

**U.S. House of Representatives  
Committee on Energy and Commerce  
Subcommittee on Energy and Power**

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

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Chairman Whitfield, Ranking Member Rush, and Members:

I am Richard Roos-Collins, appearing on behalf of the Hydropower Reform Coalition.

Thank you for this opportunity to testify on the discussion draft of the bill, “Hydropower Regulatory Modernization.”

The Hydropower Reform Coalition (HRC) represents nearly 2 million people who fish, hunt, boat, and otherwise enjoy the lands and waters of hydropower projects. Formed in 1992, our member conservation groups<sup>1</sup> have signed more than 170 comprehensive settlement agreements with licensees.<sup>2</sup> We contribute sweat equity to the implementation of the settlement terms. We hold recreation events, maintain wildlife habitat, and undertake scientific monitoring and other tasks in cooperation with licensees. We negotiated with industry and agencies to develop the Integrated Licensing Process, the primary process used by the Federal Energy Regulatory Commission (FERC) since 2005. We have developed and supported reform legislation, including the Hydropower Regulatory Efficiency Act of 2013.

The HRC supports the goal behind this discussion draft: saving time and money in hydropower licensing proceedings. We strongly oppose certain mechanisms proposed in the draft. Let me explain.

In the 1935 amendments to the Federal Power Act, Congress required that every license must be best adapted to a comprehensive plan for all beneficial uses of the basin. These include power, flood control, water supply, fish and wildlife, and recreation. This mandate is remarkable and right, today as then. It recognizes the uniquely important and complex functions of water.

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<sup>1</sup> We represent 160 non-governmental organizations throughout the nation.

<sup>2</sup> The projects subject to these settlements have 11,215 megawatts (MW) of capacity.

The Federal Power Act is not just about generation of electrical power. It deliberately advances other beneficial uses.

The statute is implemented through cooperative decision-making. FERC makes the ultimate decision whether to license a project, and how to serve the public interest. Other federal and state agencies with unique expertise and authorities in non-power uses, such as fish passage and water quality, develop license articles specific to those uses.

In early decades, licenses were mostly bilateral efforts between applicants and the Commission. That changed as a result of regulatory programs under the 1965 Fish and Wildlife Coordination Act, 1969 National Environmental Policy Act (NEPA), 1972 Clean Water Act, 1973 Endangered Species Act, and other modern statutes that apply generally to all federal actions affecting navigable waters. In the modern era, the agencies that administer these laws have been increasingly active in relicensing as original licenses expired.

The cooperative federalism enhances the public benefits of hydropower. During the modern era, new licenses have increased the power capacity of projects by 4% and have provided many billions of dollars in regional economic benefits associated with better fisheries and recreation.<sup>3</sup> This success reflects the integrated expertise of FERC and other regulatory

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<sup>3</sup> In 2001 FERC surveyed the time and cost of relicensing proceedings from 1986 – 2000. It found that new licenses reduced power generation by 1.6%, and increased generation capacity by 4%, relative to original licenses. See FERC, *Report on Hydroelectric Licensing Policies, Procedures, and Regulations: Comprehensive Review and Recommendations Pursuant to Section 603 of the Energy Act of 2000* (2001), p. 50. This appears to be FERC's most recent review of such time and cost.

We reviewed environmental documents and other evidence in the record of licensing proceedings, to provide this rough estimate of the economic benefits associated with recreation, commercial fisheries, and other non-developmental uses. We are not aware of any survey by FERC on this topic.

agencies. The Federal Power Act is based on the principle, and this experience confirms the wisdom, that any one agency in Washington, D.C., even one as competent as FERC, does not have the on-the-ground knowledge necessary to optimize a license for all such water uses.

This draft bill would disrupt this cooperative federalism. FERC would set the schedule for other agencies' work during a licensing proceeding. It would make the final call on disputed factual issues relevant to Commerce, Interior, and Agriculture Departments as they develop their articles for fishways and federal reservations, respectively. A state's water quality certification would no longer be subject to appeal in state court. After license issuance, FERC would have exclusive authority to amend, enforce, and administer all articles, even those that are integral to regulatory programs (such as a water quality control plan) administered by these other agencies.

