

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426
April 14, 2022

OFFICE OF ENERGY PROJECTS

Project No. 1889-085
FirstLight MA Hydro LLC

Project No. 2485-071
Northfield Mountain LLC

Project No. 1855-050
Great River Hydro, LLC

Project No. 1892-030
Great River Hydro, LLC

Project No. 1904-078
Great River Hydro, LLC

VIA FERC Service

Rich Holschuh
Tribal Historic Preservation Officer
Elnu Abenaki Tribe
117 Fuller Drive
Brattleboro, VT 05301

Re: Comment Letters Dated September 20 and 21, 2021

Dear Messrs. Holschuh, Sheehan, and Taylor:

We received your letters filed on September 20 and 21, 2021, in which you express concern regarding the adequacy and completeness of consultation between the Elnu Abenaki Tribe, the above-listed licensees, and Commission staff, regarding the relicensing of FirstLight's¹ Turners Falls Project No. 1889 and Northfield Mountain Project No. 2485, and Great River Hydro, LLC's (Great River Hydro) Bellows Falls Project No. 1855, Wilder Project No. 1892, and Vernon Project No. 1904 (collectively, Connecticut River Projects). Additionally, you request "that FERC require the licensees

¹ FirstLight MA Hydro LLC and Northfield Mountain LLC are collectively referred to as FirstLight.

. . . to codify and support a [Programmatic Agreement (PA)] or [Memorandum of Understanding] between themselves and the Elnu Abenaki Tribe that will meaningfully inform an ongoing [Traditional Cultural Properties (TCP)] process, as a living document, which can then inform a comprehensive and responsive [Historic Properties Management Plan (HPMP)].” We offer the following information to encourage and assist your continued participation in the relicensing process.²

Background

Under section 106 of the National Historic Preservation Act (NHPA)³ and its implementing regulations,⁴ federal agencies must take into account the effect of any proposed undertaking on properties listed or eligible for listing on the National Register of Historic Places (defined as “historic properties”) and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. This process generally requires the Commission to consult with the State Historic Preservation Officer (SHPO) and other consulting parties, such as federally recognized Indian Tribes,⁵ to determine whether and how a proposed action may affect historic properties, and to seek ways to avoid or minimize any adverse effects. In many cases, to satisfy its consultation responsibilities, the Commission executes a PA with the SHPO when the proposed project may affect historic properties.⁶ Prior to executing a PA, the Commission can consider adding additional consulting parties.

The Relicensing Process for the Connecticut River Projects

The relicensing process for these projects began in 2012, with the filing of the notices of intent (NOI) and pre-application documents (PAD) by the respective licensees

² The relicensing process for these five projects is governed by Part 5 of the Commission’s regulations. 18 C.F.R. §§ 5.1-5.31 (2021).

³ 54 U.S.C. § 306108.

⁴ 36 C.F.R. pt. 800 (2021).

⁵ The NHPA defines “Indian Tribe” as “an Indian tribe, band, nation, or other organized group or community . . . that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.” 54 U.S.C. § 300309.

⁶ The PA generally requires the licensee to implement an HPMP for the term of the license to address any adverse effects to historic properties.

or their predecessors.⁷ In addition to the Federally Recognized Tribes consulted, FirstLight provided the NOI and PAD for the Turners Falls and Northfield Mountain projects directly to the Elnu Abenaki Tribe for review and comment.⁸ On December 21, 2012, the Commission issued a public notice of the NOI and PAD and solicited comments on the PAD, scoping document, and suggestions for additional studies. In January 2013, the Commission held six in-person scoping meetings in the vicinity of the five projects to help identify study needs, specifically requesting input from Indian Tribes, among others.⁹

On April 15, 2013, the licensees filed Proposed Study Plans for the Connecticut River Projects, which included cultural resources surveys but not TCP studies.¹⁰ In May and June 2013, the licensees held additional public meetings to discuss the study plans, including cultural resources surveys.¹¹ On July 15, 2013, The Nolumbeka Project¹² filed a study request that the licensees conduct a TCP study for the projects. The licensees

⁷ This letter uses the term “licensees” to refer to licensees FirstLight and Great River Hydro or their predecessor licensees, FirstLight Hydro Generating Company for the Turners Falls and Northfield Mountain projects and TransCanada Hydro Northeast Inc. for the Bellows Falls, Wilder, and Vernon projects.

⁸ FirstLight, NOI/PAD, Docket Nos. P-1889-085 and P-2485-071, at 16 (filed Oct. 31, 2012) (including the Elnu Abenaki on the distribution list for the projects).

⁹ See December 21, 2012, NOI and PAD and Request for Comments at 4 (“The daytime meetings will focus on resource agency, Indian tribes, and non-governmental organization concerns, while the evening meetings are primarily for receiving input from the public.”)

¹⁰ FirstLight, Proposed Study Plan, Docket Nos. P-1889-085 and P-2485-071, at 3-209 (filed Apr. 15, 2013); TransCanada Northeast Hydro Inc., Proposed Study Plan, Docket Nos. P-1855-050, P-1892-030, and P-1904-078, at 236 (filed Apr. 15, 2013).

¹¹ FirstLight, Proposed Study Plan, Docket Nos. P-1889-085 and P-2485-071, at ii (filed Apr. 15, 2013); TransCanada Northeast Hydro Inc., Proposed Study Plan, Docket Nos. P-1855-050, P-1892-030, and P-1904-078, at 5 (filed Apr. 15, 2013).

