



FRIENDS OF THE EEL RIVER

Working for the recovery of our Wild & Scenic River, its fisheries and communities.

Thursday, April 22, 2021

Federal Energy Regulatory Commission
submitted via e-filing to FERC's Office of Public Participation docket (AD21-9)

RE: Friends of the Eel River comments on FERC Office of Public Participation

Dear FERC staff and commissioners,

Friends of the Eel River (FOER) is a nonprofit citizens' group based on California's North Coast. We advocate for the protection and recovery of the Wild and Scenic Eel River's outstanding resource values, particularly the three salmonid species native to the Eel protected under the federal Endangered Species Act.

Two of those fisheries – chinook salmon and steelhead – have suffered such serious harms from the existence and operations of Scott and Cape Horn dams on the upper Eel River, licensed by FERC under the Potter Valley Project (P-77), that the National Marine Fisheries Service (NMFS) in 2002 found FERC's last proposed license would jeopardize their existence. For more than twenty years, FOER worked toward the opportunity to seek removal of the two dams presented by the relicensing process that began in 2017. We have sought every possible opportunity to inform FERC's decision-making in the slow trainwreck that relicensing process has become.

The funding and activation of FERC's Office of Public Participation are long overdue, and surely represent important steps toward increased, and more effective, civic engagement with FERC, its processes, and its decisions.

It is particularly important that the Office of Public Participation is attempting to reach out to communities which have long suffered from the unjust and disparate impacts of FERC's decisions. However, merely encouraging the victims of generations of environmental injustice to participate in FERC's opaque, indifferent processes will only add layers of insult to the harms these communities already suffer. A broad culture shift is necessary for meaningful change.

The Environmental Protection Agency defines "environmental justice" as "the fair treatment and meaningful involvement of all people, regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies." In general, our experience is that FERC does not provide meaningful involvement with its decisions to the public.

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A. FERC must be reformed to provide for democratic and effective civic engagement.

The establishment of the Office of Public Participation as a separate element of FERC implies the Commission intends for the other parts of FERC to continue to operate as they have. In reality, all of FERC must be reoriented to the need for effective public engagement. Public participation must be an essential ingredient of the cake, not just the icing.

Including the public in decisions is just one of the ways in which FERC must be realigned to a new and urgent 21st century mission. To regulate, check, and hold accountable the utilities with which FERC has grown intertwined will be no small task. It will require FERC to undertake searching internal reassessments and a reordering of priorities unlike anything in the Commission's history. Nonetheless, FERC must be fixed. We have a great deal of very urgent work to do to electrify and make sustainable as much of our infrastructure as possible, as soon as possible. To make this happen, FERC must become nimble, clear-eyed, and focused on the public interest: in essence, the complete opposite of what the Commission is today.

However, our experience with FERC at Friends of the Eel River tells us that unless such reforms are undertaken, the more people attempt to engage with FERC, the more people will be enraged by the Commission's culture, policies, processes, and decisions. Bluntly, FERC treats the public, and expressions of concern for the public interest, with responses that range from disinterest to contempt.

1. FERC does not care what the public wants. Its partners are the utilities.

From the perspective of a democratic populace, the problems with FERC's policies and processes are less the lack of a mechanism to facilitate public engagement than FERC's deep-rooted disinterest in what the public wants. Though the Commission acts with public authority, FERC fundamentally does not act as if it is accountable to the public. Rather, FERC understands power utilities to be its partners, other agencies its hapless rivals, and the public and its concerns a mere annoyance.

FERC's processes are deliberately obscure, impenetrable, and frustrating. They are what you get when you build out from a deep solicitude to corporate power and an active hostility to public opinion. FERC routinely ignores the concerns of the other public agencies charged with protecting the public trust resources put at risk by FERC's licensed projects. If FERC is comfortable ignoring relatively powerful agencies, why would FERC start to attend to the concerns of relatively powerless citizens? Why should we take the Commission's claim to care about public participation seriously?

