

April 21, 2006

Mr. Mark Oakley
Relicensing Project Manager
Catawba-Wateree Hydroelectric Project
P.O. Box 1006
Mail Code EC12H
526 South Church Street
Charlotte, North Carolina 28201

RE: Catawba-Wateree Hydroelectric Project (FERC Project No. 2232)

Dear Mark,

Thank you for providing the Catawba-Wateree Relicensing Coalition with a copy of the draft license application. The CWRC submits these comments to Duke Energy Corporation pursuant to its request for comments on its draft application for a new license for its hydroelectric facilities on the Catawba-Wateree Rivers.

GENERAL COMMENTS

The CWRC has been an active stakeholder participant in Duke Energy's enhanced traditional process to apply for a new license for its facilities. CWRC worked with the applicant in the planning and design of the process, commented on the Initial Consultation Document, attended all public meetings and worked with other stakeholders and the applicant to write the Charter that guides the process. We have submitted study requests, comments on the study plan and our board members have served on numerous study teams and resource committees during the second stage of the process. We appreciate this opportunity to comment on the first draft for the application to be submitted to the Federal Energy Regulatory Commission.

The draft application for the new license refers to and includes terms from a draft Agreement in Principle (AIP) dated November 23, 2005. Since then the AIP has been through a number of revisions. Therefore a several of the terms proposed for the new license have been changed through the stakeholder negotiation process and are now reflected in an AIP dated March 31, 2006. Because of this we have commented on some but not all the terms from the November 23, 2005 document. We will comment further and more completely when the final application is offered for review. We have also attached a copy of our "reservation statements" which will serve as comments to the latest version of the AIP.

CWRC finds the draft application to be very well presented and designed reflecting tremendous effort by Duke staff and consultants. While the majority of the draft application appears clear and accurate we offer the following specific comments for clarity as well as substance.

COMMENTS ON EXECUTIVE SUMMARY

The Executive Summary contains results of a survey referred to as the “KPC Survey” indicating opinions of area residents for various aspects of Duke Power’s operations and activities. We have been unable to find any reference information regarding this survey to indicate the methodology used, examples of questions, response rates, background of KPC, and other information normally included when presenting survey results. We request that this information be provided to afford the fullest credibility to this survey.

Examples of questions we have regarding the survey:

1. How were the 809 participants chosen?
2. How were the questions presented?
3. The survey characterizes the respondents as “residents”. This is confusing. Do the percentages relate to the number of participants responding, rather than to the total number of residents in the area as implied?
4. Did the survey overlap the surveys used in the Recreation Use and Needs Study? Did some of the same people get both? How do the results compare between surveys. For example, the KPC survey indicates that 70% of “residents” say Duke provides adequate recreational facilities for their area. But the surveys done as part of the RUNS do not indicate the percentage of area residents who consider the facilities adequate. Rather the RUNS report only indicates average ratings of respondents to specific questions. This makes it difficult to compare results.

For these and other reasons we are concerned that the perfunctory manner in which the KPC survey data is presented along with its prominence in the Executive Summary may lead to unclear or false impressions regarding actual assessments by area residents.

Page 8 of the Executive Summary contains a bullet point regarding Conservation Support which refers to both Duke Power and Duke Energy with no explanation regarding the distinction between the two, or whether one or both are considered to be the license applicant. In light of recent changes in Duke Energy’s structure, and a recent filing with the FERC regarding the name of the licensee, we strongly request clarification as to who the license applicant will be. This issue becomes particularly relevant for the sections of the AIP which purport to bind Duke Energy or other Duke owned entities.

On pages 10-11 the statement is made that CHEOPS uses 75 years of data. While this data was initially put into the model, it is our understanding that the majority of model runs were done using only the past 50 years of data. We would appreciate clarification on this.

On page 16 sturgeon and mussels are listed as subjects for protection, mitigation and enhancement measures under the Terrestrial section. We think these species are better listed under aquatic or fisheries related measures.

COMMENTS RELATED TO STUDIES

The CWRC submitted to applicant and the FERC a number of study requests on May 30, 2003 and additional comments and reframed requests on November 14, 2003. A number of these requested studies were either not included or were not designed to sufficiently address some of the issues we raised.

Because of this and depending on the terms of the Final Agreement and final license application we may file additional comments and requests for additional information at a later date. However for the purposes of the draft application we note the following concerns related to the studies.

