

NOTES

A CASE STUDY FOR STAKEHOLDERS: AN ALTERNATIVE TO TRADITIONAL HYDROELECTRIC RELICENSING

I. INTRODUCTION

Hydropower projects were originally licensed for fifty year terms.¹ Those licenses were issued prior to the National Environmental Policy Act's (NEPA) passage,² and the environmental effects of those dams were given scant consideration. Many of the original project licenses are due to expire, and as various commenters have noted, NEPA's requirements will, in most cases for the first time, bring environmental issues into the decisionmaking process:

New license proceedings will become very important in the near future. Approximately 200 licenses will expire by the year 2000. . . In addition, in light of the fact that most licenses were issued before Congress enacted the NEPA, which requires FERC to consider a project's effects on the environment, new license proceedings may be the first time environmental consequences of many existing hydro projects will be thoroughly examined.³

The ecosystem management issues introduced by NEPA must be considered in the context of the hydropower industry's objectives and other stakeholder interests as well. Industry, businesses, and residents want inexpensive electric rates. Communities want to attract people. White-water river rafters want a free-flowing river. Sport fishermen want plentiful and biologically diverse fish. Conservationists want to preserve the river and restore its habitat. These parties and entities are "stakeholders" in any licensing proceeding and resolution of their conflicting and competing philosophies and objectives typically result in confrontation and the expenditure of considerable amounts of time, money, and resources.

Hydropower is considered by its proponents to be a clean, reliable, and cheap form of electricity.⁴ The operation of a hydroelectric facility is not as complicated as operating other electricity generators and a dam may

1. 16 U.S.C. § 799 (1994).

2. National Environmental Policy Act (NEPA) of 1969, *amended by* Pub. L. No. 91-190, 42 U.S.C. §§ 4321-4347 (1970), *amended by* Pub. L. No. 94-52 (1975), Pub. L. No. 94-83 (1975), and Pub. L. No. 97-258 (1982).

3. THOMAS E. MARK, 2 ENERGY LAW AND TRANSACTIONS § 53.04(2)(b) (David J. Muchow & William A. Mogel eds., 1996).

4. "Dams do not create the environmental problems associated with other energy sources, such as acid rain, global warming, or toxic waste. Hydropower is also cheaper than other forms of electricity, its prices are stable, and the plants are relatively simple and inexpensive to operate. Moreover, hydropower is a more reliable source because it is both domestically available and renewable and thus

have many beneficial uses to the community it serves. A dam and its associated impoundment may increase the value of surrounding property, draw tourism to a community through their fishing, boating, and camping facilities, provide irrigation and flood control, and attract industry with cheap electric rates.⁵ Conversely, others consider hydroelectric power as damaging because it alters the ecosystem's natural state.⁶ Operation of a dam can adversely affect animal and plant habitat, contribute to soil erosion, take up fish through its turbines, and degrade water quality.⁷

This paper is a case study of an alternative dispute resolution approach, used recently by stakeholders prior to traditional hydroelectric relicensing, for resolving these ecosystem management issues. The paper explains the current hydroelectric relicensing process, gives an overview of alternative dispute resolution in the administrative sector, analyzes the approach used by these stakeholders, and compares that approach to the traditional relicensing process. This paper will also discuss the problems associated with using a settlement agreement approach. Finally, this paper will advance the propositions that the alternative dispute resolution approach is preferable to the current traditional relicensing process and that the current process should be changed.

II. THE TRADITIONAL HYDROELECTRIC RELICENSING PROCESS

The hydroelectric facility relicensing process is detailed and complex. "By one estimate, at least forty federal statutes are applicable to the hydropower permitting and licensing process."⁸ However, projects are licensed (and relicensed) primarily pursuant to the Federal Power Act (FPA),⁹ National Environmental Policy Act (NEPA),¹⁰ and the Energy Consumers Protection Act (ECPA).¹¹

The Federal Energy Regulatory Commission (FERC) is responsible for issuing hydroelectric licenses.¹² The FERC, when contemplating whether to issue a license,¹³ must give "equal consideration" to "the pur-

not subject to the vagaries of politics and markets." Michael T. Pyle, Note, *Beyond Fish Ladders: Dam Removal as a Strategy for Restoring America's Rivers*, 14 STAN. ENVTL. L.J. 97, 115-116 (1995).

5. "Hydropower projects provide nonpower benefits as well. Many hydropower projects are congressionally authorized as multipurpose facilities for recreation, flood control, navigation, and irrigation. Often, license conditions imposed on nonfederal projects by FERC or its predecessor spell out nonpower uses that project owners must fund and accommodate such as visitor parks, recreational flow regimes, fish and wildlife facilities, and flood control regulations to protect local communities." George William Sherk, *Approaching a Gordian Knot: The Ongoing State/Federal Conflict Over Hydropower*, 31 LAND & WATER L. REV. 349, 375 n.131 (1996).

6. Pyle, *supra* note 4, at 102-04.

7. Pyle, *supra* note 4, at 102-04.

8. Sherk, *supra* note 5, at 361.

9. 16 U.S.C. §§ 791a (1994).

10. 42 U.S.C. §§ 4321 (1994).

11. The ECPA requires the FERC to give equal consideration to environmental issues and recommendations made based on surveys and investigations conducted by agencies. See 16 U.S.C. § 803(j)(1) (1994); *United States Dep't of the Interior v. FERC*, 952 F.2d 538 (D.C. Cir. 1992).

12. 16 U.S.C. § 797(e) (1994).

