

# ROLE OF SETTLEMENTS IN THE FERC LICENSING PROCESS

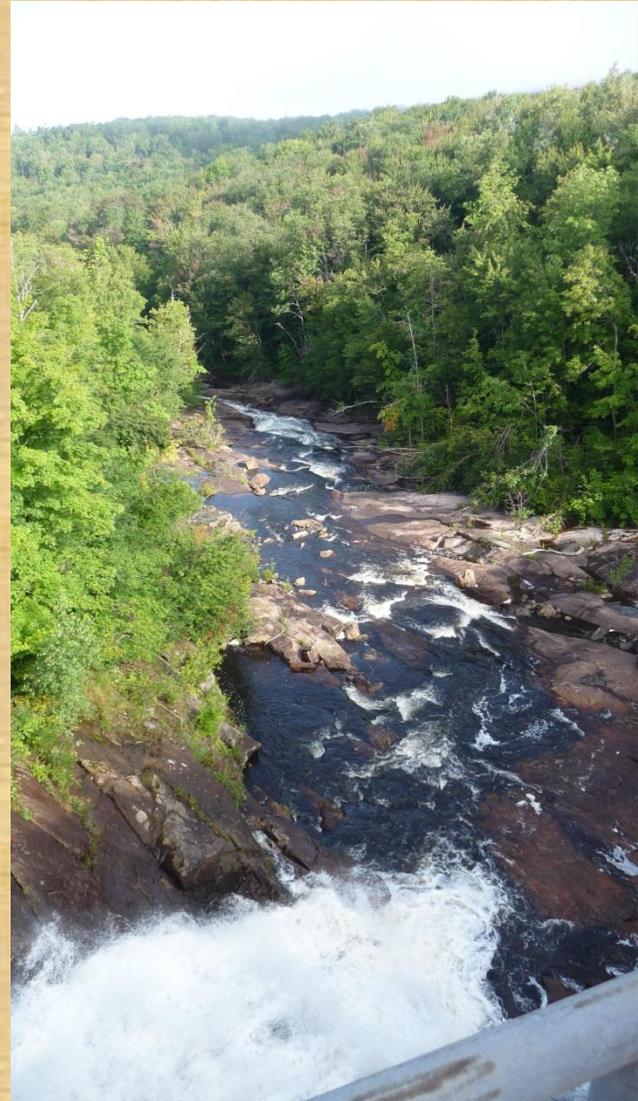
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REGION 5 HYDRO SETTLEMENTS					
YEAR	SETTLEMENT	RIVERS	# PROJ	# DEV	KEY FISH SPECIES
1994	Deerfield River	Deerfield	2	9	Trout, Atlantic salmon
1994	DSI-West Springfield	Westfield	1	1	American shad, Atlantic salmon
1995	Beaver River	Beaver	1	8	Trout
1995	Black River	Black	2	6	Warmwater/Coolwater
1997	Fifteen Mile Falls	Connecticut	1	3	Trout, Coolwater, Warmwater
1998	Raquette River	Raquette	4	14	Warmwater, Eel
2000	Upper Hudson/Sacandaga	Hudson, Sacandaga	4	6	Warmwater, Trout
2001	West Branch St. Regis River	St. Regis	1	2	Coolwater, Trout
2002	Hoosic River	Hoosic	1	2	Warmwater
2002	Newton Falls	Oswegatchie	1	2	Coolwater, Trout
2003	Oswego River	Oswego	2	5	Salmonids, Eel
2003	Piercefield	Raquette	1	1	Warmwater
2003	St. Lawrence/FDR	St. Lawrence	1	1	Lake sturgeon, Eel
2004	Holyoke	Connecticut	1	5	American shad, Shortnose sturgeon, Eel
2004	Macomb	Salmon	1	1	Trout
2004	Saranac River	Saranac	1	4	Salmonids
2005	Niagara River	Niagara	1	2	Salmonids, Coolwater
2005	School Street	Mohawk	1	1	River herring, Eel
2006	Merrimack River	Merrimack	1	3	American shad, River herring, Eel, Riverine species
2007	Saco River	Saco	6	6	American shad, River herring, Atlantic salmon, Eel
2009	Green Island	Hudson	1	1	River herring, Eel, Shad, Shortnose sturgeon
2010	Emeryville	Oswegatchie	1	1	Coolwater
2010	Natural Dam	Oswegatchie	1	1	Lake sturgeon, Coolwater
2011	Oswegatchie River	Oswegatchie	1	6	Lake sturgeon, Eel
2014	Eagle Creek	Winnepesaukee, Nashua, Suncook, Piscataquog	8	8	Eel, River herring, Riverine species
2014	Pepperell	Nashua River	1	1	River herring, Eel
2015	Chasm	Salmon	1	1	Trout
2015	Hogansburg	St. Regis	1	1	Lake sturgeon, Eel, Salmonids
TOTALS	28		49	102	

