

UNITED STATES OF AMERICA
Before the
FEDERAL ENERGY REGULATORY COMMISSION

**Critical Energy Infrastructure)
Information)**

**Docket No. RM02-4-000
and PL02-1-000**

COMMENTS OF THE NATIONAL HYDROPOWER ASSOCIATION

On September 5, 2002, the Federal Energy Regulatory Commission (“FERC” or “Commission”) issued a Notice of Proposed Rulemaking and Revised Statement of Policy on Critical Energy Infrastructure Information (“CEII”) in Docket Nos. RM02-4-000 and PL02-1-000 (“Notice”) [IV FERC Stats. & Regs. ¶ 35,542; 67 FR 3129 (January 23, 2002)]. The National Hydropower Association (“NHA” or “Association”) hereby submits its comments in support of FERC’s decision to restrict public availability of CEII and to create a CEII Coordinator position within the Commission. The Association believes that the procedures as outlined in the Notice and Revised Statement of Policy, with some modifications, would provide a level of protection of our nation’s hydropower projects and, in turn, protect life and property.

I. Introduction

NHA is the national trade association committed exclusively to representing the interests of the hydroelectric power industry. Our members represent 61 percent of domestic, non-federal hydroelectric capacity and nearly 80,000 megawatts overall in North America. NHA’s membership consists of more than 140 organizations including; public utilities, investor owned utilities, independent power producers, equipment manufacturers, environmental and engineering consultants and attorneys.

The hydropower industry recognizes the importance of public safety and takes its responsibilities to ensure safety very seriously. During the weeks following September

11, 2001, the industry took considerable steps to increase security in and around hydropower projects. Threats to projects, along with several reports of suspicious activity, raised the level of awareness regarding the vulnerability of dams. For years prior to 9/11, groups have been concerned about domestic terrorism, similar to the bombing in Oklahoma City. Mayors from around the country met in 1999 to discuss domestic counter-terrorism training, including a discussion of the threat to hydroelectric projects. These concerns were further justified after the 9/11 attacks and the news that the Grand Coulee Dam was targeted in the days following 9/11.

On October 11, 2001, FERC issued a Policy Statement in Docket No. PL02-1 [97 FERC ¶ 61,030; 66 FR 52917 (October 18, 2001)] under which it removed certain information from easy public access that it considered critical and sensitive in view of the events of 9/11. The information removed from public access included drawings, locations and studies for hydro projects, as well as details regarding the gas industry and electric utility industry. During subsequent meetings with FERC, NHA pointed out additional documents that contained critical and sensitive data the release of which could pose security risks. Further, NHA raised concerns that even if such data were not publicly available, the documents may be obtainable by terrorists under the Freedom of Information Act (“FOIA”).

On January 16, 2002, FERC published its “Notice of Inquiry and Guidance for Filings in the Interim” in Docket No. RM02-4, proposing to revise its regulations to address public availability of CEII [IV FERC Stats. & Regs. ¶ 35,542; 67 FR 3129 (January 23, 2002)]. NHA submitted comments on that notice confirming its belief that open public access to critical and sensitive information relating to hydroelectric projects

could facilitate a future tragedy. NHA further urged the Commission to adopt a plan that would allow secure sharing of information among stakeholders as necessary for permitting, licensing and compliance matters under the Federal Power Act (“FPA”).

The Commission issued the present Notice on September 5, 2002 [IV FERC Stats. & Regs. ¶ 32,564; 67 FR 57,994 (September 13, 2002)] in Docket Nos. RM02-4 and PL02-1. NHA appreciates the opportunity to comment further on this important national security issue.

II. Comments on the Notice

A. Restriction of Access to Information Through FOIA Disclosure

NHA agrees with FERC’s conclusion in its Notice that the FOIA process, in use since the issuance of the Commission’s Policy Statement on October 11, 2001, is ill suited to handling requests for CEII. While the Association continues to support regulations that require sharing of information with stakeholders during FPA proceedings, it believes that CEII must be exempt from mandatory disclosure under FOIA.

NHA supports the creation of a CEII Coordinator at the Commission whose responsibilities will include processing non-FOIA requests for CEII and making the determinations regarding such requests. NHA is also in agreement with FERC’s decision to allow the designee of the CEII Coordinator to perform these duties. The Association believes the CEII Coordinator will have a substantial workload responding to CEII requests. As such, the ability of the CEII Coordinator to delegate this authority further, as contemplated in Section 375.313 of the proposed regulations, is not only necessary, but also essential, for the process to work in a timely and efficient manner. However,

NHA believes that the owner/operator of an existing licensed project or the applicant for a proposed project can serve as the CEII Coordinator designee in certain circumstances. Therefore, NHA requests that the proposed regulations be modified to expressly allow for the designation of the owner/operator or applicant as the CEII Coordinator designee. Furthermore, other than where the owner/operator/applicant is designated, the CEII Coordinator designee should be an employee of the Commission.