13. A license is only issued by the FERC upon acceptance of a licensee's application.

poses of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife. . . , the protection of recreational opportunities and the preservation of other aspects of environmental quality.”¹⁴ Licenses are issued upon whole or partial acceptance of an operator’s application and subject to various conditions imposed by the FPA as amended.¹⁵ Perhaps the most important condition is listed in section 803(j).¹⁶ That section requires each license to include “conditions for such protection, mitigation, and enhancement . . . in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat).”¹⁷ Section 803(j) is significant because it not only requires the FERC to consider the ecosystem management issues involved in the relicensing of hydroelectric projects, but also requires the agency to place conditions in the license which protect the ecosystem. The FERC was under no obligation to protect the ecosystem until this section was enacted.

In setting the licensing conditions, the FERC relies on suggestions received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. § 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.¹⁸ However, the FERC may reject these suggestions¹⁹ if it believes that they are “inconsistent” with the FPA or other laws and if it finds that the conditions chosen by the FERC satisfy section 803(j)(1).²⁰

License applications must contain “maps, plans, specifications, and estimates of cost,” and evidence of compliance with various other state and federal laws which may affect the license.²¹ In addition, the FERC may require such supplemental information as it deems necessary for completion of its analysis of the application.²² These other requirements are developed through a three-stage consultation process.

The first stage of the consultation process requires the license applicant to confer with relevant federal agencies, state agencies, nongovernmental organizations (NGOs) and any Native American Tribes (Tribes)

14. 16 U.S.C. § 797(e) (1994).

15. 16 U.S.C. § 803 (1994). These conditions require the Commission to adopt the license application which is best suited for “improving or developing” the waterway for the benefit of commerce, “improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife . . . , and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes” *Id.* § 803(a)(1).

16. 16 U.S.C. § 803(j) (1994).

17. 16 U.S.C. § 803(j)(1) (1994).

18. *Id.*

19. 16 U.S.C. § 803(j)(2) (1994).

20. 16 U.S.C. § 803(j)(1) (1994).

21. “Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this chapter.” 16 U.S.C. § 802(a)(2) (1994).

22. 16 U.S.C. § 802(a)(3) (1994).

which may be affected by the project.²³ Prior to the mandatory consultation, the applicant must provide these stakeholders with detailed information regarding the project, proposed resource studies, and any proposed changes to the project or its operations.²⁴ At a minimum, the consultation process involves a joint meeting and site visit, both are open to the public.²⁵ After the joint meeting, the stakeholders submit their written comments regarding the project, proposed resource studies, and proposed changes to the applicant.²⁶ The stakeholders include in these comments their respective 'wish-lists' of additional studies they believe should be performed and their reasons for requesting the further studies.²⁷

During the second stage of the consultation process, the applicant completes all "reasonable and necessary" studies and obtains all "reasonable and necessary" information requested by the stakeholders.²⁸ These studies are, to the extent possible, required to be completed prior to the filing of the license application.²⁹ Application filing and acceptance, however, is not suspended or considered fatally deficient if the studies are not complete.³⁰ The draft application includes study results, a discussion of those results, the applicant's response to suggestions made by the stakeholders, and any proposed "protection, mitigation, or enhancement measure[s]."³¹ The applicant then provides the stakeholders with a draft application, for written comments.³²

The third consultation stage is begun by the filing of the final application for a project license.³³ The final application must include a record of resolved and ongoing disputes between the resource agencies or Tribes and the applicant, copies of any correspondence from an agency or Tribe containing "comments, recommendations, and proposed terms and conditions," copies of public correspondence containing "comments and recommendations;" and recommendations for an "environmental protection, mitigation, or enhancement measure," including the "applicant's disagreement with the resource agency or Tribe."³⁴

Any disputes which arise during the consultation process are resolved according to a procedure contained in the regulations. If a dispute arises regarding whether a study or information sought by the agencies or Tribes is "reasonable and necessary," the complainant may submit a written peti-

23. 18 C.F.R. § 16.8(b)(2)(i) (1997).

24. 18 C.F.R. § 16.8(b)(1) (1997).

25. 18 C.F.R. § 16.8(b)(3) (1997).

26. 18 C.F.R. § 16.8(b)(4) (1997).

27. 18 C.F.R. § 16.8(b)(4)(i)-(ii) (1997).

28. 18 C.F.R. § 16.8(c)(1) (1997).

29. 18 C.F.R. § 16.8(c)(1)(i) (1997).

30. 18 C.F.R. § 16.8(c)(3)(ii) (1997).

31. 18 C.F.R. § 16.8(c)(4) (1997).

32. 18 C.F.R. § 16.8(c)(4)(iii) (1997).

33. 18 C.F.R. § 16.8(d)(1) (1997).

34. 18 C.F.R. § 16.8(f) (1997). The application must also include evidence of the applicant's § 401 water-quality certification under the Clean Water Act, evidence of any waivers of any part of the consultation process by an agency/tribe, and a discussion of how the application provisions will respond to public comments and concerns. *Id.*

tion to the Director of the Office of Hydropower Licensing at the FERC. The complainant must serve any such petition on the applicant.³⁵ The applicant may submit a response to the Director of the Office of Hydropower Licensing within fifteen days.³⁶ The Director will then resolve the issue and send a letter to the parties.³⁷ If an applicant disagrees with the Director's decision, and does not provide the information or conduct the study, then the applicant must explain in its application its reasons for disagreement with the Director's decision or why it chose not to conduct the study.³⁸

If a stakeholder disputes the applicant's conclusions regarding the environmental impacts of its "proposed protection, mitigation, and enhancement measures," the applicant and the disputing agencies or Tribes will hold a joint meeting to attempt to settle the issue.³⁹ Any remaining disagreements and their basis must be included in the application.⁴⁰

NEPA provisions require the FERC or the applicant to prepare an environmental assessment (EA).⁴¹ The EA must contain "brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E) of NEPA, the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted."⁴² Based on the EA, the FERC determines the need for an environmental impact statement (EIS).⁴³ An EIS prepared pursuant to NEPA section 102 requires the FERC to take a "hard look" at the action and its alternatives.⁴⁴ In addition, the FERC, in order to satisfy NEPA requirements, can order that the applicant conduct additional studies outside of those performed during the three-stage consultation process.⁴⁵

III. ALTERNATIVE DISPUTE RESOLUTION

Alternative dispute resolution (ADR) can be one, or a combination of any number of processes, outside of the traditional trial situation used by two or more parties to settle a dispute.⁴⁶ There are many types of ADR.

