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**New England *FLOW***

April 23, 2021

Kimberly Bose  
Federal Energy Regulatory Commission  
888 First Street NE  
Washington, DC 20426

**Re: Comments on how the Commission should establish and operate the Office of Public Participation pursuant to section 319 of the Federal Power Act. Docket No. AD21-9-000**

Dear Ms. Bose,

The Hydropower Reform Coalition, Appalachian Mountain Club, Connecticut River Conservancy, and the undersigned organizations write to jointly submit the following comments to the Federal Energy Regulatory Commission in the above referenced docket.

We appreciate this effort by the Federal Energy Regulatory Commission (FERC or Commission) to increase transparency in the work of the Commission. We would like to offer a few general comments before addressing the questions posed that are specific to the Office of Public

Participation (OPP or Office). While the implementation of this office will be vital to increasing public participation, there are also existing issues related to public participation that we have noticed in our interaction with hydropower licensing processes. The OPP should not work in silo but should integrate transparency to facilitate public participation across the Commission's various workflows.

### Overuse of Privileged and CEII-Designated Information

One major challenge participants face in licensing proceedings is the quantity of information that is designated as either privileged or critical electric infrastructure information (CEII). Examples of filings designated as such, and therefore inaccessible to the public, include monitoring reports, emergency action plans, resumes, plans for fish passage structures, and submission of study reports on archaeological and traditional cultural properties. The OPP should advocate for the public interest and, with stakeholder input and in collaboration with other offices within FERC, develop standards for what can be submitted as CEII or privileged. It is particularly critical for public safety that dam safety inspection reports and other information related to dam safety be available to the public, especially in cases where the project is non-compliant with dam safety standards. However, a host of other reports and plans are essential for public interest groups to be able to engage in licensing proceedings with information about what resources are at stake, and to engage in public outreach to an inclusive set of relevant parties and communities.

Outside of licensing proceedings, there is a wide array of information that is marked as privileged or CEII under electric power and transmission markets and tariffs and related policy design. FERC regulates the ISOs and RTOs that implement these, as well as the NERC regional entities. Electric power and transmission markets and tariffs, reliability requirements, and related policies are important to our organizations because they affect hydropower project operations such as flows, hydro peaking, and reservoir management. Additionally, market and tariff design affect the costs and benefits of any given or proposed license operations. To provide for more informed public participation, confidentiality on project owners' participation in these should be accorded only when truly necessary for healthy markets. As possible, confidential information should be selectively shared with stakeholders in licensing proceedings, including projects' participation in different markets, planned/possible future markets in which projects might be able to participate, likely impacts on flow and storage, and projected project revenues.

When documents are filed as privileged or CEII, they should go through a short internal FERC review process before the designation is approved. Regardless of the ultimate designation, the justification for the designation request, submitted by the filer as required under 18 CFR § 388,<sup>1</sup> as well as ISO and RTO information policies<sup>2</sup>, should be made available to the public.

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<sup>1</sup> 18 CFR § 388

<sup>2</sup> ISO New England Information Policy, Effective Date 10/1/2020. Docket #: ER20-2518-000

According to 18 CFR § 388.112, “The filer also must submit to the Commission a public version with the information that is claimed to be privileged material redacted.”<sup>3</sup> Although many licensees and applicants comply with this regulation, producing both a privileged version of a document and a public redacted version in order to provide for public transparency, there have been many instances in which a redacted version was not provided to the public record.<sup>4</sup> The public is denied valuable information when a redacted version is not provided, and there is currently little recourse for the public to access the missing information. The OPP should increase accountability of all entities filing privileged or CEII-designated documents.

#### TLP process Limits Public Involvement

18 CFR § 16.7 requires an applicant in a relicensing proceeding to provide the Preliminary Application Document to “members of the public likely to be interested in the proceeding” and those public stakeholders are also able to subsequently request studies in the relicensing process.<sup>5</sup> In the Traditional Licensing Process (TLPs), after study requests are submitted by the public or public advocacy organizations, no other communication is required to be provided to the public until the applicant files the final application. Most facility owners communicate during the study phase with resource agencies, but they do not necessarily communicate with public members who may have requested studies. This results in very little transparency in the most important part of the process, when studies are being undertaken and study reports developed. The Hydropower Reform Coalition recommends the OPP work with the Office of Energy Projects to provide a more transparent process during relicensing that utilizes the TLP.

