Robert Nasdor
Northeast Stewardship & Legal Director
bob@americanwhitewater.org
65 Blueberry Hill Lane
Sudbury, MA 01776
617.584.4566

Sent via email to DataClearance@FERC.gov.

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Debbie-Anne A. Reese, Secretary
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426

Re: Docket No. (IC26-42-000)
FERC Information Collection number (FERC-510)

Dear Secretary of the Commission:

American Whitewater submits these comments on the Federal Energy Regulatory Commission's Information Collection Activities (FERC-FERC-510); Comment Request; Extension.

American Whitewater is a national 501(c)(3) non-profit organization with a mission to protect and restore America's whitewater rivers and to enhance opportunities to enjoy them safely. Our members are primarily conservation-oriented kayakers, canoeists, and rafters who enjoy exploring whitewater rivers. As outdoor enthusiasts who spend time on and in the water, our members have a direct interest in the health and water quality of our nation's waterways. American Whitewater works throughout the country to protect healthy, free-flowing rivers and restore rivers that have been dammed, degraded, and dewatered through hydropower development. For paddlers, water quality directly influences our health, our enjoyment of public streams, our tourism contributions to rural economies, and in many cases, our livelihoods. American Whitewater has been involved in numerous license surrender proceedings before the Commission and on petition for review in the Court of Appeals.

The Commission seeks information on collection requirements pertaining to FERC-510 applications for the surrender of a hydropower license. According to the FERC notice, the

Commission receives approximately 10 applications for surrender annually. The notice does not specify the nature of surrender applications filed but presumably include voluntary surrender of licenses and exemptions of both constructed and unconstructed projects but excludes involuntary license terminations and revocations as well as preliminary permit terminations. Specifically, the Commission seeks comments on: (1) whether the collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

Background

Under Section 6 of the Federal Power Act (16 U.S.C. 799), "Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the Commission after thirty days' public notice." Surrender or termination of a FERC license is regulated under 18 CFR Part 6. Under these regulations, voluntary surrender is a process whereby a hydropower dam owner seeks to relinquish its federal license and discontinue federal oversight. Similarly, an exempt project owner may seek to discontinue operations and surrender its exemption.

While licensing proceedings under FERC regulations must follow one of three licensing processes (i.e., Integrated, Traditional, or Alternative), FERC has no established process for surrender proceedings other than the requirement in § 6.1 that the public be given 30 days notice of the application for surrender. While FERC licenses require water quality certification by states under § 401 of the Clean Water Act, § 6.1 is ambiguous on when § 401 certification is required in surrender proceedings. Additionally, FERC does not require financial assurances that dam owners have the resources to meet licensing or surrender requirements, although the agency has expressed the opinion that it has the authority to do so.

While license surrender, other than termination by implied surrender, is a process initiated by a licensee, it is subject to such terms and conditions as FERC may prescribe. After FERC receives an application for surrender, FERC is required to publish a notice in the Federal Register soliciting public comments on the surrender application and intervention in the surrender proceeding. Intervention is required by parties seeking rehearing of the surrender order or parties seeking a petition for review of the surrender order in federal court.

Absent an application for license transfer, FERC must complete an environmental analysis of the surrender plan, typically an Environmental Assessment considering a limited range of

alternatives. FERC regulations do not require consideration of a dam removal alternative in surrender proceedings, and even if they did, NEPA requires only a brief discussion of reasonable alternatives. Typically, FERC will not consider federal takeover, and in the absence of other applications, cannot require the licensee to continue operating the project.

In 2021, FERC requested public comments on financial assurances that would require that dam owners have sufficient assets to ensure that licensees have the capability to carry out license requirements and, particularly, to maintain their projects in safe condition. In theory, these financial assurance would also apply to requirements for dam removal at surrender.