35. 18 C.F.R. § 16.8(b)(5)(i)-(ii) (1997).

36. 18 C.F.R. § 16.8(b)(5)(ii) (1997).

37. 18 C.F.R. § 16.8(b)(5)(iv) (1997).

38. 18 C.F.R. § 16.8(b)(5)(v) (1997).

39. 18 C.F.R. § 16.8(c)(6)(i) (1997).

40. 18 C.F.R. § 16.8(c)(8) (1997).

41. 18 C.F.R. § 380.5(b)(10) (1997).

42. 18 C.F.R. § 380.2(d)(3) (1997).

43. 18 C.F.R. § 380.5(a) (1997).

44. Section 102(C) of NEPA requires a detailed statement to be performed by the FERC, or a third-party contractor under FERC oversight, on the project's "(i) environmental impact . . . , (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." 42 U.S.C. § 4332(C) (1994).

45. 18 C.F.R. § 380.3(b)(2) (1996).

46. Charlene Stukenborg, *The Proper Role of Alternative Dispute Resolution (ADR) in Environmental Conflicts*, 19 U. DAYTON L. REV. 1305, 1306 (1997).

Some of the most common include negotiation, mediation, arbitration, and summary jury trial/mini-trial.⁴⁷ Parties use ADR to save money, time and their own psychological well-being, in a variety of situations, sometimes with great success, sometimes not.⁴⁸ It is often used in labor disputes, divorce/custody disputes, and insurance disagreements. ADR can also be useful in the administrative arena.

ADR is statutorily authorized for use in administrative processes by the Alternative Dispute Resolution Act of 1990.⁴⁹ This act is primarily a policy statement and requires federal agencies to consider ADR methods prior to undertaking any litigation. Any ADR initiated pursuant to this statute is purely voluntary; parties cannot be forced to participate in the ADR.⁵⁰ In addition, Congress, through the Negotiated Rulemaking Act of 1990,⁵¹ authorized federal agencies to use "regulatory negotiation" in their rulemaking procedures. The Act also established a statutory framework for the negotiated rulemaking and encourages the use of ADR measures in the rulemaking process.⁵²

Despite the existence of those statutes, attorneys have traditionally underutilized ADR in environmental disputes. Reasons for the underuse appear to be ignorance or misunderstanding by attorneys as to whether they can use ADR to settle the dispute, and if they can, how to use ADR within more accepted administrative or judicial processes.⁵³

IV. WILDERNESS SHORES SETTLEMENT AGREEMENT

On July 31, 1996, a trail-blazing settlement agreement was reached between Wisconsin Electric Power Company (WE), various federal and state agencies,⁵⁴ and two NGOs.⁵⁵ The Wilderness Shores Settlement Agreement, resolved disputes concerning the relicensing of eight Wisconsin Electric dams located in the Menominee River Basin. The stakeholders set-

47. Robert B. Fitzpatrick et al., *Alternative Dispute Resolution—Types of ADR Mechanisms*, CA30 A.L.I.-A.B.A. 259 (1995). Other types of ADR include internal grievance procedures without arbitration, arbitration fact-finding, court-administered arbitration, advisory opinions, early neutral evaluation, moderated settlement conference, binding hi-low summary jury trial, evaluative mediation, hybrid mediation in complex multi-party cases, private judging/rent-a-judge, and special master under FRCP 53 and state rules. *Id.* See also Stukenborg, *supra* note 46, at 1306-09.

48. "ADR techniques are generally considered faster, cheaper, and better able to leave the parties satisfied with the process." Tom Melling, *Bruce Babbitt's Use of Governmental Dispute Resolution: A Mid-Term Report Card*, 30 LAND & WATER L. REV. 57, 85 (1995).

49. 5 U.S.C. §§ 571-583 (1994).

50. Stukenborg, *supra* note 46, at 1329.

51. 5 U.S.C. §§ 571-583 (1994).

52. Stukenborg, *supra* note 46, at 1330.

53. Stukenborg, *supra* note 46, at 1332-33.

54. The federal and state agencies which were part of the negotiation process are the United States Fish and Wildlife Service, United States National Park Service, Michigan Department of Natural Resources, Michigan Department of Environmental Quality, Wisconsin Department of Natural Resources, and the Wisconsin Department of Administration. WILDERNESS SHORES SETTLEMENT AGREEMENT § 2.1.2 (July 29, 1996).

