

ONE HUNDRED FOURTEENTH 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**

**May 12, 2015**

**To: Subcommittee on Energy and Power Democratic Members and Staff**

**Fr: Committee on Energy and Commerce Democratic Staff**

**Re: Hearing on “Discussion Drafts Addressing Hydropower Regulatory Modernization and FERC Process Coordination under the Natural Gas Act”**

On Wednesday, May 13, 2015 at 10:00 a.m. in room 2123 of the Rayburn House Office Building, the Subcommittee on Energy and Power will hold a legislative hearing on the “Discussion Drafts Addressing Hydropower Regulatory Modernization and FERC Process Coordination under the Natural Gas Act.”

**I. FERC PROCESS COORDINATION DISCUSSION DRAFT**

The “FERC Process Coordination” discussion draft is the latest iteration of a legislative proposal aimed at expediting the natural gas pipeline permitting process at the Federal Energy Regulatory Commission (the Commission or FERC). On November 21, 2013, the House passed H.R. 1900, the “Natural Gas Pipeline Permitting Reform Act,” with a roll call vote of 252-165.<sup>1</sup> For further background information on the Committee’s consideration of H.R. 1900, please see the [memos](#) from the legislative hearing and markups held during the 113th Congress.

On January 5, 2015, Rep. Pompeo introduced H.R. 161, a bill that is identical to H.R. 1900. The House passed H.R. 161 on January 21, 2015, with a roll call vote of 253-169.<sup>2</sup>

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<sup>1</sup> U.S. House of Representatives, Roll Call Vote on Agreeing to H.R. 1900 (Nov. 21, 2013) (252 yeas, 165 nays) (online at [clerk.house.gov/evs/2013/roll611.xml](http://clerk.house.gov/evs/2013/roll611.xml)).

<sup>2</sup> U.S. House of Representatives, Roll Call Vote on Agreeing to H.R. 161 (Jan. 21, 2015) (253 yeas, 169 nays) (online at [clerk.house.gov/evs/2015/roll041.xml](http://clerk.house.gov/evs/2015/roll041.xml)).

On May 6, 2015, the majority put forward a discussion draft to reform the siting review process for natural gas pipelines at FERC. This draft differs from H.R. 1900 and H.R. 161 in that it would require FERC to play the role of “police” in its relationship with other agencies. Under the draft, FERC is directed to select which agencies are to participate in the review process, and establish deadlines for them in completing their consideration of pipeline applications.

The stated goal of the “FERC Process Coordination” discussion draft is to “expedite consideration of much-needed natural gas pipelines by reforming and modernizing the siting review process.”<sup>3</sup> However, this draft could in fact disrupt FERC’s existing permitting process, which has been ensuring the timely permitting of natural gas pipelines.

#### **A. The Existing Permitting Process for Natural Gas Pipelines**

Under section 7 of the Natural Gas Act, FERC reviews applications for the siting, construction, and operation of interstate natural gas pipelines. A pipeline company cannot construct or operate an interstate natural gas pipeline without a FERC-issued “certificate of public convenience and necessity.”<sup>4</sup> The certificate establishes the terms and conditions for constructing and operating a pipeline, including those related to location, engineering, rates, and environmental mitigation. Section 7 grants the right of eminent domain to a pipeline company that is issued a certificate of public convenience and necessity by FERC.<sup>5</sup>

The permitting process typically begins with the pre-filing phase, which is intended to expedite the certificate application process by engaging stakeholders in the identification and resolution of stakeholder concerns prior to the filing of a formal application with FERC.<sup>6</sup> During this phase, FERC contacts agencies that will be involved in preparing the environmental analysis of the project so that the scope of the environmental analysis can be defined and public outreach can begin.<sup>7</sup> This is a voluntary phase that is used by about two-thirds of applicants for major interstate pipeline projects.

