

ONE HUNDRED FIFTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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MEMORANDUM

May 2, 2017

To: Subcommittee on Energy Democratic Members and Staff

Fr: Committee on Energy and Commerce Democratic Staff

Re: Hearing on “Legislation Addressing Pipeline and Hydropower Infrastructure Modernization.”

On **Wednesday, May 3, 2017, at 10:00 a.m. in room 2123 of the Rayburn House Office Building**, the Subcommittee on Energy will hold a hearing entitled “Legislation Addressing Pipeline and Hydropower Infrastructure Modernization.”

I. NATURAL GAS PIPELINE LEGISLATION

Background

Under Section 7 of the Natural Gas Act, the Federal Energy Regulatory Commission (FERC) reviews applications for the siting, construction, and operation of interstate natural gas pipelines. A pipeline company cannot construct or operate an interstate natural gas pipeline without a FERC-issued “certificate of public convenience and necessity.” Section 7 grants the right of eminent domain to a pipeline company that is issued a certificate of public convenience and necessity by FERC.

In 2002, FERC established a pre-filing phase to expedite the certificate application process by engaging stakeholders in the identification and resolution of stakeholder concerns prior to the filing of a formal application with FERC. This is a voluntary phase and it is used by about two-thirds of applicants for major interstate pipeline projects. During this phase, FERC contacts agencies that will be involved in preparing the environmental analysis of the project so that the scope of the environmental analysis can be defined and public outreach can begin. Depending on the details of a project, a number of agencies are responsible for evaluating permit applications under different statutes and participating in the environmental review process.

Once pre-filing activities are complete, or if the applicant chose to skip the pre-filing phase, the applicant submits an application for a certificate. During the application phase, FERC prepares the environmental analysis (either an Environmental Impact Statement or an Environmental Assessment) with the assistance of the cooperating agencies that have jurisdiction over aspects of the permitting process. FERC may place conditions on a certificate, such as obtaining all necessary federal and state permits and authorizations.

Section 313 of the Energy Policy Act of 2005 (EPA 05) amended the Natural Gas Act to designate FERC as the lead agency in preparing the environmental analysis and require FERC to establish a schedule for all necessary federal permits and authorizations. FERC requires federal and state agencies to make final decisions on requests for federal authorizations no later than 90 days after FERC issues its final environmental document, “unless a schedule is otherwise established by federal law.” Section 313 provides the remedy of a petition to the U.S. Court of Appeals for the DC Circuit for an alleged failure of an agency to issue, condition, or deny a permit within the established deadlines.

H.R. The “Promoting Interagency Coordination for Review of Natural Gas Pipelines Act”

This draft bill would require FERC to establish a schedule with deadlines for submission of information from other federal or state agencies, local governments or Indian tribes for a natural gas pipeline or liquefied natural gas project requiring FERC approval under the National Environmental Policy Act of 1969 (NEPA). Concurrent reviews by these federal or state agencies would be established to provide FERC with timely information. FERC would be allowed to pursue remedies or implementation plans if a federal or state agency fails to meet the schedule established by FERC under this section. The draft would also require federal and state agencies to accept aerial survey data and provides that such agencies may grant a conditional approval based on that data, conditioned on their verification by subsequent onsite inspection.

II. CROSS BORDER LEGISLATION

HR. The “Promoting Cross-Border Energy Infrastructure Act”

The discussion draft establishes a new permitting process for applicants seeking to construct, connect, operate, or maintain a border-crossing facility for importing or exporting oil, natural gas, or electricity from Canada or Mexico.¹ Under the new process, the relevant official must issue a “certificate of crossing” for a border-crossing facility within 120 days of final action under the NEPA, unless the official finds that the project “is not in the public interest of the United States.”² The relevant officials are FERC for oil and natural gas pipelines, and the Secretary of Energy for electric transmission lines. FERC currently has no authority or

¹ A similar proposal was considered as part of H.R. 8 in the 114th Congress. For further background information, please see this [memo](#) on section 3104. The Committee also considered H.R. 3301 during the 113th Congress. For further background information please see these [memos](#) from the related legislative hearing and markups on the bill.

² H.R. _ Promoting Cross-Border Energy Infrastructure Act § 2(a)(2)(A).

experience with the siting of oil pipelines. Cross border oil pipeline approval currently is delegated to the State Department.

