ownership or authorization, the Commission should require that the applicant show cause why its application should not be dismissed as patently deficient. This process would eliminate the preliminary permit applicants who file without ownership or any real intent to construct a project.

Secondly, the regulations should be modified to provide a new procedure for subsequent preliminary permits as follows:

1) Coincident with the status report filed 6 months prior to expiration of the preliminary permit, the permittee would file an NOI as required under the new relicensing rules (without the requirement to file a PAD), and Commission would consider this NOI to be equivalent to an application under its regulations so as to maintain priority for that permittee in subsequent permit and/or application analysis. This would require a modification to the

framework of the existing regulations to allow the filing of this NOI while the permit is still in effect.

2) The Commission would notice the NOI and allow for competition to be filed against the NOI by the filing of a competing NOI within 30 days of the date of the notice.

3) Within 60 days of the Commission notice, both the original permittee and any competitor that has timely filed an NOI in response to the Commission notice, must file a mini-PAD (*i.e.*, a skeletal PAD). Both such PADs would be due on the same date to avoid a competitor from copying from the permittee's PAD. The permittee could include in its mini-PAD the data and materials it had developed during its initial preliminary permit; the competitor would not be able to use the information in the permitee's periodic reports.

4) On review of the mini-PADs filed, the Commission would reject, as patently deficient the NOI of any applicant (whether the prior permittee or the competitor) that did not meet a minimum standard. There would be no opportunity to cure the deficiency.

5) On the day after the original preliminary permit expired, the Commission would issue a new preliminary permit based on the NOIs and mini-PADs on file.

6) The recipient of the new preliminary permit would have 60 days to file its NOI for licensing (describing the process it would use – TLP, ILP or ALP) and to submit the standard PAD to meet the requirements of the licensing process. Then the procedure would continue parallel to the relicensing process.

Under this proposal, the Commission rules would also reconfirm that no entity is permitted to file an application for preliminary permit while a permit is in effect, and that any prematurely filed preliminary permit applications would be deemed filed as of the day after expiration of any existing preliminary permits.

This proposal presents an opportunity for the Commission to ensure that preliminary permits are not issued to entities that have no real plan to file an application for a license or exemption and develop a site. Through the processes proposed above, the Commission would have a clearer indication of the permittee's intent to develop a proposed site before commencing involvement in an ILP, ALP or TLP process.

b. Competition for New Licenses [¶173]

NHA understands that the Commission is not inclined to require a party to file an NOI for an original license application in competition with an existing licensee or another applicant for original license, but that all other provisions of the ILP would apply to a competitor, including the development of a PAD. If a competitor must develop and distribute a PAD, even though not an NOI, there should be timely and sufficient notice to all licensing participants of the competitor's plans. In order to assure time for consultation, the competitor's PAD should be due no less than five years prior to license expiration in the case of competition with an existing licensee.

However, the proposed regulations are confusing to the extent that proposed section 4.38(b)(1) states that "a potential applicant for an original license must, at the time it files its notice of intent to seek a license…" and proposed section 5.3(c) states that prior to filing "any application for an original, new, or subsequent license, a potential license applicant…must distribute…the notification of intent." Under both proposed provisions a competitor (which would be a party seeking an original license) would be required to file an NOI. [NHA also notes that the cross reference to proposed sections 5.2 and 5.3 in proposed section 4.38(b)(1) should be to proposed sections 5.3 and 5.4, respectively.] This apparent inconsistency in the proposed regulations should be corrected.

2. Process Steps [¶174]

a. NOI, Process Schedule, and Study Plan Development [¶¶175-82; Question #7]

As discussed above in Section III.B, NHA strongly believes that the applicant should be free to choose the process (whether TLP, ALP or ILP) to be used in its licensing proceeding. Also as discussed above in Section III.D.1.b, the contents of the PAD should be significantly abbreviated from that proposed in the NOPR in order to make the PAD a more functional document without excessive and unnecessary costs to the applicant.

