



February 17, 2021

*Via electronic mail*

The Honorable Richard Glick  
Chairman  
U.S. Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, DC 20426

Dear Chairman Glick:

The Appalachian Trail Conservancy (“Conservancy” or ATC) looks forward to the Commission’s establishment of an Office of Public Participation (“OPP”). FERC’s work has always been vital to the national interest, but given the complexity of the issues FERC deals with, it has long been difficult for the public to participate fully in FERC’s processes. Public input is more vital today than ever before, however, as the Commission navigates the necessary transition from fossil to renewable energy while engaging in major, long-term decisions such as a series of renewals of fifty-year hydroelectric licenses. The details of how the Commission establishes and operates OPP are important. We write to offer our recommendations for an OPP that will best achieve some of the key purposes of public participation.

The Conservancy is the § 501(c)(3) nonprofit organization that manages the Appalachian National Scenic Trail (“the Trail”), a unit of the National Park System, under a cooperative agreement with the National Park Service. The Conservancy works closely with the 31 Appalachian Trail Maintaining Clubs, the National Park Service, the United States Forest Service, 14 state governments, and public and private partners. Our mission is to protect and maintain of the natural, cultural, and experiential resources of the Appalachian Trail, as we have done since our founding in 1925. The Trail is 2,193 miles long, surrounded by approximately 300,000 acres of government-protected land (the Corridor), and has the second-longest boundary line within the National Park System (in excess of 4,000 miles). Its north-south orientation along the Appalachian Mountain Range provides the Conservancy a unique perspective on infrastructure development, as there have been, are, and will undoubtedly remain, extensive development pressures on the Trail and its protected Corridor. As the managers of a linear park—the first designated under the National Trails System Act and brought into the National Park System—ATC has extensive experience in conserving the natural, cultural, and experiential values of our public lands.

The Department of Energy Organization Act recognizes that FERC’s statutory mission and mandate include “restoring, protecting, and enhancing environmental quality” and “incorporat[ing] . . . national environmental goals in the formulation and implementation of energy programs.” FERC is also mandated “[t]o provide for, encourage, and assist public participation in the development and enforcement of national energy programs.” We salute the plans to develop an OPP to support the latter goal. We believe an effective OPP will be an important mechanism for helping FERC fulfill its mandates to manage energy supplies in a way that protects and enhances environmental quality.

Furthermore, we are confident that the OPP will be a leading voice in FERC's deliberations for the central national goal of limiting and mitigating climate change.

ATC recognizes that society's demand for energy and electrical resources is increasing. Still, demand should first be addressed with increased energy conservation strategies and demand-side management, to the extent that is technologically and economically feasible, followed by increasing our renewable energy supply. For example, the 1999 FERC Methane Policy Statement is meant to create a balance between the enhancement of competitive alternatives and the possibility of over-building pipelines. FERC's existing Methane Pipeline Statement needs updating because the energy landscape of today is dramatically different from 1999 when it was adopted.

An effective OPP is critical to ensure that FERC gets full information about the possibilities for conservation, demand management, and more. Moreover, in the past, environmental concerns have often not been fully aired in FERC's decision-making processes. These important considerations include the lasting value of intact forest land and clean rivers to provide habitat connectivity, conserve clean air, bank carbon, and drive outdoor recreation economies. For example, a decision about whether to allow the construction of new pipeline infrastructure must recognize that it may compromise valuable landscapes. While the infrastructure itself will have an expected utility of only about 50 years, far shorter than the long time horizon that intact landscapes could be preserved, the impacts to a previously intact ecosystem may last longer. Additionally, fragmenting forest to facilitate the burning of fossil fuels and release of planet-warming gasses may not serve the nation's long-term goals of reducing climate-endangering emissions. How these concerns play out in a particular matter, and how FERC balances them against energy needs, may be complex. The OPP will be an important resource for helping FERC make those decisions in a sound, fully informed manner.

To help the OPP be the best it can be, the Conservancy makes the following recommendations:

- (1) Given the limited opportunities to influence the trajectory of a proposed project, the Commission recognize pre-filing consultations for a gas pipeline certificate or a hydroelectric license as a "significant proceeding" under Federal Power Act section 319.
- (2) The OPP should facilitate early stakeholder participation beginning in the pre-filing phase of a proposed development or renewal of authority for development or operation.
- (3) OPP should act as the primary outreach entity regarding proposed development under FERC's jurisdiction. FERC should, through OPP, conduct its own stakeholder outreach.
- (4) OPP's assistance to those seeking to participate and/or intervene in a matter should facilitate, as much as possible, representation and expertise on a footing similar to those of the applicants for licenses, permits, or certificates.