The lack of a meaningful FERC surrender process, the lack of clear requirements that the surrender plan meet state water quality standards, the lack meaningful analysis of surrender alternatives and the value of river restoration, and the lack of financial assurances to require that dam owners have the means to remove dams and restore rivers at surrender results in the abandonment of hydropower dams in rivers, permanent obstruction of fish passage, loss of recreation opportunities, threats to public safety, and the degradation of water quality and aquatic habitat.

Surrender Process

FERC licensees seeking to decommission hydropower projects and surrender their FERC license must file an application for surrender of a hydropower license in the same form and manner as an application for license under § 6.1 of the Commission's regulations. Unlike licensing, the public is provided with little opportunity to participate in the surrender proceeding through project scoping, public meetings, requesting studies, commenting on study plans, proposing study modifications or new studies, assisting with the completion of studies, or commenting on study reports. Public participation in surrender is generally limited to a 30-day public comment and intervention period after FERC provides an often cryptic notice in the Federal Register to those who monitor such things daily. Typically, FERC issues an Environmental Assessment rather than an Environmental Impact Statement evaluating the environmental effects of the proposed surrender, but does not issue a draft environmental document for public comment in most cases. FERC will issue a final surrender order at some point following the issuance of the environmental document. Parties to the surrender proceeding may file for rehearing and petition for review in the Court of Appeals.

FERC licensees will typically initiate a surrender proceeding at the time of relicensing when it deems the project no longer viable due to the cost of maintenance, repair or needed facility upgrades, or an inability to meet environmental standards. Some projects have been non-operational for prolonged periods at the time of relicensing, and licensees may decline to seek new licenses or withdraw a license application and seek license surrender during relicensing.

Hydropower projects, particularly smaller ones, are particularly susceptible to surrender due to deteriorating facilities, sediment buildup that eliminates usable storage, decreasing need for baseload power at run-of-river developments, lack of passage facilities, and other environmental impacts, and climate change.

FERC's review of surrender applications can be best characterized as limited and predetermined. While surrender applicants provide detailed information supporting their proposed alternative, applicants are not required to provide detailed information on other alternatives proposed by state and federal resource agencies and other stakeholders. Typically, surrender applications propose decommissioning and license surrender without dam removal, removing electrical equipment, and closing gates to power canals or penstocks, but leaving the dam in place. Since the passage of the Federal Water Power Act (now the Federal Power Act) in 1920, FERC has only once required the removal of a hydropower dam when not proposed by the licensee at the Edwards Dam on the Kennebec River in 1997.

Contrary to FERC's *Project Decommissioning at Relicensing Policy Statement ("Policy Statement")*, FERC licensee surrender process typically results in surrender orders that allow dam owners to simply walk away from licensed hydropower projects with little regard for the ongoing environmental and public safety impacts of abandoned hydropower projects. Abandoned hydropower dams, such as the Niangua Hydroelectric Project, have recently resulted in fatalities at the base of low-head dams, often referred to as "drowning machines" due to recirculating currents. Under current procedures, FERC does not require licensees seeking surrender to provide detailed information evaluating dam removal alternatives.

Information Collection Requirements

FERC's Policy Statement makes clear that the Commission has the power to take steps necessary to assure that the public interest is suitably protected in surrender proceedings, and the requirement that the Commission act in the public interest is found throughout the Federal Power Act. To fulfill these responsibilities, the Commission must require that applicants for license surrender provide sufficient information to allow for the completion of the environmental analysis that will inform the Commission's public interest determination at license surrender. Doing so necessitates requiring surrender applicants to identify and evaluate surrender alternatives including the environmental benefits of dam removal. The public interest at surrender requires more than an explanation of the minimal measures that the surrender applicant proposes to free itself of federal oversight.

The Commission currently has no surrender rulemaking procedure, leaving it to surrender applicants to provide as much or as little analysis of surrender alternatives as they wish. As is commonly the case with applications proposing license surrender without dam removal,

applications typically exclude dam removal as a surrender alternative with little or no analysis often based on the expected cost of dam removal. The Commission made clear that potential ratepayer impacts associated with decommissioning are outside the scope of NEPA review. See Niangua Hydroelectric Project Surrender Order (Accession No. 202512180-3039). Accordingly, the Commission should require applicants to provide information on all reasonable alternatives rather than excluding alternatives based on anticipated costs.