#### Removal of Form 80 Limits Important Public Information

In December of 2018, FERC issued a Final Rule change to remove § 8.11—” Information Respecting Use and Development of Public Recreational Opportunities” from the CFR.<sup>6</sup> This section previously required licensees to file a recreation report every six years. The National Park Service commented in that rulemaking proceeding encouraging the FERC to, “(i) Conduct a comprehensive evaluation of its recreation planning and monitoring programs for licensing and post-licensing compliance; (ii) develop guidance and offer training and technical assistance for recreation management planning and monitoring and (iii) establish a public process for periodic review of recreation facilities, conditions, needs, and recreation flows.”<sup>7</sup> We believe that FERC overstates their oversight of recreation amenities at licensed projects and relies too heavily on

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<sup>3</sup> 18 CFR § 388.112

<sup>4</sup> For example, the amended final license application for Turners Falls Dam (p-1889) and Northfield Mountain Pumped Storage (p-2485) does not have a public version that shows the proposed fish passage measures. FERC eLibrary Accession Number: 20201221-5502. In addition, the Historical Properties Management Plan is not public at all.

<sup>5</sup> 18 CFR § 16.7

<sup>6</sup> 83 FR 67060

<sup>7</sup> *ibid.*

reports of non-compliance. Relying on non-compliance allegations assumes that the public is aware of the responsibility of licensees to provide recreation, that they know that they file complaints with FERC, and that they know how to do that. Moreover, it assumes that the only use for Form 80 data is to assert non-compliance. Many recreation issues are tackled at the local level with no communication to FERC in the record.

We argue that transparency in this process is a public participation issue and encourage OPP to establish a public process for periodic review of recreation facilities, conditions, needs, and recreation flows as suggested by the National Park Service in their comments.

Without Form 80 requirements, there is no way to know the amount of money that hydropower companies are investing in their recreation amenities. Although an imperfect tool, Form 80 provided a means for a power company to report how much they spent on recreation offerings. With the current system, there is no information on this and no way to find out. This is particularly challenging during relicensing, when stakeholders need to evaluate recreation proposals and cannot gauge that against what has been spent in the past.

The elimination of Form 80 itself demonstrates the need for the OPP. Several non-governmental stakeholders, including HRC members, reported being surprised by this final rule. They had used the data many times in various proceedings and did not find out Form 80 was being proposed for elimination until after the rule became final. Better communication by FERC with stakeholders would help prevent this situation from occurring in the future.

We now turn to the specific questions asked by FERC in the Supplemental Notice of Virtual Listening Session and a Public Comment Period.<sup>8</sup>

1. Section 319 of the FPA states that the OPP will be administered by a Director. (16 U.S.C. § 825q-1(a)(2)(A)). In addition to the Director, how should the office be structured?

The Director should structure the OPP with sufficient staff to provide technical and financial assistance to entities participating or seeking to participate in FERC proceedings as well as providing direct representation for entities unable to participate but potentially impacted by a Commission proceeding. Technical assistance should include resource experts in fields related to the National Environmental Policy Act process, as well as experts to represent ratepayers, indigenous communities, and other public interests.

The Office should be structured in such a way because intersects with all aspects of communication around public proceedings. The Office needs to be able to assess the efficacy of Commission proceedings as they relate to transparent public information dissemination and

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<sup>8</sup> Supplemental Notice of Virtual Listening Session and a Public Comment Period, March 23, 2021, FERC eLibrary Accession Number: 20210323-3031

opportunities for comment and feedback.

The Office should work in constant collaboration and communication with the tribal liaison, the newly appointed environmental justice staff, and the Director of the Office of Enforcement.

Finally, the Office should be structured to facilitate communication and linkages between branches of FERC regulation and thus participation where they interrelate. That is, when one aspect of FERC regulation, e.g. electric markets, may affect another, e.g. hydropower, the Office should facilitate cross-referenced communication, outreach and participation so that there is transparent and publicly available analysis and participation that includes stakeholders from both sides.

2. Should the Commission consider creating an advisory board for OPP? If so, what role would the board serve and who should be on the board?

An advisory board should be established for the OPP representing stakeholders that frequently participate in proceedings before FERC as well as stakeholders impacted by FERC proceedings. State and Federal resource agencies that have a stake in FERC proceedings should also be represented, as well as representatives from the Council on Environmental Quality and the Department of Energy.

3. How should the OPP coordinate assistance to persons intervening or participating, or seeking to intervene or participate, in a Commission proceeding?

The OPP should coordinate assistance to persons, organizations, tribes, and other entities participating in a Commission proceeding by providing consistent public outreach and education on Commission rules and proceedings, as well as helping to facilitate information requests. Technical assistance should be provided to assist public interests in understanding the details of a FERC proceeding process and the resource- and issue-specific components. This will require resource experts to assist public entities in understanding complex resource studies, for example.