2. FERC must accept its duty to make environmentally responsible decisions.

Overcoming environmental injustice requires justice for the environment. However, FERC continues to demonstrate that it does not take responsibility for environmental harms resulting from its decisions. The Commission rarely even acknowledges objections to its decisions from expert public agencies charged with the protection of fish, wildlife, and

natural resources affected by FERC projects. Indeed, FERC allows project proponents to write the draft licenses they seek, then forces other federal agencies to fight the draft licenses. Requiring those agencies to prove a draft license will violate federal law is backwards and frankly insane given the harms FERC projects cause.

FERC needs to stop proposing licenses that will result in impermissible harms. To do so, FERC must develop an internal capacity to evaluate environmental impacts. This will be a substantial undertaking given the Commission's long history of circumventing the requirements of US environmental law.

For example, FERC has for decades refused to honor the consensus of every other federal agency in interpreting National Environmental Policy Act (NEPA). Alone among federal agencies, FERC insists NEPA does not require the Commission to consider how the dams and other projects it approves have affected the environment. Instead, FERC treats man-made dams as if they, and not the rivers they obstruct, have existed for millennia. FERC must acknowledge the dams it licenses are not permanent features of the landscape. **For every project FERC considers, the Commission must analyze and consider a no-project alternative defined as removing the existing project.**

FERC does the opposite today, allowing project proponents to decide whether removal of existing projects can even be publicly considered. For example, when Pacific Gas and Electric (PG&E) announced its intention to relicense the FERC-licensed Potter Valley Project on the Eel and Russian Rivers in northern California in 2017, FOER (and many others) asked that FERC require PG&E to develop study plans to consider removal of Scott and Cape Horn dams. Scott dam has no fish passage at all, in clear violation of California law, while the fish ladder at Cape Horn has been substandard for more than a century. Nonetheless, FERC flatly refused our requests to study the potential costs and benefits of dam removal, because PG&E did not request dam removal be considered.

Nor would FERC require PG&E study the presence and potential bioaccumulation of hazardous methylmercury in the anoxic waters of the Lake Pillsbury reservoir behind Scott dam. Here, despite the clear facts that mercury accumulation in the reservoir was an obvious environmental impact of the existence of the dam and thus the proper subject of a study plan concerning the Potter Valley Project's impacts on the environment, FERC refused to require the study because it would be 'a dam removal' study.

Four years later, PG&E has abandoned its relicensing effort for the Potter Valley Project after trying to auction off the whole thing in the middle of relicensing. A coalition of regional interests submitted a new project plan for relicensing which includes removal of Scott Dam, the dam highest on the river. Nonetheless, when FOER and others asked FERC to require a study of Cape Horn dam removal as well, the agency replied this March 13 that

"... this determination does not address study requests that were received related to project alternatives that we do not plan to evaluate in our environmental analysis (e.g., decommissioning Cape Horn dam)."

FERC's obstructionist behavior will prevent neither study of Cape Horn dam removal nor actual removal of the dam. It could, however, delay a study for many additional years, as FERC has delayed so many other processes, at immense expense to participants and even greater cost to the environment. (How long has the Oroville dam relicensing process been going on now?)

Similarly, FERC has repeatedly and willfully refused to follow the clear requirements of the Endangered Species Act (ESA). The ESA imposes an independent legal obligation on FERC to consult whenever the Commission allows, requires, funds, conducts, or otherwise does anything that may affect a species listed under the Act. FERC understands this perfectly well but has spent decades pretending it doesn't. The law cannot possibly apply only when you get caught red-handed. See, for example, the Commission's March 25, 2021 ORDER RESCINDING ORDER MODIFYING AND APPROVING REVISED FISH PASSAGE FACILITY WINTER OPERATION PLAN under subdocket 77-302, which notes:

"(c)ommission staff has determined that we are required to consult with the National Marine Fisheries Service (NMFS) under section 7(a)(2) of the Endangered Species Act (ESA) to ensure that implementation of the Plan is not likely to "jeopardize the continued existence of any of endangered species or threatened species or result in the destruction or adverse modification of habitat of such species"

FOER asserted that obvious legal fact in a letter to FERC in March 2019. Nonetheless, FERC spent the next two years considering and ordering actions that clearly could affect listed species without ever initiating consultation with NMFS as required by the ESA. FOER challenged FERC's January 23 Order approving a plan without any consultation by filing a motion to intervene and request for rehearing. We then filed a notice of intent to sue. The next day, FERC issued the above Order. No citizen, or citizens' group, should have to bear the burden of such intense engagement with FERC to have a chance of forcing the agency to do what the plain language of the Endangered Species Act clearly requires.

