



STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

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November 3, 2017

The Honorable Greg Walden
U.S. House of Representatives
2185 Rayburn House Office Building
Washington, DC 20515

The Honorable Frank Pallone, Jr.
U.S. House of Representatives
237 Cannon House Office Building
Washington, DC 20515

Re: Hydropower Regulatory Modernization Act of 2017

Dear Chairman Walden and Ranking Member Pallone:

I am writing to express my concerns with the *Hydropower Regulatory Modernization Act of 2017*, H.R. 3043, which would amend the Federal Power Act to modify certain requirements. The Washington Department of Ecology (Ecology) supports the ostensible intent of this bill to gain efficiency in the licensing of hydropower projects. In addition, we support the goal of improving the certainty and timeliness of the hydropower licensing process. However, provisions in H.R. 3043 that modify the authorities of the Federal Energy Regulatory Commission (FERC) would impede or invalidate states' independent authority provided by Section 401 of the Clean Water Act (CWA §401) to establish license conditions that protect water quality.

Our residents and tribes harvest salmon from the Puget Sound up through the Columbia River, and our farmers grow hops in the Yakima River basin. They also depend on water as a source of energy to power their homes and communities, and our industries rely on abundant and consistent energy to build aircraft in Everett, power data server farms in Quincy, manufacture car bodies for electric vehicles in Moses Lake, and process apples along the Wenatchee River basin. Balancing the need for clean energy with the need for safe water supplies begins with the proper management of water as a resource, and it is one of the major focal points of this legislation.

Decades of federal court decisions interpreting CWA §401 have established the states' authority to require conditions in FERC licenses that are necessary to protect water quality. These decisions recognize and affirm the basic principle of federalism embodied in the CWA that states have a primary role and responsibility to ensure state water quality standards are met.



Ecology implements the state's Water Pollution Control Act (RCW 90.48). As the state water pollution control agency, we are responsible for implementing federal water pollution control laws and regulations, including state water quality certifications required by CWA §401 for any federal permit or license that result in a discharge to state waters. Ecology has developed durable partnerships with the hydropower industry in Washington State – the largest of any state in the nation – and has a successful record of accomplishment in expediting water quality certifications that are incorporated as FERC license conditions.

In an effort to improve H.R. 3043, my team worked for several weeks with two members of the National Hydropower Association along with staff at the Chelan County Public Utility District in Washington State. Our objective in these discussions was to maintain the intent of this legislation while also protecting states' authority provided in the CWA §401. Although the group did not reach full consensus, significant progress was made to put forth alternative language that would remove ambiguity regarding FERC and state authority. My team identified a number of changes in language that are necessary to protect independent state authority to condition and certify FERC licenses. If provided more time, and engagement directly with your committee, I am confident that all parties can reach a mutually-satisfactory policy.

Ecology appreciates Congress' effort to streamline the FERC licensing process, however, the addition of **SEC. 34 (b) (2) OTHER AGENCIES AND INDIAN TRIBES**, would require states' water quality certification process to follow a schedule under the requirements of the FERC, rather than the schedule in CWA §401. The timelines and independent state authorities granted by CWA §401 must remain intact, as both are essential for states to issue water quality certifications. States must also retain the ability to practice a "withdraw and reapply" process that has proven necessary for some complex hydropower licenses. If FERC is provided authority to oversee and set a timeline different than that provided under CWA §401, it undermines states' ability to ensure effectiveness and certainty for protection of water quality.

Meanwhile, **SEC. 34. HYDROPOWER LICENSING AND PROCESS IMPROVEMENTS (b)** designates FERC as the lead agency for federal authorizations related to a license application, license amendment, or exemption for a hydropower license. H.R. 3043 **SEC. 34. HYDROPOWER LICENSING AND PROCESS IMPROVEMENTS (d)** also requires states to adhere to deadlines established by FERC, effectively reducing the amount of time a state would have to complete scientific studies necessary to determine whether water quality standards and requirements would be met in accordance with CWA §401. This will likely create pressure on states to utilize existing information (SEC 3 (b)) rather than new studies to make these determinations.

In Washington State, work thus far to provide CWA §401 certifications for licensing of hydropower facilities have been timely, responsive, efficient, and protective of the state's water quality. While additional work remains, durable partnerships and a strong track record form a solid foundation to build upon.

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In summary, Ecology opposes this bill in its current form because:

- FERC will have undue influence on the ability of states and tribes to obtain environmental data and information via studies that are necessary to write CWA §401 certifications to protect waters in their jurisdiction.
- It would lock state and federal natural resource agencies into a no-win situation. Agencies will be forced to make regulatory decisions based on incomplete applications that lack the necessary technical information, which would put agencies at risk of missing new FERC deadlines resulting in litigation.
- We believe this bill provides enough ambiguity for individuals to attempt to preempt state CWA §401 authority. The bill as written could result in legal challenges and protracted litigation on how the extension of FERC's authority conflicts with states' rights to protect water quality and quantity.

Finally, Ecology views many elements of this modernization bill as unnecessary. In July 2005, FERC restructured its process and implementing the Integrated Licensing Process (ILP) that effectively streamlined FERC's licensing process. Over the course of 12 years, Washington State has provided water quality certifications for 16 FERC issued licenses as well as 10 license amendments. The ILP has proven to be a predictable, efficient, and timely licensing process that continues to ensure adequate resource protections. This bill would eliminate the flexibility available in the current system and return to a traditional approach that is less responsive to environmental concerns and more susceptible to litigation.

We urge that the provisions of H.R. 3043 that would have the effect of curtailing state authority under CWA §401 be significantly improved or stricken from the bill. Please contact me to discuss further at maia.bellon@ecy.wa.gov or (360) 407-7001.

Sincerely,



Maia D. Bellon
Director

cc: The Honorable Maria Cantwell, U.S. Senator
The Honorable Cathy McMorris Rodgers, U.S. Representative
Robert Duff, Office of the Governor
Sam Ricketts, Office of the Governor
Jim Unsworth, Washington Department of Fish & Wildlife
Denise Clifford, Washington Department of Ecology