The language replaces the existing presidential permit process that requires an entire trans-boundary project, not just a segment, to obtain federal approval,³ and establishes a rebuttable presumption of approval. Instead of requiring an agency to affirmatively find that a project is in the public interest, it shifts the burden of proof to opponents of the project to show that it is not in the public interest. Further a “border-crossing facility” is defined as the portion of the project “that is located at an international boundary.”⁴ This language limits the scope of review for federal approval to just a sliver of a much larger project—only that portion that physically crosses the border—and makes it more difficult for an agency to deny the application as contrary to the public interest.⁵

The discussion draft also amends section 3 of the Natural Gas Act to require the Department of Energy (DOE) to grant authorization for the export or import of natural gas to or from Canada or Mexico, within 30 days with no mechanism for a deadline extension. Currently, approvals can include conditions, such as prohibitions against simply using Canada or Mexico as a pass-through before shipping the gas to another country. If DOE is faced with rigid deadlines it cannot meet, the result may as likely be unnecessary application denials as expedited approvals.

Significantly, the draft exempts modifications to cross-border energy projects from any requirement for federal review or approval – either under the new certificate process or the existing presidential permit process. Under this section, modifications include a change in ownership, volume expansion, downstream or upstream interconnection, or adjustments to maintain flow (such as an increase or decrease in the number of pump or compressor stations).⁶ As a result, controversial modifications to cross-border pipelines or transmission lines would not be subject to any environmental review under NEPA, despite potentially having environmental impacts as significant as those resulting from an entirely new project.

III. HYDROELECTRIC POWER LEGISLATION

Background

Hydropower facilities built by utilities in interstate commerce are licensed by FERC under Part I of the Federal Power Act of 1935 (FPA). Under Section 6 of the FPA, FERC licenses hydroelectric projects for periods of up to fifty years.⁷ Section 15 of the FPA provides

³ Subsection (d) eliminates the current requirement to obtain a presidential permit for transboundary oil or natural gas pipelines and electric transmission lines.

⁴ H.R. _ Promoting Cross-Border Energy Infrastructure Act § 2(g)(1).

⁵ *Id.* at § 2(a)(2)(A).

⁶ *Id.* at § 2(g)(2).

⁷ 16 USC § 799.

for the relicensing of existing projects and automatic annual extensions for those projects whose licenses have expired but have yet to complete the relicensing process.⁸ For more background on hydroelectric licensing process, please refer to the [memorandum](#) for the March 13, 2017 Energy Subcommittee hearing.

A. H.R. The “Hydropower Policy Modernization Act of 2017”

This draft legislation contains several wide-ranging hydropower policy initiatives. The most significant provisions address the process for licensing hydroelectric facilities under the FPA, including designating FERC as the lead agency to coordinate the licensing process. FERC is provided the authority to set deadlines for decisions by federal agencies, states and tribes administering other laws (e.g. the Endangered Species Act, the Clean Water Act, etc.) and limits deadline extensions to a single 30-day period, regardless of whether such timelines are feasible. The extension of FERC’s authority conflicts with states’ rights to manage water quality and quantity. The draft would designate the Council on Environmental Quality (CEQ) as the arbiter of interagency disputes surrounding any failure to adhere to FERC’s schedule, as well as contentions regarding alternative conditions and prescriptions. The bill also provides both license applicants and other stakeholders a new ability to challenge a mandatory resource protection condition or prescription, opening the door for protracted litigation.

Another major change involves alterations to the “trial-type hearing” process, established by the Energy Policy Act of 2005 (EPA05) the applicant’s request. Significantly, the legislation would require such hearings –which address issues related to mandatory conditions imposed by federal resource agencies-- to be conducted by a single FERC Administrative Law Judge (ALJ) rather than ALJs at the resource agency with expertise in the law giving rise to a challenged condition. The ALJ is not empowered to determine whether the original or alternative condition or prescription should be adopted. A decision by the FERC ALJ regarding challenges to a mandatory condition would be final and leave the Secretary originating that condition the choice to either adopt, modify, or withdraw the condition. Decisions of the ALJ under this section on disputed facts are not subject to further administrative review, but would be part of the consolidated record and subject to judicial review.

Other aspects of the legislative draft include provisions to expand the federal renewable energy purchase requirement established under EPA05, and broaden the statutory definition of renewable energy to include all existing hydropower rather than just new capacity. The draft also provides FERC with the authority to grant longer periods for preliminary and construction permits and associated extensions under Sections 5 and 13 of the FPA. The legislation also provides FERC with new authority to approve qualifying project upgrades to an existing licensed project under a very streamlined process.

⁸ 16 USC § 808(a).