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<sup>3</sup> House Committee on Energy and Commerce, *#SubEnergyPower to Tackle Hydropower Projects and Natural Gas Pipelines Next Week* (May 6, 2015) (online at [energycommerce.house.gov/press-release/subenergypower-tackle-hydropower-projects-and-natural-gas-pipelines-next-week](http://energycommerce.house.gov/press-release/subenergypower-tackle-hydropower-projects-and-natural-gas-pipelines-next-week)).

<sup>4</sup> Natural Gas Act of 1938 § 7; 15 U.S.C. § 717f.

<sup>5</sup> *Id.*

<sup>6</sup> Federal Energy Regulatory Commission, *Pre-Filing Environmental Review Process* (online at [www.ferc.gov/help/processes/flow/lng-1.asp](http://www.ferc.gov/help/processes/flow/lng-1.asp)).

<sup>7</sup> 18 C.F.R. § 157.21; U.S. Government Accountability Office, *Pipeline Permitting: Interstate and Intrastate Natural Gas Permitting Processes Include Multiple Steps, and Time Frames Vary* (Feb. 15, 2013)(GAO-13-221).

Once pre-filing activities are complete, or should an applicant choose to skip the pre-filing phase, the applicant would then submit an application for a certificate. During the application phase, the environmental analysis (either an Environmental Impact Statement or an Environmental Assessment) is prepared by FERC with the assistance of the cooperating agencies that have jurisdiction over aspects of the permitting. FERC also conducts non-environmental review and analysis to address engineering, tariff (rates and terms and conditions), policy, and accounting issues. FERC may place conditions on a certificate, such as obtaining all necessary federal and state permits and authorizations.<sup>8</sup>

Depending on the details of a project and according to different statutes, any number of agencies could be directly responsible for evaluating permit applications and participating in the environmental review process. For example, the Army Corps of Engineers has authority to issue wetlands permits under section 404 of the Clean Water Act and authorizations affecting navigable waters under the Rivers and Harbors Act of 1899. The Fish and Wildlife Service is generally responsible for administering the Endangered Species Act, while the Bureau of Land Management is primarily responsible for issuing right-of-way permits for natural gas pipelines that cross federal lands. State environmental agencies have delegated authorities under the Clean Water Act and Clean Air Act for water quality certifications, water pollution discharge permits, and air emissions permits.<sup>9</sup>

Under FERC regulations promulgated in 2006, which were made pursuant to amendments to the Natural Gas Act,<sup>10</sup> federal and state agencies must make final decisions on requests for federal authorizations no later than 90 days after FERC issues its final environmental document, “unless a schedule is otherwise established by federal law.”<sup>11</sup> Those amendments further provided applicants with legal recourse to petition the U.S. Court of Appeals for the DC Circuit for agency failures to issue, condition, or deny a permit within the established deadlines.

## **B. Summary and Critique of the Discussion Draft**

### **1. Arbitrary and Rigid 90-Day Timeline**

The discussion draft amends section 15 of the Natural Gas Act to add a new subsection. The new subsection (b)(2), would require FERC to identify and formally invite any other federal, state, or local agency to review the application for purposes of issuing any license, permit, or

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<sup>8</sup> U.S. Government Accountability Office, *Pipeline Permitting: Interstate and Intrastate Natural Gas Permitting Processes Include Multiple Steps, and Time Frames Vary* (Feb. 15, 2013)(GAO-13-221).

<sup>9</sup> U.S. Government Accountability Office, *Pipeline Permitting: Interstate and Intrastate Natural Gas Permitting Processes Include Multiple Steps, and Time Frames Vary* (Feb. 15, 2013)(GAO-13-221); Congressional Research Service, *Interstate Natural Gas Pipelines: Process and Timing of FERC Permit Application Review* (Jan. 16, 2015) (R43138).

<sup>10</sup> Energy Policy Act of 2005 § 313.

<sup>11</sup> 18 C.F.R. § 157.22.

approval required under Federal law in connection with the siting, construction, expansion, or operation of any interstate natural gas pipeline. This new subsection requires any agency invited by FERC to approve or deny the issuance of their license, permit, or approval not later than 90 days after FERC issues its final environmental document for the pipeline project. If an agency fails to meet this arbitrary and rigid 90-day deadline, then it must notify Congress and put forth a plan to ensure completion.