Yet another example is FERC's appalling abuse of the *Hoopa Valley* decision to effectively nullify state authority under Section 401 of the Clean Water Act to protect water quality impaired by FERC-licensed projects. If FERC is truly unable to find a way to comply with the water quality protections of the Clean Water Act, then it needs to tell Congress how the statute must be changed to meet the legislature's intent to protect America's natural heritage. Instead, FERC gives every indication of being unwilling to follow the intent of the Clean Water Act. When FERC starts making a good faith effort to comply with the laws of the US in the same way as other federal agencies, maybe the public will start feeling like they are dealing with an agency capable of listening to its concerns.

3. FERC's opposition to dam removal is structural and cultural. It is also arbitrary and capricious and without foundation in law.

FERC construes its mission with respect to rivers as promoting and defending hydroelectric developments, apparently regardless of their obsolescence, economic inutility, or potential for structural collapse, let alone something as irrelevant as the

environmental harms they cause. This is a position radically misaligned not only with the science of endangered species protection and river restoration, but with the economics of renewable energy.

Hydropower is not inherently sustainable. When power production comes at the cost of survival for salmon and steelhead, you cannot think of it as 'green' in any meaningful sense. Small hydropower is sometimes the most destructive of all. For example, the Potter Valley Project on the upper mainstem Eel River has a nominal 'faceplate' rating of 9.2 MW. It has seldom produced in excess of 4 MW over the last several decades of operation. By some state and federal standards, the Potter Valley Project should be considered a sustainable project because it produces so little power. It is no such thing. As noted, Scott dam allows no fish passage at all. Small is sometimes just wildly obsolete.

There is overwhelming evidence of the harms done to fisheries across the Pacific Northwest by the wave of hydroelectric dams built in the early part of the 20th century. Many, like Scott dam on the Eel River, or the Elwha and Glines Canyon dams on the Elwha River, simply made no provision for salmon and steelhead passage, regardless of the requirements of state and federal law. FERC did nothing at all to require its licensees protect fisheries.

As noted above, FERC flatly refuses to consider dam removal unless the project proponent requests it. This has the effect of giving utilities additional leverage in situations where they already hold immense power. FERC does not, however, enforce the dam removal related requirements it purports to impose on licensees. In theory, licensees must prove they have the financial and technical ability not only to operate but to remove the dams they propose to license. In reality, FERC does not actually require its licensees maintain the financial capacity to remove their dams.

Not only does FERC arbitrarily oppose dam removal, it actively erects arbitrary obstacles to dam removal proposals. The clearest recent example of this is FERC's ruling on the proposed transfer of the license for the Klamath River dams to the new entity set up to remove them. Out of the blue, FERC staff imposed a previously unheard of requirement that the current owner and licensee remain a co-licensee during dam removal. This had the effect of significantly altering the financial terms of a complex deal, creating yet another crisis for project proponents to overcome in order to finally secure the dam removal agreement they had already renegotiated several times. This order will significantly reduce the incentive for other utilities to participate in collaborative efforts to remove dams, if they will have to bear the liabilities and potential costs regardless.

This is how FERC has come to prop up hundreds of deadbeat dams across the country. This is how FERC obstructs the transition to much cheaper and far more sustainable wind and solar sources of electric power, even as we need so desperately to accelerate it.

4. FERC treats dam safety as a state secret, at the expense of actual public safety.

Dam safety presents yet another area where FERC seems determined to exhaust the cynicism of its harshest critics. History should long remember that FERC simply walked away from its regulatory responsibilities at the Sanford and Eden dams in Michigan. In one of the most appalling examples of regulatory incompetence on record, FERC actually argued the dam owner's scofflaw behavior meant there'd be no point ordering them to remove the dams:

"Revocation of the Edenville Project license does not mandate removal or any modification of the dam. While, the Commission has broad authority to fashion appropriate remedies to further the goals of the FPA in a manner that is "necessary and appropriate to carry out" the revocation of this license, "as a general rule, we do not condition the effectiveness of a license revocation by imposing additional requirements on a licensee that has shown its unwillingness to comply with other Commission orders."

