

**Collaborative Processes
Making the Most of FERC'S Alternative
Licensing Option**

**Lessons Learned
from Four New England Case Studies**



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by

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I. Introduction and Summary

FERC has recently issued new regulations for an “alternative process” for hydropower licensing in which the pre-filing consultation process and the environmental review process are combined into a single process (FERC Order No. 596 issued October 29, 1997). This alternative process officially recognizes and provides rules for an alternative licensing approach that has been used on an informal case-by-case basis since at least 1994. In that year, collaborative efforts were initiated for two very different landmark cases, Wisconsin Electric Power Company’s eight projects on the Menominee River, and International Paper Company’s projects on the Androscoggin River in Maine. Both licensees made the decision to work collaboratively with the agencies and non-governmental organizations (NGOs) to negotiate a settlement agreement on the license application prior to submitting the application. Wisconsin Electric’s “Wilderness Shores Settlement Agreement,” was signed in 1996, 3 years in advance of when the application was due; while International Paper’s settlement agreement took the form of an application and Applicant Prepared Environmental Assessment submitted with the support of the various parties in September of 1997.

Since these early efforts to adopt a different approach to licensing, one that brings what most would view as “adversaries” into a cooperative process to jointly decide on the issues of importance and to agree on provisions in the license application to address them, a number of projects around the nation have, in one form or another, opted for this alternative process. This paper provides a detailed review of three projects in New England which have utilized this alternative approach in seeking a new license, and a fourth project which represents a precursor to the collaborative movement, New England Power Company’s Deerfield Project, in which NEP began negotiating with the agencies and NGOs prior to submitting its license application (1991), but did not reach agreement until 3 years after its submission (1994).

The paper focusses first on the provisions of the settlement agreements, reviewing the achievements for environmental mitigation and enhancement, and the effects on generating capacity and operations. **It shows that these settlement agreements, by considering options for mitigation and enhancement that are outside of FERC’s normal purview as well as traditional measures, have achieved “win-win” solutions whereby the environmental gains are larger than would otherwise be possible, and the production of energy and auxiliary services for which certain hydropower projects are well suited, have been essentially maintained.** Later, the paper examines the “lessons learned” from these experiences: what makes them work, and what aspects of the process proved to be most difficult, and how were these handled. Finally, we offer some cautions to those considering using an alternative process.

Viewed collectively, these four projects have accomplished the protection of over 30,000 acres of land in a region where natural resource values are high, where development and commercial forestry interests are reluctant to compromise their economic interests, and hence land protection efforts are difficult and expensive. They have addressed the difficult issues of fish passage (three are located on river stretches that have historically supported anadromous fish runs), restoring flows to bypass

reaches, augmenting minimum flows and other measures for improved fishery habitat conditions, and accommodating whitewater boating interests and other recreational interests. At the same time, these settlement agreements have passed muster with the economic interests of the licensees, with two of the settlements taking place in the context of utility deregulation and having to consider the impending sale of the projects. These are forward thinking agreements that acknowledge the real trade-offs between the goal of producing economical, clean electrical power (a concern that has been amplified of late with a global imperative to reduce CO₂), and the impacts of utilizing significant river resources for hydropower production on fisheries, wildlife, and botanical resources, as well as the diversity of environments and opportunities associated with free-flowing rivers. What has been achieved is not only a “balancing of interests,” but a foundation for sustainable economic development.

This is not to say that these agreements have been easy to negotiate. Collaborative processes are not for the faint of heart or impatient. Finding solutions that work for all interests requires participants to: break from what many attorneys would recommend as prudent; break from most corporate cultures; and break from what has traditionally been viewed as “safe” and reveal previously tightly held “proprietary” information, admit that problems and issues exist, demonstrate a willingness to negotiate and compromise, and share power and decision making. For interests accustomed to “fighting to win,” building a legal record, and seeing opposing interests as “the enemy”, this requires a shift in mind set that is not easy. **The New England case studies show that fundamental to the success of these efforts is 1) the ability of the participants to make the leap from tradition to a new way of resolving conflicts, and 2) a commitment to work together until a satisfactory solution is found for each and every issue.**