B. H.R. The “Promoting Hydropower Development at Existing Non-Powered Dams Act”

This draft legislation would allow FERC, in consultation with federal and state resource agencies and Native American tribes, to exempt any existing dam that has not previously been developed for energy production from regulation under the FPA (including assignment of mandatory conditions). The draft limits terms and conditions of an exemption to only those “necessary to protect public safety or reasonable, economically feasible, and essential to prevent loss of or damage to, or to mitigate adverse effects on, fish and wildlife resources directly caused by the construction and operation of the qualifying facility, as compared to the environmental baseline existing at the time the Commission grants the exemption.” Additionally, the draft limits environmental review under NEPA and the scope of the federal government’s jurisdiction over a project. It also creates a fund for environmental enhancement projects within an associated watershed paid for by user fees.

C. H.R. The “Promoting Closed-Loop Pumped Storage Hydropower Act”

This draft legislation would exempt closed-looped pumped storage hydropower projects from the mandatory conditions and associated protections contained in Sections 4 and 10 of the FPA. The legislation would limit conditions that are necessary to protect public safety or the environment to those that are “reasonable, economically feasible, and essential to prevent loss of or damage to, or to mitigate adverse effects on, fish and wildlife resources directly caused by the construction and operation of the project.” The draft would also allow private entities to take advantage of municipal preference in licensing by partnering with or jointly filing for a license with a municipality.

D. H.R. The “Promoting Small Conduit Hydropower Facilities Act of 2017”

This draft legislation further expands the exemptions from hydropower licensing for small conduit hydropower facilities that were enacted by Congress in 2013. This legislation would exempt qualifying small conduit hydropower facilities from the FERC licensing process. The exemption would apply to projects that have a generation capacity that is greater than 2 MW and less than 5 MW. Under this process, FERC would have 15 days after receipt of a notice of intent to construct a small conduit project by the developer to determine if the project met the qualifying criteria. If FERC fails to make a determination within the 15-day period, the facility is deemed to qualify and the developer may proceed. The bill also exempts these projects from the requirement for FERC to publish a public notice of the determination of the project’s qualification for exemption from a license giving the public notice for 45 days with an opportunity for comment or contest of FERC’s determination.

E. H.R. 1538, The “Supporting Home Owner Rights Enforcement Act”

This legislation amends Sections 4 and 10 of the FPA to require FERC to consider and minimize infringement on “the useful exercise and enjoyment of property rights held by non-licensees” in issuing hydropower licenses. Further, it requires a licensee developing any recreational resource within the project boundary to consider private landownership as a means

to “encourage and facilitate” private investment as well as increased tourism and recreational use.

F. H.R. 2122, To Extend The Deadline For Commencement of Construction Of A Hydroelectric Project Involving The Jennings Randolph Dam

This legislation, introduced by Rep. McKinley, authorizes FERC to extend for six years the date by which the licensee is required to commence construction of a hydroelectric facility at the Jennings Randolph Dam located on the North Branch of the Potomac River in Maryland and West Virginia. Similar legislation passed the House of Representatives by a 418-2 vote during the 114th Congress.

G. H.R. 446, To Extend The Deadline For Commencement Of Construction Of A Hydroelectric Project

This bill, introduced by Rep. Griffith, authorizes FERC to extend for six years the date by which the licensee is required to commence construction of a hydroelectric facility at the Gathright Dam in Alleghany County, Virginia. Similar legislation passed the House of Representatives by voice vote during the 114th Congress.

H. H.R. 447, To Extend The Deadline For Commencement Of Construction Of A Hydroelectric Project

This bill, also introduced by Rep. Griffith authorizes FERC to extend for six years the date by which the licensee is required to commence construction of a hydroelectric facility at the Flannagan Dam in Virginia. Similar legislation passed the House of Representatives by voice vote during the 114th Congress.

IV. WITNESSES

The following witnesses have been invited to testify:

Panel One:

Mr. Terry Turpin

Director, Office of Energy Projects
Federal Energy Regulatory Commission

Mr. John Katz

Deputy Associate General Counsel, Office of General Counsel
Federal Energy Regulatory Commission

Panel Two:

William Robert Irvin

President and CEO
American Rivers

Jennifer Danis

Senior Staff Attorney

Eastern Environmental Law Center

*On behalf of Columbia University, the New Jersey Conservation Foundation, and the
Stony-Brook Millstone Watershed Association*

Mr. Andrew Black

President and CEO

Association of Oil Pipe Lines

Mr. Jeffrey A. Leahey

Deputy Executive Director

National Hydropower Association

Mr. Donald Santa

President and CEO

Interstate Natural Gas Association of America

Mr. Jeffrey Soth

Legislative and Political Director

International Union of Operating Engineers