

February 10, 2022

Ms. Kimberly D. Bose  
Secretary Federal Energy Regulatory Commission  
888 First Street, N.E.  
Washington, D.C. 20426

**Via online submission to: <http://www/ferc.gov> (cross-filed)**

**Subject: Preliminary Comments on the Proposed Study Plan (PSP) for the Ripogenus Project (P-2572) and the Penobscot Mills Project (P-2458)**

Dear Secretary Bose:

The Maine Council of Trout Unlimited (“TU”), Appalachian Mountain Club (“AMC”), American Whitewater (“AW”), Caribou, Chesuncook Lake Camp Owners Association, Chesuncook Dam Camp Owners Association, the Allagash Gateway Campground, and Andre Emerson Cushing Corporation file these comments to address our underlying concerns regarding the current status and direction of the relicensings of the Ripogenus Project (P-2572) and the Penobscot Mills Project (P-2458) being undertaken by Great Lakes Hydro America, LLC for Brookfield Renewable (“Brookfield”) or (“Applicant”). Brookfield filed its Proposed Study Plan on November 22, 2021. While each of our organizations intends to file separate comments in response to specific study requests, we are providing these comments to voice our shared concerns regarding the manner in which Brookfield has approached the relicensing process to date.

## **Background**

Maine Council of Trout Unlimited represents six local chapters with over 2,000 fisher-conservationists in Maine. The mission of the organization is to bring together diverse interests to care for and recover rivers and streams so our children can experience the joy of wild and native trout and salmon. The entire watershed of the West Branch of the Penobscot is especially important to a great many of our members who enjoy its fishing resources, including the area from McKay Station to Nesowadnehunk Falls, Ripogenus-Chesuncook-Caribou Lake, and the waters below to its confluence with the main stem of the Penobscot River that are greatly affected by the Ripogenus and Penobscot Mills projects.

Since 1876, the Appalachian Mountain Club has promoted the protection, enjoyment, and understanding of the mountains, forests, waters, and trails of the Appalachian region. AMC is the largest conservation and recreation organization in the Northeast with more than 90,000 members, supporters, and advocates, many of whom visit the lands and waters upstream and downstream of the projects for recreation.

American Whitewater is a national non-profit 501(c)(3) river conservation and recreation organization founded in 1954. With approximately 6,000 members and 100 affiliate clubs, representing tens of thousands of whitewater paddlers across the nation, American Whitewater’s mission is to protect and restore our nation’s whitewater resources and to enhance opportunities to enjoy them safely. Our members are primarily conservation-oriented kayakers and canoeists, many of whom live and/or engage in recreational boating in the New England region within reasonable proximity to the West Branch of the

Penobscot River. American Whitewater has long been involved with the FERC licensed hydropower projects in Maine, including hydropower projects located on the Penobscot, Kennebec, Rapid, and Magalloway rivers, and is party to settlement agreements that provide for whitewater boating opportunities that partially mitigate for project impacts. We highly value the whitewater activities offered by the West Branch.

The Caribou and Chesuncook Lake Camp Owners Association and Chesuncook Dam Camp Owners Association represent the interests of those with property on the shores of these lakes who have been greatly affected by the severe dewatering of the Ripogenus-Chesuncook impoundment in recent years.

Allagash Gateway is a four-season sporting camp located on Ripogenus Lake near the Chesuncook Dam Point Boat Launch. It offers a private boat launch, canoeing, campsites, lodging, guide services, and a small store. During the summer months, Allagash Gateway's clientele is primarily interested in boating and fishing the lakes that make up the Ripogenus impoundment. Operations of the campground have been profoundly impacted over the last few years by the water levels of Ripogenus Lake and Chesuncook Lake.

Andre Emerson Cushing Corporation is the majority landowner in T3 R12 WELS. Approximately 80% of Ripogenus Lake and 20% of Chesuncook Lake are within the boundaries of T3 R12 WELS. William Cushing, a director of Andre Emerson Cushing Corporation, is a year-round resident of T3 R12 WELS, and his home is on Ripogenus Lake.