The Office should conduct internal audits of Commission processes to assess ease of use and public understanding. For instance, the Commission relies heavily on the eLibrary to provide public access to information, but it is impractical for accessing most documents and nearly unusable. Additionally, the process for providing public comment on a proceeding is cumbersome and confusing. It is impossible to comment without knowing the docket number and it is not easy to find the docket number in the FERC website. The eLibrary and commenting process should be improved to make them more accessible and easier to use. The public should be able to search for facilities and dockets based on location to find the projects closest to them geographically. The OPP should provide ongoing workshops and webinars to help the public understand all aspects of the Commission's work.

4. To what extent do you, or the organization you represent, currently interact with the Commission? What has hindered or helped your ability to participate in Commission proceedings?

HRC member organizations and the HRC itself are active in Commission proceedings, both on rule makings and policy dockets, as well as on individual project proceedings. Our participation in these proceedings has always been hindered by our constrained resources, notably staff time and funding to support resource experts, lawyers, and consultants. HRC and our members, at times, have secured private grants from Foundations to assist us in our participation in Commission proceedings. HRC has found Commission staff and staff of appointed Commissioners to be available and helpful resources, though engagement in a Commission proceeding requires considerable expertise and financial resources over many years to effectively participate and represent the public's interests. Post-licensing processes require an even longer-term commitment of resources to develop and implement post-licensing plans and monitoring.

5. Have you engaged with other governmental entities—such as local, state, and other federal agencies—on matters involving your interests? If so, how did those agencies engage in outreach, and what practices improved your ability to participate in their processes?

HRC and HRC member organizations engage with government entities at all levels related to our interests. HRC has found generally that government entities often also lack adequate resources to participate fully in Commission proceedings. HRC has also found government entities to be willing to discuss Commission proceedings with HRC and our member organizations. At a project level, HRC has found that collaborations formed outside of the formal FERC and applicant-led process between government entities and public interest groups on project-specific Commission proceedings have been helpful platforms for these entities to coordinate. HRC encourages the OPP to assist in establishing stakeholder collaborations for public interests as a parallel process during a Commission proceeding.

Additionally, the establishment of stakeholder collaborations focused on particular public interests across multiple project proceedings would allow for information exchange and a more consistent regulatory result. For instance, very active participation in one proceeding may result in license requirements that are not necessarily replicated in other proceedings. Compiling summaries of license requirements across facilities would aid stakeholders in providing examples of exemplary outcomes.

Particularly helpful outreach practices include: notification of regulatory, licensing or other processes that may impact resources or communities; facilitation of meetings between communities and public interest groups, companies and government agencies; insistence on companies' sharing of information; and making available local/regional staff who have the capacity to respond to inquiries and requests for meetings as well as expertise to carefully consider, review, and provide reports and data.

6. How should the OPP engage with Tribal Governments, environmental justice communities, energy consumers, landowners, and other members of the public affected by Commission proceedings?

FERC has a responsibility to engage all public interests, and this is rightly the role of the OPP. Where stakeholders representing those public interests, including potentially impacted

communities, do not participate in the FERC proceeding, it does not relieve the Commission from the obligation to engage these communities.

The HRC looks forward to the appointment of a tribal liaison, consistent with 18 CFR § 2.1c, who “will provide a point of contact and a resource for tribes for any proceeding of the Commission.”<sup>9</sup> The OPP should ensure that information about the tribal liaison, including scope of services and contact information, is publicly available and easily accessible on the FERC website. We also look forward to the creation of a new senior position to better incorporate environmental justice and equity concerns into the Commission’s decision-making processes, recently announced by Chairman Glick.<sup>10</sup> We anticipate close collaboration between the tribal liaison, the new environmental justice staff, and the Director of the Office of Public Participation.

We encourage the Commission to reach out directly to Native American communities who have been historically impacted by hydropower to solicit input on ways to better recognize tribal treaty rights and cultural values of rivers. We also suggest the following concrete ways to improve collaboration with tribal nations, to be undertaken by the OPP in coordination with the Office of Energy Projects (OEP):