NHA notes that under the NOPR the requirement for the PAD to contain a preliminary list of issues, as well as the steps of issuing a Commission NEPA scoping document and holding a NEPA scoping meeting, would not apply to applications prepared under the TLP since those steps would occur after the filing of the license application under the TLP, rather than at the point proposed for the ILP. While applicants using the TLP may find it useful to identify potential issues in the PAD, NHA recommends that the Commission revise proposed section 5.4(c)(2)(J) to confirm that the inclusion of the "list of issues, by resource area, in the form of a scoping document" would be optional for the TLP.

NHA's comments on the proposed rules addressing development of study plans and the resolution of study disputes are discussed above in Sections III.D.1.c and d, above.

b. Conduct of Studies [¶¶183-85; Questions #8 and #9]

The NOPR proposes that at an appropriate but unspecified time following the first season of studies, or at some other appropriate (again unspecified) time, the applicant shall provide an initial status report on its study plan with study results and analyses to date. NHA believes that the requirement to file such status reports should not be worded to include "study results and analyses to date," but only require brief albeit informative summaries. The requirement to include actual study results and analyses in this status report could distract scientists and researchers from making necessary progress on the studies themsevles, and thus be counterproductive. NHA recommends that the proposed section 5.14(a) be revised to state that the initial status report contain "a summary of study results and analyses to date" in order to avoid the unnecessary production of detailed reports and data.

In proposed sections 5.14(a) and (b), the Commission would require license applicants to: (i) prepare and file status reports on study results and analysis; (ii) hold a meeting with all stakeholders; (iii) prepare a meeting summary and any necessary amendment to an approved study

plan; (iv) accept filed disagreements to the meeting summary and study plan amendments; (v) respond to the filings in item (iv); and (vi) await a decision of the Director on any dispute. These steps are likely to create further, if unintended, delay and are likely to increase the cost of the licensing process.

NHA has two suggestions for improving this process. First, the Commission's final rules should allow that the initial status report on separate studies may be prepared at different times, specific to the timing of individual studies, not all at once. This would get information to the parties in a more timely fashion. Second, the applicant would send the initial status report and any recommended changes to the Commission for approval. NHA suggests that the Commission allow for a shortening of the process by making the requirements for meetings and subsequent filings dependent on a clearly articulated need for such additional steps. Nothing would prevent a license applicant from holding meetings and entertaining written comments on the status reports when circumstances warrant; however, such additional processes should not be required. Parties would be required to submit comments within 30 days of the filing of the initial status report(s), and FERC staff would decide if a meeting were necessary.

NHA agrees that if there is a disagreement with a proposed study plan modification, the Director of OEP should resolve the dispute. Only study plan modification proposals, consistent with proposed sections 5.14(b) and 5.10(b), should be approved by the Director, and NHA believes that reference to those criteria must be added to proposed section 5.14(a)(6). NHA also believes that requests for studies previously dismissed or modified by the Director or the dispute resolution process should not be reconsidered. [NHA notes that the reference to proposed section 5.12 in proposed section 5.14(a)(7) should be to proposed section 5.10(b).]

The process would then, after the second season of studies, require an updated status report to be filed. The criteria at this point with respect to requests for new studies would be the same as for studies originally proposed, except that parties would have to demonstrate extraordinary circumstances warranting approval. Following the updated status report, participants should only be permitted to make recommendations regarding the implementation of approved studies and not be permitted to make new information-gathering requests. Again, previously dismissed study requests should not be reconsidered. NHA believes that applicant's willingness to accept dispute resolution and implement FERC ordered study plans necessarily has to be accompanied by certainty later in the process. Limiting information requests at this stage and at any time subsequent to the application filing goes a long way toward providing that

certainty. The proposed regulations should be revised to ensure that these points are clear.

c. Draft Application to License Order [¶¶186-98; Questions ## 10, 11, 12 and 13]

In the NOPR, the Commission asks for comments on whether a draft license application should be circulated for comment, as proposed in section 5.15. NHA believes that under the ILP a draft license application should not be required (¶ 187). License applicants initially will provide a significant amount of information to stakeholders in the PAD and through the available project files, even scaled back as NHA recommends above. Much of the information to be provided in the PAD and the project files, particularly together with the initial and updated study results, would merely be duplicated by the filing of a draft application. Furthermore, the entire ILP is designed to fully involve stakeholders early in the process and provide them with the information of interest as the process proceeds, rather than in the draft application as is the case with the TLP.