In providing the Commission with documentation pertaining to surrender alternatives including those proposed by entities other than the applicant, the Commission should require applicants to provide information quantifying the long-term benefits and measures to mitigate the adverse impacts of each surrender alternative. While licensees will typically submit an Exhibit E Environmental Report addressing the environmental effects of the proposed surrender plan, the Commission should require the surrender applicant to provide a similar level of detail for other viable alternatives including dam removal alternatives when not proposed by the licensee.

Additionally, the Commission should require surrender applicants to provide evidence of Tribal, resource agency, and stakeholder consultation in the development of the surrender plan including public meetings and response to comments. Applicants should also be required to provide documentation that a succeeding regulatory authority supports the surrender plan and has accepted regulatory responsibility post-surrender.

- Prefiling Consultation and Studies

While prefiling consultation is required in licensing, there is no such requirement for surrender, although some licensees voluntarily seek public input when considering surrender. This consultation should be formalized but also made more robust. Prefiling consultation can identify resource agency and stakeholder concerns, the range of alternatives that should be considered, and information needed in the development of the surrender plan. This also would provide an opportunity for early engagement around dam removal before significant expenditure of resources. We also recommend a standard set of studies that could be commenced prior to filing a notice of intent to surrender that could reduce delay. Relevant studies could include the following: 1) Dam stability & public safety; 2) Water quality; 3) Fish passage; 4) Existing uses (e.g. water supply, recreation); and, 5) Economic analysis of surrender alternatives including long-term costs and benefits.

- Surrender Application

The formal surrender process, like the relicensing process, begins with a notice of intent to surrender filed by the dam owner. This could occur either during the term of the license, through a notice of intent not to seek a new license, or as is often the case, mid-way through the

relicensing process when the dam owners assess the costs of meeting modern environmental standards such as fish passage or water quality standards. This also can be an opportunity for the dam owner to present a comprehensive surrender plan with the support of resource agencies and stakeholders that would expedite the surrender process. FERC typically issues an orphan project notice seeking other applicants to take over the project license for the term of the current license, or in the case of a license expiration, an intent not to renew. Prior to issuing the orphan project notice, FERC should determine whether the transfer to a new entity is a feasible alternative. Where dam safety, penstock failure, or environmental non-compliance makes license transfer infeasible, FERC should determine quickly that issuing an orphan project notice would be futile and proceed with the surrender application.

Early project scoping, as with the ILP, would provide all surrender process participants with the opportunity to share surrender concerns and propose studies other than those completed by the applicant during the prefiling consultation phase. Depending on the extent of the studies completed during the prefiling stage, the need for additional studies should be limited. For example, there may be a need to obtain information that would support consideration of alternatives that would protect existing uses. We anticipate supplemental studies would require only desktop analysis in most cases and be less time consuming and costly than field studies. As with study disputes under § 16.8(b)(6) in the relicensing process, FERC would resolve disputes by an order directing the potential applicant to gather such information or conduct such studies as are reasonable and necessary. This process would allow the public to both comment on completed studies and request additional studies, as needed.

- Environmental analysis

Currently, there is no requirement that licensee's surrender plan include an analysis of surrender alternatives, including dam removal. For example, costs for dam breaching or full dam removal to support volitional fish passage or alternatives that would support other existing uses are not required in surrender applications. FERC should require an analysis of reasonable alternatives in the surrender application including dam removal alternatives. Providing this information in the surrender application would reduce the time necessary for environmental review.