55. The non-governmental organizations which are party to the agreement, and included in its negotiations, are Michigan Hydro Relicensing Coalition and River Alliance of Wisconsin. *Id.*

tled their disputes before Wisconsin Electric officially initiated the FERC relicensing proceedings.⁵⁶ The settlement was the culmination of approximately two years⁵⁷ of unassisted negotiations,⁵⁸ and was spurred by the earlier frustrating and expensive experience with hydro relicensing in 1992⁵⁹ and 1993.⁶⁰

In 1992, a settlement agreement was reached between Consumers Power Company of Michigan and various state and federal agencies.⁶¹ The agreement covers eleven hydroelectric plants on three different rivers and resolves disputes which arose during the FERC relicensing proceedings.⁶² The agreement required dam decommissioning studies, a trust fund for dam decommissioning, dam decommissioning, extensive recreational improvements, installation of fish ladders, modification of hydroelectric operations, a fund dedicated to improving water quality, a fund dedicated to the construction of fish barriers, a multi-million dollar contribution by Consumers Power Company to the State of Michigan Habitat Improvement account for restoring fisheries and habitat, and the formation of an implementation committee.⁶³ These provisions were incorporated substantially unaltered into the eleven project licenses and the master order.⁶⁴ Some of the stakeholders in the Consumers Power Company agreement carried their experience to the negotiations which resulted in the Wilderness Shores Settlement Agreement.⁶⁵ Indeed, many of the provisions in the Wilderness Shores Settlement Agreement are modeled by provisions in the Consumers Power Company Settlement Agreement.⁶⁶

56. *Id.*

57. Telephone Interview with Gary Whelan, Michigan Department of Natural Resources and the negotiator for MDNR during these meetings (Oct. 11, 1996).

58. Unassisted negotiations occur in situations where parties work together without a facilitator to find a resolution for their dispute. Fitzpatrick, *supra* note 47, at 265.

59. Telephone Interview with Patti Leppert-Slack, Chief, Recreation and Land Use Section, Office of Hydropower Licensing, Division of Licensing and Compliance (Oct. 11, 1996). [The views expressed herein do not represent the official views and policies of the Federal Energy Regulatory Commission]; Telephone Interview with James Schramm, Esq., Michigan Hydro Relicensing Coalition (Oct. 4, 1996); Telephone Interview with Gary Whelan, Michigan Department of Natural Resources (Oct. 11, 1996).

60. Telephone Interview with Rita Hayen, P.E. Hydro Licensing, Wisconsin Electric Power Company (Oct. 8, 1996).

61. *Consumers Power Company*, 68 F.E.R.C. ¶ 61,077 (1994).

62. *Tentative Accord Reached on AuSable, Manistee Dam Pact*, N. WOODS CALL, Dec. 9, 1992.

63. *Id.*

64. *Consumers Power Company*, 68 F.E.R.C. ¶ 61,077 (1994).

65. These parties include the Michigan Department of Natural Resources and Michigan Department of Environmental Quality (formerly integrated into Michigan Department of Natural Resources), the U.S. National Park Service and the U.S. Fish and Wildlife Service. See WILDERNESS SHORES SETTLEMENT AGREEMENT § 2.4; CONSUMERS POWER COMPANY SETTLEMENT AGREEMENT § 1.1.

66. See and compare WILDERNESS SHORES SETTLEMENT AGREEMENT & CONSUMERS POWER COMPANY SETTLEMENT AGREEMENT.

Wisconsin Electric also had a strong incentive to negotiate the Wilderness Shores Settlement Agreement.⁶⁷ In 1993, Wisconsin Electric filed a FERC relicensing application for four Menominee River Basin dams. During the relicensing process, studies were conducted in accordance with the FERC relicensing regulations.⁶⁸ Unfortunately, Wisconsin Electric was required to undertake additional studies as intervenors continued to enter the process.⁶⁹ In the end, Wisconsin Electric was forced to expend enormous amounts of money and time in order to comply with the requirements of the FERC and NEPA.⁷⁰

This unhappy experience prompted Wisconsin Electric to reexamine their approach.⁷¹ Looking at a recent success in negotiating an energy sales contract with a municipal customer, Wisconsin Electric realized that negotiations might be beneficial elsewhere. Accordingly, Wisconsin Electric and the various state agencies met and brainstormed a way to use negotiations in the FERC hydroelectric relicensing proceedings. In the end, a convergence of the FERC relicensing process, the negotiation procedures used in the Consumers Power Settlement Agreement, and the negotiation procedures used in the energy sales contract led to the negotiation process used in the Wilderness Shores Settlement Agreement. The stakeholders' negotiations were in effect, an informal and slightly modified version of the first-stage consultation process.⁷²

The Wilderness Shores Settlement Agreement negotiations took approximately two years⁷³ of joint meetings.⁷⁴ The parties agreed, prior to each meeting, on the issues to be discussed so that each stakeholder could develop its proposals accordingly.⁷⁵ Wisconsin Electric assembled a four-

67. Telephone Interview with Rita Hayen, P.E. Hydro Licensing, Wisconsin Electric Power Company (Oct. 8, 1996, and Mar. 6, 1997). [The views expressed herein do not represent the official views of the Wisconsin Electric Power Company].

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. The negotiations, however, cannot replace the first-stage consultation process and the regulatorily-mandated first-stage consultation was begun shortly after the negotiations were completed. Telephone Interview with Rita Hayen, P.E. Hydro Licensing, Wisconsin Electric Power Company (Oct. 8, 1996 and Mar. 6, 1997). [The views expressed herein do not represent the official views and policies of Wisconsin Electric Power Company].

73. Telephone Interview with Rita Hayen, P.E. Hydro Licensing, Wisconsin Electric Power Company (Oct. 8, 1996); Telephone Interview with Gary Whelan, Michigan Department of Natural Resources (Oct. 11, 1996).