1. Sediment regimen and sediment transport studies were minimally performed. This may or may not need to be revisited.
2. Collection methods for two mussel species (Brook Floater and Rayed-pink fatmucket) appear to be inadequate since these species live in water depths below those included for the study.
3. There was no assessment as to whether impact minimization zones and the shoreline management guidelines related to them result in improved habitat. We had requested that they be compared with environmental areas and unprotected areas to determine the effectiveness of this shoreline classification. We continue to consider this important data that should be collected.
4. We had requested that the effects of the Shoreline Management Plan and Guidelines be studied to determine impact on recreation, habitat and water quality using various build-out scenarios along the shoreline. This was done only with regard to certain aspects of recreation. We continue to believe that this data is essential in assessing the effects the Shoreline Management Plan and Guidelines so that improvements and adjustments can be made over the term of the new license.
5. Studies regarding diadromous fish appear to be inadequate or incomplete. The U.S. Fish and Wildlife Service has indicated further information and analysis are needed. We concur and defer to their recommendations in this matter.

While the CHEOPS model used to project effects of various flow scenarios was adequate for the most part, we are concerned that it was not modified to model additional proposals that might have allowed for a better balancing of interests. For example, flows to accommodate diadromous species expected to be migrating up the reach below Wylie dam in future years were proposed. But since the proposal contained conditions (flows only provided when adequate water was determined to be available) that the CHEOPS model was not configured to analyze, this scenario was not adequately considered. We think this is a serious concern and should be addressed prior to preparation of the Final Agreement and the submission of the license application.

COMMENTS ON PROTECTION, MITIGATION AND ENHANCEMENT MEASURES

Since many of the PM&E measures are not included in the draft application we are able to comment only on those included, or summarized in the Executive Summary, or those reflected in the AIP.

Trash management-

The current AIP includes the provision that the applicant will ensure non-biodegradable trash or woody debris that it removes from the Project reservoirs, downstream reaches, islands and licensee owned access areas will be properly disposed and that dam operation will be adjusted to avoid as much as possible the passage of such large amounts of debris at any one time as to cause a navigational hazard. We note this section is missing from the draft application and request it be included.

Habitat flows-

We are concerned that minimum flows as noted below have been reduced from those provided in the draft application in order to accommodate expenses for land acquisition:

1. Oxford flows (table 10 page 35)– draft application provides 150 – 200cfs but the revised AIP provides 100 all year.
2. Lookout Shoals (table 11 page 36) draft application provides 160cfs for Jan-March but revised AIP provides 80cfs all year.

We support the flows as provided in the draft application.

Rare, threatened or endangered species-

Management plans for rare, threatened and endangered species at the project are missing. We understand the applicant has yet to consult with the Fish and Wildlife Service on the development of these plans.

Since the U.S. Fish and Wildlife Service and the National Marine Fisheries Service will be making recommendations and prescriptions for diadromous fish, we find the lack of provision for the flows necessary to accommodate these fish in future years a serious omission. We strongly recommend that the applicant conduct the necessary studies and work with the appropriate resource agencies to properly plan for migrating fish that will result from a large basin-wide restoration plan in South Carolina.

Recreation –

Since a number of recreation terms have been changed in the latest AIP such as the timing for the recreation specialist meetings (every 7 years rather than 10 years per draft page 73), and several land parcels have been added, we refrain from final comments on recreation enhancements at this time. However we do make the following comments on terms included in the draft application:

1. The chart on page 75-91 seems unclear and may be misleading regarding what is included in “total cost” column. While it is noted later on pages 97-98 that the chart includes all listed and suggested enhancements whether or not paid for by applicant, it remains unclear how items suggested to be installed by hypothetical third parties responding to marketing efforts of the applicant are treated. Are those included even though there is no guarantee that any of them will be done? We suggest that the chart reflect the amount committed to by applicant. Even though costs of all facilities are given on pages 97-98, with a general statement of Duke’s percentage, it is very difficult to confirm the contribution without going back through each enhancement and breaking out each facility.
2. We reiterate the concern about future use projections that we have stated in previous comments to the RUNS report. A 1999 projection using the same methodology and same consultant as used this time grossly underestimated the future recreational use. For example, the 1999 report estimated recreational use at Lake James for 2010 to be 696,661 when in fact it was 994,674 by 2004. For

Lake Norman the 1999 projections estimated 1,096,831 for 2010, but in fact by 2004 the use was already three times that much. We request that all the current projections be understood against those past underestimations and frequently reviewed. The population in the region continues to increase dramatically and the need to continually update recreation facilities remains critical.