# TIMING

- Can start at any time during the 6-year licensing process
- Ideally negotiated before the PLP/DA so it can be incorporated into the PLP/DA
- Often occurs between the PLP/DA and Final License Application
- Can occur after the application is filed but before the EA is issued



# HOW LONG DOES A SETTLEMENT TAKE?

- Simple settlements with few controversial issues can be done quickly, usually with only one or two face-to-face negotiations
- Complex settlements can take months of frequent, hard negotiations
- In general, the more stakeholders, the more diverse the issues, the more conflicts, the longer it takes

# TYPES OF SETTLEMENTS

- Whole Cloth
  - Most common type
  - Includes all stakeholders and addresses all issues
- Issue Specific
  - Addresses only specific issues (e.g., all issues except whitewater boating)
- Stakeholder Specific
  - Signed by a select group of stakeholders (e.g., only resource agencies)



# MULTI-SETTLEMENT

- On large projects with multiple issues and stakeholders, licensees often settle separately with each group of stakeholders
- An umbrella document ties all the settlements together
- Stakeholders don't have to trade off with other groups with unrelated issues (e.g., people vs. fish)



Niagara Power Projects – Sir Adam Beck (OPG)(l) and Robert Moses (NYPA)(r)

# WHO'S AT THE TABLE

- Settlements are usually negotiated by technical staff, followed by a legal review
- Supervisors should be kept informed throughout the process, so there are no surprises
- Know what you are authorized to accept
- Technical staff have to be authorized to speak for the agency (i.e., everyone must have confidence that if they reach agreement with the people at the table that higher ups will support it)



# GETTING STARTED ON A SETTLEMENT

- Be prepared. Do your homework.
- Determine key issues and priorities.
- Decide what you want, and what is the minimum you will accept (i.e., the bottom line)
- Meet with partners and agree on issues, goals, bottom lines
- Strategize

# UNDERSTAND THE OTHER PARTIES' ISSUES



- The key to a successful settlement negotiation is understanding the other parties' issues and priorities
- The goal is to discover a way to achieve a “win-win”

# HOW TO TACKLE SETTLEMENT ISSUES

- We have had the most success by tackling the easy issues first (usually recreational amenities)
- This gives the process momentum and the parties feel like they are accomplishing something
- This also keeps the process from getting bogged down on a tough issue

# TACKLING ISSUES (CONT.)

- All agreements are tentative and subject to change until all the issues have been addressed
- “River Funds” are usually negotiated last, after the licensee has a feel for how much the settlement will cost them