Proposed Section 375.313 of the regulations specifies a very skeletal description of the powers and obligations of the CEII Coordinator or its designee. This section needs to be expanded to be consistent with the Revised Statement of Policy and other regulations as modified pursuant to the Notice. In particular, Section 375.313(b) should cross-reference to the criteria to be followed by the Coordinator. Further, Section 375.313 should be modified to expressly require that the Coordinator receive an NDA from all appropriate parties before releasing data. Thirdly, Section 375.313(d) should expressly state that the copies of documents requested should be at the expense of the requester, unless the Coordinator designee is the owner/operator or applicant. Finally, the regulations should expressly provide that the name of the Coordinator and/or designee will be included in the Commission's Notice of the filing that triggers the FPA proceeding. The regulations (particularly this Section) must be more specific to ensure that there is uniformity in implementation of the CEII policy and process and to provide security to the owner/operator or applicant.

B. Definition of CEII

In the Notice, FERC defines critical energy infrastructure information as “information about proposed or existing critical infrastructure that: 1) relates to the

production, generation, transportation, transmission, or distribution of energy; 2) could be useful to a person planning an attack on critical infrastructure; 3) is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552; and 4) does not simply give the location of critical infrastructure.” Further, in its Notice the Commission defines the pivotal term “critical infrastructure” to mean “systems and assets, whether physical or virtual, that are so vital to the United States that the incapacity or destruction of such systems or assets would have a debilitating impact on the security, national economic security, national public health or safety, or any combination of those matters.”

NHA supports the Commission’s proposed definition of CEII with caveats. The Association fully stands behind FERC’s decision to include proposed facilities in the definition; doing so insures that proposed facilities receive the same protection as existing facilities. However, the Association is concerned that location information of critical infrastructure will not be protected under the proposed regulations. Clearly, for a terrorist planning an attack on a facility, location information would be of primary importance. At the same time, NHA recognizes that the release of some level of locational information is necessary to inform the public of proposed or existing facilities and is necessary for the NEPA review process. Therefore, NHA requests that the exclusion from CEII of locational information be limited to general geographic location information, but that detailed locational information (such as details of the sensitive parts of facilities) be expressly included in the definition of CEII. Further, NHA requests that an owner/operator or applicant for a project be able to seek CEII protection for locational information where it believes that public release would cause increased security concerns.

In addition, with general geographic location information to be publicly available, NHA stresses the need to protect all other CEII as essential to public safety.

Further, NHA is concerned that the definition of “critical infrastructure” (a critical building block in the definition of CEII) could be interpreted restrictively and, thus, could prevent the protection of critical and sensitive information about hydroelectric infrastructure. In its final rule, the Commission should confirm that its intent under this definition is that the national hydroelectric infrastructure, as a whole, meets this definition and, therefore, the CEII protections cover all individual hydroelectric facilities.

NHA is specifically interested in ensuring that at least the following information is included in the definition of CEII and is protected under the new regulations and policy statement. Again, this list is not intended to be all inclusive.

- 1) Detailed drawings and information as related to plant security and emergency action responses to security violations.
- 2) Part 12 reports which show dam and facility design details plus critical descriptions of facilities. As the new FERC plan is implemented to incorporate Failure Mode Analysis as an appendix to Part 12 reports, this information is particularly sensitive.
- 3) Annual inspection project reports as completed by FERC regional staff should be restricted.
- 4) All electrical and control drawings, plus control system descriptions.
- 5) Appendices to Emergency Action Plans that describe dam break analysis, and detailed dam designs.
- 6) Project drawings and other documents that describe the physical locations of project control centers.

C. Requester’s Status and Need for CEII

Under the Notice, FERC sets forth a process for non-FOIA requests whereby requesters would provide to the CEII Coordinator detailed information about themselves

and their need for the information. The CEII Coordinator would use this detailed personal information in determining whether to release the CEII material. If the requester is determined to be eligible to receive the information requested, the CEII Coordinator will determine what conditions, if any, to place on the release of the information. Where appropriate, the CEII Coordinator would forward a non-disclosure agreement (“NDA”) to the requester for execution.

Generally speaking, NHA supports this CEII request process. However, the process requires further refinement to ensure adequate security for hydroelectric infrastructure. In particular, as discussed further below, the Association believes that NDAs should be mandatory for any requester, other than the owner/operator or applicant of a project (or their agents) that is deemed eligible to receive CEII. By virtue of their status, owners/operators already possess a great deal of knowledge regarding the CEII of their project and have the greatest incentive in protecting that information – the desire to keep safe their employees, assets and other property. Other requesters, however, may have interests that compete against the protection of CEII. To be sure this information is safeguarded, NDAs must be mandatory for these requesters.