Centralizing licensing authority would not enhance the quality of the licenses themselves. Since 2011 certain witnesses before Congress<sup>4</sup> have argued for fewer cooks in the kitchen, to cut time and cost. We agree that the relicensing process should generally take 5.5 years (as anticipated by the statute)<sup>5</sup> or less, not more. We agree that the cost to the licensee and its customers should not exceed what is necessary for an informed decision.

Cut red tape? You bet. Which red tape?

This bill proposes to amend certain procedures, ostensibly to cut time and cost. For example, Section 1303 addresses the trial-type hearing that the 2005 Energy Policy Act requires

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<sup>4</sup> Before this and the House Natural Resources Committee.

<sup>5</sup> The Federal Power Act does not set a hard deadline for a relicensing proceeding. However, by requiring a notice of intent 5 to 5.5 years before the expiration of the original license, the statute creates an expectation that the proceeding will end roughly within that timeframe. *See* 16 U.S.C. § 808(b).

on disputed issues of fact related to fishways.<sup>6</sup> How much red tape is in this hearing procedure? Three trials have occurred since Congress adopted this procedure in 2005.<sup>7</sup> All met the statutory deadline of 180 days. The Administrative Law Judges assigned by the agencies have been tough and fair. In one proceeding on a fishway article, the pre-trial conference was over in a few minutes. The judge started by saying that he would not tolerate unnecessary argument on the pending motions. The licensee, prescribing agency, and other parties rested on their pleadings. The judge then decided pending motions on the spot. This no-nonsense approach motivated prompt settlement of the issues otherwise set for trial. Transferring such authority from an agency's judges to the Commission, as proposed in Section 1303, would not speed-up such trials or the final licenses.

We support practical reforms to expedite relicensing of existing projects. We ask: what has actually caused some proceedings to slow to a crawl, while many others have kept to the expected schedule of 5.5 years or less?

In the early 2000's, Pat Wood, who was President Bush's appointee as FERC Chair, held an annual oversight hearing to address delayed relicensings. He asked his staff, other agencies, licensees and other stakeholders, to participate. Without assigning blame, he grilled the participants on why they had not completed a given relicensing. He used each hearing to identify specific causes for delay and fix them. This procedure greatly reduced the relicensing backlog during his term. Unfortunately, it is not still being used.

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<sup>6</sup> 16 U.S.C. §§ 797(e), 811.

<sup>7</sup> In 2009 FERC reviewed the implementation of the trial-type hearing procedure in EPCA. At that time, there have been a total of 16 requests for trial-type hearings, and 13 had settled before trial. *See* Testimony of J. Mark Robinson, House Committee on Natural Resources (June 27, 2012), p. 5.

Some recent testimony has broadly traced delays and unnecessary cost to the states who administer Clean Water Act section 401, as well as the federal agencies who administer Endangered Species Act section 7 and Federal Power Act sections 4(e) and 18. This view is unfounded. It disregards the delays caused by applicants who have submitted incomplete studies or untimely responded to information requests. We do not see any hard facts that other agencies are dragging their feet in relicensings as a matter of strategy or competing priorities.<sup>8</sup>

Experience has shown that delays do often result from inadequate coordination between FERC and other agencies in the development of the record. These left hand-right hand issues are fixable under existing law or with modest statutory reform.

First, the NEPA document in a relicensing should be jointly prepared and adopted by FERC (as lead) and the other agencies responsible for license articles.<sup>9</sup> Second, FERC and these

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<sup>8</sup> In June 2012, then-Representative Markey asked FERC for any documentation that relicensing delays since 2005 have been caused by the exercise of conditioning authorities under Federal Power Act sections 4(e) (federal reservations) and 18 (fishways). FERC responded: “Commission staff is unable to provide this information because we do not track the individual conditions filed in each relicensing case. It would be extremely time consuming to gather this information because it would require researching the record for each relicensing since late 2005 as well as any settlement agreement that may have been filed.” See FERC, “Responses to The Honorable Edward J. Markey” (June 2012), p. 1.

