TESTIMONY OF TOM KIERNAN ON BEHALF OF
AMERICAN RIVERS
UNITED STATES HOUSE OF REPRESENTATIVES
THE ENERGY AND COMMERCE COMMITTEE
ENERGY SUBCOMMITTEE
HEARING ON "*Modernizing Hydropower: Licensing and Reforms for a Clean Energy Future*"
CONGRESSMAN BOBBY RUSH, CHAIRMAN
HEARING ON MAY 12, 2022

Chairman Rush, Ranking Member Upton, and Members of the Subcommittee:

Thank you for this opportunity to testify and share the perspective of American Rivers on the topic of *Modernizing Hydropower: Licensing and Reforms for a Clean Energy Future*.

My name is Tom Kiernan and I am the President and CEO of American Rivers. American Rivers is one of the leading national conservation organizations involved in hydropower licensing. Our staff have been involved in hundreds of new and original license proceedings since our founding, and we have seen the best and worst that the federal licensing process has to offer. Since 1973, American Rivers has protected and restored more than 150,000 miles of rivers through advocacy efforts, on-the-ground projects, and an annual America's Most Endangered Rivers ® Campaign. Headquartered in Washington, DC, American Rivers has offices across the country and more than 300,000 members, supporters, and volunteers. As the nation's leading river advocate, American Rivers seeks to ensure our nation's rivers and floodplains are protected.

American Rivers is a participant and leader in the *Uncommon Dialogue on Hydropower: Climate Solution and Conservation Challenge*, which is a forum created by the Stanford Woods Institute to change the paradigm around hydropower and river health by bringing together a diverse group of stakeholders to develop consensus policy, technology, and investment recommendations related to river health, hydropower, and dam safety. We chose to participate in this forum because we wanted to search for the win-win-win solutions to the challenging issue of hydropower licensing reform.

Licensing Reform touches on many of the most pressing issues of our time from biodiversity loss to climate disruption to racial and cultural inequity. We feel the weight of these challenges and have come to the negotiating table to try to positively address these issues. The licensing reform package we have brought to you today was born from the encouragement of this committee to seek common ground and find solutions. It is an extension of our shared goals of protecting rivers and tribal sovereignty while also generating renewable electricity that contributes to achieving a 21st century clean energy grid. This package is an integrated and holistic proposal that successfully creates common ground among the differing interests and priorities of the environmental, tribal, and industry constituencies and it has been carefully balanced to ensure that we "do no harm" to any constituencies' interests while advancing each of our constituencies' interests. American Rivers is grateful for the opportunity to provide our

perspective and we would like to invite the committee to join us in the same spirit of collaboration that we pursued in negotiating this package.

I will focus my testimony today on how the licensing reform package addresses how hydropower intersects with three significant challenges: biodiversity loss, climate disruption, and racial and cultural inequity.

Biodiversity Loss

Since 1970, the world has lost 83% of freshwater species and nearly ⅓ of freshwater ecosystems.[1] Freshwater species are declining twice as fast as their terrestrial and ocean counterparts.[2] One significant factor driving the loss of biodiversity is loss of habitat and connectivity.[3] Dams have significant effects on river ecosystems and when they are improperly sited or lack functional fish passage, they can contribute to the factors causing biodiversity loss.

The licensing reform package addresses this growing issue by requiring FERC to open a rulemaking to add timelines and greater specificity to the license surrender process. Even when all parties agree that a dam needs to be removed, it can take decades to do so. The Federal Power Act's existing surrender provisions, and FERC's existing regulations, lack timelines and milestones to help move the license surrender process forward in a timely manner. They also lack opportunities for early input by agencies and other stakeholders, making cost-effective multi-benefit solutions more difficult to advance and evaluate. The licensing reform package looks to the *Energy Policy Act of 2005,* and the Integrated Licensing Process it created, as a model to reform the license surrender process. These proposed changes will help licensees better predict the time and costs associated with license surrender and make the process more predictable and easier to remove unwanted dams.

The package also shines a spotlight on non-operational dams and requires FERC to send a report to Congress every 5 years identifying non-operational projects under its jurisdiction. The report must provide a timeline for either rehabilitating or removing the non-operational projects. FERC licenses assume projects are in working condition, and many license conditions designed to protect aquatic ecosystems lose their protective function when projects are not operating. Removing dams and project works from rivers when they have outlived their useful life opens habitat, making it easier for freshwater species to rebound.