Furthermore, as part of the review process for requesters, the CEII Coordinator (or designee) should have access to a database from Federal and State law-enforcement sources, which indicates those parties in the area who could pose a security concern. NHA strongly agrees with the Notice [at Section 388.112(d)] that the CEII Coordinator should notify the owner/operator or applicant when a person is requesting access to information. However, such notice must be “actual notice,” *i.e.*, not constructive notice (by way of the Federal Register or issuance of a FERC notice); the Coordinator must

contact the owner/operator or applicant and give at least 10 business days notice before intended release of the information. Any shorter period of time, and the lack of actual notice, would likely prevent the owner/operator or applicant from adequately responding. Often the owner/operator or applicant is more knowledgeable about the persons in the vicinity of the project who would have a reason to need such information, and those who would not. The Coordinator should solicit and rely on such data, unless shown to be in error.

D. Verification and Access Issues

In the Notice, FERC proposes to continue to allow use of the Internet to file CEII with the Commission. Based on the provisions in the Notice, it is unclear how CEII data would be available to an authorized user through the Internet. Furthermore, the Commission does not outline any new security precautions or changes to the current security system to protect the information which the owner/operator or applicant submits as CEII.

NHA objects to Internet access for an authorized user without a high level of protection. Security mechanisms must be put in place, such as, at a minimum, individual identification numbers and passwords for authorized users (including owners/operators and applicants, and their agents).

NHA also strongly believes the lack of detail regarding security of CEII data when electronically submitted to the Commission is a flaw in the Commission's proposal. There is no clear evidence of how the Commission will keep electronically submitted CEII data protected once it is on the Commission's electronic database. Electronic security systems are not 100% secure. Even the country's most protected systems (*e.g.*,

those of the Pentagon) have been infiltrated at times by Internet hackers. NHA believes the safest course of action for the Commission is to require that CEII data be only submitted in paper form, while at the same time the redacted or non-CEII data can be submitted electronically. NHA also proposes that there be a grace period on due dates (of at least 24 hours) for submittal of such paper form of CEII data where the non-CEII data is timely submitted electronically.

E. Use of Non-Disclosure Agreements

FERC proposes in its Notice that the Commission use NDAs, where appropriate, as a condition of releasing CEII to requesters. NDAs would not be required for owner/operator requesters or for the federal agencies. The Commission also proposes to require agents of owners/operators and applicants to request CEII directly from the owner/operator, rather than from the Commission.

NHA supports this reasoning with regard to the use of NDAs with some caveats. As noted above, NHA agrees that owners/operators and applicants have the most incentive for protecting CEII and should not be required to sign an NDA. Similarly, the Commission should provide that the agents of owners/operators and applicants are not required to execute NDAs. However, in all other cases signing an NDA should be required before any CEII data is released (whether the CEII data is just viewed or is copied). While the Commission will only agree to release CEII to a requester after evaluating the requester's need to know the information, another legal mechanism is needed to insure CEII does not fall into the wrong hands. The NDA provides this additional layer of protection.

Furthermore, NHA believes that NDAs are needed when the Commission distributes CEII to Federal agencies. NHA members are concerned that these agencies may experience a conflict between their assigned duties and their duty to protect CEII data. Some in these agencies may view their particular mission as superior to the security of this information; however, national security supersedes all other issues. Recognizing the unique nature of the Federal agencies (particularly their being subject to the Commission's security regulations), a streamlined, modified NDA should be required with a particular reference to the Commission's procedures and with a commitment by the Federal agency representative to comply therewith. At a minimum, if the Commission declines to require NDAs of the Federal agencies, it should include a cover sheet on all distributed CEII data that reminds the non-FERC personnel that the information is protected for national security reasons and that they are subject to the FERC restrictions.

In addition, NHA believes that the Commission must require NDAs for State agencies. The reasons discussed above in the context of Federal agencies are also applicable to the State agencies; but also State disclosure laws may require the State agencies to release CEII material without complying with the FERC restrictions. Furthermore, the State agency likely has much of the hydroelectric data in the context of its other regulatory processes related to FPA licensing (*e.g.*, the certification process under Section 401 of the Clean Water Act). In its Notice, FERC proposes a possible "on loan" program for CEII, that it believes would potentially take the information outside of State FOIA law. While the loan program may exempt the CEII from the State FOIA law, NHA is concerned that it would be unwieldy and difficult to administer. Documents

would need to be tracked and recovered when proceedings terminated. Further, given the term of many hydroelectric proceedings and subsequent compliance matters, the reality is that while the loan process might work for natural gas pipeline certificate proceedings, it may not work for hydroelectric CEII. However, as NHA has proposed for Federal agencies (discussed above), a modified NDA could be used with the State agencies providing for return of any loaned documents if a FOIA or other request is received by the State agency – if that type of process would protect the data.