<sup>9</sup> NEPA encourages such cooperation between the lead federal agency and other agencies with relevant jurisdiction. Each cooperating agency reviews or prepares analysis within its expertise. The document specifies issues where the lead and cooperating agencies disagree, and it then states separate findings and conclusions as appropriate on such issues. The joint document thus serves as the record for all related parts of a final decision. See 40 C.F.R. § 1501.5 – 1501.6.

It is rare today that other agencies cooperate in a NEPA document for a relicensing. FERC has applied its *ex parte* rule, 18 C.F.R. § 385.2201, to require that a cooperating agency must forfeit its right to become a party, because it will be in a position to receive off-the-record information related to the NEPA document. Most of the time, state agencies will not accept that Catch-22 and thus prepare their own environmental documents. This is a primary driver for the delays associated with water quality certifications.

agencies should develop a joint study plan to provide all new information needed for their respective decisions.<sup>10</sup> Third, they should compile a joint schedule, without FERC's prescribing the specifics for any agency; and early judicial review should be available to correct unnecessary delay.<sup>11</sup>

Let me turn to the topic of original licensing as proposed in Section 1302. We do not support exempting unpowered dams, conduits, and similar facilities from applicable requirements for protection of environmental quality and public safety. We do support retrofitting these facilities in circumstances where the baseline (both in terms of environmental quality or public safety) stays the same or is enhanced. Since all fifty states have such infrastructure, it makes sense to add generating capacity quickly and on a big scale. We are puzzled why so few conduits have been retrofitted under the 2013 statute and FERC's

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A simple fix is that FERC adopt a new policy or practice to encourage a joint document in each relicensing. A cooperating agency will commit that: (a) its separated staff will work with the Office of Energy Projects on the joint environmental document, (b) its other staff will work on its internal deliberations, and (c) these staffs will not communicate about the project. In turn, FERC will agree that the cooperating agency may become a party. We believe that this procedure is clearly permissible under FERC's existing rule. Indeed, FERC used this procedure in the relicensing proceeding for New York Power Authority's St. Lawrence-FDR Project in the late 1990's.

<sup>10</sup> Under 18 C.F.R. § 5.9, an agency may request studies in a licensing proceeding. Roughly 66% of the time, FERC approves these requests. In the other 33%, it declines the requests and directs the agency to use its own authority to obtain a given study. *See* FERC, "Response to The Honorable Edward J. Markey" (June 2012), pp. 1-2. These study plan disputes often cause delays in relicensings. That is because, once FERC says "no," the agency must seek to persuade or compel the licensee to undertake the rejected study, given its obligation (independent of FERC) to have substantial evidence in support of any license article it submits. *See Bangor Hydro-Electric Company v. FERC*, 78 F.3d 659 (D.C. Cir. 1996).

<sup>11</sup> Judicial review of delay, sought during a relicensing, rarely occurs today, although at least one case was brought to challenge FERC's delay in starting ESA consultation. *In re American Rivers and Idaho Rivers United* (D.C. Cir. 03-1122).

implementing rules,<sup>12</sup> which have typically resulted in a final decision only 63 days after an application.<sup>13</sup> We believe that unfavorable terms for grid interconnection and transmission may be a primary driver. We are working closely with small hydropower associations to isolate this and other possible drivers.

The Hydropower Reform Coalition is ready to work with the hydropower industry, agencies, and other stakeholders on effective reforms. We seek practical solutions that expedite licensings and preserve cooperative federalism true to the mandate that each license must be best adapted to all beneficial uses of the affected waters.

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<sup>12</sup> See FERC, Order 800 (Sept. 18, 2014), 148 FERC ¶ 61,197 (2014).

<sup>13</sup> Office of Energy Projects, “Briefing on Implementation of Hydropower Regulatory Efficiency Act” (Jan. 16, 2014), p. 5.