### **1. Pre-Filing Consultation is a Significant Proceeding**

Prospective applicants planning major energy infrastructure developments commonly take advantage of FERC's pre-filing consultation processes. Applicants recognize that after a formal application filing,

there are truly only a very limited number of points during the FERC application process that allow for significant course corrections or changes to a particular proposal; changes that do happen after a formal application are costly to everyone involved.

This dynamic has important consequences for public participation. Even bad ideas are advanced absent applicant restraint or stakeholder engagement, because once a formal application is filed, the process tends toward approval. If an applicant ignores the perspectives of other interested parties, often the only viable way to influence a proposed project is through litigation. That is, of course, the least desirable of potential engagement methods and should be avoided whenever possible.

Pre-application consultation is meant to identify potential weaknesses in an application as well as apprise the prospective applicant of how the process will proceed. The pre-filing period is of significant value to the potential applicant in terms of education and access. Such education and access must be made available to those stakeholders that may be potentially impacted by the prospective development as well. After all, the pre-filing consultation process is a time for an applicant and stakeholders to identify relevant concerns, in as substantial a manner as feasible to enable an efficient application process; to work out solutions, where possible, to any concerns or disputes; and develop the information that FERC will need to assess the environmental consequences of a proposed project. This is substantial work. FERC's pre-filing policies implicitly assume that stakeholders will engage seriously in pre-filing consultations, but doing so requires a commitment of time, energy, and resources.

When proposed projects have similarities in purpose, similar nature of environmental concerns, and a common timeline among the projects, it makes economic and ecological sense for FERC to consider pipeline projects under a Programmatic Environmental Impact Statement (PEIS), or some reasonable regional review. This approach would simultaneously consider the purpose and need of each project, the cumulative impacts of these projects in a discrete geographic region, and the optimal combination and alignment of, for instance, pipelines to deliver gas from the Marcellus and Utica shale to eastern and southeastern markets. Identifying which projects would be appropriate and/or relevant for a PEIS is something best determined prior to the application's filing, during pre-filing consultations with FERC.

In recognition of these realities, upon establishing OPP, FERC should qualify the pre-filing phase for gas pipeline certificates and hydroelectric licenses as "significant proceedings" under section 319. Identifying the pre-filing part of the process as a "significant proceeding" will enable OPP to provide direct financial support for eligible stakeholders to contribute meaningfully to the consultation. The public that would be affected by a project should be able to use the services of scientific, engineering, and legal experts to develop the most useful input to the pre-filing process, given the significance of pre-filing consultation to the overall licensing endeavor. Strengthening the pre-filing process this way will empower both the potential applicant and the ascertainable parties of interest who may be impacted.

## **2. The Office Must Facilitate Participation in Pre-Filing**

Given the outsized impact consultations have during the pre-filing process, requests for pre-filing consultations should be addressed to OPP as well as to the Office of Energy Projects (OEP). Public participation is a key part of the pre-filing process, and it is natural that OPP should lead that

component. For it to be successful in that role, it must get notice at the same time as OEP, and it must be fully involved in all pre-filing conversations with a potential applicant. Among other reasons, the timeline for pre-filing consultations is quite tight. Currently, OEP guides the determination of dates for stakeholder meetings (for gas projects, within seven days of pre-filing consultation request), the contacting of identified stakeholders (within 14 days of the request), and receiving the list of contacted stakeholders (within 30 days of the request). For OPP to contribute meaningfully to enhancing public participation during this rapid process, it must be a full partner alongside OEP from the beginning of the process.

The pre-filing request is supposed to include detailed descriptions including routes, approach to the NEPA process, an identification of other agencies (tribal, federal, and state) with relevant jurisdiction, and a public participation plan. We request that, in addition to the identification of tribal, federal and state agencies that may have relevant jurisdiction, OPP should assist the potential applicant in its development of a public participation plan, including early outreach to ascertainable parties of interest (APIs). We recognize that it will not always be feasible to identify representatives of all affected interests in the neighborhood of a proposed project. But it should be straightforward to identify as APIs the relevant county governments; entities (like, in some areas of the country, ATC) that are responsible for managing public trust resources; and entities that would be likely to undertake litigation after a license approval. Facilitating input by local governments is likely to lead to better siting and a better appreciation by the potential applicant of pitfalls in the development of the infrastructure. Input from the latter categories of API is likely to give them the ability to express concerns upfront and give the potential applicant advance warning of potential attacks on the proposal.