74. Telephone Interview with Gary Whelan, Michigan Department of Natural Resources (Oct. 11, 1996); Telephone Interview with James Schramm, Esq., Michigan Hydro Relicensing Coalition (Oct. 4, 1996); Telephone Interview with Monica Gross, Esq., River Alliance of Wisconsin (Oct. 1, 1996); Telephone Interview with Rita Hayen, P.E. Hydro Licensing, Wisconsin Electric Power Company (Oct. 8, 1996).

75. Telephone Interview with Gary Whelan, Michigan Department of Natural Resources (Oct. 11, 1996).

member team, each of the NGOs was represented by counsel, and each involved agency sent a representative.⁷⁶

The agency representatives and counsel for the NGOs caucused prior to the meetings to resolve any differences of opinion so as to present a unified front to the Wisconsin Electric team.⁷⁷ Historically, the Michigan Department of Natural Resources and the Michigan Hydro Relicensing Coalition work closely together and the interests of agencies and the non-governmental interests were closely aligned.⁷⁸

Initially, Wisconsin Electric and the agencies followed the procedure used in the Consumers Power Settlement Agreement, that is, the utility and the agencies met with the NGOs present, but not participating in the joint negotiations. The NGOs' input during caucuses with the agencies eventually led all parties to recognize the value of the NGOs input. Finally, the process was changed to permit the NGOs to participate directly in the joint negotiations.⁷⁹

The state agencies and NGOs believed they gained additional leverage during the negotiations by their unified front and their use of section 401 of the Clean Water Act.⁸⁰ This section requires any discharge into a body of water, requiring a permit under the Clean Water Act, to be certified by the state agency responsible for implementing the Clean Water Act.⁸¹ This Section also mandates that "state water conditions shall become a condition precedent to any federal license or permit subject to the provisions of the Clean Water Act."⁸² The United States Supreme Court interpreted this section to allow states to impose minimum stream flow requirements as a condition to certification, and read section 401(d) of the Clean Water Act as "authorizing additional conditions and limitations on the activity as a whole once the threshold condition, the existence of a discharge, is satisfied."⁸³ Using the water permit certification process, the states can now impose conditions on the project license previously considered unattainable.⁸⁴

76. *Id.* The appropriate Tribes were invited to attend the negotiations, however, they declined the invitation for reasons unknown. The Tribes continue to receive relevant documents from Wisconsin Electric pursuant to FERC regulations. Telephone Interview with Rita Hayen, P.E. Hydro Licensing, Wisconsin Electric Power Company (Oct. 8, 1996).

77. Telephone Interview with Monica Gross, Esq., River Alliance of Wisconsin (Oct. 1, 1996); Telephone Interview with James Schramm, Esq., Michigan Hydro Relicensing Coalition (Oct. 4, 1996); Telephone Interview with Gary Whelan, Michigan Department of Natural Resources (Oct. 11, 1996).

78. *Id.*

79. Telephone Interview with Rita Hayen, P.E. Hydro Licensing Wisconsin Electric Power Company (Oct. 8, 1996 and Mar. 6, 1997). [The views expressed herein do not represent the official views and policies of the Wisconsin Electric Power Company].

80. Telephone Interview with Monica Gross, Esq., River Alliance of Wisconsin (Oct. 1, 1996); Telephone Interview with James Schramm, Esq., Michigan Hydro Relicensing Coalition (Oct. 4, 1996); Telephone Interview with Gary Whelan, Michigan Department of Natural Resources (Oct. 11, 1996).

81. 33 U.S.C. § 1341 (1994).

82. MARK, *supra* note 3, at 355.

83. PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 114 S.Ct. 1900, 1909, 1914 (1994).

84. Sherk, *supra* note 5, at 355.

V. CONTRASTING THE RELICENSING PROCESS WITH THE SETTLEMENT AGREEMENT

The FERC relicensing process takes anywhere from five years to ten years to complete,⁸⁵ is cumbersome,⁸⁶ and expensive. The 1993 license awarded to Wisconsin Electric covers four dams and costs the utility an average of \$1 million dollars per project without ever taking into account the protection, mitigation, and enhancement measures which became part of the license conditions. A true account of the costs would, of course, also have to include the time and money devoted to the process by the FERC staff, the federal and state resource agencies, and NGOs.

Another problem with the licensing process is that it is a reactive process.⁸⁷ The applicant prepares its proposals, then the agencies, Tribes, and public react to those proposals.⁸⁸ The reaction is usually adverse which extends and expands the process.⁸⁹ In addition, the public's participation tends to be quite limited. Although there are plenty of opportunities for participation in the FERC relicensing process,⁹⁰ the public can formally influence the proceedings only by filing a motion to intervene.⁹¹ The applicant must acknowledge the public comments and explain how its proposal will address those comments, but intervention is the public's only means to ask the agency to force the license applicant to accept the public's suggestions.⁹²

Also, the FERC's relicensing process may not adequately address the natural resource management issues. Although the FERC is required to base its decisions regarding fish and wildlife protection, mitigation, and enhancement on agency recommendations, the FERC may reject these recommendations if it believes that they are inconsistent with the FPA or any other relevant law.⁹³ The FERC bases its decision on the evidence already

85. "At the present time, the relicensing process takes five to ten years to complete." Sherk, *supra* note 5, at 371.

86. Telephone Interview with Rita Hayen, P.E. Hydro Licensing, Wisconsin Electric Power Company (Oct. 8, 1996).

87. Telephone Interview with Patti Leppert-Slack, Chief, Recreation and Land Use Section, Office of Hydropower Licensing, Division of Project Review (Oct. 11, 1996).

88. "One of the barriers to successful resolution of conflict is a psychological phenomena known as reactive devaluation. When a concession or proposal is made by a perceived adversary, the person considering the concession or proposal is likely to value it less favorably simply because it is coming from his perceived adversary." Melling, *supra* note 48, at 66.