Many NHA members have had experience with publishing numerous copies of extensive and detailed draft license applications, and suspending virtually all other relicensing activities during the preparation, publication and comment period – only to find that reviewers are primarily interested only in Exhibit E, if in any part of the draft at all. The delay and cost – not

to mention the resources and time needed – to produce a draft license application could be addressed more productively and efficiently if the proposed ILP regulations start with the minimal assumption that no draft license application will be needed, and then allow the applicant and stakeholders to decide whether a draft Exhibit E or a full draft license application will add value to the particular licensing process.

It is possible that a well-organized ILP will have been designed so that stakeholder understanding of the applicant's licensing proposal has developed in tandem with the execution of studies in order to encourage the likelihood of achieving settlement before the application is filed. In these cases, the applicant should not be required to produce a draft application, so that the parties can focus on completing settlement discussions.

Additionally, there may be any number of less controversial projects where resource issues are small and manageable, such that there is no need for a draft license application.

On the other hand, a draft license application can, in certain circumstances, be very useful to the relicensing process, such as in cases when the applicant and/or stakeholders would benefit from a formal review and comment period, or where there is a need to present a formal

description of the proposed PM&E measures in the context of the analysis of study results. The applicant and stakeholders should be permitted to add the draft application step to the process where they feel it adds value.

Therefore, NHA recommends that the Commission revise proposed section 5.15 to specifically state that a draft application is not required, but may be prepared in the form of a draft Exhibit E in circumstances where the applicant and/or stakeholders believe it to be beneficial to pre-filing consultation.

NHA also recommends that proposed section 5.15 be revised to allow a comment period of 60 days on any draft license application. It appears unnecessary to allow 90 days for comments on a draft application under the ILP since information and earlier stakeholder involvement should certainly provide adequate time for commenting within 60 days.

In the NOPR preamble discussing the filing of a draft license application (¶ 189), the Commission states that "it may be appropriate for the parties to file preliminary 10(j) recommendations, terms and conditions, or fishway prescriptions . . ." following the updated studies status report. It may be possible, as the Commission suggests, that the updated status report will indicate that enough information is available for agencies to file preliminary FPA 10(j) recommendations, terms and conditions, and

prescriptions, and that the agencies would respond to a Commission request to do so. However, NHA is concerned that agencies would likely need to respond on a case-by-case basis depending on their view of whether there is enough information in the record to develop preliminary recommendations, terms and conditions, and prescriptions.

Instead, NHA recommends that the Commission require that all preliminary 10(j) recommendations, terms and conditions, or prescriptions be provided within 60 days of the filing of the final application for a new license.

The next step, consistent with the Commission's concept, would be that final conditions would be filed "in response to the Commission's notice of ready for environmental analysis [REA]" (¶ 189). This is feasible because the REA notice would only be issued after the Commission has determined that no additional information is required for the Commission to prepare its environmental analysis. Even assuming that the Commission issues the REA notice shortly after the license application is filed (but no sooner than 60 days), the agencies would have sufficient time to issue final terms and conditions, knowing that the project has not changed, and that no additional information has been provided that might cause an agency to revise its preliminary conditions. Furthermore, NHA

sees no reason why the Commission cannot use this same process under the TLP and the ALP, as well as under the ILP.