ADDITIONAL CONCERNS

We did not find applicant's statement regarding the feasibility of buffers along project waters as required by 18 CFR 4.51(f)(6)(iv). We request that this be included in the license application and a draft provided for review.

CONCLUSION

We have attached our reservation statements regarding the proposed Agreement in Principle as well as a proposal to alleviate the risk of needing to materially amend the Final Agreement once jurisdictional bodies with mandatory conditioning authority act according to their statutory obligations. These documents are incorporated herein and are to be considered part of our comments.

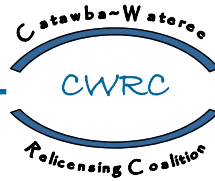
We appreciate the opportunity to provide these comments and look forward to working with Duke Energy and other stakeholders during the process of drafting a Final Settlement Agreement and preparing the final license application.

Sincerely,

(electronic signature)

Victoria Taylor
Executive Coordinator, Catawba-Wateree Relicensing Coalition

Cc: Federal Energy Regulatory Commission



Attachment A

To Catawba Wateree Relicensing Coalition comments on Duke Energy's application for a new license for its hydroelectric facilities on the Catawba-Wateree Rivers

Statement of Major Reservations to the Agreement in Principle Catawba-Wateree Relicensing Coalition April 23, 2006

The CWRC recognizes the extraordinary effort of all stakeholders over the past several years to reach the current level of agreement in the Agreement in Principle. While we support most of the AIP with minor reservations, six sections contain terms about which we have major reservations due to vague, inconsistent or incomplete terms, or references to missing or unagreed documents or sections. Therefore we have signed the AIP with consensus level of "4" are able to "live with" the AIP with the understanding:

Section 4 –

•4.1.1 and 4.1.3

..that the final Flow and Water Quality Implementation Plan(FWQIP) will be acceptable to state and federal agencies in respect of their authorities under the Clean Water Act (CWA), the Endangered Species Act(ESA) and the Federal Power Act(FPA). Since the FWQIP will not be final until the CWA section 401 water quality certifications are issued which will be after the FA is signed, we understand that the FA will include appropriate provisions to avoid or resolve any conflicts with the certifications.

•4.1.7

..that since the mitigation packages are not complete nor agreed by either state or other parties at this time, that the mitigation will meet each state's obligations and specifically that the terms for the conservation easements will be drafted to fulfill the purpose of conservation, public access and water quality protection.

•4.8

..that since at least two jurisdictional agencies have indicated that the flows below the Wylie and Wateree dams may be inadequate over the term of the license to provide for migratory fish, we understand and expect that the parties will continue to work with these agencies so that the FA will include appropriate provisions to avoid or resolve conflicts arising from mandatory conditions under ESA §7(a) and FPA §18.

Section 10 –

•10.1.22

..that the appearance of two entities in this paragraph - licensee and Duke Energy - will be resolved so that the promised support and the lands owned or controlled by Duke Energy, will be available under the terms of the contract to be signed by licensee.

..that since there may be a substantial interval between purchase option date (12/06) and the availability of funding support, that adequate measures will be provided such as

granting the option without an escalation clause, or increasing the portion of Duke's contribution to account for any escalation in price.

•10.2 – 10.22

..that clarification will be made whether the enhancements proposed to be constructed by third parties under AAll leases are intended to be license obligations or contractual obligations, or both, enforceable by the parties to the FA after the AAll leases are executed.

..that we have major reservations regarding the conditions precedent to many of the recreational enhancements. To reduce the risk that needed facilities may never be built, the licensee's responsibility should be clarified to include all facilities within the project boundary.

•10.1.22;10.3.1; 10.3.2; 10.3.3; 10.3.4; 10.4.4; 10.10.3; 10.17.1; 10.21.5

..that since all these paragraphs contains references to binding Duke Energy to terms in the agreement, we expect that Duke Energy will be a signatory to the FA.

Section 11 –

•11.1.5

..that since specific plans for species protection are not yet presented that these plans will be acceptable to the agencies charged with such protection, and that the parties will work cooperatively to draft appropriate terms in the FA to prevent or resolve any conflicts that may arise.