It is an understatement to say that collaborative processes can, at times, be arduous, discouraging, and trying, particularly in the mid-part of the process when the group is struggling to find solutions that work for everyone. This requires participants to be patient and persistent and to keep their “eyes on the prize” even when it seems to be moving further from their reach. Some charge that collaborative processes are overly costly and inefficient, and they undoubtedly are, if compared to a process controlled by a single interest; however, no such process would be acceptable to other interests and hence it would fail, the ultimate in inefficiency. In the end, the savings which result from “messy” collaborative processes more than compensate for the time consuming process of getting everyone on the same page and working out solutions that are mutually acceptable. These savings include achieving a faster review and approval by FERC, and avoiding potential litigation and legal fees from following the traditional licensing process. Collaboratives also create possibilities for settlement agreements that “expand the pie,” hence everyone involved (applicant and others) get more, through preserving the economic value of the project and employing non-traditional mitigation and enhancement measures.

Beyond being willing to embrace new techniques for resolving disputes and making a commitment to succeed, two other fundamentals account for the success of these projects: an agreement to share all relevant information and decision making throughout the process; and a commitment by the applicant to ensure a “level playing field,” that is, to ensure that all participants have the

resources to participate meaningfully. For three of the alternative licensing efforts reviewed in this paper, the applicants paid for the services of a “technical advisor” for the NGOs who, unlike other participants, would have had neither the financial resources, nor the time to participate effectively otherwise.

Other factors that have contributed to the success of the case studies reviewed and discussed in this paper include:

- **A well organized process** with established ground rules and a work plan with established time frames for each phase.
- **Good communication** on both procedural and substantive matters.
- **Leadership** with the authority and skill to guide discussions towards consensus.
- **Adequate information and analyses** to understand the issues and tradeoffs.
- **Timing** - knowing when the time is right to negotiate.

Each of these factors is explored in greater detail later in Section IV of this paper.

II. Background: Cooperation and Collaboration as an Alternative Approach for Hydropower Licensing

Industrial and environmental interests are accustomed to fighting to “win” disputes over the licensing of facilities and the related management of natural resources. State and federal regulations have institutionalized this process, premised on adversarial relationships, as the standard operating model for informing public decisions on environmental licensing.

But such processes have their drawbacks both in terms of efficiency and the results they may produce. Regarding potential results and whether or not outcomes are likely to be based on the facts, the National Academy of Sciences, commenting on administrative proceedings based on the adversarial model, stated ...

“confrontation and the adversary process do not create an atmosphere conducive to the careful weighing of scientific and technical knowledge”.¹

While regarding both efficiency and potential outcomes federal judge Henry Friendly observed ...

“under our adversary system the role of counsel is not to make sure the truth is ascertained but to advance his clients cause by any ethical means ... causing delay and sowing confusion not only are his right but may be his duty.”¹

Thus, increasingly both environmental and developmental interests have realized how unwieldy, expensive, and unnecessarily polarizing such models are in cases

¹Howard, Phillip, **The Death of Common Sense**, Page 86.

involving complex environmental and economic development issues. Perhaps most importantly, they have realized that neither side may “win” in the end, but rather, everyone may lose.

For several years a number of forward thinking companies have voluntarily opted for an alternative approach to balancing disparate natural resource management interests, inviting environmentalists into the decision making process in order to reach agreement with these interests prior to presenting a management proposal to regulatory authorities. **Benefits of this alternative approach can include a shortened and less expensive (less litigious) permitting or licensing process, with new possibilities for cooperative problem solving resulting in "win/win" solutions that optimize benefits for all parties.** This alternative approach is being used for a number of different types of situations, but one of the most promising has been in the area of hydropower licensing and relicensing.