To facilitate this process and enhance post-filing processing timeliness, NHA recommends that the Commission formally request final terms and conditions pursuant to its REA notice. Upon receipt of such final terms and conditions, the Commission would be able to complete its NEPA and licensing analysis cognizant of all influences on the economics of the project. The timing of the final terms and conditions, as proposed herein, would also allow time for the applicant to pursue an appeal of any mandatory conditions through the conditioning agency without significantly delaying the Commission's ability to issue a final license in a timely manner.

It is not likely that the agencies will have the opportunity to consider public comments on their preliminary recommendations, terms and conditions or prescriptions if they are filed in response to the Commission's tender notice for the application unless a specific opportunity is created. If, however, preliminary recommendations, terms and conditions or prescriptions are filed at the completion of the updated status report, or in response to the draft license application (if a draft license is scheduled in the specific ILP), then the public would have the

opportunity to comment thereon when the Commission issues its tender notice.

F. Improvements to Traditional Process and ALP [¶199]

NHA supports the inclusion of study dispute resolution provisions in the TLP. Additionally, the ILP study criteria, with the amendments suggested by NHA, would be appropriate for the TLP as well. The study criteria are just as important in determining the necessary study plans for the license applicant to develop in the TLP as in the ILP. In fact, the criteria may be more important in directing the license applicant to provide the necessary information for the license application due to the reduced Commission participation prior to the license application being filed. Consequently, NHA suggests the Commission add the study criteria to proposed section 16.8(b)(5).

1. Increased Public Participation [¶¶200-02]

The regulations propose additional consultation in the TLP by requiring that the public be included in all consultation steps formerly limited to agencies and tribes. This could significantly increase the time and cost of the TLP licensing process while at the same time blurring the distinction between the TLP and the ILP. NHA recommends that the Commission revise the existing regulations at sections 4.38 (b) and 16.8(b) to allow for public input early in the process, as

described below, but to allow further engagement of the public in pre-filing consultation to be at the applicant's discretion.

As opposed to the proposed ILP, which is intended to integrate the NEPA scoping process prior to a license application being filed, the TLP should be distinguished from the ILP by following the more typical NEPA approach, with the majority of the public involvement occurring after the license application is filed.

NHA believes that the PAD, as made more efficient and effective in NHA's recommendations at Section III.D.1.b of these comments, can be applicable to the TLP, and that it can be circulated to agencies and tribes, members of the public likely to be interested in the proceeding and publicly noticed as available to the general public on FERRIS. This will substantially improve public access to the TLP over its current use of the ICP.

NHA recommends that the Commission revise the existing TLP regulations at section 16.8(b)(4) to encourage the public to provide the license applicant with the same type of comments to be provided by resource agencies and tribes following the joint meeting described in sections 16.8(b)(2) and (3). This ensures that the license applicant will be aware of the issues of concern to the public so that the license applicant may take those into consideration when preparing study plans and the license application. NHA further recommends that the applicant, as well as the agencies, provide responses to public comments filed after the joint

meeting so that public commenters are aware of how their interests will be addressed as pre-filing activities proceed.

Structuring the requirements for public participation as suggested above will not prohibit license applicants from providing increased stakeholder involvement and sharing of information under subsequent steps in the TLP. However, such modifications would allow a license applicant to decide what level of stakeholder participation was appropriate for each particular hydroelectric project, given the range of potential issues and the costs of enhanced public involvement. The Commission would then be able to ensure that full public participation in the NEPA process occurs after the application is filed, as is currently the case.

2. Mandatory, Binding Study Dispute Resolution [¶¶203-07; Question #14]

NHA supports the inclusion of mandatory dispute resolution to the TLP to more effectively manage the licensing process. Dispute resolution by the Director of OEP should be binding on the Commission (to prevent the reconsideration of previously resolved disputes), agencies (as to information needs under the FPA) and applicants**.** NHA further supports the Commission's proposal that consulted entities not requesting dispute resolution would thereafter be precluded from contesting study plans or results, and the proposal to eliminate the opportunity for agencies to request additional studies after the application is filed.