FERC's environmental analysis in surrender proceedings is currently limited to the licensee's surrender plan for all intents and purposes. After summarily disposing of the no-action alternative because it cannot compel a licensee to continue operating the project when it no longer seeks to do so, rejecting a non-power license for the same reason, and then rejecting federal takeover because it would require Congressional action, FERC typically moves on to the licensee's surrender plan with little consideration of a full or partial dam removal alternatives.

FERC should be required to consider a dam removal alternative in all surrender proceedings,

particularly when requested to do so by state or federal resource agencies and stakeholders asserting that removal is necessary to protect non-power resources. This does not mean that removal will be the preferred option in every surrender proceeding; however, the burden should be on the applicant to demonstrate that allowing dam structures to remain in the river outweigh the benefits of removal. The fact that the cost of dam removal exceeds the cost of dam abandonment should not be a basis for rejecting dam removal any more than the cost of environmental compliance is not a basis for lowering water quality standards.

FERC evaluates surrender applications using a public interest standard, although that term is not defined in statute or regulations. Nor is there any explanation of how this standard differs from the comprehensive development and equal consideration standards under Section 10(a) and Section 4(e) of the Federal Power Act, respectively, applicable to licensing proceedings. A key difference between FERC's use of different standards in relicensing and surrender proceedings is that in surrender, power generation is not balanced against other resource considerations. While FERC will not require the installation of fish passage structures at surrender because they would require ongoing operation and maintenance, it has the authority to require dam removal at surrender when considering the effects of leaving the dam in place on all other non-power resources including aquatic habitat, recreation, aesthetics, cultural and historical resources, and so forth.

In evaluating alternatives, FERC uses current project conditions as the environmental baseline. Hence, a surrender plan that requires no modifications of dam structures or new discharges will not be considered to have any environmental effects. This limits FERC's consideration of the benefits of river restoration through dam removal. Conveniently, FERC seems routinely willing to analyze the detriments of dam removal in surrender to reject dam removal alternatives, while dismissing all benefits as speculative. While FERC surrender proceedings will typically evaluate dam stability at surrender, this is not always the case. FERC's termination of the license and failure to require Boyce Hydro to address dam safety concerns at the Edenville Dam resulted in dam failure in 2020.

FERC currently uses present project conditions, or the river as it exists today under the current licensed project, as the environmental baseline on all surrenders without regard to whether dam removal is a possible alternative. FERC compares the effect of the surrender plan to the effects of existing diversions and discharges through project facilities, routinely resulting in a finding of no substantial impact, or FONSI. FERC's environmental baseline ignores the effect of abandoned structures on the river ecosystem. To properly complete its environmental analysis of surrender alternatives, FERC should require that applicants provide information sufficient to evaluate dam removal alternatives at surrender.

- Endangered Species Act

FERC has an unmet legal obligation under ESA § 7(a)(1) to develop a program for the conservation of listed species affected by hydropower dams. Federal agencies, including FERC, have affirmative obligations under § 7(a)(1) to develop a program that is effective in promoting the recovery of endangered and threatened species. This obligation should extend not only to licensing but also surrender. An agency's conservation program must be carried out "in consultation with and with the assistance of" FWS or NMFS under 16 U.S.C. § 1536(a)(1). To date, FERC has not developed a conservation program for endangered and threatened fish species affected by hydropower dams, either independently or in consultation with FWS or NMFS. Surrender applicants should be required to document that they have met this consultation requirement and made a part of the surrender process.

- Water Quality Certification

On November 21, 2024, FERC issued new regulations addressing requirements under Section 401 of the Clean Water Act. The new rules address a reasonable period of time for issuing certification, as well as certification requirements for license amendments, exemptions, expedited processes, and surrenders. The regulations state that "For any surrender that requires certification under section 401(a)(1) of the [Clean Water Act], a certifying authority is deemed to have waived the certification requirements of section 401(a)(1) . . . if the certifying authority has not denied, expressly waived, or granted certification by one year after the date the certifying authority received a written request for certification." FERC should require that surrender applicants demonstrate compliance with section 401 of the Clean Water Act in their surrender applications to determine whether any potential discharge complies with state water quality standards or other appropriate requirements of state law.