In essence, the alternative approach to hydropower licensing involves bringing the several interests which may be affected by the dam licensing or relicensing (e.g. conservation, recreation, and local interests as well as the dam owner) together to reach agreement on the provisions of the licensing application, and participate in preparing the licensing proposal. At least two variations of the alternative process have been used in New England:

- a “collaborative” approach which uses a decision-by-consensus model and includes: defining issues of concern and the studies needed to address those issues; selecting consultants; interpreting study results; formulating specific management plans for the facility, including measures to maintain or enhance environmental values as well as mitigate any adverse impacts (a settlement agreement); and overseeing the preparation of the license application and in some cases, an Applicant Prepared Draft Environmental Assessment; and
- a “cooperative approach” which, at least ostensibly, stops short of decision making by consensus, but seeks to involve stakeholders in defining the issues of importance and studies needed, reviewing study results, negotiating a settlement agreement, and preparing a license application and in some cases, an Applicant Prepared Draft Environmental Assessment.

In reality, the difference between these two approaches is not great in terms of the outcome, for the settlement must, by definition, be approved by consensus. In our experience the first approach goes more smoothly since committing to consensus decision making removes a barrier to open communication and cooperation at the outset of the process.

Specific outcomes desired from these alternative processes include:

- **an accurate, comprehensive, and objectively developed information base** for assessing the full range of environmental impacts, potential enhancements and management options;

- **an application for licensing** or relicensing and an Environmental Assessment (if applicable) which meet FERC requirements and are **supported by all parties**;
- **savings in time and money**;
- **a settlement agreement** among the parties regarding conditions under which the project should be licensed; and
- most importantly, **an outcome which achieves, as nearly as possible, the optimum, cost effective combination of benefits for the environment and the efficient production of clean, renewable energy.**

III. Four Case Studies in New England

A. Overview

This document presents a description of the results and lessons learned from four distinctly different alternative licensing efforts in New England which generated mutually acceptable agreements among the parties between 1994 and 1998. While the nature of the issues, and the processes used for these projects were different in each case, these four projects demonstrate the real gains that can be achieved through alternative licensing approaches, both for the industry, and for environmental interests. Each offers different insights into how alternative processes can work, and the outcomes that are possible. The author was personally involved in three of these projects as facilitator and technical advisor for the non-governmental organizations².

1. Comparing the Projects: Distinguishing Features

Deerfield Project: The earliest, and perhaps the most visible of these alternative efforts was New England Power's efforts to involve a number of parties in the relicensing of the Deerfield River Project in Massachusetts and Vermont. The Project includes 8 dams and 15 generating units with a capacity of 85 MW. It is one of only three rivers that provide reliable summer Class II-IV whitewater boating opportunities in southern New England, and lies within 100 miles of 10 million people. A Settlement Agreement on this project was reached in 1994. The process used for this Settlement Agreement might be considered a pre-cursor to the alternative process, since stakeholders were involved in discussions and negotiations with NEP both prior to and after the license application was submitted in 1991.

² Projects in which Alec Giffen participated as facilitator/ technical advisor to the alternative process include the International Paper Riley-Jay-Otis-Livermore Project, New England Power Company's Fifteen Mile Falls Project, and Union Water Power Company's Upper and Middle Dam Project.

Riley-Jay-Otis-Livermore Project: International Paper Company (IP) was one of the first company's in the nation to invite state and federal agencies and non-governmental organizations to participate in developing their dam relicensing application through a consensus process from the start of the licensing process. A collaborative effort was initiated by IP in July of 1994 for relicensing its four hydropower dams on the Androscoggin River in Maine. IP not only opened its process to outside interests, it paid for a technical advisor to serve the non-governmental organizations so that they could participate effectively. An agreement covering certain issues outside FERC's normal process (offsite land protection) was reached concurrent with the submission of the "Collaborative Team's" Application and Applicant Prepared Environmental Assessment to FERC in September of 1997. A new license order is expected to be issued this summer.