NHA believes that binding dispute resolution could be adopted on a case-by-case basis in the ALP where participants agree that they cannot resolve study planning disputes internally.

3. Recommendations not adopted

a. Waiver of Pre-Filing Consultation [¶¶208-11; Question #15]

The Commission rejected NHA's earlier request for a revision to the TLP that would significantly streamline the licensing process for low-impact or non-controversial projects by allowing waivers of pre-filing consultation. The Commission acknowledged the importance of small hydroelectric projects and the potential imposition of unnecessary licensing costs on those projects, depending on the environmental issues involved. Without some specific streamlining, the Commission's regulations create a significant burden on license applicants, even with the TLP, especially for non-controversial projects. NHA suggests that the Commission reconsider the original NHA recommendation for the following reasons:

1. NHA is not aware of other federal agencies that require extensive pre-filing consultation prior to an application being filed with the federal agency for approval.
2. NEPA does not require pre-filing consultation.
3. The use of pre-filing consultation is not as critical for licenses issued after 1986, when the Electric Consumers

Protection Act of 1986 ("ECPA") was enacted, or 1987, when the Commission adopted its NEPA regulations. The Commission notes that a NEPA document more than several years old could be outdated. NHA is not proposing that the Commission make these previously licensed projects categorically exempt from NEPA. Rather, those projects would have undergone an environmental analysis at the time the last license was issued and would usually contain many specific mitigation protection measures. Thus, although a new NEPA analysis would occur, the likelihood of new impacts being addressed is greatly reduced. The Commission would still need to scrutinize the project's impacts, such as any impacts to threatened or endangered species not previously listed, but the level of scrutiny would be much less than for projects that did not undergo a prior NEPA analysis.

4. Other federal agencies typically complete NEPA environmental analysis for new projects within 12-18 months after an application is filed. Even though the Commission has the unique requirement to involve the statutory authorities before it can make a licensing decision, the Commission should be able to complete its NEPA analysis in a similar time period for non-

controversial projects, especially given the extent of the information necessary for a license applicant to file a complete license application without the need for pre-filing consultation.

5. License applicants would be free to fully consult with all regulatory agencies and the public to the extent the license applicant believes such efforts will produce an application with a greater likelihood of acceptance by the Commission.

6. NHA would support the requirement in the TLP that the modified PAD, as discussed above, still be filed with the Commission and resource agencies. Thereafter, a notice that the document was available from FERRIS would be published for the public. This would allow interested stakeholders to contact the license applicant to make sure the applicant knows of the particular interest of each stakeholder. Then, license applicants could address the interests of each interested stakeholder in the most appropriate manner.

For these reasons, NHA believes that the Commission should include in its regulations at a new section 16.8(a)(4) specific reference to the applicant's ability to obtain a waiver of the consultation requirements for less controversial projects by

reference to the provisions of section 4.38(e)(i) of the regulations. The Commission should also make clear that, while it will consider the comments of agencies and tribes on any request by an applicant for a waiver of consultation requirements, it will also consider the size and potential complexity and controversy of the project as factors in deciding whether to grant the requested waivers.

b. Applicant-Prepared NEPA Documents [¶212; Question#16]

NHA has no specific comments.

c. Process Steps in the ALP [¶213-214]

NHA agrees that additional process steps are not needed in the ALP.

G. Ancillary Matters

1. Intervention by Federal and State Agencies [¶¶215-217]

NHA has no objection to the Commission's proposal to permit intervention by notice by federal and state agencies.

2. Information Technology [¶¶218-21]

NHA's comments on CEII issues are included above in Section II.A.1.b.

3. Project Boundaries and Maps [¶¶222-23; Question #17]

NHA has no objection to the Commission's proposal to establish consistent standards for project boundary maps, except that the Commission should not

impose such new standards on existing minor licenses whose project boundary maps have already been drawn and filed with the Commission. Similarly, existing exemptions holders should not be required to develop project boundaries or to file new maps.