Of course, the Edenville dam failed in May 2020, breaching the Sanford dam downstream and flooding the city of Midland, Michigan.

Hundreds if not thousands of FERC-licensed dams are decades past their planned lifetimes. Some, like Scott dam on the Eel River rest basically atop active faults that were unknown when the dams were built. FOER and others have repeatedly requested FERC require PG&E analyze and disclose potential safety risks to Scott dam, including those associated with (a) the earthquake fault; (b) an active landslide above the dam's southern abutment; (c) the potential for a flood to overcome the dam's inadequate spillway, and (d) the potential for the only outlet to the dam to become clogged with sediment. FERC just refuses to do anything, asserting that dam safety has nothing to do with relicensing and is in any case adequately addressed by its dam inspection program, which failed to find any problems with the Oroville dam in the years before it nearly collapsed. It makes no sense at all to relicense unsafe dams for another fifty years.

B. FERC needs to shift its culture to ensure meaningful public engagement:

To earn the trust of the public, FERC must join the 21st century in environmental law and policy. To provide meaningful public engagement, FERC must change its culture, policies, and practices. Simply instating a new Office of Public Participation is not enough.

1. A few broad suggestions to that end:

- a. **"Tell the truth and follow the law."** That was the famous advice of U.S. Forest Service chief Jack Ward Thomas as he led his embattled agency to a new relationship with the public. FERC must break old habits to build new trust with citizens affected by its decisions.

- b. Be as transparent as possible.** Provide citizens with access to all the information they need to understand the questions before us. Explain your decisions, policies, and goals in clear language that lays out their legal, regulatory, and factual bases. When you get something wrong, correct it.
- c. Listen to what the public says.** FERC has a longstanding reputation for paying close attention to what utilities want while ignoring public concerns. Change our experience by changing your behavior.
- d. Solve problems, don't make them worse.** Environmental justice delayed is justice denied. FERC's stagnant policies give utilities enormous leverage to maintain conditions which harm vulnerable communities and ecosystems. Reform relicensing processes to promote functional and timely solutions.
- e. Keep utilities at arms' length.** By adopting and maintaining procedures that aren't grossly tilted toward its utility clients, FERC can put citizens on a more equal footing.
- f. Focus on the public interest.** Energy lies at the critical intersection of issues which challenge and must transform our society over the next several decades. FERC must lead decision making in a number of different arenas by focusing on an understanding of the public interest that goes beyond providing electrical power. Environmental justice, protection and restoration of ecosystems damaged by hydroelectric development, and building an economy that will halt our contributions and limit our vulnerability to climate change have all become essential issues which FERC must consider in its decisions.

2. Specifically, FERC's Office of Public Participation should:

- a. Dramatically simplify FERC's complex commenting process.
- b. Designate staff to provide technical assistance in engaging with FERC proceedings.
- c. Provide financial assistance for legal consultation, expert witnesses, and other outside assistance required for effective advocacy on FERC projects. This should be a simple grant process with high approval rates, or clearly articulated need-based thresholds.
- d. Provide general educational resources about FERC projects and processes. At present, the Commission lacks even basic resources, like a text-searchable Frequently Asked Questions document.
- e. Clearly communicate which docket items are open for comments and discussion. Streamline the use of subdockets. Give interested parties the right to intervene in subdockets where critical decisions are made.
- f. FERC imposes strict deadlines on parties that deal with the Commission, but routinely delays its own processes without explanation. Clearly articulate timelines for FERC processes, then follow them.
- g. To improve public information about FERC projects, OPP should sharply limit overuse of Critical Energy Infrastructure Information (CEII) classification, which keeps critical information about FERC projects out of the public eye.

- h. OPP can measure its effectiveness by regularly surveying commenters and interested parties.
- i. OPP should report its results publicly on the primary FERC website.

Conclusion

The Commission and its new Office of Public Participation face serious challenges in providing the meaningful participation and fair treatment which the EPA has identified as the essence of environmental justice. It is essential that the establishment of the new office mark a genuinely new course for FERC's relationship to the public and the public interest.

We look forward to engaging with a FERC that is responsive to the public and attentive to the public interest.

Sincerely,
/s/
Scott Greacen
Conservation Director