## The Problem

Brookfield devotes pages of the Pre-application Document (PAD) to the assertion that: *"GLHA maintains that a full suite of new studies is not needed, that the vast body of information on which today's certifications and licenses are soundly based and should be relied upon for these relicensings. In addition, consistent with the Commission's criteria for study requests, the scope and extent of any new study be focused on addressing specific data gaps necessary to inform the development of license requirements."*<sup>1</sup> The PAD goes on to explain: *"These PM&E measures comprehensively address resource interests specific to the Project areas, as well as the larger river basin. These interests include water quality; management and balancing of flows within and downstream of the West Branch; aquatic and terrestrial resources; whitewater and recreational opportunities; cultural resources; and land management."*<sup>2</sup> The implication is that these measures remain fully adequate when they are not. The PSP states: *"Based on the totality of studies conducted, settlement agreements reached, PM&E measures incorporated, and water quality certifications issued, FERC's 1996 licenses concluded that the Projects are best adapted to serve the public interest. GLHA maintains that nothing has significantly changed that would alter this conclusion."*<sup>3</sup>

These assertions could not be more wrong and started the relicensing off on the wrong foot. A glaring example: The Ripogenus-Chesuncook impoundment has not been fully watered in two years, and the boat launch provided as PM&E has been so far from the waterline for most of the summers so as to be practically unusable, as many photos have clearly shown. The public interest has vastly changed since the last relicensing. Agencies bent over backward to ensure the profitability of the mills in East

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<sup>1</sup> Brookfield Notices of Intent and Pre-application Documents for the Ripogenus Project (P-2572) and the Penobscot Mills Project (P-2458) dated June 11, 2021, page 1-11.

<sup>2</sup> Id., page 1-8.

<sup>3</sup> PSP, pages 11-12.

Millinocket, the major employer in the area, that were supplied by power the projects provided. If that were not the case, the Use Attainability Analysis (UAA) and the provisions of 38 M.R.S.A. § 464(9-A) would not have allowed so much leeway for project operations, e.g., no minimum drawdown for the Ripogenus-Chesuncook impoundment other than the lowest levels the physical characteristics of Ripogenus Dam allow. Other examples included the dewatered Ripogenus Gorge on the main stem of the West Branch below Ripogenus Dam and 4.5 miles of the main stem below Stone Dam. **It is highly unlikely that these examples would have been permitted under the last relicensings were it not for economic considerations that simply no longer exist.** With the mills closed and the electricity produced by the projects going to the grid and not dramatically affecting the economy of the region, the situation has changed greatly, and that change needs to be acknowledged for the relicensing process to proceed effectively under the ILP. Brookfield should acknowledge this fact or include the request for a socio-economics study submitted by the Penobscot Indian Nation<sup>4</sup> in its Revised Study Plan.

Brookfield is required to provide FERC with information in the PAD and PSP referencing either relevant and recent existing studies or proposing new studies that address a number of subject areas including: Fish and Aquatic Resources, Recreation and Land Use, Aesthetic Resources and Tribal Resources. Instead, Brookfield relies on dated, unavailable, or non-existent studies or directs stakeholders to search for the information themselves at other agencies or on the Internet. Examples: Fisheries Resources - including "*Species life stage composition*"<sup>5</sup> were provided by referencing data some of which is over 30 years old. During the PSP teleconference, Brookfield referred the requirement to the Maine Department of Inland Fisheries and Wildlife. It is not the Department's requirement to provide the information, it is the Applicant's obligation, and the data still has not been fully provided for all projects' reaches except by references to a number of studies of varying ages. Recreation and Land use was nearly ignored, and we fail to understand the relevance of Brookfield's reference to "*Existing shoreline management policies*"<sup>6</sup> for an impoundment that has not been fully watered for two years and where the waterline has generally been hundreds of feet from the boat launch it accesses. There are many recreational amenities not in the project area that are well known and frequently used that will not be considered by forthcoming studies. The accepted information and study standards are simply being ignored.