Developing a project boundary to comply with the Commission's proposed new Exhibit G requirements could cost a minor project or exemption owner thousands of dollars to conduct potential field survey and drafting efforts. Such an imposition appears to be inconsistent with Congress' intent in its treatment of minor projects (*i.e.*, for projects of less then two thousand horsepower or one thousand five hundred kilowatts) under the FPA.

To date, the Commission has maintained licensing rules for minor projects (18 CFR § 4.60, *et. seq*.) that allow owners of hydropower projects less than five megawatts to utilize a shorter license format. There is no public interest served by a new rule that imposes additional requirements on minor project licensees, exemptions holders, and applicants. The basis for the proposed new requirement under the NOPR is that it would be convenient for the Commission to have common project boundary requirements for all categories of projects. Contrary to the NOPR's proposed requirements, the Commission can continue to obtain all of the project mapping information that is necessary for it to process minor project applications under the current rules without adding this burden on minor project and exemption applicants.

Additionally, existing license holders should not be required to make wholesale revisions to their existing Exhibit G drawings after promulgation of the new regulations. The regulation should only require the license holder to revise its project boundaries at the time a new license application is filed or if the license holder is otherwise seeking to revise a particular Exhibit G drawing.

Similarly, under the regulations proposed in the NOPR, the Exhibit F maps would require more detail for minor projects and exemptions, but no justification for this increased requirement is given. The Commission can limit its requirement for an applicant to file more complicated drawings to the minor project proceedings where situations arise necessitating such detail, *e.g.*, where loss of life or property potential exists, special environmental facilities exist. There is no need for the categorical imposition of such additional burdens on minor project applicants or licensees where the subject situations do not arise. The Commission should adopt the same limitation on the application of the new Exhibit F as NHA requests above for Exhibit G changes to existing projects.

H. Transition Provisions [¶¶226-29]

NHA recommends that the effective date of the proposed regulations be extended from three to six months from the date of final issuance by the Commission to permit potential license applicants a better opportunity to consider the effects that the new rule will have

on their projects and, as appropriate, to consult with other stakeholders before making a process selection.[5]

However, if the Commission declines to adopt NHA's recommendation above that the ILP should not be made the default process for all future license proceedings, and declines to delay making the ILP the default process for a period of 5 – 6 years, then NHA recommends that, at a minimum, the transition period be extended to up to one year from the date of effectiveness of the final rule.

IV. ADDITIONAL IMPORTANT POLICY ISSUES

As noted in Part III of NHA's December 6, 2002, response to the Commission's initial request for comments in this proceeding, there are a number of issues which NHA believes need to be addressed by the Commission and other federal agencies to truly reform and improve the hydroelectric licensing process. NHA understands that the Commission is not disposed to take up those issues in this rulemaking. However, NHA remains committed to fair and thorough resolution of those licensing issues beyond the scope of the Commission's NOPR, and stands ready to participate in and contribute constructively to the resolution of those issues in the appropriate venue.

V. CONCLUSION

The National Hydropower Association once again commends the Commission for initiating this rulemaking proceeding and applauds the work performed on the NOPR.

[5] Even with a transition period of up to six months, NHA believes that some licensees could be adversely impacted. As such, FERC should be flexible in its application and work with licensees caught within the

NHA also appreciates this opportunity to present its Comments on the NOPR. The Association believes that the procedures as outlined in these Comments would provide an enhanced licensing process and an improved framework for hydropower regulation, to the benefit of the Commission, the industry, and all stakeholders. NHA looks forward to participating actively in the upcoming drafting sessions to assist the Commission in crafting a final rule that meets the needs of the industry and all participants in the hydropower licensing process.

Respectfully submitted,

NATIONAL HYDROPOWER ASSOCIATION

By 

Linda Church Ciocci
Executive Director
National Hydropower Association
One Massachusetts Ave., N.W.
Washington, D.C. 20001
(202) 682-1700

transition period to ensure fairness so that no licensee is unduly burdened by the new rules.