Livermore Falls was initially developed in 1877, and is where International Paper Company was conceived. Today the four project dams are operated as run-of-river, with a combined capacity of 29 MW, and the power generated supplies about 13% of the electrical demand at IP's Androscoggin Mill. Redevelopment at one of the dams (endorsed by the "Collaborative Team") will boost this to 16%.

Fifteen Mile Falls Project: New England Power has used a cooperative process in its efforts to relicense the Fifteen Mile Falls Project on the Connecticut River in Vermont and New Hampshire. Because of an impending sale of the project, the settlement was reached early on in the process, in July of 1997, in only 8 months from the time NEP announced its intention to sell the project, and well ahead of the application due date of July 31, 1999. Because of the schedule imposed by the sale, the settlement negotiations occurred prior to the completion of many of the basic relicensing studies, and so had to be completed amid considerable uncertainty. Like IP, NEP paid for a technical advisor to serve the non-governmental organizations so that they could participate effectively.

The Fifteen Mile Falls project is the largest hydropower project in New England. Three dams provide both peaking and non-peaking power, with a combined capacity of 369 MW. The Fifteen Mile Falls Project is one of three facilities most commonly used in the New England Power Pool for ancillary services - including load following and system protection from frequency and voltage deviations.

Upper and Middle Dams Project: Most recently, Union Water Power Company has undertaken a cooperative effort in licensing its upper basin storage projects on the Androscoggin River. Following the IP and NEP model, UWP agreed to pay for the services of a technical advisor for the NGOs. An agreement in principle was reached in March of 1998. This is an original licensing for a headwaters storage project with dams that have been in place for over 100 years. The project has extraordinary resource values including two large relatively undeveloped high quality lakes (Mooselookmeguntic, 16,300 acres, and the Richardsons, 7,100 acres) surrounded by a semi-wilderness setting of wooded

hills and mountains, and a stretch of the Rapid River offering some of the finest whitewater boating in the Northeast. Both the lakes and the Rapid River have been renowned for trout fishing since the 1800's. The area is reported to have produced brook trout up to 10 pounds and in 1997 native brook trout in excess of 6 pounds were caught.

2. **Collective Gains Achieved through the Settlement Agreements**

These four projects have achieved very substantial gains for the environment while maintaining the hydropower values of the projects, and speak to the success of collaboration in hydropower licensing. Highlights of the collective achievements of these four settlements include:

- **Protection of over 30,000 acres of land;** together these efforts amount to one of the largest recent land protection efforts in northern New England.
- **Over 12 miles of formerly dry river beds now have permanent flows** that support fish and other aquatic life;
- **Minimum flows have been enhanced on over 100 miles of river,** for example, minimum flows on the Rapid River have been nearly doubled and on the Deerfield the minimum flow below the Harriman Dam has been increased from leakage only to substantial flows needed to protect biota;
- **A major new whitewater boating opportunity** supporting both commercial and non-commercial use has been added to New England's limited supply of such areas (the area was formerly dry most of the year);
- **All of this was accomplished while maintaining hydropower production capacity and ancillary services largely undiminished and with only minor losses in annual energy production;** annual energy losses of only 2% on Fifteen Mile Falls and 10.5 % on Deerfield. Further, these losses are partially offset by a 27% net gain on IP generation at the Riley -Jay-Livermore and Otis projects.

B. **The Case Studies: A More Detailed View**

The attached summary table and summaries of each of the projects provide a more detailed description of the projects and what they achieved, including both environmental gains and what the project owners gained from the Settlement Agreements.

IV. Lessons Learned

A. Fundamentals

The most effective alternative processes are true collaboratives. A collaborative process is more than seeking advice and increasing the amount of interaction with outside interests in the relicensing. **A truly collaborative effort is built on two fundamental commitments.**

1. **Personal commitments from all the parties in the relicensing process to several underlying principles.** For the process to be successful all parties must embrace:
 - a. **A commitment to success:** first and foremost, finding ways to make the process successful, whatever obstacles are encountered;
 - b. **Mutual respect:** respecting the views of all interests;
 - c. **Openness: openly and honestly sharing all information** which is relevant to the relicensing process; and
 - d. **Willingness to compromise:** maintaining a willingness to compromise in finding solutions to problems that balance competing needs and interests and work for all participants.