Climate Disruption

Extreme weather events are becoming more frequent and disruptions like the freeze in Texas and crippling drought in the west make considering climate change when crafting license

---

[1] David Tickner, Jeffrey J Opperman, Robin Abell, Mike Acreman, Angela H Arthington, Stuart E Bunn, Steven J Cooke, James Dalton, Will Darwall, Gavin Edwards, Ian Harrison, Kathy Hughes, Tim Jones, David Leclère, Abigail J Lynch, Philip Leonard, Michael E McClain, Dean Muruven, Julian D Olden, Steve J Ormerod, James Robinson, Rebecca E Tharme, Michele Thieme, Klement Tockner, Mark Wright, Lucy Young, Bending the Curve of Global Freshwater Biodiversity Loss: An Emergency Recovery Plan, *BioScience*, Volume 70, Issue 4, April 2020, Pages 330–342, https://doi.org/10.1093/biosci/biaa002

[2] Id

[3] https://www.iucn.org/theme/species/our-work/freshwater-biodiversity

conditions critically important. Many licensees already analyze how hydrology and the operation of their projects are changing as the climate changes. It is part of sound business practice. But this type of analysis is not incorporated into the licensing process. The package requires FERC, mandatory conditioning agencies and Federally Recognized Tribes to consider during licensing how project effects may change under a changing climate when developing their license conditions. It also requires FERC to stay abreast of and incorporate the latest climate science and analytical tools through periodic technical conferences convened in consultation with the U.S. Department of Energy. These are common-sense requirements that will promote better decision-making to ensure healthy and climate resilient rivers into the future.

Hydropower licenses last, on average, 45 years. The licensing process provides a once-in-a-generation opportunity to understand the impacts of a changing climate on hydropower projects and affected rivers. This understanding will improve community safety and security, and help rivers and communities thrive and become more resilient.

Racial and Cultural Inequity

Infrastructure development in the twentieth century had profound impacts on tribal rights, authorities, and resources. This is particularly true where hydropower licensing and development ignored tribal treaty rights, overlooked tribal interests and perspectives, and damaged culturally important species such as salmon.[4]

Reform is needed to achieve the promise of self-determination for tribes. In 1975, Congress passed the Indian Self-Determination and Education Assistance Act recognizing Tribes as sovereign governments by providing greater autonomy and the ability to administer and participate directly in programs and authorities that had previously been administered on their behalf. Significant progress toward self-determination has occurred in the interim period, but the administration of Section 4(e) of the Federal Power Act remains a relic of the pre-self-determination era. The package would take long-overdue action by providing mandatory conditioning authority under Section 4(e) of the Federal Power Act to federally recognized tribes whenever a hydropower project has project facilities within the boundary of a tribal reservation.

More than 45 years after Congress recognized tribes as sovereign governments, tribal governments must still rely upon their “trustee”, the Department of the Interior, to intervene on their behalf to protect their resources. The continued need for an intermediary adds complexity and inefficiency to the licensing process and is an affront to the sovereignty of tribal governments. It is long past time that tribal governments receive the authority to protect their trust lands impacted by hydropower. Doing so will make the process more efficient and timely by having tribes at the table and able to make decisions about resource protection. Many tribal governments have built world-class fisheries and natural resource departments and are well equipped to make these decisions themselves.

---

[4]Frank, Derek Red Arrow (2017) “A Hell of a Complex: The Miscarriages of the Federal Hydropower Licensing Regime” *American Indian Law Journal*: Vol. 6: Issue 1, Article 5, pg. 244.
Available at: https://digitalcommons.law.seattleu.edu/ailj/vol6/iss1/5/

The package also promotes respect for treaty rights by requiring Federal land management agencies to consult with the Secretary of the Interior and any potentially affected Federally Recognized Tribes regarding the obligations of the United States that apply in the project area under a federal treaty. If treaty obligations are identified, the package imposes a requirement on FERC and other agencies to meet federal obligations applicable to the treaty with a Federally Recognized Tribe and gives the tribe the ability to make recommendations under Section 10(j) of the Federal Power Act, with the same standing as state fish and wildlife agencies.