89. Telephone Interview with Gary Whelan, Michigan Department of Natural Resources (Oct. 11, 1996).

90. The applicant is required to invite the public to the initial joint meeting which is also attended by the agencies and tribes. In addition, the public can intervene in "any proceedings involving a party or parties" which deal with an environmental issue. 18 C.F.R. § 16.8(b)(3); 18 C.F.R. § 380.10(a)(1) (1996).

91. "In addition to submitting comments on the NEPA process and NEPA related documents, any person may file a motion to intervene in a Commission proceeding dealing with environmental issues under the terms of § 385.214 of this chapter." 18 C.F.R. § 380.10(a)(1).

92. 18 C.F.R. § 16.8(f)(8) (1996) requires "[A] description of how the applicant's proposal addresses the significant resource issues raised by members of the public during the joint meeting held pursuant to paragraph (b)(2) of this section."

93. 16 U.S.C. § 803(j)(1)-(2) (1994).

on the record and is required to explain the basis for its decision. In addition, the FERC is limited by its jurisdiction.⁹⁴ It may only place conditions on the hydroelectric licensee which directly relate to the project.⁹⁵ Hydroelectric licensees may also have large landholdings adjoining the project or near the project which, despite restrictions on the project per se, are being managed in a manner detrimental to the resources.⁹⁶ The FERC and the FPA have also been criticized because they take control of the resources out of the hands of those who are directly impacted by changes to a project. The FERC is required to consider the socioeconomic effects of the project, including these impacts on the community.

A settlement agreement, such as the Wilderness, can avoid many of these problems. FERC regulations specifically authorize settlement agreements,⁹⁷ but only in "any proceeding pending before the Commission or set for hearing under Subpart E."⁹⁸ The FERC approves a settlement agreement "upon a finding that the settlement agreement appears to be fair and reasonable and in the public interest," but may choose not to accept a settlement agreement or portions of a settlement agreement, despite its formation during a pending proceeding.⁹⁹ Upon acceptance of a settlement agreement, or portions of a settlement agreement, its terms usually become part of the license.¹⁰⁰ The FERC, however, encourages settlement agreements as a potentially effective approach to expediting the relicensing process.¹⁰¹

The general trend toward the use of settlement agreements in agency decision-making has been variously attributed to the mass movement toward ADR, a trend in institutions and administrations toward a "partnership" approach rather than a "command-and-control" approach,¹⁰² and the Clinton Administration which is advocating a streamlined approach to administrative processes.¹⁰³

94. Telephone Interview with Patti Leppert-Slack, Chief, Recreation and Land Use Section, Office of Hydro Power Licensing, Division of Project Review (Oct. 11, 1996).

95. *Id.*

96. Telephone Interview with Monica Gross, Esq., River Alliance of Wisconsin (Oct. 1, 1996).

97. 18 C.F.R. § 385.602 (1996). FERC regulations also authorize alternative dispute resolution mechanisms. *See* 18 C.F.R. §385.604 (1996).

98. 18 C.F.R. § 385.602(a) (1996) Subpart E addresses the hearing procedures. 18 C.F.R. §§ 385.501-10 (1996).

99. 18 C.F.R. § 385.602(g)(3) (1996).

100. Telephone Interview with Patti Leppert-Slack, Chief, Recreation and Land Use Section, Office of Hydropower Licensing, Division of Licensing and Compliance (Oct. 11, 1996). [The views expressed herein do not represent the official views and policies of the FERC].

101. *Id.*

102. Telephone Interview with Rita Hayen, P.E. Hydro Licensing, Wisconsin Electric Power Company (Oct. 8, 1996). Ms. Hayen stated that one of the reasons Wisconsin Electric was seeking a settlement agreement rather than the traditional relicensing process was due, in part, to the company's overall change to a partnership approach.

103. "President Bill Clinton swept into Washington promising change and an end to gridlock. His motto is 'collaboration not confrontation,' and his modus operandi is the town hall meeting. Implicit in his approach is a belief that government can facilitate consensus-building and conflict resolution." Melling, *supra* note 48, at 58.

The Wilderness Shores Settlement Agreement avoided most of the problems traditionally associated with the FERC relicensing process. Traditional relicensing takes approximately five to ten years,¹⁰⁴ but a settlement agreement will usually take only five years.¹⁰⁵ Negotiation began two years ago and an agreement has already been reached. Wisconsin Electric, however, must still go through the formalities of the traditional FERC relicensing process, which is where the additional three years comes into play.¹⁰⁶ If the FERC determines that it lacks jurisdiction to enforce some of the provisions of the settlement agreement, those provisions outside of FERC jurisdiction may still be enforceable in state court.¹⁰⁷

The Wilderness Shores Settlement Agreement not only saves time, but it also saves money. The estimated cost of relicensing the eight dams, including required participation in the traditional FERC relicensing, totals \$4 million.¹⁰⁸ In contrast, the relicensing process for the four dams on the Menominee River in 1993 cost twice as much per project.¹⁰⁹ WE saved \$4 million by negotiating the Wilderness Shores Settlement Agreement prior to the traditional FERC relicensing process. These amounts do not include the savings by the FERC, the resource agencies and Tribes, and the NGOs, which will now not be contesting the relicensing proceedings. A portion of these savings is attributable to the Wilderness Shores Settlement Agreement's reliance, in part, upon studies conducted on the Menominee River Basin during the relicensing proceedings for projects licensed in 1993.¹¹⁰ However, the monetary savings can be transferred to other stakeholders in those agreements who may also choose to rely on completed studies.