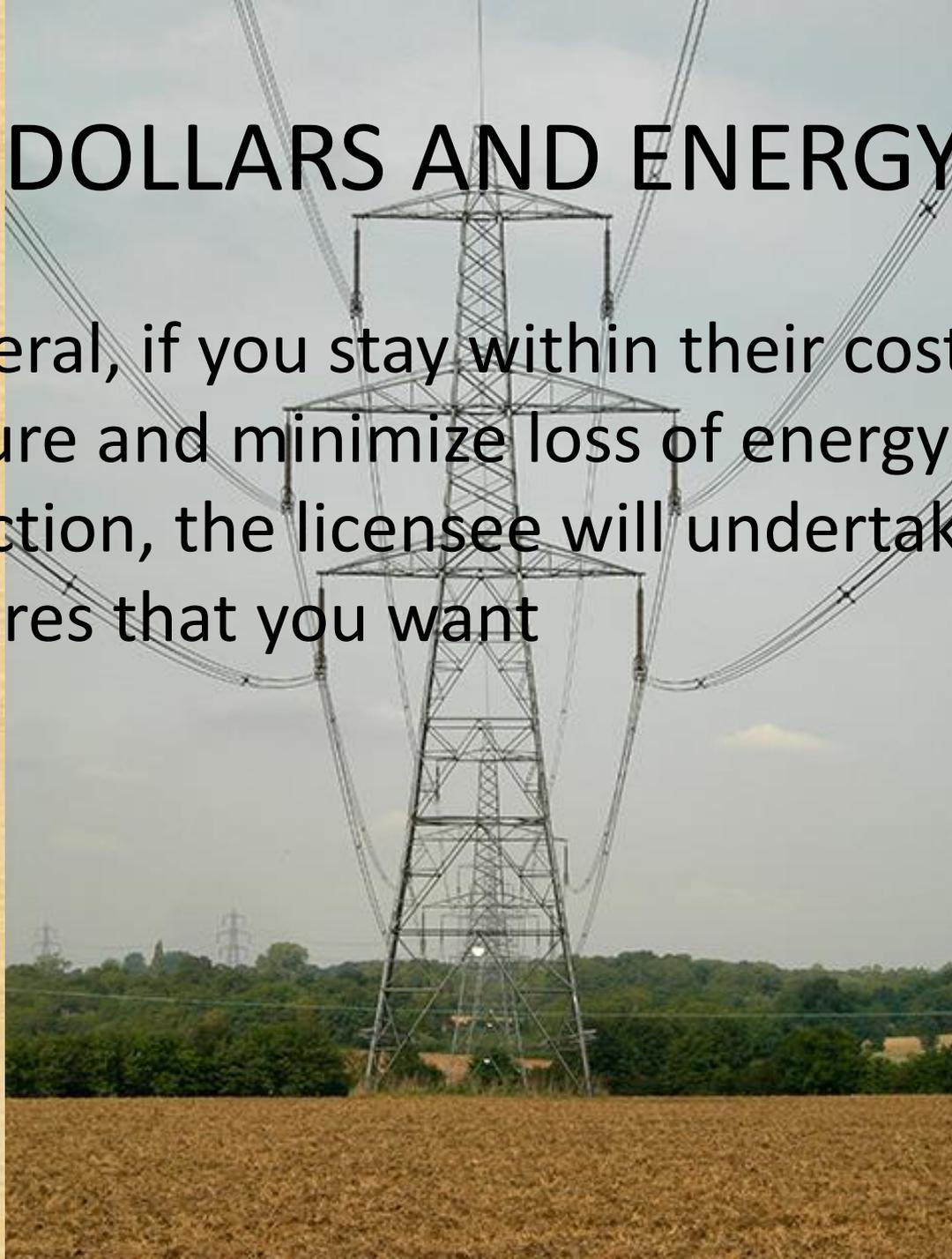
# DOLLARS AND ENERGY

- In most cases, the licensee will mainly be concerned with costs and impacts on energy production
- If possible, get the licensee to put a dollar and energy cost on each measure (e.g., how much does each cfs placed in the bypassed reach cost and what does it mean in lost mwh of production)
- With this information, you can do your own balancing and establish what may be acceptable to the licensee



# DOLLARS AND ENERGY

- In general, if you stay within their cost structure and minimize loss of energy production, the licensee will undertake measures that you want



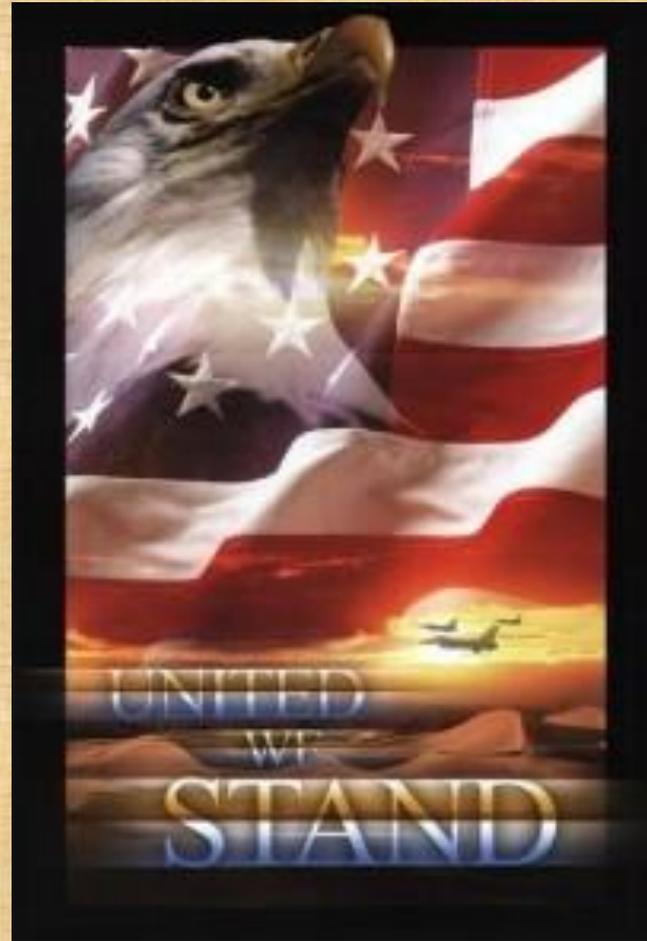
# BEST ALTERNATIVES

- Your best alternatives are likely the 401 Water Quality Certification, 4(e) authority, or Section 18 (for fishways)
- Don't settle for less than you think will be achieved through the normal FERC (non-settlement) process