The key studies are the flow studies proposed by the National Marine Fisheries Service (NMFS); key information is the ten years of operational data requested by the National Marine Fisheries Service (NMFS) There is no USGS flow gauge above the Medway Project nearby to the confluence of the West Branch with the main stem of the Penobscot River. Brookfield has been reluctant to release operational data that would reveal flows. Brookfield clearly has this data and has provided it to FERC Compliance Division on a number of occasions when reporting flow excursions. There was some discussion during the PSP Teleconference of delaying the requirement for a project operations and flow monitoring plan until after the new license is issued. This would make the relicensing process itself nearly meaningless. Over 50 years have passed since the passage of the Clean Water Act. Our nation's waters now run clean but too many still lack the indigenous aquatic organisms due to dams and lack of access to critical habitat. The dams on the West Branch will remain for the foreseeable future. The task of relicensing is to manage the resource most effectively to support all uses including power generation, ecology, recreation and aesthetics. Flow data is essential to the relicensings of both projects. It has been available all along and should have been offered with the PAD. While Brookfield has stated that it will provide

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<sup>4</sup> Penobscot Nation letter dated October 12, 2021, RE: Penobscot Mills (P-2458-247) and Ripogenus (P- 2572-133) Notice of Intent, Pre-application document, Scoping document #1 and study requests

<sup>5</sup> Id., page 5.

<sup>6</sup> Id., page 6.

some flow data with the RSP, this will not provide stakeholders with sufficient time to analyze and comment on data that Brookfield has yet to provide.

The Integrated Licensing Process is intended to “streamline the Commission's licensing process by providing a predictable, efficient, and timely licensing process that continues to ensure adequate resource protections.” To date, any reasonable analysis of Brookfield’s participation in the Ripogenus - Penobscot Mills relicensing process indicates that Brookfield is attempting to delay and confuse the process by failing to provide the data required by FERC with the PAD, and then rejecting study requests involving the data.

### **The Commission’s Opportunities**

The FERC process has developed over the years to provide an orderly process leading toward licensing or relicensing of an energy project. 18 CFR § 5.6 clearly defines what information the applicant should provide in the PAD. Instead of providing it, Brookfield referenced studies conducted over 30 years ago and proposed to fill “data” gaps. Stakeholders submitted requests for the information in their PAD comments; Brookfield’s response was to concentrate on the study requests and instead of providing the requested information in a usable form, to provide or reference old studies. This is not how relicensings are generally conducted under the ILP, whether or not the relicensing is the first conducted after passage of Electronic Consumers Protection Act (ECPA).

We appreciate FERC staff’s recognition that the terms “dry way” and “back channel,” used by Brookfield to refer to dewatered sections of the main stem of the West Branch, are inappropriate. We also applaud SD2 as a significant step in the right direction and expanding significantly on the limited scope that Brookfield had proposed. Brookfield’s response was to issue a Proposed Study Plan that only accepted three studies as submitted. In a number of cases, studies are rejected that are clearly indicated by the SD2 as within the scope of FERC’s planned NEPA analysis, yet Brookfield is not committing to completing studies that will address the data gaps and scope provided by SD2. For example, SD2 identifies that the NEPA analysis will seek to understand the effects of the projects on angling access/opportunities on the project impoundments, yet the PSP provides for no methodology or approach within the recreation study to specifically survey or assess the impact to and quality of angling on the impoundments and this information cannot be ascertained solely through spot counts and a facility assessment. Comparable, SD2 indicates that the NEPA analysis will assess the effects of the projects on angling opportunities for landlocked salmon and brook trout in the riverine reaches, which cannot be adequately assessed using the PSP’s methodology which includes only site assessments and spot counts.