The time required to issue a certificate or permit is highly variable and depends on the complexity of the project, the length of the proposed pipeline, the proposed path of the pipeline, and the degree of public concern, among other factors. However, under this bill, the same rigid deadline applies to every pipeline project. It applies to a straightforward 30-mile pipeline far from population centers that crosses no rivers—and a complex, 500-mile pipeline that goes through a major population center and crosses a dozen rivers.

Inevitably, there will be complex pipeline projects for which coordinating agencies charged with issuing required permits under other federal laws will likely will not be able to issue a license, permit, or approval within the 90-day timeframe. Agencies are required to comply with their statutory responsibilities under the Clean Water Act, Clean Air Act, Endangered Species Act, Rivers and Harbors Act, National Historic Preservation Act, Coastal Zone Management Act, Mineral Leasing Act, and other statutes. Agencies that cannot complete the legally-required analysis necessary to issue a permit or authorization within 90 days of the completion of the FERC environmental document may have no choice but to deny the application – or worse even, to issue legally dubious permits that do not adequately protect public health, safety, and the environment.

In other words, requiring agencies to either approve or deny an application in 90 days may result in a greater number of denied applications that would have been granted if the agencies had adequate time to consider the application. This draft, aimed at speeding up FERC permitting, could end up having the opposite effect.

## **2. Coordinating Agencies' Consideration**

The discussion draft provides that if a coordinating agency identifies issues of concern that might delay or prevent the agency from issuing a license, permit or granting approval for an application, then FERC is required to convene a resolution meeting with the relevant agencies and the applicant to resolve any issues no later than 21 days after the request is made. If the issue is not resolved within 30 days after the resolution meeting then FERC is required to notify the heads of the relevant agencies.

It is unclear whether a resolution meeting will be either an effective or an appropriate mechanism for quickly resolving difficult or persistent issues. The inclusion of a resolution meeting might not result in quicker application approvals, since under the draft the timing of such a meeting would probably be too late to speed up the FERC process in any meaningful way.

The discussion draft would require all federal and state agencies to give deference to FERC in regards to the necessary scope of the environmental review. It is not clear whether

FERC possesses the necessary expertise to determine the appropriate scope of the environmental review required under all federal laws.

### **3. Redundant Website Requirements**

Additionally, the discussion draft requires FERC to establish a publicly available website to track all information regarding a pending application, including information related to required actions to complete the permitting and review process. The website must also include information regarding deadlines established by the Commission, a list of actions required by each relevant coordinating agency and the expected completion date, the agency point of contact, and an explanation for any delays.

Much of this information can already be found on FERC's existing website. Establishing a duplicative website, as the discussion draft directs the Commission to do, would unnecessarily divert staff resources away from reviewing applications, and thus undermine the discussion draft's principal objective to expedite natural gas pipeline permitting application reviews.

### **4. Potential for Improper Relationships**

To ensure FERC has adequate staff available to comply with all of the new requirements of the discussion draft, applicants are given an opportunity to help provide additional resources. Under the provisions of the draft, applicants seeking approval of a pipeline project can pay third party contractors or FERC staff to help expedite the application review process which could lead to both perceived and actually improper relationships.

This provision could lead to very troublesome, inappropriate, and unethical relationships and dealings between the Commission and applicants seeking approval of a pipeline project. Allowing applicants to pay FERC staff for expedited application decisions may lead to calls of impropriety on the part of FERC, or bribery on the part of the applicant. Additionally, applicants could accuse FERC staff of delaying their applications because they did not supply additional funds, or accuse the Commission of catering to the highest bidder for their services.

### **C. Summary of Discussion Draft Shortcomings and Potential Impacts**

The discussion draft will disrupt what is already a well-functioning permitting process for interstate natural gas pipelines. It would further limit arbitrarily, the time in which FERC and other agencies have to review pipeline applications, which could lead to perverse case outcomes in which permits are rushed and projects are denied on and for avoidable grounds and reasons. . The result will be rushed permitting and unnecessary project denials.

