



**HYDROPOWER
REFORM
COALITION**
*Putting water, wildlife,
and people back in rivers.*

August 18, 2016

ELECTRONICALLY FILED

Kimberly D. Bose
Secretary of the Commission
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426

Re: Comments on Proposed Rulemaking- Regulations Implementing FAST Act Section Docket No. 61003 – Critical Electric Infrastructure Security and Amending Critical Energy Infrastructure Information (FERC Docket No. RM16-15-000)

Dear Ms. Bose,

The Hydropower Reform Coalition (HRC) appreciates the opportunity to comment on the Notice of Proposed Rulemaking (Notice) to implement the Fixing America's Surface Transportation (FAST) Act Section 61003 (FERC Docket No. RM16-15-000). This rulemaking seeks to integrate existing rules regarding Critical Energy Infrastructure Information (CEII) specific to the Federal Energy Regulatory Commission (Commission) with broader transportation legislation recently passed by Congress.

The Hydropower Reform Coalition (HRC) is a consortium of more than 160 conservation and recreation organizations that represent more than one million conservationists, anglers, boaters, and homeowners. Since 1992, we have advocated in numerous cases to improve the operations of hydropower projects around the country. We also frequently participate in policy discussions surrounding hydropower, renewable energy, and river management.

The HRC has been interested and engaged in the Commission's implementation of rules related to Critical Energy Infrastructure Information (CEII). We submitted comments when the Commission issued Notice of Proposed Rulemaking on September 15, 2002 and when the Commission sought public comments on February 13, 2004 regarding the implementation of CEII rules. As in the previous instances, our comments this time are also about CEII related to hydropower projects and infrastructures.

As noted in the Notice, it has been 8 years since the Commission reviewed protocols and procedures related to CEII. In addition to integrating Commission policy and practice with the

Steering Committee:

Alabama Rivers Alliance • American Rivers • American Whitewater • Appalachian Mountain Club
California Hydropower Reform Coalition • California Sportfishing Protection Alliance
Coastal Conservation League • Friends of the River • Idaho Rivers United • Michigan Hydro Relicensing Coalition •
New England FLOW • Trout Unlimited • Water and Power Law Group

new transportation legislation, the HRC believes it is also a good time for the Commission to take stock of the implementation of previous policy and rules, and to consider improvements.

The HRC appreciates and agrees with the goal of protecting energy infrastructure. The transportation legislation FAST Act and previous CEII rules primarily contemplate threats to this infrastructure from potential terrorist acts. Measures and rules to protect energy infrastructure from such acts are necessary and appropriate.

In addition to such potential acts, issues related to maintenance of infrastructure and to normal operations for energy production and distribution also pose substantial concerns both for energy reliability and for public safety. Well-maintained facilities and smart project operations are a cornerstone of energy reliability. Public interest organizations such as those in the HRC have a direct interest in this reliability. The HRC also has a direct interest in the environmental benefits that are made possible by well-functioning and properly operating energy infrastructure.

The HRC believes that informed public participation and citizen oversight of power producers have an important role to play in the protection of energy infrastructure as it relates to maintenance and normal operations for both power and non-power purposes. We also believe that public participation and citizen oversight are important democratic values and elements of public safety. The HRC seeks to maintain an appropriate balance in protecting these values at the same time that energy infrastructure is protected from potential terrorist acts.

We offer specific recommendations on the notice of rulemaking below.

1. Scope Purpose and Definition

FERC proposes to amend its regulations to specify that CEII is exempt from disclosure under FOIA pursuant to section 215A(d)(1)(A). The regulations should clarify that the classification of a document as CEII by a non-governmental entity does not automatically exempt the document from disclosure under FOIA unless and until the Commission determines that the document has been properly segregated and contains CEII that is exempt from disclosure under a specific FOIA exemption (e.g. Exemption 7(F)).