# UNIFIED MESSAGE TO FERC

- The purpose of a settlement is to allow the licensee and other stakeholders to present a united front to FERC
- If the settlement contains reasonable provisions, FERC will normally accept them
- However, the parties must remain unified when commenting on the license application



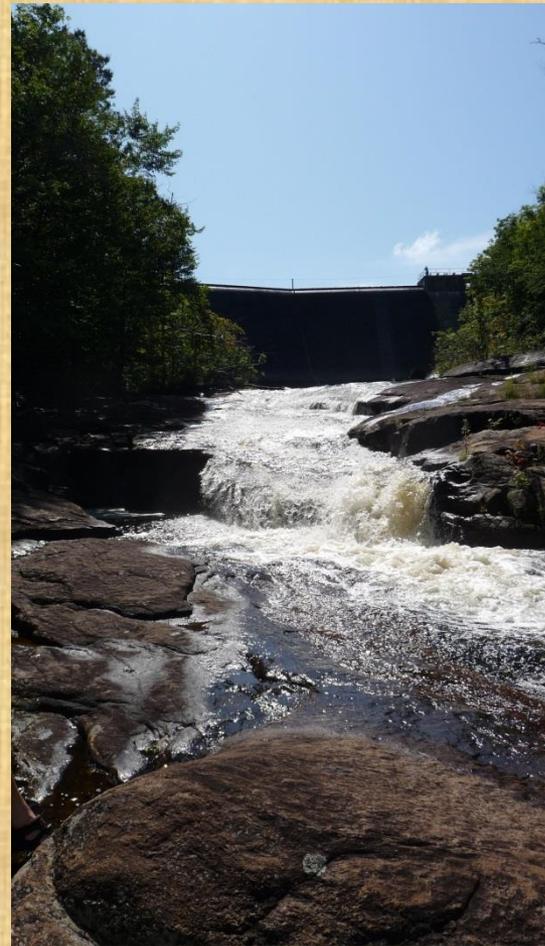
# PRESCRIPTION VS. SETTLEMENT

- Fishways can be part of a settlement
- It is wise to prescribe fishways anyway; this ensures that your mandatory authority cannot be overruled
- The prescription must be consistent with measures agreed-to in the settlement
- Always reserve your Section 18 authority as well to preserve your rights in the future



# 401 WQC VS. SETTLEMENT

- Some states (e.g., NY) adopt the settlement as part of their 401
- The 401 usually includes additional measures
- The 401 should be consistent with the settlement



# IMPLEMENTATION DATES

- Time is Money!
- Licensees will often offer more PME measures if you can space them out over time so they can budget for them and pay as they go
- Many PME measures have a long planning and design phase
- It is not practical to shut down multiple turbines or multiple powerhouses to get everything done at once
- Work out a reasonable schedule

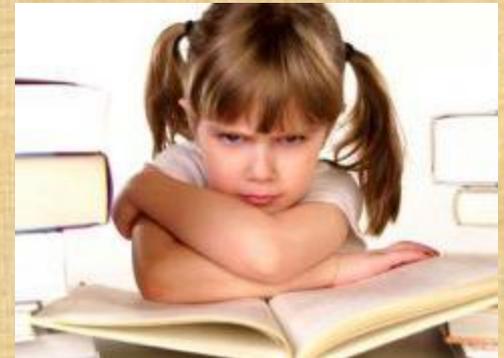
# SAMPLE IMPLEMENTATION SCHEDULE

Table 2.1: Master Implementation Schedule for the Raquette River

Site	Instream Flow	Fish Passage	Fish Protection	Impoundment Fluctuation	Guide Curve	Base Flow	Recreation	Whitewater Releases
Carry Falls	NA	NA	NA	NA	6/1/2001	NA	by 2004	NA
Stark	2002	2002	2016 to 2018	2002	NA	NA	by 2004	NA
Blake	2002	2002	2016 to 2018	2002	NA	NA	by 2004	NA
Rainbow Falls	2004	2004	2012 to 2015	2004	NA	NA	by 2004	NA
Five Falls	2003	2003	2012 to 2015	2003	NA	NA	by 2004	NA
South Colton	2003	2003	2012 to 2015	2003	NA	NA	by 2004	NA
Higley	NA	2001	2009 to 2011	19699	NA	NA	by 2004	NA
Colton	1999	1999	2009 to 2011	1999	NA	NA	by 2002	2000
Hannawa	2000	2000	2005 to 2008	2000	NA	NA	by 2002	2000
Sugar Island	1999	1999	NA	1999	NA	NA	by 2002	2000
Norwood	NA	2001	2005 to 2008	1999	NA	NA	by 2003	NA
East Norfolk	2000	2000	2004	2000	NA	NA	by 2003	NA
Norfolk	2000	2000	2002	2000	NA	NA	by 2003	NA
Raymondville	NA	2001	2000	1999	NA	2000	by 2003	NA