The provisions of the discussion draft micromanages the successful FERC natural gas pipeline application process, by establishing a long list of prescriptive requirements for each agency that participates in the pipeline permitting process. However, the draft does not provide clear guidance or standards for agencies to follow in order to expedite the review process as proposed by the discussion draft.

In addition, the bill micromanages the application process by requiring FERC to “police” other agencies, by having the Commission establish deadlines by which other agencies must issue the necessary permits without requiring input from those affected agencies. As a result, the bill will needlessly disrupt good- working relationships that already exists between FERC and those agencies it collaborates with in reviewing applications, which may lead to delays in application decisions.

The bill also enables potentially unethical relationships and arrangements to form between applicants and FERC staff, by allowing applicants to pay staff for expedited service.

Further, the discussion draft aims to solve a problem that does not exist. FERC data shows that, from 2009 to 2015, the Commission approved over 100 major natural gas pipeline projects, spanning over 3,700 miles in 35 states and with a total capacity of over 45 billion cubic feet per day.<sup>12</sup> The average time from filing to approval was under ten months. FERC decides 91% of certificate applications within 12 months.<sup>13</sup> In addition, the Government Accountability Office (GAO) has concluded that FERC’s pipeline permitting is predictable and consistent and that its processes are getting pipelines built.<sup>14</sup>

A final and salient point is that natural gas pipeline companies are in agreement that the current permitting process works well. The Interstate Natural Gas Association of America has testified that more than 12,000 miles of new interstate pipeline capacity was placed into service between January 2003 and March 2013.<sup>15</sup> When the Chief Executive Officer of Dominion Energy testified on behalf of the pipeline companies in May 2013, he told the Subcommittee on Energy and Power that “the industry can add new pipeline capacity in a timely, market-responsive manner.”<sup>16</sup> He also testified that: “The interstate natural gas pipeline sector enjoys a favorable legal and regulatory framework for the approval of new infrastructure.” His

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<sup>12</sup> Federal Energy Regulatory Commission, *Approved Major Pipeline Projects (2009-Present)*(online at [www.ferc.gov/industries/gas/indus-act/pipelines/approved-projects.asp](http://www.ferc.gov/industries/gas/indus-act/pipelines/approved-projects.asp)).

<sup>13</sup> Executive Office of the President, Office of Management and Budget, *Statement of Administration Policy H.R. 161- Natural Gas Pipeline Permitting Reform Act* (Jan. 20, 2015).

<sup>14</sup> U.S. Government Accountability Office, *Pipeline Permitting: Interstate and Intrastate Natural Gas Permitting Processes Include Multiple Steps, and Time Frames Vary* (Feb. 15, 2013)(GAO-13-221).

<sup>15</sup> House Committee on Energy and Commerce, Subcommittee on Energy and Power, Testimony of Gary Sypolt, on behalf of the Interstate Natural Gas Association of America, *Hearing on Grid Reliability Challenges in a Shifting Energy Resource Landscape*, 113th Cong. (May 9, 2013).

<sup>16</sup> *Id.*

conclusion was that “[t]he natural gas model works.” At the July 2013 hearing on H.R. 1900, the pipeline trade association testified that the FERC permitting process “is generally very good.”<sup>17</sup>

## II. HYDROPOWER REGULATORY MODERNIZATION DISCUSSION DRAFT

On May 6, 2015, the majority put forward a discussion draft to reform and modernize FERC’s hydropower licensing process. Rep. McMorris Rodgers circulated a similar discussion draft on April 24, 2015.<sup>18</sup> The Committee has not held any legislative or oversight hearings on hydropower licensing thus far in the 114th Congress.