Section 13 –

•13.1.1 and 13.2.1

..that the FA will include appropriate provisions to avoid or resolve any conflicts with the water quality conditions imposed.

Section 14 –

14.2.1

..that if only one state's agency signs the FA, the signing state will still receive its contribution to the HEP.

Section 16 –

•16.5.3

..that ability for stakeholders to support or oppose fish passage prescriptions is intended to include any future "zone of passage" flow provisions required under the ESA or FPA.

•16.2.2.5, 16.5.1, 16.5.2, 16.7.2.2

..that since many critical terms of the agreement are referred to but missing the parties will work cooperatively toward drafting those to provide clear and fair provisions for amending the agreement, resolving disputes, withdrawing from it, terminating the agreement, among other things.

•16.10

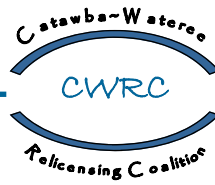
..that the formula for escalating monetary values is acceptable to affected parties.

•16.7.2.3

..that since the mechanism for extending the Final Agreement Committee requires licensee's consent there will be provisions for dispute resolution in the event a majority that does not include the licensee votes to continue the FAC.

General

...that the entity who will hold the license is clarified in light of a recent FERC filing by Duke Energy stating that the current licensee is Duke Energy Corporation and requesting a change to a newly created entity, Duke Power LLC. We are concerned about the extent of FERC's jurisdiction over the parent company depending on whether the LLC is a substantive entity that can perform on the obligations of a new license, and we are concerned about stakeholders' ability to ensure performance under the terms of the Final Agreement.



**Attachment B:
to comments on Duke Power's draft application for a new license for its
hydroelectric facilities on the Catawba-Wateree Rivers**

**POTENTIAL APPROACHES TO
TO MANAGE LIKELY INCONSISTENCIES BETWEEN FINAL AGREEMENT
TERMS AND MANDATORY LICENSE CONDITIONS**

Catawba-Wateree Relicensing Coalition

April 21, 2006

The Catawba-Wateree Relicensing Coalition requests that the licensee consider how best to manage the risk that the terms of the Final Settlement Agreement will be inconsistent with mandatory conditions likely to be imposed by agencies with jurisdictional authority.

The conditions most likely to be inconsistent with the Final Agreement terms are fishway prescriptions issued by the US Fish and Wildlife Service and National Marine Fisheries Service under Federal Power Act section 18; reasonable and prudent measures or alternatives issued by the National Marine Fisheries Service for listed fish under Endangered Species Act section 7; and water quality certifications issued by North Carolina Department of Environment and Natural Resources and South Carolina Department of Health and Environmental Control.

The risk arises because of the sequence of negotiations and other actions in the relicensing proceeding. The Agreement in Principle will be signed by April 17, at a time when these agencies have not issued these conditions even in preliminary form. The Final Agreement (FA) will be signed in August which is also prior to the conditions being issued. If the signatories do not have a risk management strategy in place, the FA will not be durable or effective if inconsistent with those conditions, since FERC must incorporate mandatory conditions into a license. Most of the agencies with such authorities will not sign the AIP and thus will develop their conditions outside of the collaborative process which increases the risk. We are seeking approaches to work together to reduce that risk.

Most relicensing negotiations that include a settlement agreement have to deal with this same risk – signing a FA in advance of mandatory conditions for water quality certification and mandatory minimum flow schedules and other flow provisions. There are successful approaches that have protected the interests of other licensees and stakeholders. Since minimum flow schedules and related flow provisions are the core of any relicensing agreement, it is most helpful when the agencies with mandatory authority are included in the collaborative process for negotiating the agreement and are willing to provide previews of their conditions. This way the terms of the FA can more likely be developed to be consistent with those conditions. We think this may still be possible in our case, but even if not, the two sample approaches we offer should substantially reduce

the risk. The first deals mostly with substantive provisions for flows and the second deals primarily with process.

We underscore that these approaches and the sample provisions are not intended to impose all the risk and all additional costs on the licensee. That may occur, but the approaches may also result in other changes that accommodate those additional costs. We strive to find a way to equitably share the risk.

Finally, these approaches are not necessarily mutually exclusive and an integration or combination of them may be the best solution.