2. **A commitment by the applicant to a structure that will enable parties to work productively together and to build a solid base of information and trust.** The process needs to be structured so that the parties can work effectively together and develop trust. For example, one of the hallmarks that mars the traditional process is that parties do not trust the information developed by applicants. This often leads them to contest the reliability or scope of the information and the process spirals down from there. A properly structured alternative process will ensure that all parties have an opportunity to participate in all important decisions, and that resources which allow meaningful participation are available. This is accomplished through two mechanisms:
 - a. **Shared decision-making:** our experience shows that a consensus decision-making process yields enormous gains in trust and commitment to the process; while parties who see themselves as “advisors” have less vested in the process, are less trustful, and are less willing to compromise. Ideally, all parties agree to function as a team and to make decisions jointly on what studies are needed, the protocols under which the studies will be performed, and the list of acceptable consultants, if the studies are to be performed by outside vendors. The result is that the information produced by the licensing studies is trusted by all parties and can then be used to make well informed resource management decisions.

- b. **Adequate resources (staff and funding) for all participants** - Processes where steps are taken to “level the playing field” regarding the difference in capabilities between applicants and other interests pay off in the end. To participate effectively, all parties must understand the legal context and processes involved, have a sound understanding of the technical issues, and have the time to participate as well. The plain truth is that for these projects the applicant has far more in the way of staff and financial resources available to it than do non-governmental organizations or most local governments. In the case of three of the projects featured in this paper, this imbalance in resources was remedied by applicant funding for a Technical Advisor for non-governmental organizations (the NGOs). The Technical Advisor participates on behalf of the NGOs in all aspects of the process, including: identifying study needs, designing studies, interpreting results, defining the tradeoffs, brainstorming solutions, and finding workable compromises.

B. Elements for successful negotiation on difficult issues and achieving a Settlement Agreement that all parties can support

In addition to having a process which is inclusive, respectful of divergent points of view and shares power, having the following elements present in the process will maximize the chances of success:

- **Motivated participants**
- **A well organized process**
- **Knowing when the timing is right for negotiations**
- **Having adequate Information**
- **Having participants with the right temperament, skills and discretion**
- **Leadership**
- **Good communication**

Each of these elements is, in our experience, important to developing a successful settlement agreement. Negotiations in which any one of these elements is absent or seriously compromised may prove difficult if not impossible to resolve. Each of these points is discussed more thoroughly below.

1. Motivation

It is of fundamental importance that each of the parties involved with the conflict be motivated to settle. In essence, each of the parties must either believe at the outset, or come to believe, that they have more to gain from resolving the conflict than they have by not resolving it at all or by resolving it in some other venue. Motivation can stem from the *uncertainty of the outcomes* that might result absent a negotiated resolution. Uncertainties can stem from a regulatory process or the possibility of an administrative appeal or a lawsuit. Beyond uncertainty motivation can also stem simply from the *cost* being incurred as a result of the dispute continuing. Costs can involve time and ill will as well as finances.

Our experience indicates that often it is a combination of both the uncertainty and cost factors that motivates participants to negotiate and resolve disputes in a mutually beneficial way.

Regarding the uncertainty of a favorable outcome, a critical element here which provides the room for negotiations to succeed is that each of the parties involved should recognize that in most cases, absent a negotiated solution, a range of outcomes for how the dispute could be resolved through other processes is possible. Further, they should also recognize that while some of these possible outcomes may be favorable, others may be unfavorable to their interests. Thus parties can be encouraged to accept a solution which, while not ideal from their perspective and perhaps not even the best that they believe might be possible, will eliminate the risk of a highly unfavorable outcome. This, plus the savings in time, frustration, and expense, provides the motivation for the development of solutions that work for all participants.