### A. Background

Hydropower facilities built by utilities in interstate commerce are licensed by FERC under the Federal Power Act (FPA).<sup>19</sup> Under section 6 of the FPA, FERC licenses hydroelectric projects for periods of up to 50 years.<sup>20</sup> 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.<sup>21</sup>

FPA predates modern environmental statutes such as the Clean Water Act, the National Environmental Policy Act, and the Endangered Species Act. As such, the FPA mostly focuses on power production with few protections for the environment, recreation or similar considerations. One such protection, however, is the requirement under section 4(e) that any license that falls 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 for the adequate protection and utilization of such reservation.”<sup>22</sup> Another important environmental protection instructs the Commission to 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.<sup>23</sup>

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<sup>17</sup> House Committee on Energy and Commerce, Subcommittee on Energy and Power, Testimony of Donald F. Santa, President and Chief Executive Officer, Interstate Natural Gas Association of America, *Hearing on H.R. 1900*, 113th Cong. (Jul. 9, 2013).

<sup>18</sup> House Committee on Energy and Commerce, *McMorris Rodgers: Expanding Hydropower Opportunities* (Apr. 24, 2015) ([energycommerce.house.gov/press-release/mcmorris-rodgers-expanding-hydropower-opportunities](http://energycommerce.house.gov/press-release/mcmorris-rodgers-expanding-hydropower-opportunities)).

<sup>19</sup> Federal Power Act, 16 U.S.C. § 791a et seq.

<sup>20</sup> *Id.* at § 799.

<sup>21</sup> *Id.* at § 808(a).

<sup>22</sup> *Id.* at §797(e).

<sup>23</sup> *Id.* at § 811.

In 1986, Congress significantly amended the FPA to require greater consideration of the environmental and recreational impacts of hydroelectric facilities in the licensing process.<sup>24</sup> In particular, the Electric Consumers Protection Act (ECPA) required FERC’s decision to issue a license not be based on power generation alone, but 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.”<sup>25</sup> ECPA also, among other things, 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.”<sup>26</sup>

As part of the Energy Policy Act of 2005 (EPACT 2005), Congress enacted a new set of reforms to the hydroelectric licensing process in response to longstanding complaints that the process both took too long and resulted in projects that were uneconomic.<sup>27</sup> Many licensees and their supporters continue to view the process as overly long and onerous, and they have called for further legislative changes particularly with regard to resource agencies’ mandatory conditioning authority.<sup>28</sup>

## **B. Hydropower Regulatory Modernization Discussion Draft**

### **1. Section 1301: Administrative Efficiency and Transparency**

This provision adds three new subsections to section 4 of the FPA:

Proposed new subsection (h) would give FERC exclusive authority to enforce, amend, and administer any requirements included in a hydropower license, including mandatory conditions set by other agencies.

New subsection (i) would require FERC to rely on existing studies and data in most instances unless FERC determines “the value of such new data or other information outweighs the cost of producing it” and provides a written explanation supported by FERC’s record demonstrating the inadequacy of existing information.

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<sup>24</sup> Electric Consumers Protection Act of 1986, Pub. L. No. 99-495.

<sup>25</sup> Federal Power Act, 16 U.S.C. §797(e).

<sup>26</sup> *Id.* at §803(j).

<sup>27</sup> See House Committee on Energy and Commerce, Subcommittee on Energy and Power, *Hearing on Hydroelectric Legislation*, 106th Cong. (Mar. 30, 2000) (online at [www.gpo.gov/fdsys/pkg/CHRG-106hhrg64033/html/CHRG-106hhrg64033.htm](http://www.gpo.gov/fdsys/pkg/CHRG-106hhrg64033/html/CHRG-106hhrg64033.htm)).

<sup>28</sup> See, e.g., American Public Power Association, *Hydropower Issue Brief* (Feb. 2015) (online at [publicpower.org/files/PDFs/23%20Hydropower.pdf](http://publicpower.org/files/PDFs/23%20Hydropower.pdf)).

New subsection (j) would significantly limit FERC’s current ability to limit project-related impacts on shoreline lands and mandates FERC to demonstrate its need for administration and management of project lands with a statement supported by the record and an explanation as to how state or local laws are “inadequate to meet the site-specific license requirement.”