APPROACH NUMBER 1

The signatories to the AIP will develop the terms for the Final Agreement to be consistent with the mandatory license conditions likely to be issued by jurisdictional bodies with mandatory authority.

Detail

After consultation with representatives from the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and the S.C. Department of Health and Environmental Control we have determined that the following flow and water quality related provisions, if added to the Final Agreement, are likely to result in an agreement with terms that will more closely resemble and accommodate the conditions that will be imposed or recommended by those bodies than those in the current version of the Agreement in Principle (3/31/06).

While the above mentioned agencies have not agreed to the specific provisions we propose, the inclusion of these provisions in the Final Agreement will substantially reduce the risk of the agreement being subject to major renegotiation, being withdrawn from or terminated. This will inure to the benefit of all signatory Parties.

We have also consulted with the North Carolina Department of Environment and Natural Resources and the North Carolina Wildlife Resources Commission who are also likely to support most of these provisions.

In addition we have consulted with American Rivers and the Coastal Conservation League and have determined that the provisions we propose are far less likely to trigger a legal challenge than those in the current Agreement in Principle. In fact, we think that both these organizations would be more likely to sign the settlement agreement if these provisions are included.

Except for the increased flows below Oxford dam where we have provided alternatives to increasing the flows, we have analyzed the impacts of the other flows using the Santee River Basin model which we were able to modify to account for the specifics of the proposal. This analysis indicates that these flows will not result in any substantial negative impacts on drought management, or system flow requirements.

We strongly urge Duke Energy to modify its water supply model (CHEOPS) so that it is capable of testing these scenarios and either verify or contradict our results. An earlier analysis of a similar flow proposal performed by Duke's consultant, Devine Tarbell and Associates using the CHEOPS model did not accurately model the flows proposed since CHEOPS' current configuration does not allow it to replicate the effects of discontinuing the flows if they would trigger Stage 0 of the Low Inflow Protocol, among other things.

In addition, a more accurate model run is needed to determine the effects of the proposed flows on power generation with regard to Duke Energy's duty to provide its customers with the lowest cost electricity available while complying with state and federal regulations and license terms.

Proposed changes to the minimum flow schedule and other flow provisions of the Agreement in Principle to be incorporated in the Final Agreement:

1. Oxford Development

a) Flows below Oxford dam will be increased to provide 50% of the habitat for the native fish community that would be expected under an unregulated flow regime. These flows would fall in the 475 – 655 cfs range. These flows would only be provided during “wet” or “normal” years and would be suspended any time that their provision would trigger a stage “0” of the Low Inflow Protocol. We understand that earlier modeling of increased flows produced impacts to the water level at Lake James that were unacceptable to some stakeholders. However, we request additional modeling be conducted to understand the impacts on lake levels if these flows were only provided as outlined above.

b) First alternative to this provision:

In the alternative, if these flows are not provided as indicated above, then adequate in-kind mitigation will be provided by increasing flows in the Catawba Bypass or below Bridgewater dam to improve habitat values in those reaches of the river.

c) Second alternative:

If neither the increased flows in the Oxford reach are provided, nor alternative mitigation flows are provided, then the licensee will provide the following mitigation in Catawba County: 100 foot conservation easements along both sides of the North and South Forks of Mountain Creek for a distance of approximately $\frac{3}{4}$ mile; and/or 100 foot conservation easement below Riverbend Park continuing for approximately 1.5 miles to coincide with the river trail; and/or conservation easement along existing gameland properties at Hudson Chapel Road along approximately 1.2 miles of riverfront.

2. Wylie Development

Beginning in the year 2024 flows below the Wylie dam will be increased to 2600 cubic feet per second from March 1 through May 15, but only if the diadromous fish (e.g. American shad, or short-nosed sturgeon, or blueback herring) are present in that reach of

the Catawba River; and only if the Low Inflow Protocol is not in effect; and with the provision that these flows will be suspended if providing them would trigger entry to stage 0 of the Low Inflow Protocol.

If no diadromous fish are present in the reach by 2024, then the U.S. Fish and Wildlife Service, the National Marine Fisheries Service and the appropriate state resource agencies will meet to determine how long to delay the provision of these flows. Since one migratory species, striped bass, are already in the reach, their presence alone is insufficient to warrant provision of these increased flows.