2. Designation and Submission to the Commission

Section 388.112(b) requires that a submitter of Critical Energy Infrastructure Information clearly mark the information as CEII and provide a justification for the designation. In addition, the Commission should require that entities submitting information labeled as CEII 1) describe in its description in the e-Library submission any particular facility to which the information relates and 2) submit a cover letter that describes the contents of the submission, without revealing sensitive information. The goal of this requirement would be to enable a member of the general public to understand the nature of the document and the basis for the CEII classification in sufficient detail so as to enable that individual or entity to seek Commission review or file an appropriate appeal.

The description in the eLibrary should name any particular facility to which the submittal relates. Thus, for instance, an acceptable description might be: “Dam safety submittal relating to Rock Creek Dam in Project P-XXXX.” A description that simply reads “Dam safety submittal under P-XXXX” would not be acceptable. In cases where a submittal concerns an entire project and cannot be reasonably further broken down, such as an Emergency Action Plan, an indication that the submittal covers the project in general would be acceptable. We note that many descriptions in the eLibrary of submittals marked CEII already include the requested level of detail.

The cover letter should specify the dam, outlet works, penstock, powerhouse, bypass valve, or such facility to which the submittal relates. It should also state generally the issue with the facility (repair, maintenance, investigation, etc.). We note that many cover letters for submittals marked CEII already include the requested level of detail.

3. Segregable Information

The Commission proposes to add a provision to section 388.113(d) that would require the submitter to segregate CEII (or information that reasonably could be expected to lead to the disclosure of the CEII) from non-CEII at the time of submission wherever feasible. We support this requirement. Frequently, materials classified as CEII contain information that, if properly segregated, would be subject to public disclosure and serve the goals of open government and public participation that the Commission’s processes are designed to promote.

4. Review of CEII Determination

The proposed regulations do not include a provision that would trigger an internal FERC review of an erroneous CEII designation upon the request of an individual or non-governmental entity to determine the appropriateness of the designation. We request that the Commission develop a procedure whereby the public can request an internal FERC review of the classification. While the proposed regulations provide a mechanism for the release of properly classified CEII information under certain circumstances and upon a sufficient showing of need by the requestor, there is no mechanism to request an internal FERC review of the *appropriateness* of the CEII classification. The proposed regulations require an individual or entity to submit a FOIA or CEII request in order to compel an administrative review of the appropriateness of the classification. This is burdensome, will result in undue delay, and limits public participation. We believe it is more efficient to include a mechanism for swift internal review of potentially erroneous or inappropriate designations.

5. Judicial Review

Further, we believe that an appeals process should not be a mandatory requirement before seeking judicial review of a CEII determination. The Commission proposes to expand the exhaustion requirement in proposed section 388.113(e) of its regulations by requiring an administrative appeal prior to seeking judicial review of FOIA and CEII determinations. While we believe an appeals process should be available, we do not think it should be a mandatory step before a party can seek relief from the courts. This attempt to create a jurisdictional bar to judicial review is not required by the Federal Power Act and is unnecessary. Courts have not interpreted current exhaustion rules to require the filing of a formal appeal with the Commission

prior to seeking judicial review. We recommend that the Commission continue with the appeals process in its current CEII rules as it has not been shown that there is a significant problem that would justify this limitation on access to the courts.

In summary, the HRC believes that informed public participation and citizen oversight are important democratic values and important elements of public safety. We seek to protect these values and the opportunities for positive public contribution in maintaining the operation of the energy infrastructures and electrical system without weakening the ability of the Commission and others to protect energy infrastructure from potential terrorist acts.

The HRC appreciates the opportunity to comment on the proposed rulemaking. We look forward to working with the Commission and other stakeholders to revise the CEII rules. Please do not hesitate to contact me at okeefe@americanwhitewater.org if we can be of further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read 'T. O'Keefe', with a long horizontal stroke extending to the right.

Tom O'Keefe, PhD
Chair