



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

June 12, 2017

Honorable Greg Walden, Chairman
Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Honorable Frank Pallone, Ranking Minority Member
Committee on Energy and Natural Resources
2322A Rayburn House Office Building
Washington, DC 20515

Re: Hydropower Policy Modernization Act of 2017

Dear Chairman Walden and Ranking Member Pallone,

I write on behalf of the Yakama Nation to register our continuing concern with proposed changes to the Federal Power Act (FPA) that would concentrate authority for hydro-project licensing in the Federal Energy Regulatory Commission (FERC) and diminish the conditioning authorities of tribal, state, and federal entities who are accountable to their respective publics for the stewardship of natural resources affected by such projects. The Yakama Nation fought long and hard to win the ability to protect fish, wildlife, and other natural resources upon which our way of life depends. Pursuant to our Treaty of 1855 with the United States, federal resource agencies including the Interior Department have a clear fiduciary responsibility to exercise their authority on our behalf. Additionally, Congress has repeatedly authorized affected federal agencies and states to ensure hydroelectric dams are operated in a fashion that protects the natural resources that could be affected by the operation of such dams. A threat to the ability of those federal agencies and states to exercise their mandatory conditioning authorities under the FPA also threatens our ability to preserve Treaty trust resources for future generations as well as the general public's enjoyment of the rivers in this country for recreational and fishery purposes.

During the many decades of hydropower development in the Columbia Basin, Yakama Nation members have borne an unequal share of the costs to natural resources from the development of inexpensive hydropower. As you know, hundreds of millions of salmon have been killed by these dams over the years and the impact of that loss to members of the Yakama Nation has been profound. To this day, hydrosystem impacts on wild salmon and steelhead listed under the Endangered Species Act threaten the recovery of these resources and limit the Treaty-reserved fisheries that support our culture, our subsistence, and the household incomes for hundreds of fishing families.

The Yakama Nation acknowledges your efforts to refine bill language in response to comments from resource agencies, tribes, and environmental groups having interests in the FERC licensing process. We also recognize stated concerns by the industry that the current process needs more certainty in terms of schedule, conditioning, and term of a new license. However, we remain unconvinced that the proposed modifications to the FPA are reasonable or necessary to sustain both an economical hydropower system and the natural resources that are unavoidably harmed by it. One merely needs to survey the hundreds of this nation's rivers damaged by hydropower development prior to Congress mandating protection to realize why weakening those protections would be a tremendous mistake. While the current FERC licensing process can be deliberate and expensive for all parties, deliberation and informed prudence are essential to achieving a proper balance of all interests in managing hydro and natural resources. We believe the current FPA licensing process provides the opportunity for affected parties to find this balance.

The current licensing process under the FPA, with its inherent system of checks and balances executed through mandatory agency conditioning authorities, provides at least minimal assurance that the resource impacts of project operations are properly evaluated and addressed by resource professionals having both the mission and the expertise to conduct such evaluations. It is FERC's mission to license hydro-projects subject to its authorities; it is not FERC's mission, nor is it within its staff expertise, to assess potential resource impacts and prescribe remedies as license terms, on a project-by-project basis. Congress wisely placed that responsibility on the federal agencies having such expertise in §§ 4(e) and 18 of the FPA and, later, §401 of the Clean Water Act. The changes proposed in the bill language would tip this intentional balance of interests in favor of the hydropower industry by conveying nearly unfettered authorities on FERC – whose mission is to license hydro-projects, not conserve natural resources – to set unreasonable schedules, evaluate the sufficiency of the scientific information base, and resolve disputes over license conditions. Such language clearly prioritizes hydropower production over the protection of tribal and public resources harmed by hydropower projects, regardless of cost and despite the significant, ongoing regional investment in ESA salmon recovery in the Northwest. Listed below are specific concerns about proposed modifications to the FPA that remain problematic in our view.

- As explained below, the proposed new bill language in sections 34 and 37 may effectively waive conditions needed to implement the Northwest Power Act, Endangered Species Act or the Clean Water Act if a state, tribe, or federal agency cannot meet FERC's schedule or misses a deadline. FERC and the license applicant may simply proceed with the proposed action and the authorization is waived.
- Field research is commonly needed to define hydro project conditions. Field seasons for salmon migration naturally occur during brief periods. Limiting the window for data collection, with a statutory limitation of a 30-day extension, is unworkable. Salmon follow their own biological schedules that are independent of calendar dates. If an authorization is delayed because an additional field study season is necessary to resolve an issue due to varying biological or physical circumstances, such as unusually high flows, or a study is incomplete due to an applicant refusing to provide a state, tribe or federal agency with the information necessary for that agency to responsibly discharge its duties, the licensing decision effectively defaults to FERC. According to the bill

language, FERC may grant a time extension of up to 30 days, but such an extension is all but meaningless in terms of biological and physical circumstances. This provision could preclude the natural resource agency from acting, thus stripping it of its authority or forcing it to deny certification for new projects in order to avoid acting without an adequate record. In such a circumstance, FERC would still be faced with the same inadequate record.