The inclusion of county-level government and not simply state-level government is advisable because the county often considers things the state does not, being closer to the impacted individuals, the potentially impacted resources, and the economic engines of the community. Take, for example, the outdoor recreation industry, which depends on public lands and resources in which the public has a vested interest (e.g. national forests and the waters of the United States). The Bureau of Economic Analysis concluded that in 2019, the outdoor recreation economy generated \$887 billion in consumer spending annually and directly supported 5.2 million American jobs. Outdoor recreation provides 2.1% of U.S. Gross Domestic Product (GDP), a greater share than mining, utilities, farming and ranching, and chemical products manufacturing. While states may have an idea of which industries contribute what to the state-wide tax base, counties are more likely to know whether a potential development may disrupt assets that their communities rely on for recreation or economic output, as well as have the ability to identify which individual persons or entities may be valuable to engage as stakeholders.

We recognize that identifying APIs may sometimes be difficult. The monthly reports that applicants are supposed to file during the pre-filing process provide an excellent opportunity to work with applicants about ongoing efforts to find additional APIs to engage with. It will be important that applicants send these reports directly to OPP as well as to OEP.

### **3. FERC is Primarily Responsible for Ensuring Outreach**

One flaw in the current system is that FERC relies on the potential applicant—the party that wants to build—to conduct the public outreach. This is a loophole in maintaining the public trust too large to be tolerated. Those seeking to develop energy infrastructure inevitably have greater resources and an appreciation for the system that may grant them permission than almost any individual or organization they will encounter during a stakeholder engagement process. They also are likely to have, at least in one sense, the absolute opposing perspective of many those they will be engaging, particularly when a FERC approval will empower them to use eminent domain to seize property without consent.

Truly, the federal government, whose authority will ultimately be employed to seize land rights, must make contact with those potentially impacted. This critical step should not be left in the hands of the applicants that want to use that governmental authority for their own purposes. The OPP should have the ability and the responsibility to do public outreach directly, during the pre-filing phase as well as after a formal application is filed. We encourage FERC to establish field duty stations for employees of the Office, initially wherever FERC field offices are located. Subsequently, the OPP may find it expedient to fulfil its statutory purposes to establish offices on a temporary or potentially permanent basis where there is a high demand for infrastructure development.

### **4. Without Similar Footing, Non-Developers Remain at a Significant Disadvantage**

In order to serve its Congressionally determined purpose, the Office must possess sufficient in-house expertise and the funding to obtain outside expertise in order to provide those seeking participation and potentially intervention meaningful access to relevant investigations, studies, analyses, legal counsel, and educational programming. The OPP must thoughtfully consider critical societal perspectives, such as environmental justice and the need for regional, national, and global evaluation of demand, need, and necessity. The ability to participate or intervene is not worth much if those whose interests are negatively impacted are without the resources to make their case in Commission proceedings as those proposing the development are able. Similar footing to make their case is fundamental to the establishment and must be to the operation of the OPP.

Currently, the responsibility of representing those whose rights are impacted—or to ensure compliance with applicable state and federal law—often falls to entities providing pro bono services. While many of these entities have exceptional experience and credentials, section 319 authorizes FERC to support these services, through the OPP, to ensure that individuals impacted themselves are represented. By appropriately funding the OPP in the manner prescribed by Congress, the OPP may certify individuals or classes of individuals to participate or intervene, as appropriate, and guarantee as much as possible the Commission’s consideration of all relevant information in determining whether, as for a natural gas/methane pipeline, the proposal is a matter of “public necessity.”

### **Conclusion**

The Appalachian Trail Conservancy appreciates the opportunity to share our perspective as the Committee considers how to structure and staff the Office of Public Participation. We welcome the

opportunity to meet to discuss our comments and perspective, especially given unique considerations for the Appalachian National Scenic Trail, the surrounding region, and the continually involving needs of the United States and the rest of the planet in regards to the anthropogenically changing climate. I may be reached at [bmysliwec@appalachiantrail.org](mailto:bmysliwec@appalachiantrail.org).

Respectfully,

A handwritten signature in blue ink, appearing to read "Brendan Mysliwec", with a long horizontal flourish extending to the right.

Brendan Mysliwec  
Director of Federal Policy and Legislation  
Appalachian Trail Conservancy

CC: Commissioner James Danly  
Commissioner Neil Chatterjee  
Commissioner Allison Clements  
Commissioner Mark Christie