Hydropower Licensing Generally

American Rivers is heartened that the Committee is examining the challenges and opportunities of hydropower in the United States. Hydropower provides approximately 7 percent of the overall energy production in the country, and comprises 50 percent of all non-fossil fuel energy consumed in the U.S. The licensing of hydroelectric dams is overseen by the Federal Energy Regulatory Commission (FERC), with the critical involvement of the federal Departments of Agriculture, Commerce, and the Interior, as well as state and tribal water quality agencies. FERC may grant a license for a term of 30 to 50 years, with the average life of a license being 45 years.

American Rivers thinks the hydropower licensing process is valuable and works well. That said, there is room for improvement, which is why we worked with our tribal and industry partners to bring the committee our licensing reform package and supported reform to existing expedited licensing processes for certain low-impact projects. On paper, hydropower licensing is designed to take 5.5 years. In practice, it takes an average of 6.7 years.[5] Licensees may avail themselves of 3 different licensing processes (the Traditional, the Alternative, or the Integrated Licensing processes) and this choice can dramatically affect the length of licensing. Relicensed projects that use the integrated licensing process on average receive a license in 5.9 years, as compared to 7.8 years for the projects using the alternative licensing process or 8.5 years for projects using the traditional licensing process.[6] While our licensing reform package makes considerable improvements to the licensing process that we believe will yield efficiency, the choices that FERC makes to approve the use of processes other than the integrated licensing process will ultimately determine how great the efficiency improvements of this licensing reform package will be if enacted.

Federal resource protection agencies also play an integral role in the licensing of hydropower facilities. Our support for the value and importance of their contribution to the licensing process remains unwavering. The Federal Power Act (FPA) delineates the responsibilities for licensing at the federal level. FERC is not, and has never been, responsible for maintaining fish, wildlife, or federal lands. Since the passage of the FPA, the Secretaries of Commerce (through the National Marine Fisheries Service) and the Interior (through the U.S Fish and Wildlife Service)

---

[5] Levine, Aaron, Brenda Pracheil, Taylor Curtis, Ligia Smith, Jesse Cruce, Matt Aldrovandi, Christa Brelsford, Heather Buchanan, Emily Fekete, Esther Parish, Rocio Uria-Martinez, Megan Johnson, and Debjani Singh. *An Examination of the Hydropower Licensing and Federal Authorization Process*. Golden, CO: National Renewable Energy Laboratory. NREL/TP-6A20-79242 pg. xi. https://www.nrel.gov/docs/fy22osti/79242.pdf.

[6] Id pg. 47.

have been responsible for fish and wildlife protection and the Secretaries of Agriculture (through the U.S. Forest Service) and the Interior (through the Bureau of Indian Affairs, the Bureau of Land Management, the U.S. Fish and Wildlife Service, and the National Park Service) have been responsible for managing lands held by the federal government ("federal reservations").

Section 4(e) requires Cabinet Secretaries with authority over a "federal reservation" to ensure that the proposed project doesn't negatively impact the reservation or interfere with its Congressionally designated use. Federal reservations are all lands and marine reserves in the federal estate, from Indian reservations to National Forests and wildlife refuges. Section 18 of the FPA deals with fish passage, or the ability of fish species to get from one side of a dam to the other and charges the Cabinet Secretaries with authority over fisheries to provide it. Most fish species do not naturally inhabit only the section of a river downstream of dams or between dams. For a population to survive the construction of a project and thrive, it often must be afforded a way to traverse project dams.

Our experience during the last 30 years of participating in licensing proceedings all over the country is that agencies are judicious and pragmatic in the exercise of their resource protection authorities. While we have supported the transfer of authority under Section 4(e) from the Department of the Interior to Federally recognized tribes, that support should not be construed as a critique of how federal agencies administer this authority generally. Rather, it is support for tribal self-determination specifically. We find tremendous value in the contributions of federal agencies. Their ability to continue to mitigate the impacts of hydropower projects through Sections 4(e), 18, and 10(j) will be critically important to addressing biodiversity loss and climate adaptation in the future.

Conclusion

The hydropower licensing process provides a range of stakeholders the opportunity to shape the shared use of our nation's rivers. The rivers do not belong to environmentalists or to electricity producers; they belong to all Americans, and they must be maintained to promote multiple uses. American Rivers believes the licensing reform package we have brought to this committee is an integrated, holistic proposal that creates common ground among the needs and appropriate authorities of our three constituencies. For your reference, we attach a summary of the licensing reform package below.

I would like to thank the committee for its invitation to speak today. American Rivers is eager to serve as a resource and stands ready to collaborate with the committee on licensing reform. I look forward to answering your questions.