- The proposed New FPA Sections 34 and 37 would give FERC the ability to overrule management decisions by any federal or state agency that has jurisdiction over the land or water whereupon a project subject to licensing is located. Currently it is only through §§4(e) and 18 of the FPA and §401 of the CWA that mandatory conditions can be placed on hydroelectric licenses. These conditions are currently not reviewable or alterable by FERC. In accessing federal reservations and navigable waters, agencies (from the Forest Service to the Army Corps) may issue other conditions on license applicants about how they may traverse the National Forest, gain access to a Corps dam, etc. By including permits, special use authorizations, and other license conditioning devices in the definition of “federal authorization,” this section operating with the other amendments would allow FERC to disregard federal and state agencies with authorities for managing lands and waters of the United States.
- Proposed new FPA language also would not allow Indian tribes with Treatment as State (TAS) status under the CWA from engaging in consultation or MOU adoption as provided for the states and federal agencies. Tribes with TAS status simply are not consulted. Instead, FERC may forward issues identified by the tribe to the Secretary of the Interior or “the federal agency overseeing the delegated authority,” presumably the Environmental Protection Agency. Additionally, issues that are raised by state agencies operating through the CWA and state and local agencies operating under other federal law would be forwarded to the agency overseeing that law, potentially involving agencies who have never participated in a licensing process and have no current authority to inform a state CWA certification. This would have the effect of divesting states and tribes of authorities recognized in the CWA.
- Proposed New FPA Section 35 could severely limit the ability of agencies to assert and defend material facts in support of a license condition. Section 35(e) directs all disputed issues of material fact supporting a condition on a license to be decided by a single Administrative Law Judge (ALJ) at FERC. Currently, facts are disputed before an ALJ in the Department from which the condition arose. The proposed new Section 35(e) would put disputes relating to, for example, the Indian treaty obligation, the ESA, or the Federal Land Policy and Management Act in front of a FERC ALJ who may not have experience with any of the issues in dispute. These proceedings (which, per §35(b), cannot last longer than 120 days, would be required to fit into the schedule established by FERC pursuant to §34(c); which is to say, FERC’s schedule and strict adherence to it would dictate if, or how much, time is permitted for a trial-type hearing. It is possible that the schedule would not allow for any trial-type hearing. Further, Section 35(i) gives FERC the option to dispute conditions imposed under §4(e) and prescriptions under §18 and force a resolution through a Memorandum of Understanding as outlined in the

proposed new Section 34(b)(2)(D). These new terms would upset the balance of authorities that has worked well, if not ideally in the view of the hydro industry, to integrate a diversity of public interests in the licensing process.

- Proposed New FPA Section 37(a)(7) establishes that, to be valid under the schedule FERC establishes in proposed new FPA §34, any “final disposition on all necessary federal authorizations...other than final action by the Commission” must occur by the 120th day following the publication of the proposed new FPA section 37(a)(4)(A) or (5) publication. To recap: FERC has 60 days to inform the agencies about the application, 30 additional days to “consult” with them, and then the agencies have 30 days to exercise their authorities under §§4(e), 18, 408 of the Rivers and Harbors Act, and others. In other words, 90 of the 120 days available for federal agencies and states to exercise their various authorities could be consumed in notification and consultation. This guarantees the agencies only half the time to be informed, study, and render a scientifically based and legally defensible decision than would be afforded if they were notified by FERC on the same day the proposed new FPA §37(a)(4)(A) or (5) notice were published. This timeline is arbitrary, with no grounding in any existing law, science, or experience on any project evaluation.

The Yakama Nation concludes that the existing provisions of the FPA provide a reasonable balance of opportunity for the hydropower industry and protection for the public’s natural resources that are unavoidably damaged by hydropower projects. To modify the FPA in the manner proposed by the draft Hydropower Policy Modernization Act of 2017 will upset this balance and work at cross-purposes to the substantial regional investment in ESA salmon recovery. We urge you to withdraw or continue to work with resource agencies and tribes to find acceptable bill language.

Sincerely,



Delano Saluskin, Vice-Chairman
Yakama Tribal Council

Cc: General Council Chairman
Tribal Council
CRITFC – Pinkham