Organizational culture plays an important part in determining motivation. Some corporations, conservation organizations, or citizen activists believe so strongly in their mission, point of view and role that they see participating in negotiations with “the enemy” as abhorrent. These groups are unlikely to be motivated to settle disputes.

The lack of motivation to reach resolution on the part of one or more parties to a negotiated settlement can lead them to abandon the process and seek resolution through another channel or lead them to be uncooperative. This can either be entirely destructive of the process, or can simply be a frustration, if a critical mass of stakeholders remain committed to the effort and are still able to successfully negotiate a solution. The importance of losing one or more parties depends on their ability to influence the outcome from outside the negotiating process and varies in the context of each particular case. Clearly reaching a successful resolution works best when all of the parties are highly motivated to find a settlement. *However, if there is not a commitment to success at some level on the part of at least a critical mass of the parties, the process, no matter how artfully designed and executed, will fail.*

2. Process

Having a well organized process for reaching a settlement is also of key importance. This includes:

- **Ground rules** for how meetings will be conducted, decisions made and memorialized, etc. Such ground rules should not only establish procedures but also set a constructive tone for interactions among participants at the meetings, etc.
- **A mission statement:** It is also helpful to supplement the ground rules for meetings with a mission statement for the entire effort. It may seem silly, after all "everyone knows what this is about and how they should conduct themselves", but efforts to get the fundamentals down on paper often pay off.
- **Procedural steps:** Early in the process procedural steps should be identified which will build towards a settlement. These generally include building the information base essential to understanding the issues, problems, and conflicts to be resolved, understanding the interests of the various parties involved, identifying the range of potentially acceptable solutions, and assessing the effects of alternative solutions on the individual interests. All participants should have a role in determining how the negotiations process will be structured, and in defining the various steps involved in working towards a solution.
- **A time line:** Establishing a schedule serves to keep the process moving forward, and gives the participants a sense of the commitment they are making in agreeing to the process. This time line is predetermined, to some extent, in the case of hydropower licensing applications.
- **Records of proceedings:** it is important to keep accurate, objective but not necessarily exhaustive minutes of the meetings. The most important part of the minutes is to capture the decisions made.
- **An outside facilitator:** It may or may not be important to use an outside facilitator to run the meetings. In some cases this is crucial and in others not. It is important that if a facilitator is used that he or she enjoy the confidence of the entire group not just one or two parties.

3. Timing

The timing of efforts to resolve conflicts and reach a settlement agreement is likewise of critical importance. If negotiations begin too early, participants may not be ready to resolve the critical issues. They may feel rushed, or have inadequate information to assess the relative merits and drawbacks of alternative solutions; or they may not have yet gained a full appreciation of the importance of a settlement and hence the consequences of failing to reach agreement.

On the other hand, it is possible to err by beginning negotiations too late, after positions have hardened, hard feelings have been created, and commitments made to other forums seeking to resolve the issue at hand. A failed attempt to negotiate, whether initiated too soon or too late, may preclude success in future negotiations because parties may say that negotiations have already been tried and failed. It's difficult to determine precisely the ideal time for beginning negotiation on any particular resource conflict, but it should be when participants are well aware of the nature and seriousness of the conflict and its consequences, and further when there is sufficient information available to understand how the possible solutions would affect all the parties concerned.

It also helps if the parties in the negotiation have a sense of urgency about reaching a settlement and understand the need for a prompt resolution. This sense of urgency may not be present at the start of the process, but it can develop during the process of exploring alternatives, as participants come to understand more fully the consequences of delaying resolution.

4. Information

Our experience is that having accurate information on the issues in question, and the resources affected, is of critical importance to resolving disputes successfully. This includes not only basic information on the character of the resource but also well thought out analyses of that information which enable participants to make sense of what might otherwise be complex and largely, if not entirely, incomprehensible masses of data. We have found that creative and credible analysis of complex environmental information, with opportunities for full participation by the stakeholders in shaping how that analysis is conducted, can be a very powerful tool in reaching resolution of otherwise intractable issues. Groups are likely to make more progress in resolving their differences by considering information on how their interests are actually affected by particular outcomes, than they are by arguing philosophy and taking positions based on preconceived notions, which in many cases are not accurate.