April 4, 2022

Summary of WG6 Federal Power Act Amendments Package

The Drafting Team for Uncommon Dialogue Workgroup 6 prepared a package of proposed amendments to the Federal Power Act. The package is intended to enhance the economic value and environmental benefits of hydropower projects and healthy rivers. It is driven by eight themes stated below.

Improves cooperation among FERC, Federally Recognized Tribes and resource agencies in the hydropower licensing process

- Requires FERC and other Federal and State agencies and Federally Recognized Tribes to consult in the development of a coordinated schedule for all federal authorizations for hydropower licensing.
- Requires FERC and other Federal and State agencies and Federally Recognized Tribes to meet in a conference to develop a joint study plan to the extent possible, and to document any disagreements.
- Provides an opportunity for FERC and other Federal and State conditioning agencies including Federally Recognized Tribes to attempt to resolve conflicting and inconsistent license terms prior to FERC's licensing decisions.
- Allows participation by all relicensing participants in these technical conferences and consultations.
- Establishes an opportunity for FERC, Federal, state and local agencies, and Federally Recognized Tribes to cooperate in preparation of the environmental assessment or environmental impact statement. Allows cooperating entities party status in the licensing proceeding, with protections against *ex parte* communications.
- Provides that administrative costs recovered in annual charges for Federal agencies' direct costs be refunded to the relevant Federal agency, with public review of annual charges determinations.
- Allows for recovery of administrative costs incurred by Federally Recognized Tribes and State agencies through a fund created by re-allocating other annual charges that FERC currently directs to the Treasury.

Expands the authority for Federally Recognized Tribes to protect their lands, waters, other resources and treaty-protected rights

- Shifts Federal Power Act (FPA) § 4(e) mandatory conditioning authority from the U.S. Department of the Interior to a Federally Recognized Tribe for any project located on land held in trust within the exterior boundaries of a Tribal reservation.
- Requires Federal land management agencies, when developing their FPA § 4(e)mandatory conditions, to consult with the Secretary of the Interior and any potentially affected Federally Recognized Tribes regarding the obligations of the United States that

apply in the project area under any effective federal treaty with a Federally Recognized Tribe.

- Imposes an obligation on FERC and other agencies to meet federal obligations applicable to a federal treaty with a Federally Recognized Tribe.

- Extends FPA § 10(j) recommendation authority to Federally Recognized Tribes during the licensing of a project that may affect treaty rights.

Promotes a culture of "show your work" in hydropower licensing

- Requires that mandatory conditions under FPA § 4(e) be reasonably related to project effects on federal lands.

- Modifies Federal Power Act § 18 to require that any fishway prescribed by the Secretary be "as appropriate to address project effects and other relevant factors."

- Requires Federal agencies and Tribes with mandatory conditioning authority under FPA§4(e) or § 18 to provide a rationale for their decisions on submitted alternatives under§33.

- Modifies the trial-type hearing process for mandatory conditions under FPA § 4(e) and§18 by: (1) allowing hearing on disputed issues of material fact relative to an alternative condition or prescription proposed by the licensee or another party; (2) placing the burden of proof on proponents of disputed issues or alternatives; and (3) providing opportunities for all parties to hearings to participate in settlement negotiations.

- Requires FERC, Federal agencies, and Federally Recognized Tribes to cite to specific parts of documents relied upon for their findings and to state the basis for reliance on the cited information in making their findings.

Addresses climate change in the hydropower licensing process

- Directs FERC, mandatory conditioning agencies and Federally Recognized Tribes to consider climate change and changing project effects under a changing climate when developing their license conditions.

- Requires FERC to stay abreast of, and incorporate, climate science and analytical tools through periodic technical conferences convened in consultation with the U.S. Department of Energy.

Provides improved evaluation of projects during the licensing process

- Defines the terms "ongoing effect" and "reasonably foreseeable effect," and defines "project effects" as such ongoing and reasonably foreseeable effects.

- Directs FERC, other Federal agencies, and Federally Recognized Tribes to consider whether any ongoing or reasonably foreseeable adverse effect on any fish species can be mitigated by providing access to habitat upstream or downstream of project dam(s),or by maintaining or improving downstream habitat, or by off-site mitigation.

- Improves the analysis of present and reasonably foreseeable future project economics, taking into account market conditions.

- Requires FERC, licensees, and other parties to disclose hydrologic data and models used in licensing proceedings, subject to protections for intellectual property.