FERC’s Notice does not expressly address the situation where a tribal authority is the requester of CEII. This situation should be clarified, but at a minimum, the tribal authority should be required to sign an NDA perhaps parallel to the type of modified NDA to be signed by State agencies – since the tribal authorities would not likely be subject to the Federal restrictions applicable to Federal agencies.

Lastly, NHA encourages the Commission to adopt enforcement measures and penalties to ensure that the CEII regulations, guidance, and in particular, the non-disclosure agreements, are properly implemented, enforced and respected. One such measure could be to disqualify requesters who unlawfully release CEII or violate an NDA from future access to CEII materials. NHA leaves to the Commission the task of developing other such measures and penalties as it deems necessary and appropriate to protect CEII.

F. Submission of CEII to FERC

NHA supports the process proposed in the Notice for filing CEII with the Commission as outlined in proposed amended Section 388.112. The Association also supports FERC’s decision to leave the method of how to segregate or redact CEII to the

filer of the information. NHA strongly believes that the most appropriate and effective means of presenting CEII to the Commission is by using a separate non-public appendix or attachment. Redacted versions of CEII are difficult and time-consuming to accomplish and keep track of. It is important that the filers retain as much flexibility as possible in protecting CEII and presenting their filing to the Commission, while still doing so in an appropriate manner.

However, the Commission should examine its other regulations relating to the permitting, exemption and licensing process under the FPA to confirm that, where data is required to be made publicly available, such requirements are overridden by the CEII regulations and policy.

G. Challenges to CEII Status

In the Notice, FERC proposes several procedural steps in Section 388.112 for challenges to the CEII status of filings submitted to the Commission. Specifically, the Commission provides that the filer of CEII should be notified when a request for release of the information has been made, or when the Commission itself questions the applicability of CEII status. Under the proposed regulations, the filer is also given an opportunity to comment on the possible release of the information before that release occurs. Once the Commission makes a decision on the CEII status, the filer would once again be notified. CEII filers will also be notified when a FOIA requester brings a lawsuit to compel disclosure.

As noted above, NHA strongly supports all of the notice and comment procedures outlined in proposed Section 388.112. It is imperative that CEII filers have an opportunity to present their case for non-disclosure to the Commission before any CEII

information is released to a requester. The filer should also receive as much time as possible to prepare its arguments. In some cases, this could require significantly more than the minimal five days notice proposed by the Commission. Therefore, the time allowed should be 10 days notice. Further, as discussed above, such notice must be actual (not constructive), should run from the date of receipt of the notice, and should be based on business days – not calendar days (which can lose up to 3 days time on a holiday weekend). In addition, any appeal of a decision to release CEII data should stay the release until the appeal is resolved.

H. Other FERC Regulations

One area not addressed by the Commission in its Notice is how this rulemaking affects other sections of FERC's regulations that require public dissemination of CEII material along with other information required in an FPA proceeding. As mentioned above, the Commission needs to ensure that where it protects sensitive data under its CEII regulations, it does not at the same time require the owner/operator or applicant to release that data to be in compliance with the permitting, licensing or exemption regulations.

Under the Commission's FPA regulations, prospective applicants and licensees are required to release and make publicly available significant amounts of material to allow them to comment and participate meaningfully in pre-filing activities, ongoing permit/license/exemption proceedings, or post-permit/license/exemption compliance proceedings. The Notice only addresses situations where CEII data is filed at FERC. But the FPA regulations involve data and documents which the owner/operator or applicant must distribute or make publicly available during consultation and formal FERC

proceedings to certain parties or stakeholders – even before a proceeding is initiated at the Commission. Nothing in the Commission’s Notice expressly states that applicants/licensees are permitted to withhold CEII materials in such circumstances. To protect CEII data, the Commission should include an exemption for CEII in its other regulations or should write the exemption into this rule. The Commission may want to consider building such exemptions for CEII data into communications protocols and expressly provide that all other FPA regulations relating to making information available are modified to the extent CEII data is involved to ensure that CEII data is protected.

III. Conclusion

The National Hydropower Association commends FERC for its quick action following the events of 9/11 to restrict public access to critical energy infrastructure information, an action that may have prevented another terrorist attack. NHA also appreciates the Commission’s efforts to follow-up this action and finalize its policies with this rulemaking. NHA requests that the Commission expeditiously issue its final regulations and policy and implement the process.

The safety of the nation’s hydropower infrastructure is one of NHA’s top concerns. The Association believes that the Commission’s proposed changes to its regulations and its revised policy statement, with the modifications and amplifications suggested herein, will help prevent sensitive information from getting into the wrong hands, and will provide the hydropower industry with an extra layer of protection. Again, NHA appreciates the opportunity to comment on this proposal critical to our nation’s security.

Respectfully submitted,

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