Furthermore, in arguing that study requests lack a nexus to project effect, the licensee relies on the *Centralia* decision (*City of Centralia v FERC*, 213 F.3d 742, 749 (D.C. Cir., 2000)) to argue that certain studies are an attempt to search for a problem where there is no evidence that problem exists. The licensee’s reliance on *Centralia* is misplaced. That case concerned a post-license study of the need for a tailrace barrier net where there was substantial evidence in the record that the barrier net was unneeded. There the court found that the project effects of the discharge on fish were entirely speculative. Similarly, in *City of Jackson, Ohio*, 105 F.E.R.C. ¶161,136 n.9 (2003), a FERC decision on which the licensee relies, likewise involved a post-license study to assess whether the project was having an adverse effect on fisheries resources. This decision is inapplicable to circumstances such as are present on the West Branch of the Penobscot where the effect of the project on a protected resource is clear and the study is designed to evaluate the extent of that impact so that FERC can complete its NEPA review based on its scoping document. *FPL Energy Maine Hydro, LLC*, 95 F.E.R.C. ¶161,106 n.15 (2001)

and *Allegheny Energy Supply Company, LLC*, 109 F.E.R.C. ¶61,028, 61,117 (2004), also cited by the licensee, likewise involved the need for a license condition requiring a post-license study of project effects on fish. Each of these cases is inapposite to the study requests on the West Branch.

The licensee endeavors to extend the holding in *Centralia* and subsequent FERC decisions to argue against requiring studies *during* the pre-application phase of the Integrated Licensing Process (ILP) to limit the information available to FERC for its NEPA analysis. FERC's nexus requirement in its study criteria was not intended to create a barrier to study of project effects on resources that are within FERC's power to address in a license condition. In effect, the licensee's circular logic would require prior study in order to justify the need for a study while prior study makes the need for a study unnecessary. To meet FERC's nexus criteria, a proposed study need only show that the project has a direct or indirect effect on a non-developmental resource that will be evaluated by FERC as part of its environmental assessment. This Catch-22 scenario was certainly not what Congress intended when the Electric Consumers Protection Act amended the Federal Power Act to require that FERC "shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality." 16 U.S.C. § 797(e).

The circumstances surrounding the *Centralia* decision are different from those surrounding the Ripogenus - Penobscot Mills relicensings. Brookfield has applied the phrase "*where evidence of a problem has not been shown*" to a number of study requests. The dewatering large areas of Maine's third largest lake for months at a time, dewatering its most dramatic gorge or a 4.5 mile section further downstream, or abruptly reducing flows from about 2000 cfs to 400 cfs or lower stranding fish and macro-organisms in the process, provides ample evidence that a problem exists.

## Conclusion and Requests

Accordingly, we ask that:

- FERC require that Brookfield address these comments when evaluating each stakeholders' individual Proposed Study Plan Comments, and offer a Revised Study Plan that will inform the process with current information.
- FERC review the applicant's revised study plan immediately after issuance to ensure that all scope items included in SD2 will be adequately assessed in the proposed studies and that the revised study plan include methodologies that will close all data gaps. Should any gaps continue to exist between the scope of the NEPA analysis and the studies proposed by the applicant, FERC should require the applicant to update the revised study plan, before stakeholders are required to comment on the revised study plan.
- FERC staff consider these comments in making its Study Plan Determination and insist on a suite of studies that will inform the process in accordance with FERC guidelines pursuant to 18 CFR § 5.6 and avoid larger problems later in the relicensing process.
- FERC staff extend the deadline for comments on the Revised Study Plan to 60 days to allow the public to provide additional comments based on operations data and other information provided in the RSP that was not provided with the PSP.

Our organizations appreciate the opportunity to provide these preliminary comments on these important projects and hope that the Commission will act to allow the resource protection agencies to obtain a range of studies that can identify potential harms to the resource and thus enable the Commission to balance project harms and benefits.

Respectfully submitted,

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