It is hard to overstate the power of information and competent analysis in changing peoples' opinions and helping to shape win-win solutions to problems.

However, designing the appropriate analyses can be a challenging task itself because each situation is different and is likely to require designing a unique approach complete with a decision making structure that insures buy in from key stakeholders.

5. Participants with the temperament and skills to participate effectively

The individuals who are involved in seeking to resolve natural resource management disputes are obviously critical to the success of settlement negotiation efforts. It is difficult for these efforts to succeed if the participants do not have a world view which recognizes the legitimacy of divergent points of view and hence are inclined to be respectful of the opinions of others. A cynic defined negotiation as a process whereby the most stubborn person gets their way. While in some cases this may be true, in general it is a recipe for disaster. Ideal participants in the process of seeking resolution of difficult environmental issues are those who enjoy the confidence of their constituency, but who, at the same time, recognize that compromise may be necessary to avoid much more dire consequences for the resources and values they care about. Having even one or two participants who are uncompromising and hence unable to participate effectively in the process can undermine or destroy an otherwise successful negotiation.

6. Leadership

Leadership is one of the most important elements for achieving a successful settlement negotiation. To reach a successful resolution one or more of the participants must emerge as “leaders” in order to guide discussions in a way that creates consensus around particularly tough issues. This may or may not be the person whose task it is to run the meetings; it may be a participant who happens to be particularly skilled in identifying the crux of an issue and finding creative solutions. In addition, it may vary from issue to issue; that is someone whose grasp of the legal or technical aspects of a particular issue may emerge as a leader in discussions involving that issue but not necessarily others. Regardless of who they are leaders credible with all the participants must be present to keep the process moving forward towards a constructive outcome.

7. Communication

Keeping all participants fully informed on both procedural and substantive aspects of a negotiations process is essential to a positive outcome. Both formal and informal (behind the scenes) communications serve a vital role in this regard. Someone has to be in charge of the formal communications necessary to inform all participants of meetings, and to distribute reports and analyses prepared on the issues of concern. Not only must all participants be kept informed with notices, reports, etc; equally important, someone has to be aware of misunderstandings, misinterpretations, and misperceptions which could unravel progress toward a settlement, or result in one or more participants leaving the process. This role usually evolves informally as a normal part of the process, may involve more than one person, and may capitalize on past relationships for its success. Whoever assumes this role must be skilled at inter-personal communications in order to overcome potential impediments to progress. This could be the technical advisor, if there is one or some other person in a position central to the process. The role of communicator may also vary from issue to issue.

Regardless of who performs it, this role is critical in developing consensus and trust among the participants who may have certain core values in common, but who often have

somewhat different interests and agendas. Often there will more than one of these “point persons” depending on the number of different alliances. Having good communications and a good rapport among these various key players will greatly facilitate progress towards a settlement.

C. The Most Difficult Issues

1. Sharing decision making

It is certainly foreign for most companies to share decision making authority with outside parties on a topic as complex and important as hydropower licensing. Most companies understandably feel much more comfortable with seeking advice, perhaps extensive advice, from outside parties, and then making their own decisions. However, for an alternative process to work best, decision making should be by consensus. This does not mean that the company cedes all control over its decisions to outside parties, for after all it is one of the parties that must agree, but rather that it agrees to sit down and reason through decisions with outside interests. This is a major leap but fundamentally important if the process is to work well.

2. Meeting the applicant’s expectations

Applicants should come to this process understanding that it does take considerable time, effort, and flexibility to make this process work. While the process can be more efficient overall, it is certainly not more efficient at every step. This is in part because the process is front-end rather than rear-end loaded, and aimed at avoiding issues such as responding to AIR’s (Additional Information Requests - these come late in the normal FERC process and typically delay the process by 1 or 2 years), etc. Thus, it does mean that considerable time must be spent up front. Furthermore, applicants should expect that they may be asked to undertake studies that they would not normally conduct on their own volition. Some of these studies are considered to be of critical importance by the NGOs and/or Agencies.