It is anticipated that the new flows will be provided via a new flow runner with a range of 700 – 1300 cfs used in combination with existing equipment. At licensee’s option, the flows may be decreased to 2200 cfs since the flow studies indicated that amount to be adequate. We are proposing 2600 cfs because it appears that would be least costly for the licensee to provide based on existing equipment and any modifications needed.

The table below indicates the flows to be provided:

Month	Minimum Continuous Flows (cfs)		Critical Flows (cfs)
	First 15 years of New License	Years 16+	
Jan	1,100	1,100	700
Feb-15 ¹	1,100	1,100	700
Mar ¹	1,100	2,600 ²	700
Apr ¹	1,100	2,600 ²	700
May-15 ¹	1,100	2,600 ²	700
Jun-15	1,100	1,300 ²	700
Jul	1,100	1,100	700
Aug	1,100	1,100	700
Sep	1,100	1,100	700
Oct	1,100	1,100	700
Nov	1,100	1,100	700
Dec	1,100	1,100	700

- Note 1: The Wylie High Inflow Protocol will be used during certain times to provide Minimum Continuous Flow of 1,300 cfs.
- Note 2: Diadromous flows begin in Year 2024. Beginning in year 2024, the Wylie Development will be operated such that Minimum Continuous Flow is provided as described in the table above unless the LIP is in effect or Stage 0 of the LIP would be entered because of diadromous flows. In the latter case flow requirements would drop to 1100 cfs to avoid entering into Stage 0.

3. Wateree Development

In order to provide adequate spawning habitat for shortnosed sturgeon, an endangered species, below the Wateree dam, flows through the bypassed reach will need to be provided. These flows will not be in addition to flows already provisionally agreed in the Agreement in Principle, but will be a re-routing of those flows through the channel. This could be accomplished by routing water that has already been used to generate electricity with the existing turbines through a channel leading to the bypassed reach, or via a new small turbine proximate to the affected area. Given that dam modifications for flood management may also be needed, we would strongly encourage Duke to consider innovative engineering solutions that will meet the multiple needs related to power generation, safety and habitat enhancement.

4. Provisions related to Conditions for Water Quality Certification

In order to accommodate the likelihood that one or both of the state water quality agencies acting under their authority and obligations pursuant to Section 401 of the Clean Water Act, will impose conditions inconsistent with the terms of the FA, the following provisions should be added to the FA:

a). Prior to imposition of conditions pursuant to water quality certification and issuance of the license, the signatories will convene to discuss the draft conditions when provided by the state water quality certifying agency. If all signatories agree to support the draft conditions then the FA will be amended to conform to those conditions pending their final imposition and issuance of the new license. If the draft conditions seek to impose flow requirements that are materially inconsistent with those in the FA, then the signatories will also determine whether additional amendments or alterations of the FA are needed in order to balance the flow needs of the Project. If any Party cannot agree to support the draft conditions, or cannot agree to additional alterations to the FA that are deemed necessary by the Licensee in order to meet the new flow conditions, then the Parties will enter a non-binding dispute resolution process. If the disagreement(s) are not resolved through this process, then any signatory may publicly support or oppose the draft conditions and shall not be bound by any terms in the FA that prohibit supporting conditions pursuant to water quality certification that are inconsistent with the FA.

b). Upon issuance of final conditions required for water quality certification, and the final FERC order that includes those conditions (and after completion of any legal challenges or requests for rehearing), the signatories shall meet to evaluate those conditions. Any and all conditions imposed that do not substantially affect the flow regime agreed in the FA shall be incorporated into the FA which shall be amended to conform to these conditions without renegotiation, reduction, alteration, or elimination of any other terms of the FA, except that the signatories may determine by consensus that additional alterations or amendments to the FA would be desirable in order to accommodate any new conditions imposed pursuant to the water quality certification. If the conditions imposed pursuant to the water quality certification include an alteration in flows that substantially affects the availability or use of water for recreational, habitat, lake levels or other project flow requirements, then the signatories will determine

whether the FA needs to be amended with regard to these flows in order to meet the conditions of the newly imposed flow conditions. Any changes to the FA must maintain an equitable balance among all flow needs in the project. In the event that the Licensee and the signatories cannot unanimously agree on the alterations or amendments to the entire flow regime that are needed in order to meet the newly imposed conditions, then the signatories shall participate in a non-binding dispute resolution process to try and resolve the disagreement(s). If the disagreement(s) are not resolved through this process then any signatory, including the Licensee may elect to initiate withdrawal procedures which shall be detailed in the FA.