- *Treat 10(a) recommendations from tribal nations the same as 10(j) conditions from state agencies-* With respect to recommendations pertaining to fish, wildlife, and other resources subject to tribal treaty rights, 10(a) recommendations from tribal nations should be afforded government-to-government consultation before the Commission makes a determination on the recommendation and should otherwise be treated similarly to 10(j) recommendations from other state sovereigns.
- *Direct OPP Staff to consult, or facilitate OEP Staff’s consultation, with tribal nations prior to the Commission’s action on preliminary permit applications-* Under existing regulations (*see* 18 C.F.R. section 4.81), applicants are not required to consult with interested tribal nations prior to filing a preliminary permit application. Once an application is filed, the Commission interprets its *ex parte* rule to prevent direct consultation with tribal nations. Thus, the Commission routinely approves preliminary permits without providing tribal nations an opportunity for direct consultation. This contributes to Commission approval of preliminary permits, including plans of study, that do not adequately consider tribal interests, leading to license applications that are similarly deficient and project licenses that potentially harm tribal interests.
- *Expand circumstances in which tribal nations can file a Notice of Intervention-* Currently, tribal nations must file a motion to intervene that can be opposed and denied, depriving the tribe of status as a party to the licensing proceeding. Expanding opportunities for tribal nations with treaty rights affected by the project to file a notice of intervention would reduce costs and uncertainty, which can be barriers to participation in licensing proceedings.

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<sup>9</sup> 18 CFR § 2.1c

<sup>10</sup> [www.ferc.gov/news-events/news/ferc-chairman-acts-ensure-prominent-ferc-role-environmental-justice](http://www.ferc.gov/news-events/news/ferc-chairman-acts-ensure-prominent-ferc-role-environmental-justice)

- *Fix the ex parte rule's incompatibility with the trust responsibility-* The federal government has an ongoing obligation to consult with tribes affected by a hydropower project and share meaningful information throughout the licensing process. Often, necessary consultations with both the Commission and other federal agencies are stymied by the ex parte rules. The Commission could remedy this by narrowing the categories of FERC staff considered “decision-makers” or clarifying that cooperating agencies still have a trust responsibility to affected tribal nations.
- *Expand the scope of settlement agreement provisions that the Commission can include in a license to increase their enforceability-* The Commission often declines to include provisions in settlement agreements in a new project license. This leaves settlement parties with little recourse besides litigation to enforce the bargained for benefits of an agreement. Including more provisions in a license will provide another avenue of enforcement and reduce the expense that parties must incur when ensuring settlement compliance.

Additionally, we wish to encourage the Commission to take seriously its obligations under 18 CFR 8.3:

“Every licensee maintaining recreation facilities for the use of the public at a licensed project, or employing or permitting any other person to maintain such facilities, shall permit, or require such other person to permit, equal and unobstructed use of such facilities to all members of the public without regard to race, color, religious creed or national origin.”<sup>11</sup>

Not only does this regulation require the Commission to remain vigilant against licensee attempts to restrict access to public resources, but it should also be viewed as a call to the Commission to more thoroughly consider access for all in recreational mitigation measures and to encourage licensees to create a welcoming space for all members of the public.

7. Section 319 of the FPA allows the Commission to promulgate rules to offer compensation for attorney fees and other expenses to intervenors and participants who substantially contribute to a significant Commission proceeding if participation otherwise would result in significant financial hardship. (16 U.S.C. § 825q–1(b)(2)). How should the Commission approach the issue of intervenor compensation? What should the OPP’s role be with respect to intervenor compensation? How should the Commission establish a budget for and fund intervenor compensation? What lessons can the Commission learn from the administration of similar state intervenor compensation programs?

The OPP should promulgate rules to offer compensation to participants in Commission proceedings. Section 319 of the FPA provides a Congressional authorization to be used by the OPP with no more than \$2.4 million to be appropriated for fiscal year 1980. This appropriation should be re-authorized at a level that will allow for meaningful financial assistance to entities participating on Commission proceedings. The OPP should allow public interests to submit a proposal for expected participation in a Commission proceeding before or at the same time as a pre-application document is filed for a licensing proceeding, for example. The OPP should respond to requests by public interests with a response to the availability and commitment of

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<sup>11</sup> 18 CFR 8.3



funding to support the participation of the applicant. Where projects are being proposed as greenfield developments, such as new pumped storage facilities on previously disturbed lands, the applicant, not the OPP, should be required to fund 100% of the budget requested by the public interests.

We appreciate the opportunity to comment on the design of the Office of Public Participation and commend the efforts FERC is making to improve stakeholder engagement in Commission processes. If you have any questions or would like to discuss our comments in more detail, please contact us at [okeefe@americanwhitewater.org](mailto:okeefe@americanwhitewater.org), [mzakutansky@outdoors.org](mailto:mzakutansky@outdoors.org), or [afisk@ctriver.org](mailto:afisk@ctriver.org).

Sincerely,

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