

## DISSENTING VIEWS

on

### *H.R. 3043, the Hydropower Policy Modernization Act of 2017*

Hydropower projects deliver affordable power to many communities across the country. We want these projects and facilities to continue to operate. However, this bill designates power generation as the primary determinant on whether to grant or extend a license to operate a hydropower project. It places private profits over the public interest. And, by significantly limiting the extent to which relevant federal agencies, other than FERC, participate in the licensing process, this bill moves us back in time, not forward.

Contrary to the claims of its supporters, H.R. 3043 will not modernize or improve the hydropower licensing process. It injects considerable uncertainty into the hydropower regulatory process by inserting the Federal Energy Regulatory Commission (FERC) into areas where it has no expertise or statutory authority. But, there is no justification for allowing hydropower facilities to use public water resources to generate power and profits without mitigating the negative impacts of their facilities on others who rely on our rivers and without complying with modern environmental laws. Such a situation contradicts Congress' clear intent to protect natural and cultural resources, as articulated in the 1986 amendments to the Federal Power Act (FPA) and in numerous laws enacted since the federal government granted the first hydropower licenses in the 1920s.

H.R. 3043 makes changes to the hydropower licensing process that adversely affect states, tribes, and the administration of numerous environmental statutes by the federal resource agencies in the Departments of Interior, Commerce, and Agriculture. Yet, in spite of repeated requests by Democratic members, the Committee did not invite state, tribal, or federal resource agency witnesses to its general oversight hearing on hydropower licensing or to the legislative hearing on this bill. The Committee received letters from numerous entities expressing concerns that the legislation could undermine their efforts to execute their responsibilities under the Clean Water Act. These entities include the Western Governors Association, the Environmental Council of the States, the Association of Clean Water Administrators, the Association of State Wetland Managers, and the states of Maryland, Vermont, and California. The Southern States Energy Board adopted a resolution in September opposing provisions of the bill that curtail state authority. The Committee also received letters from several tribal nations – the Yakama, the Puyallup, and the Skokomish – expressing their serious concerns about the impacts of this bill on tribal land and water rights. The unbalanced nature of the bill reflects the lack of input by and the absence of the Majority's concern for the views of these parties.

H.R. 3043 is targeted more toward relicensing older, existing hydropower facilities than new hydropower projects. As John Katz, the Deputy Associate General Counsel of FERC testified, many of the projects entering the relicensing process were last licensed prior to the enactment of modern environmental laws and to the Electric Consumers Protection Act (ECPA) in 1986. ECPA amended the FPA to ensure that FERC fully considers all beneficial public uses of water and protection of fish and wildlife. The imposition of conditions and prescriptions on these existing projects often sets up a confrontation between the hydropower operator that wishes to renew a license with as few imposed conditions as possible and federal resource agencies,

states, tribes, recreation, and environmental advocates who seek to protect water quality, fisheries, recreation, drinking water supply, and other private and public uses of water.

***H.R. 3043 would establish a severely flawed schedule and application process***

H.R. 3043 directs FERC to issue a rule that will govern schedule-setting for the evaluation and disposition of each hydropower license or relicense application. Certainly, a schedule that clearly lays out the responsibilities and deadlines of each party in the licensing process can be a valuable tool to facilitate identification and resolution of issues associated with a specific hydropower project. However, the schedule process under this bill favors the license applicant and does not provide assurance that federal agencies, states, and tribes will have sufficient time to fulfill their obligations under the statutes they administer. As a result, the process will not yield a completed license application that complies with all applicable environmental laws.

FERC itself disputes claims that the bill will streamline the licensing process. Mr. Katz stated: “I am concerned that proposed new FPA section 34 could increase the complexity and length of the licensing process, while giving the Commission the added responsibility of policing other entities’ compliance with statutory deadlines, without giving the Commission the authority to enforce the schedule that it establishes.”<sup>1</sup>

The newly proposed section 34 licensing process is built on two false assumptions. First, it assumes that the only major source of delay in these deliberations is inaction by federal agencies, states, and tribes. Section 34 directs FERC to establish a defined schedule that states, tribes and agencies must follow, yet applies no similar schedule discipline to hydropower applicants. Second, the bill wrongly assumes that all applicants have an incentive to move the licensing process to completion in the shortest time possible. But, in the case of a relicensing, there are often strong incentives for the applicant to delay the process for obtaining a new long-term license. The operator of a facility that was last licensed prior to 1986 received a license before FERC was required to include mandatory conditions and prescriptions developed by federal resource agencies to protect federal reservations and natural resources. In a number of cases, new conditions and prescriptions are likely to be imposed to address a variety of environmental mitigation issues. These conditions will require investments (e.g. fishways) or changes in operations (e.g. adjustments in water flow regimes) among other possibilities thereby imposing costs on the licensee.

Furthermore, during the period when the license application is pending, FERC provides the applicant with an open-ended, annual license under the existing terms that renews automatically until the new license is granted. This means, the applicant continues to sell power and operate its facility indefinitely under the older, more profitable conditions, creating a clear financial incentive for delaying any license process. H.R. 3043 includes provisions to discourage

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<sup>1</sup>House Committee on Energy and Commerce, Testimony of John Katz, Deputy Associate General Counsel, Office of the General Counsel, Federal Energy Regulatory Commission, *Hearing on Legislation Addressing Pipeline and Hydropower Infrastructure Modernization*, 115<sup>th</sup> Cong. (May 3, 2017).

delays by federal agencies, states, and tribes. However, the lack of uniform incentive to all parties to adhere to an agreed schedule is unlikely to produce a completed application that complies with the requirements of all the relevant, current federal laws.