## **2. Section 1302: Promoting New Hydropower Infrastructure**

This provision adds a new section 34 to the FPA that deregulates new hydropower added to existing non-powered dams, so long as the projects 1) are not currently licensed or exempt; 2) are associated with a non-power dam constructed before date of enactment and operated for some other purpose; 3) are built for power generation; 4) generate power using releases, flows, diversions from underlying water infrastructure; and 5) don’t result in “material change” to the dam’s storage control, diversion, release, withdrawal, or flow operations.

New projects of less than 5 megawatt (MW) capacity would not be subject to FERC jurisdiction so long as the entity proposing such facility files with FERC a notice of intent to construct, along with “sufficient information to demonstrate that the facility meets the qualifying criteria.” For new projects greater than 5MW, the legislation authorizes FERC to grant exemptions to projects it determines are qualifying facilities and greatly constrains FERC and resource agencies’ abilities to impose environmental conditions on such projects, subjects environmental conditions to cost-benefit analysis and justification, and limits the scope of NEPA review.

## **3. Section 1303: Promoting Accountability, Requiring Balanced and Efficient Decision-making, and Reducing Duplicative Oversight**

This provision makes significant changes to key hydroelectric license reforms added by EPACT 2005 and dramatically alters the mandatory conditioning authority of the resource agencies in section 4(e) and the fishway authorities in section 18 of the existing FPA. Among other things, the provision gives FERC the exclusive authority to replace alternative conditions under section 4(e) and fishway prescriptions under section 18(j) with conditions proposed by the dam owner, so long as those conditions cost less and the Commission determines that they meet the required level of protection. Since enactment of the FPA, such determinations have been made by the relevant resource agencies.

The provision also weakens the EPACT 2005 standard for alternative mandatory conditions under section 4(e); drastically rewrites section 4(e) and section 18 of the FPA and overturns decades of case law to give FERC new authority to reject any or all resource agency-imposed conditions or prescriptions; takes the trial-type hearing and alternative conditioning process away from the conditioning agencies and gives it to FERC; and abolishes the dispute resolution procedure.

## **4. Section 1304: Promoting Efficient and Timely Decision-making**

This provision modifies two procedural and administrative provisions contained in part III of the FPA to give FERC authority for “coordinating all applicable Federal authorizations” for hydroelectric projects under FPA and section 405(d) of the Public Utility Regulatory Policies Act (PURPA). The provision defines “federal authorization” broadly to include any “permit, special use authorization, certifications, opinions, consultations, determinations, or other approvals as may be required under Federal law” including authorizations required under existing laws like the National Environmental Policy Act, Endangered Species Act, Clean Water Act, and the Coastal Zone Management Act. FERC is required to set a schedule for the other federal and state agencies to complete action on such authorizations and to maintain a consolidated record, which is the record for judicial review for all federal or state authorizations. If the record is incomplete or an agency fails to meet FERC’s schedule, an applicant can take the agency to court. The provision also amends section 313 of the FPA to move judicial review of federal or state agency decisions to federal court and allows review of an “alleged failure to act” by federal or state agency that has not completed a relevant federal authorization.

### **III. WITNESSES**

The following witnesses have been invited to testify:

#### **Panel One:**

**The Honorable Paul R. LePage**  
Governor of Maine

**Ann F. Miles**  
Director of the Office of Energy Projects  
Federal Energy Regulatory Commission

#### **Panel Two:**

**Donald F. Santa**  
President and Chief Executive Officer  
Interstate Natural Gas Association of America

**Randy Livingston**  
Vice President, Power Generation  
Pacific Gas and Electric Company

**John J. Suloway**  
Senior Advisor  
New York Power Authority

**John Collins**  
Managing Director of Business Development  
Cube Hydro Partners

**Carolyn Elefant**  
Member of the Board  
The Pipeline Safety Coalition

**Richard Roos-Collins**  
General Counsel  
The Hydropower Reform Coalition