Public participation in the Wilderness Shores Settlement Agreement was almost certainly greater than in traditional FERC relicensing proceedings. The NGOs were able to take a proactive approach, rather than reacting to the licensee's proposals, and to participate in the actual decision-

104. Sherk, *supra* note 5, n. 89.

105. Telephone Interview with Rita Hayen, P.E. Hydro Licensing, Wisconsin Electric Power Company (Oct. 8, 1996). [The views expressed herein do not represent the official views and policies of Wisconsin Electric Power Company].

106. Scoping Document 1, UPPER MENOMINEE RIVER BASIN HYDROELECTRIC PROJECTS, ENVIRONMENTAL ASSESSMENT, § 1.4.

107. WILDERNESS SHORES SETTLEMENT AGREEMENT, § 2.3.4, p. 9: "In the event that FERC issues final license orders that do not include all of the conditions of this Settlement because FERC has determined it lacks jurisdiction over these issues, the Parties agree that they will be bound by the conditions of the entire Settlement which is enforceable as a whole in state court." WILDERNESS SHORES SETTLEMENT AGREEMENT § 2.3.4, p. 9. The FERC's modification, in its final orders, of the settlement agreement will trigger a timeline for objections to FERC's modifications. The parties bound themselves, if they have an objection to the FERC's modifications, to participate in negotiations for at least ninety days. If at the end of the ninety-day period a party still objects, then they have the option of withdrawing from the agreement. Withdrawal by Wisconsin Electric or any of the resource agencies voids the settlement agreement. However, a withdrawal by a non-governmental organization does not terminate the agreement. WILDERNESS SHORES SETTLEMENT AGREEMENT § 2.3.3, 2.3.5.

108. Telephone Interview with Rita Hayen, P.I. Hydro Licensing, Wisconsin Electric Power Company (Oct. 8, 1996). [The views expressed herein do not represent the official views and policies of the Wisconsin Electric Power Company].

109. *Id.*

110. *Id.*

making proceedings.¹¹¹ The agencies and NGOs had similar interests and were able to apply leverage to WE during the negotiations for their interests.¹¹² In addition, these NGOs, as coalitions of several organizations, were not limited to a narrow set of interests, but represented groups with similar goals. These groups have also been made ex-officio members of the implementation team formed by the settlement agreement and provision has been made for any other NGO group which may wish to become part of the implementation team.¹¹³ This status is only advisory;¹¹⁴ however, considering how closely aligned the state resource agencies and the NGOs' interests were during the negotiations, public interest will be manifested through the state agencies' votes at the implementation meetings.¹¹⁵ Lastly, the Wilderness Shores Settlement Agreement permits creative resolutions to the natural resource management issues. An example is the provision contained in the Wilderness Shores Settlement Agreement which places a covenant restricting development on the title of certain lands owned by Wisconsin Electric in the Menominee River Basin.¹¹⁶ Another example is a provision within the agreement which guides the management of non-project lands containing large forest stands.¹¹⁷ Both of these provisions are considered outside of FERC jurisdiction and would be unenforceable as license conditions.¹¹⁸

Other creative provisions include the decommissioning of three dams,¹¹⁹ creation of an implementation team to integrate completed and ongoing studies into the natural resource management plan.¹²⁰ In addition, the Project Coordination team has control over the various funds established by the agreement for development of fish barrier devices, additional studies, and protection, mitigation, and enhancement measures.¹²¹ FERC

111. Telephone Interview with James Schramm, Esq., Michigan Hydro Relicensing Coalition (Oct. 4, 1996).

112. *Id.*

113. WILDERNESS SHORES SETTLEMENT AGREEMENT § 9.1.2.

114. *Id.*

115. The parties to the WILDERNESS SHORES SETTLEMENT AGREEMENT wrestled with the issue of who should be members of the implementation team. The NGOs were given advisory status, because under the current relicensing regulations, once the settlement agreement is made a part of the license by the FERC, then the agencies and the applicant are bound to its terms. The FERC, however, has no authority to bind the NGOs to the terms of the agreement and their commitment for the duration was difficult to forecast. Telephone Interview with Rita Hayen, P.E. Hydro Licensing, Wisconsin Electric Power Company (Mar. 6, 1997). [The views expressed herein do not represent the official views and policies of the Wisconsin Electric Power Company].

116. WILDERNESS SHORES SETTLEMENT AGREEMENT § 5.2.3.

117. "WE will manage the Quiver Falls Tract for old growth and biodiversity, and will not develop this tract. WE shall allow public access to these lands when compatible with overall land management goals which are to be determined in consultation with the Team." WILDERNESS SHORES SETTLEMENT AGREEMENT § 5.2.2. This is one of the situations where the settlement agreement provided for management of non-project lands. *Id.*

118. Telephone Interview with Patti Leppert-Slack, Chief, Recreation and Land Use Section, Office of Hydro Power Licensing, Division of Project Review (Oct. 11, 1996).

119. WILDERNESS SHORES SETTLEMENT AGREEMENT §§ 8.1-8.4.

120. *Id.* §§ 9.1-9.4.

121. *Id.* §§ 4.2-4.4.

license conditions are normally implemented by the licensee and enforced by the FERC.¹²²

VI. PROBLEMS WITH THE SETTLEMENT APPROACH TO RELICENSING

The settlement process is not however, perfect, which is why the FERC must still exercise some oversight to guard the public interest.¹²³ The national public does not necessarily align itself with the agencies', NGOs', or dam operators' views. If license conditions are not screened by the FERC on behalf of the public, issues critical to the public interest may be overlooked.