If the licensee challenges the final conditions for the water quality certification, or requests rehearing of a FERC order that includes such conditions, the signatories shall not be under any obligation to join such challenge or rehearing request, but no signatory may oppose such challenge or rehearing request.

Nothing in this paragraph (b) shall preclude signatories from continuing to meet to try and reconcile differences between conditions imposed for water quality certification and the FA throughout the process or during any legal challenges or hearings.

APPROACH NUMBER 2

Draft cooperative procedures for amending the Final Agreement to conform to imposed mandatory conditions after execution of the Agreement, for dispute resolution, for withdrawal, or for termination that are fair and equitable among the Parties.

Detail

We propose the following basic steps to assist the Parties to the agreement in using their best efforts to reconcile any differences between the terms of the FA and conditions that may be imposed by jurisdictional bodies such as the U.S. Fish and Wildlife Service (USFWS), the National Marine Fisheries Service (NMFS), either states' water quality certifying agency under Section 401 of the Clean Water Act, or the Federal Energy Regulatory Commission.

The purpose of these steps is to avoid unnecessary delays or litigation and to encourage the durability and effectiveness of the Final Agreement. We strongly recommend active consultation with the USFWS, NMFS and state agencies to gain a better understanding of the actions they are considering and be able to anticipate subsequent recommendations, prescriptions and/or conditions. Since once the federal and state agencies act there is a presumption in favor of their recommendations, conditions and prescriptions, we strongly encourage keeping them "at the table" and fostering open communication with a commitment to find mutually acceptable solutions.

The following procedure is to be followed only with regard to actions of jurisdictional bodies that address issues that are unresolved in the FA . Those issues are limited to:

1. Fishways prescriptions under Section 18 of the Federal Power Act.
These prescriptions are limited to physical structures, facilities or devices and to project operations and measures related to such structures, facilities or devices which are necessary to ensure their effectiveness;
2. Flow requirements that become a condition for water quality certification under Section 401 of the Clean Water Act;
3. Modifications to project operations and equipment necessary to meet conditions under Section 401 of the Clean Water Act;
4. Fishways or flow requirements necessary under the Endangered Species Act.

Since these are issues that are not resolved in the FA, and are therefore not part of the agreement, any Party may choose to support or oppose draft conditions or mandatory actions imposed without violating their obligation to support the terms of the FA provided they have first met with the other Parties and have attempted to reconcile the draft mandatory actions with the FA and have participated in non-binding dispute resolution procedures if a consensus on reconciliation was not achieved.

Recommended Reconciliation Procedure:

Upon issuance of any preliminary draft recommendations, prescriptions or conditions under Sections 18 and 10(j) of the Federal Power Act, per any state's water quality certification process, or the draft biological opinion under the Endangered Species Act, the Parties to the FA will:

a) Evaluate the consistency of the draft actions with the FA. If the Parties find that the actions are not materially inconsistent with the FA or if they agree that no changes are needed to the existing terms of FA in order to incorporate the proposed actions, then the Parties will notify the jurisdictional body who proposed the draft actions of the outcome of the evaluation. If the final action is consistent with the draft actions, then the Parties will amend the FA to incorporate the final action without amending any of the original terms of the Agreement.

b) If any Party finds the draft actions materially inconsistent with the FA , then that Party will explain why the action is materially inconsistent and propose alternative(s) that will result in the jurisdictional body's ability to meet its statutory obligations while remaining consistent with the FA. Any alternatives or comments regarding the draft actions will also be filed according to any formal notice procedures pursuant to the licensing process.

The Parties, including the jurisdictional body, will meet and discuss the alternatives and use their best efforts to reconcile any differences and find an alternative solution that can be incorporated into the FA. The outcome of these discussions will be submitted to the agency or body proposing the draft action.