Applicants should also come to this process understanding that it may not be possible to have unanimous support for the application and the Environmental Assessment in the end. The FERC process is a complex one at best and no one can assure that an alternative process will produce unanimity. What is very likely, if the process is properly executed, is that in the end the applicant will have many if not all outside interests supporting its application.

3. Meeting the NGOs’ and/or Agencies’ expectations

It is important to understand that the NGOs and/or Agencies are interested not only in an outcome which is environmentally beneficial from a relicensing process, but they also care about how that proposal is developed and what information supports it. As pointed out above, in some cases, they will be asking for studies on topics that are unfamiliar to the applicant. Furthermore, they will almost certainly be asking for an impact analysis that is even-handed and complete, although not necessarily lengthy, for in the end, the applicant is, or should be, asking the NGOs to stand up and support their application and Environmental Assessment. Therefore, the NGOs must have confidence in the information on which these documents are based and must be convinced that they provide a fair, objective treatment of the topic before they feel comfortable publicly endorsing the application and supporting documents.

4. Understanding that frustration and inefficiencies are inherent in the process of working out a Settlement Agreement, but that the gains achieved overshadow these problems and in the end save time and money.

Previously it was noted that a commitment to work together until a satisfactory solution is found for every issue is fundamental to the success of collaborative efforts. This requires a shift in mind set that for many participants is not easy. This is also one of the most difficult and time-consuming aspects of the process. The process may seem, during the negotiating phase, to be arduous, costly and inefficient, because, at that phase, it is. However, the savings in the end, in terms of achieving a faster review and approval by FERC, and avoidance of legal fees in following the traditional licensing process, and the possibilities for creating settlement agreements that expand the pie for all parties, including the applicant, through non-traditional mitigation and enhancement measures, more than compensate for the seeming spinning of wheels in the negotiations phase.

D. Cautions

As we have indicated, there is no one formula or model for an alternative process that can be stamped out by a cookie cutter and guarantee success in hydropower licensing. Each must be custom fit to the circumstances. Neither do FERC regulations for an alternative process prescribe the type of structure or process to be used beyond the broadest requirements. FERC has recognized that every project is different, what works for one may not work for another, and flexibility is needed to allow each project to design a process that works for it. Flexibility is the operative word. We caution, however, that all players be aware that not all cooperative or collaborative processes are created equal. Be aware that in our experience:

- 1. The probability of successfully completing a collaborative process and the ease with which it is executed is, in our experience, directly proportional to the degree that the applicant is willing to openly share information, and truly involve the participants in decision-making, not just treat the participants as advisors.** If participants suspect that not all the pertinent information has been shared, that the outcome of meetings is pre-determined, or that they are being “gamed” in any way they will lose trust in the process. If the applicant has already

taken a hard position on difficult issues and is unwilling to compromise, or offers compromises that are not genuine attempts to find mutually acceptable solutions but instead, are intended only to give the appearance of open negotiations, the participants will soon recognize a wolf in sheep's clothing and will lose their commitment to the process.

2. **If there are truly “irreconcilable differences” on certain issues, and these are known at the start, they should be clearly identified up front as non-negotiable.**

There should be a mutual understanding from the start as to what issues the applicant and other parties are willing to consider for negotiations. **This will mean that the alternative process is not appropriate in some cases**, where non-negotiable issues are critical to two or more parties with opposing viewpoints.

3. **This can be some of the toughest work you will ever do.** The real promise of using an alternative licensing process is not that it will make the process easier, or less stressful - **by forcing divergent interests and individuals with different personal styles to work closely with one another, this process can, on an interpersonal level, be much more challenging than the traditional adversarial process** - the real promise is that truly cooperative problem solving can yield new solutions that go beyond traditional choices, that are more targeted to the most important resource issues, and that serve more interests.