¹² The Nolumbeka Project describes itself as a “non-profit organization dedicated to the preservation of the history of Native Americans/American Indians of New England through educational programs, art, history, music, heritage seed preservation and cultural events.” Nolumbeka Project, *Who We Are*, <https://nolumbekaproject.org/who-we-are/> (accessed Mar. 29, 2022).

agreed and added a TCP study to their Revised Study Plans filed on August 14, 2013.¹³ The TCP studies were conducted in 2014 and 2015. All interested stakeholders were invited to participate. The Elnu Abenaki did not participate.

Continuing Opportunities to Participate in the Relicensing Processes

The views of Indian Tribes are essential to inform Federal decision-making in the relicensing and section 106 processes. There are upcoming, important opportunities to participate in the relicensing process. We encourage you to avail yourselves of them.

FirstLight and Great River Hydro filed Amended Final License Applications for the projects on December 4, 2020, and December 7, 2020, respectively. Since then, Commission staff has continued to engage in additional information collection. Pursuant to Commission regulations, the next step in the proceeding is for the Commission to issue Notices of Acceptance and Ready for Environmental Analysis (REA), which will solicit comments and interventions.¹⁴ Comments will be due 60 days after the issuance date of the REA notices.¹⁵ The Commission will next issue a draft environmental document (either a draft Environmental Assessment or draft Environmental Impact Statement), that will consider comments filed on the REA notices, including any proposed and recommended measures, terms and conditions, and prescriptions. Comments on the draft environmental document will be due after issuance of the draft environmental document as specified in the accompanying notice.¹⁶ A final environmental document will then be prepared and issued.

Commission staff will evaluate whether the proposed projects adversely affect historic properties and whether measures are needed to protect historic properties, including the need for an HPMP and the need to execute a PA to meet the requirements of section 106 of the NHPA. Commission staff's conclusions on the need for a PA and an HPMP will be discussed in the draft environmental document. Should a PA be necessary, Commission staff will draft a PA and invite parties to consult on it. Finally, the Commission will make a decision on the license applications, including whether to issue new licenses and, if so, which conditions to include in any issued licenses.

In your letters, you state that the Elnu Abenaki Tribe has knowledge of TCPs that are not yet included in the record. At Turner Falls, you note that the area known as the

¹³ FirstLight, Revised Study Plan, Docket Nos. P-1889-085 and P-2485-071 (filed Aug. 14, 2013); TransCanada Northeast Hydro Inc., Revised Study Plan, Docket Nos. P-1855-050, P-1892-030, and P-1904-078, at 353 (filed Aug. 14, 2013).

¹⁴ 18 C.F.R. § 5.22.

¹⁵ *Id.* § 5.23.

¹⁶ *Id.* § 5.25.

Rock Dam, located in the bypassed reach between the Turners Falls Dam and Cabot Station, is an ancient traditional fishing place. Similarly, at Bellow Falls, you note that the petroglyphs, located in the bypassed reach, are an ancient and sacred traditional fishing place and burial ground surrounded by sensitive, well-documented archaeological sites. To the extent the Elnu Abenaki Tribe has information pertaining to TCPs at any of the five projects that is not yet in the record, the Commission strongly encourages you to file that information so that it may inform our analysis of project effects on TCPs. The Commission would like to be able to consider this information in its environmental document. Any sensitive information about the location, character, or ownership of an historic property should be filed as privileged.¹⁷ Section 388.112 of the Commission's regulations describes the procedures for requesting privileged treatment for some or all of the information contained in a particular document.¹⁸

Options for Filing Sensitive Cultural Resources Information

The Commission's ex parte rules forbid the Commission from receiving information regarding the merits of a contested proceeding that is not available to other parties to the proceeding.¹⁹ Therefore, any information filed as privileged that you want the Commission to consider in reaching a decision must be disclosed to state and federal agencies with responsibilities for protecting cultural resources and to the applicant and other entities on a "need to know" basis. The Commission will notify you if someone requests access to a filing containing sensitive cultural resources information.

You may request that any person seeking access to sensitive cultural resources information first sign a non-disclosure agreement, in which the person will agree to keep the information confidential and to use it only for the purpose of the proceeding. It is preferable that the entities involved in a proceeding negotiate the terms of a non-disclosure agreement early in a proceeding before any sensitive information is likely to be filed. Another option would be to redact sensitive information from a filing. Redaction would allow a filer to protect such things as site-specific information but would also mean that the Commission would not be able to consider the more detailed information in reaching a decision.

¹⁷ Section 304 of the NHPA provides that Federal agencies must withhold from public disclosure information about the location, character, or ownership of an historic property "if that disclosure may cause a significant invasion of privacy; risk harm to the historic property; or impede the use of a traditional religious site by practitioners." *See* 54 U.S.C. § 307103. Relatedly, FOIA exempts from disclosure information that is exempted from release by statute. 5 U.S.C. § 552(b)(1)(3).

¹⁸ 18 C.F.R. § 388.112 (2021).

¹⁹ 18 C.F.R. § 385.2201 (2021).

The Commission strongly encourages electronic filing. Please file the requested information using the Commission's eFiling system at <https://ferconline.ferc.gov/eFiling.aspx>. For assistance, please contact FERC Online Support at FERCOnlinesupport@ferc.gov; call toll-free at (866) 208-3676; or, for TTY, contact (202) 502-8659. In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, MD 20852. The first page of any filing should include docket numbers P-1889, P-2485, P-1904, P-1855, and P-1892, as appropriate.

If you have additional concerns or questions regarding the licensing process and participation opportunities, you may contact Steve Kartalia of the Office of Energy Projects at (202) 502-6131, or Stephen.Kartalia@ferc.gov, regarding the relicensing process for the projects.

Sincerely,

Vince Yearick
Director
Division of Hydropower Licensing