If the jurisdictional body determines that none of the proposed alternatives will meet its statutory obligations, and if any signatory Party cannot accept including the draft action without amending existing terms of the FA, then the next steps will be followed.

c) The Parties to the agreement will meet to discuss amending the existing terms of the FA in order to accommodate the proposed mandatory action. The Parties will agree to use their best efforts to amend the FA in a way that is least disruptive to the balance of interests in the entire agreement. If the Parties are unable to reach agreement in finding the way to amend the FA that causes the least disruption to the negotiated balance of interests reflected in the entire agreement, then the Parties will enter non-binding dispute resolution. (Sample of Dispute Resolution Procedures below)

d) During this period of discussion, negotiation and dispute resolution, the Parties will not be deemed to have waived any legal remedies that are appropriate and may pursue them. However, all Parties agree to refrain from tactics that are designed to interfere with a constructive intent to resolve the issues and reconcile the draft conditions with the FA.

e) Once any final mandatory actions that are materially inconsistent with the FA have been issued including the conditions, prescriptions or recommendations to be imposed, then any Party objecting to such action may initiate the process to withdraw from the FA. The Party may initiate withdrawal proceedings only if it has complied with the required dispute resolution procedures to attempt to resolve the objection, and that Party does not file for appeal. If the Party files an appeal to resolve the inconsistency, that Party may not withdraw until its appeal is exhausted.

Sample Dispute Resolution

This sample provision directs the FA signatories to resolve disputes related to consistency of the FA with mandatory conditions.

1. **General Applicability** All disputes among the Parties regarding any Party's performance or compliance with this Settlement Agreement, including resolution of any disputes related to any provision of the New Project License, Final Mandatory Terms and Conditions, Section 401 Certification, Permits related to the New Project License, or other mandatory license condition that is Inconsistent with the Settlement, shall be the subject to the dispute resolution process provided in this Section XX, unless otherwise specifically provided in this Settlement Agreement. The Parties agree that disputes shall be brought in a prompt and timely manner.

2. **General Obligations.** The Disputing Parties shall devote such resources as are needed and as can be reasonably provided to resolve the dispute expeditiously. The Disputing Parties shall cooperate in good faith to promptly schedule, attend and participate in the dispute resolution. Unless otherwise agreed among the Disputing Parties, each Disputing Party shall bear its own costs for its participation in this or any administrative dispute resolution process related to the Settlement Agreement. Each Disputing Party shall promptly implement any resolution of the dispute.

3. **Related Proceedings.** The dispute resolution process in this Section does not preclude any Party from timely filing and pursuing an action for administrative or judicial relief of any FERC order, compliance matter, or other regulatory action related to the New Project License; provided that any such Party shall pursue dispute resolution pursuant to this process as soon as practicable thereafter or concurrently therewith. The Party initiating a dispute under this Section shall notify FERC when dispute resolution proceedings are initiated relevant to an issue related to the New Project License. The Parties acknowledge that the initiation of dispute resolution proceedings shall have no effect on filing deadlines or applicable statutes of limitation before FERC.

4. **Process**

4.1. **Dispute Initiation Notice** A Party claiming a dispute shall give Notice of the dispute. If the dispute includes a claim that the New Project License, or any preliminary or final condition thereof, is Inconsistent with this Settlement Agreement, the Notice shall be issued within the applicable time periods specified in Section XX. Such Notice shall describe: (A) the matter(s) in dispute, (B) the identity of any other Party alleged to have not performed an obligation provided by the Settlement Agreement, and (C) the specific relief sought. The Parties agree that disputes shall be brought in a prompt and timely manner.

4.2. **Informal Meetings** The Disputing Parties shall hold at least two informal meetings to resolve the dispute, commencing within 30 days after the Dispute Initiation Notice.

4.3. **Mediation**. If the informal meetings do not resolve the dispute, the Disputing Parties shall decide whether to use a neutral mediator, such as FERC's Office of Dispute Resolution Services. The decision whether to pursue mediation shall be made within 20 days after conclusion of the informal meetings. The Disputing Parties shall agree on an appropriate allocation of any costs of the mediator employed under this section. Mediation shall not occur if the Disputing Parties cannot agree on the allocation of costs. The Disputing Parties shall select a mediator within 30 days of the decision to pursue mediation, including the agreement of allocation of costs. The mediation process shall be concluded not later than 60 days after the mediator is selected. The above time periods may be shortened or lengthened upon mutual agreement of the Disputing Parties.

1.4 **Dispute Resolution Notice** The Disputing Parties shall provide Notice of any resolution of the dispute achieved under Sections 4.1-4.3. The Notice shall: (A) restate the disputed matter, as initially described in the Dispute Initiation Notice; (B) describe the alternatives which the Disputing Parties considered for resolution; (C) state whether resolution was achieved, in whole or part, and state the specific relief agreed-to as part of the resolution.