While the removal of a dam resulting in sediment discharge will typically require certification, FERC has not required certification where it has approved a surrender plan without requiring dam removal, reasoning that there will be no "new" discharge beyond what was permitted under the license being surrendered. Missing from FERC's determination of the applicability of section 401 to surrender is the ongoing effect of dam abandonment on water quality including impacts from the dam on sediment transport, water chemistry, fish passage, upstream and downstream aquatic and terrestrial habitat, recreation, and aesthetics -- resource impacts that are all within the scope of state Section 401 authority. Analyzing these impacts under the Clean Water Act is more stringent than under the Federal Power Act in that compliance with state water quality standards under Section 401 is not balanced against the cost of compliance, be it in licensing or surrender.

Requiring certification by states that the license surrender plan meets state water quality standards is appropriate because the states will ultimately bear the burden of assuring the safety

of abandoned structures that could become public hazards, result in ongoing impairments to water quality, and restrict recreational opportunities. Surrender represents the best and perhaps only opportunity that states have to require dam owners of projects leaving federal jurisdiction to restore rivers that have been altered by their structures and operations. Allowing dam owners to walk away from their projects with no accountability for these harms circumvents the intent of the Clean Water Act that section 401 was intended to protect. In doing so, FERC inappropriately shifts responsibility for dam safety and environmental harm to either state regulators who may or may not have jurisdiction over the dam, or to licensees themselves with no future oversight.

- Financial Assurance

On January 19, 2021, FERC solicited public comment on instituting requirements that hydropower dam owners provide financial assurances that they have the resources necessary to meet their license requirements including dam safety, project facility maintenance, or environmental compliance. Specifically, the notice solicited comments on the following:

- requiring licensees to obtain bonds to cover the costs of safety measures and project operation and maintenance;
- establishing an industry-wide trust or remediation fund or requiring licensees to maintain individual trust, escrow or remediation funds; or
- requiring licensees to obtain insurance policies for unforeseen safety hazards or dam failures.

While FERC did not specifically address surrender in the solicitation, surrender requirements are treated the same as any other license requirement and should also require financial assurances. Requiring financial assurances at the time of project licensing assures that funds will be available to cover the costs of surrender including dam removal where appropriate. Absent these financial assurances such as a third-party bond, dam owners are disincentivized to support dam removal when surrendering project licenses.

While larger hydropower projects, often with global ownership, have sufficient resources, there is a growing trend among licensees to transfer ownership of these assets and licenses to subsidiary corporations to limit liabilities. Additionally, most of the projects being surrendered -- projects out of compliance with environmental requirements, non-operational projects, and those with unaddressed safety concerns -- are licensed to smaller entites with fewer resources to address liabilities. Developing a meaningful license surrender process will require that FERC proceed with addressing financial assurances. Requirements for financial assurances are consistent with statutory requirements and are within FERC's authority to implement through rulemaking.[1] The applicant should document the financial assurances available to fulfill the

[1] Under Section 10(b) of the Federal Power Act, each licensee must construct project works as authorized and then

applicant's surrender obligations.

Conclusion

American Whitewater appreciates the opportunity to provide these comments on FERC Information Collection number (FERC-510).

Very truly yours,



Robert Nasdor
American Whitewater
Northeast Stewardship & Legal Director
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Sudbury, MA 01776
(617) 584-4566
bob@americanwhitewater.org

avoid any alteration "not in conformity with the approved plans…." Under Section 10(c), a licensee must "…maintain project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power …." It must "establish and maintain adequate depreciation reserves" for "all necessary renewals and replacements." Id. Under Section 10(d), a licensee must also establish "amortization reserves" and maintain them until the termination of the license. Lastly, under Section 10(c), a licensee is responsible to address any damages caused by its project. In sum, the statute requires that a licensee must have fiscal capacity for license compliance.