# SOME DO'S AND DON'T'S

- Be calm, but forceful in stating your positions
- Avoid being emotional
- Be able to provide scientific support for your positions (justify everything)
- Always offer alternatives; don't just say no
- Frequently caucus; make sure you and your partners are on the same page



# MORE DO'S AND DON'TS

- Use subcommittees to work out some technical details and bring them back to the larger group
- Everyone must attend every meeting for cohesion and continuity
- Negotiate in person, not via Webex
- Final wordsmithing can usually be done via email or conference call



# OBSERVE OTHERS

If you have a chance, observe someone else's negotiation before you go through one of your own

The best way to learn is by observing the big picture

# TYPICAL SETTLEMENT CONTENTS

- Introduction
- General Agreements (includes most of legal language)
- Protection, Mitigation, and Enhancement Measures
- Additional Agreements not Intended to be Part of the License

# INTRODUCTION

- List of Parties
- Term of the Settlement
- Purpose Statement
- Conventions and Definitions
- Some Legal Language



# GENERAL AGREEMENTS

- License Term (if applicable)
- Implementation Schedule
- Legal Language Related to:
  - Reopeners
  - Withdrawal Rights
  - Enforceability
  - Etc.

# PME MEASURES (Examples)

- Operational Mode
- Fluctuation Limits
- Base Flows
- Bypassed Reach Flows
- Fish Protection
- Upstream and Downstream Fish Passage



# MORE EXAMPLE PME MEASURES

- Habitat Improvement Projects
- Monitoring Plans
- Fish Stocking or Trap-and-Transfer
- Wildlife Enhancements
  - Loon Nesting Rafts
  - Osprey Poles
  - Turtle Habitat
  - Etc.



# PME MEASURES (More Examples)

- Conservation Easements/Land Transfers
- Recreational Amenities



# AGREEMENTS NOT TO BE INCLUDED IN LICENSE (Examples)

- Recreational Amenities Outside Project Boundary
- Enhancements of Recreational Facilities Owned by Others
- River Funds



# IMPORTANT SETTLEMENT COMPONENTS

- Should be very specific about what is agreed to (including maps and general design drawings)
- Spell out each party's responsibilities
- Include justification statement for each measure
- Include an implementation schedule outlining when each agreed-upon measure should be completed

# RECOMMENDED LICENSE ARTICLES

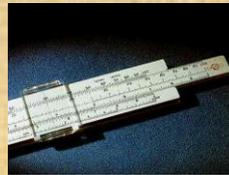
- Some settlements include recommended license articles
- Specific language is crafted (similar to language FERC has previously used)
- Helps clarify for FERC exactly what settlement intends and demonstrates that FERC has included similar articles in past licenses

# NO PRECEDENTS

- Most settlements include a clause stating that the settlement establishes no precedents
- This is legal coverage
- However, in reality, successive settlement negotiations always look back on previous settlements to see what was done

# WHAT SKILLS DO YOU NEED?

- Strong biology background
- Well-versed in fisheries issues
- Hydrology
- Engineering skills
- Legal skills
- Hopefully, you have an attorney and an engineer to assist you as needed, but you have to understand those concepts to negotiate properly



# PROS and cons



- You can better manage the overall package of PME measures
- Things are not left up to FERC's interpretation of what is best
- Establishes a good working relationship between the agencies and licensee which can carry over into post-licensing activities
- Saves time and energy at the REA stage of licensing

# PROS and cons



- Prescriptions will not be contested
- 401's will not be contested
- Likely avoids 10(j) negotiations
- Can get commitments (e.g., funds, offsite mitigation) that you wouldn't get in the normal FERC process
- Allows stakeholders to work outside the box

# Pros and CONS



- Can require a lot of time and energy
- Can have high travel costs
- Often intense work schedule over a short period of time
- Extremely stressful
- Need to have engineering and legal assistance readily available

# Pros and CONS



- Must have authority to negotiate (doesn't work well if you have to keep going back to higher ups for approval or have higher ups at the table)
- Must be cautious about setting precedents (i.e., everything you agree to is because it is part of a package, not something you would necessarily accept on its own)
- Must be careful not to give away too much for the sake of having a settlement

**ALMOST ALWAYS  
BETTER TO SETTLE!**

