

ONE HUNDRED FIFTEENTH CONGRESS
Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
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WASHINGTON, DC 20515-6115

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MEMORANDUM

June 5, 2018

To: Subcommittee on Energy Democratic Members and Staff
Fr: Committee on Energy and Commerce Democratic Staff
Re: Hearing on “Improving the Hydropower Licensing Process”

On **Thursday, June 7, 2017, at 11:00 a.m. in room 2123 of the Rayburn House Office Building**, the Subcommittee on Energy will hold a hearing titled “Improving the Hydropower Licensing Process.”

I. FEDERAL HYDROELECTRIC POWER REGULATION

Hydropower facilities built by utilities in interstate commerce are licensed by the Federal Energy Regulatory Commission (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 50 years.¹ Section 15 of the FPA provides 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.²

The FPA predates modern environmental statutes such as the Clean Water Act, the National Environmental Policy Act and the Endangered Species Act. As was characteristic of most environmental statutes passed before the 1970s, the FPA mostly focused on power production while providing few protections for the environment, recreation or similar considerations. One exception is Section 4(e) of the FPA, which required that any license within a reservation (e.g. a national wildlife refuge, national park, etc.) not interfere or be inconsistent with that reservation’s purpose and that the license be subject to “such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary

¹ 16 USC § 799.

² 16 USC § 808(a).

for the adequate protection and utilization of such reservation.”³ Another important environmental protection incorporated into the Act was the requirement in Section 18 that the Commission require licensees to construct, maintain and operate “such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce” in order to protect fish populations.⁴

In 1986, Congress enacted the Electric Consumers Protection Act (ECPA), PL 99-495, which significantly amended the FPA to require greater consideration by FERC of the environmental and recreational impacts of hydroelectric facilities in the licensing process. The ECPA demands that a decision by FERC to issue a license must not be based on power generation alone. Rather the Act directs FERC to also “give equal consideration to” such things as fish and wildlife protection and enhancement, energy conservation, protection of recreational uses of a river “and the preservation of other aspects of environmental quality.”⁵ ECPA also added subsection (j) to Section 10 of the FPA which requires a license contain conditions to “adequately and equitably protect, mitigate damages to, and enhance fish and wildlife...affected by the development, operation, and management of the project” and that such conditions be based on recommendations from federal and state fish and wildlife agencies.⁶

As part of the Energy Policy Act of 2005, Congress enacted a new set of reforms to the hydroelectric licensing process in response to longstanding complaints that the process took too long and resulted in uneconomic projects.⁷ Many licensees and their supporters continue to view the process as onerous, however, and have called for further legislative changes, particularly with regard to resource agencies’ mandatory conditioning authority.⁸ In contrast, tribal communities, fish and wildlife advocates, outdoor recreation advocates, and others believe that FERC too often defers to licensees and does not do enough to ensure that information to support license applications is available to support timely permitting decisions by other federal agencies, states and tribal governments.

II. HYDROELECTRIC LEGISLATION DURING THE 115TH CONGRESS

During the 115th Congress, the Committee has considered, and the House has passed, a number of bills to expedite various aspects of the hydroelectric licensing process, including those related to conduit hydroelectric facilities, non-powered dams and pumped-storage hydroelectric projects.

³ 16 USC §797(e).

⁴ 16 USC § 811.

⁵ 16 USC §797(e).

⁶ 16 USC §803(j).

⁷ See, e.g., House Committee on Energy and Commerce, *Hydroelectric Legislation*, 106th Cong. (Mar. 30, 2000) (Serial No. 106-106) (www.gpo.gov/fdsys/pkg/CHRG-106hhrg64033/html/CHRG-106hhrg64033.htm).

⁸ See, e.g., American Public Power Association, *Hydropower Issue Brief* (Feb. 2015) (publicpower.org/files/PDFs/Hydropower_1485898717956_2.pdf).

The most significant and contentious of these bills is H.R. 3043 sponsored by Rep. McMorris Rodgers (R-WA), which addresses the process for licensing hydroelectric facilities under the FPA, including designating FERC as the lead agency to coordinate the licensing process. The measure grants FERC authority to set deadlines for decisions by federal agencies, states and tribes administering other applicable laws (e.g. the Endangered Species Act, the Clean Water Act, etc.) and limits deadline extensions to a 90-day period, regardless of whether the agency's decisional timelines under these respective statutes are feasible for evaluating the project. The extension of FERC's authority conflicts with states' rights to manage water quality and quantity. 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.

H.R. 3043 further requires the Federal agency that is proposing a condition to protect water quality, endangered species, fisheries, or other natural or cultural resources to demonstrate that it gave equal consideration to energy supply, navigation, flood control, and air quality. The resource agencies have no direction or obligation in their respective statutes or in the Federal Power Act to consider any of these matters in making a recommendation as to a condition for a hydropower license. This provision is in direct contrast with current law, and significantly undermines the ability of these agencies to protect natural and cultural resources.

H.R. 3043 does not resolve or address at all one major cause of delay in the licensing and relicensing process, which is an applicant's failure to provide all the information necessary for federal resource agencies, states and tribes to make timely decisions. Disputes over the studies and information required to fulfill the obligations of all regulatory parties in the licensing process are often a source of delay. Although FERC has an obligation to ensure compliance with statutes administered by federal resource agencies,⁹ the Commission has frequently dismissed requests made by resource agencies and states for studies to enable them to issue legally defensible decisions or permits under their statutory authorities.¹⁰

III. WITNESSES

The following witnesses have been invited to testify:

Terry Turpin

Director

Office of Energy Projects

Federal Energy Regulatory Commission

⁹ Testimony of John Katz, *supra*, at note 1.

¹⁰ House Committee on Energy and Commerce, Responses submitted by David Steindorf, California Stewardship Director, American Whitewater, to the questions for the record, *Hearing on Modernizing Energy Infrastructure: Challenges and Opportunities to Expanding Hydropower Generation*, 115th Cong. (Mar. 12, 2017).

Chris Oliver

Assistant Administrator for Fisheries
National Oceanic and Atmospheric Administration

John Goodin

Acting Director
Office of Wetlands, Oceans, and Watersheds
Environmental Protection Agency

Greg Sheehan

Principal Deputy Director
U.S. Fish and Wildlife Service

Ryan Fisher

Principal Deputy Assistant Secretary of the Army (Civil Works)
Department of the Army