H.R. 3043 also does not address a major cause of delay in the licensing and relicensing process: 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 license process are often a source of delay. Although Mr. Katz testified that FERC has an obligation to ensure compliance with statutes administered by federal resource agencies,<sup>2</sup> the Commission has frequently dismissed requests by resource agencies and states for studies to enable them to issue legally defensible decisions or permits under their statutory authorities.<sup>3</sup>

There is no point in setting a strict schedule for making decisions until an application is truly complete and ready to be evaluated.

***H.R. 3043 institutes new, burdensome, and biased trial-type hearing procedures***

Trial-type hearings were instituted by the amendments to the Federal Power Act included in the Energy Policy Act of 2005 (P.L. 109-58). Congress made these changes in response to utilities' request that they have an opportunity to challenge the factual basis for conditions proposed by federal resource agencies prior to the issuance of the license. These provisions were opposed at the time by a wide array of environmental, tribal and state organizations that also have direct interests in the management of water and other natural resources within the affected watershed.

Despite these concessions, the industry is still not satisfied. Once again, industry has requested and receives special treatment in the form of a greatly expanded, biased provision on

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<sup>2</sup> Testimony of John Katz, *supra*, at note 1.

<sup>3</sup> 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*, 115<sup>th</sup> Cong. (Mar. 12, 2017). Mr. Steindorf stated that in his experience FERC orders studies to fulfill its own responsibilities. It is FERC's policy not to defer to what other agencies need to carry out their authorities. As an example, he cited a FERC order in which FERC wrote: "[I]t is up to the Commission to determine whether a particular study is necessary for the Commission to fully understand the effects of licensing or relicensing a project, and we are not obligated to require a study to support another agency's decision making." (FERC Order Denying Rehearing. 151 FERC ¶ 61,240,p.9); House Committee on Energy and Commerce, Response Submitted by William Robert Irvin, President and Chief Executive Officer, American Rivers, Inc., to questions for the record, *Hearing on Legislation Addressing Pipeline and Hydropower Infrastructure Modernization*, 115<sup>th</sup> Cong. (May 3, 2017). Mr. Irvin provided examples from nine projects in nine states in which FERC denied study requests made by states or federal resource agencies needed to support their decisions under their statutes.

trial-type hearings in H.R. 3043. This provision provides the industry with everything it believes it needs to secure decisions in its favor. Industry picks the venue, sets the rules, and secures additional points in the licensing process to challenge conditions that federal resource agencies or FERC seeks to impose on a license to protect public interests.

Under the new provision, hearings on conditions proposed by federal resource agencies will no longer be conducted by an Administrative Law Judge (ALJ) in the respective agency that proposed the condition. Instead, all trial-type hearings will be conducted before an ALJ at FERC. The industry perceives FERC to be more receptive to its concerns than the ALJs at the respective resource agencies. However, it is the ALJs at the resource agencies that have the relevant experience and knowledge of the laws, resources, and information on natural resource issues to evaluate the issues raised in these hearings.

This provision remains in spite of testimony opposing this change by Mr. Katz, who asserted that this change would not reduce the substantial expense associated with trial-type hearings. He also noted that moving the trials to FERC was likely to result in additional delay in the license process and would divert resources from processing applications to dealing with hearings. In fact, Mr. Katz recommended that Congress: "... consider eliminating trial-type hearings, thereby returning to the agencies the responsibility of supporting their conditions with substantial record evidence."<sup>4</sup>

In stark contrast to FERC's recommendation, the trial-type hearing provision in H.R. 3043 changes more than just the venue of the hearings. It also expands the scope of trial-type hearings beyond conditions imposed by resource agencies. Furthermore, the provision eliminates the restriction in current law to a single trial-type hearing on the issues of fact associated with a proposed condition. Under the provision in H.R. 3043, a utility could request multiple hearings on a condition and any respective alternative conditions that the resource agencies reject. This expansion of trial-type hearings would be extremely expensive and burdensome, and cause further licensing process delays.

Since being enacted in 2005, the experience with this provision has been mixed. It has encouraged settlement of disputes on conditions and prescriptions between licensees and agencies, but it has also diverted resources, lengthened the licensing process, and may have resulted in less resource protection than Congress intended in ECPA. There is no justification for further empowering industry in the license process to undermine environmental protection. We should follow the advice offered by Mr. Katz – either leave current law unchanged or repeal the provision on trial-type hearings altogether.

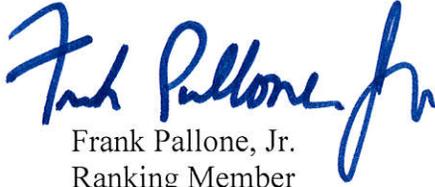
H.R. 3043 is an unbalanced bill that is far more likely to generate new controversy and lawsuits than to facilitate a timely and efficient hydropower licensing process. It will deliver neither the faster outcomes nor the improved environmental performance we need. It will encourage more confrontation among competing water users. Rivers belong to all of us. Water is required by every living thing and it is required for every private and public activity in which

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<sup>4</sup> Testimony of Deputy AGC Katz, *supra*, at note 1.

we engage. The hydropower licensing process can and should be more efficient, but the industry should not be permitted to operate without conditions to mitigate adverse impacts.

For the reasons stated above, we dissent from the views contained in the Committee's report.

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Frank Pallone, Jr.  
Ranking Member

Handwritten signature of Bobby L. Rush in blue ink, featuring a large, stylized 'B' and 'R'.

Bobby L. Rush  
Ranking Member  
Subcommittee on Energy