Another problem with the settlement process is who decides who gets to participate in the settlement negotiations. The regulations currently require the Tribes and the federal and state agencies to be included in the process; however, the public is not and cannot be required to participate, meaning the public interest groups may not be committed to the agreement if they do participate and are dissatisfied with the results. As was noted earlier, the agreement would be lacking valuable input without NGO participation.¹²⁴ Their input resulted in the public exerting actual influence over the license conditions. However, there are many different NGOs in existence, all of which might have a stake in the project's relicensing. As the numbers involved in settlement negotiations increase, the likelihood of reaching an agreement decreases. If a stakeholder is excluded for one reason or another, under the current relicensing regulations, they can intervene later and attempt to modify or terminate the settlement agreement.

Enforcement of the settlement agreement is also problematic. The FERC may either accept or partially accept the terms of the settlement agreement. Crucial terms of the agreement may be modified or eliminated, causing a party to withdraw from the agreement, and forcing termination of the agreement. If the agreement is terminated, then all is for naught, and more time and money will be spent accommodating those changes.

VII. IMPROVING THE TRADITIONAL RELICENSING PROCESS

Changes in the current relicensing process are necessary in order to reduce the time, money, and resources spent on the traditional relicensing process and to promote proactive public participation in project relicensing. Currently, settlement agreements can only augment the traditional relicensing process. A two-track system for relicensing hydropower projects would address the problems with the current relicensing process and settlement agreements. A two-track system is necessary, because, according to the Alternative Dispute Resolution Act of 1990,¹²⁵ federal agencies gener-

122. Telephone Interview with Patti Leppert-Slack, Chief, Recreation and Land Use Division, Office of Hydropower Licensing, Division of Project Review (Oct. 11, 1996).

123. 16 U.S.C.A. § 808(a)(1)-(3) (1994).

124. Telephone Interview with Gary Whelan, Michigan Department of Natural Resources (Oct. 11, 1996).

125. 5 U.S.C. §§ 571-83 (1994).

ally cannot force parties to submit to alternative dispute resolution. The operator would have the option of relicensing through a settlement track or through the traditional relicensing process.

The settlement track would utilize a process similar to that used to reach the Wilderness Shores Settlement Agreement, but a process which would retain various portions of first-stage consultation under the current relicensing regulations. The applicant would be required to consult the public and relevant and appropriate agencies and Tribes at joint meetings.¹²⁶ The notice requirement would serve to put the NGOs on notice concerning ongoing negotiations. These measures provide the agencies, Tribes, and the public with a proactive opportunity to influence the license conditions.

Once a settlement agreement is reached and an EA is prepared in conjunction with that agreement, the applicant submits its application. The FERC will only be allowed to modify the agreement if it clearly contravenes public policy. The FERC must justify any modification with evidence in the record, which will be published to all parties, made part of the license, and will become basis for judicial review.

While the FERC acts to protect the national public interest, local and state public interests are protected by the negotiations themselves. In negotiations, the state agencies represent the views of the legislators and administration in state office. Public interest is expressed at the voting booth when electing an administration into state offices or seats. Thus, the state agencies also advance the public interest when they pursue their state legislative and administrative goals.

Enforcement of the settlement agreement can be achieved through a settlement provision providing that all settlement provisions not subject to FERC jurisdiction will be enforceable in the state in which the contract was executed. Those provisions which are subject to FERC jurisdiction should, again, only be rejected if in clear contravention of public policy. The basis for such a decision should be evidentiary. The rejection of the provision and the reasons therefore should be made a part of the license order and a basis for judicial review.

If an applicant chooses the settlement track, then negotiations should begin no less than five years prior to license expiration. The applicant will be motivated to complete timely negotiations because of the threat of license expiration. NGOs, federal and state agencies, and Tribes should be

126. The NGOs participating in the WILDERNESS SHORES SETTLEMENT AGREEMENT were also involved in the 1993 relicensing proceedings and one of the NGOs was involved in the 1992 CONSUMERS POWER SETTLEMENT AGREEMENT as well. The parties did not intentionally exclude any NGOs; negotiating the WILDERNESS SHORES SETTLEMENT AGREEMENT was an evolutionary process and these groups were included due to their past involvement with WE and the agencies. Also, they were the groups most likely to intervene later, during the traditional relicensing process, and were included to eliminate that possibility. Other groups were given the opportunity to respond during the traditional relicensing process. Telephone Interview with James Schramm, Esq., Michigan Hydro Relicensing Coalitino (Oct. 4, 1996); Telephone Interview with Rita Hayen, P.E. Hydro Licensing, Wisconsin Electric Power Company (Oct. 8, 1996 and Mar. 6, 1997). [The views expressed herein do not represent the official views and policies of the Wisconsin Electric Power Company].

motivated to complete negotiations because withdrawal from the negotiations may result in their interests being ignored. There should also be a provision to extend the negotiation deadline in those situations where the parties are on the verge of reaching an agreement. If the parties are not close to agreement, however, the application, and the other stakeholders' responses to it, should be submitted to the FERC as the final arbiter of the license conditions.

VIII. CONCLUSION

Settlement agreements augmenting the current relicensing process save time and money, increase public participation in such decision making, and may result in resource conservation. The FERC encourages use of settlement agreements during the relicensing process; "[A] settlement agreement is an effective tool which can benefit the parties involved in the relicensing process and the affected environment."¹²⁷ Relicensing regulations should be reformed to enhance the effectiveness of the settlement agreement approach to relicensing.

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127. Telephone Interview with Patti Leppert-Slack, Chief, Recreation and Land Use Division, Office of Hydropower Licensing, Division of Licensing and Compliance (Mar. 12, 1997). [The views expressed herein do not represent the official views and policies of the FERC].

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