

February 3, 2016

The Honorable Ed Whitfield, Chairman  
The Honorable Bobby L. Rush, Ranking Member  
Subcommittee on Energy and Power  
Committee on Energy and Commerce  
U.S. House of Representatives

Dear Chairman Whitfield and Ranking Member Rush:

We are writing to express our views on the following five bills being considered by the subcommittee.

- H.R. 2080, a bill to reinstate and extend the deadline for commencement of construction of a hydroelectric project involving the Clark Canyon Dam;
- H.R. 2081, a bill to extend the deadline for commencement of construction of a hydroelectric project involving the Gibson Dam;
- H.R. 3447, a bill to extend the deadline for commencement of construction of a hydroelectric project involving the W. Kerr-Scott Dam;
- H.R. \_\_\_\_, a bill to extend the deadline for commencement of construction of a hydroelectric project involving the Jennings Randolph Dam; and
- H.R. \_\_\_\_, a bill to extend the deadline for commencement of construction of a hydroelectric project involving the Cannonsville Dam.

Section 13 of the Federal Power Act requires hydropower licensees to commence construction within two years of receiving a federal license from the Federal Energy Regulatory Commission (FERC). The Commission may extend the construction deadline once for an additional two-year period. If a licensee fails to begin construction by this extended deadline, its license expires and is terminated through a written order by the Commission. Each of these five bills would extend the statutory deadline for commencement of construction for a hydroelectric project. Four of the five projects that are seeking a statutory extension for the Federal Power Act's construction deadline have already received a two-year extension from the Commission. Two of the bills would reinstate licenses that have already been terminated by FERC.

American Rivers does not support individual license extension bills like the ones currently being considered by the committee. The vast majority of hydroelectric projects are able to commence construction within FERC's statutory deadline, and we generally look with disfavor on attempts to evade regular order in proceedings before FERC. We are concerned about the precedent set when Congress passes earmarks to waive regular order at specific dam sites or FERC projects. We want to make clear that our objection is to the practice of earmarking FERC projects in general, and not with any of the specific projects before the Committee at this time.

These bills are also a symptom of a larger issue with hydropower development. All of these projects involve retrofitting existing non-powered dams with new hydroelectric facilities. American Rivers generally supports policies, like the Hydropower Regulatory Efficiency Act of

2013, that would encourage the responsible development of hydropower on existing non-powered water infrastructure.

As you know, our organization strongly opposed the hydropower provisions in H.R. 8, which would dramatically weaken environmental standards for hydropower projects. The hydropower industry has argued that these changes – which would weaken bedrock environmental laws like the Clean Water Act and the Endangered Species Act, along with key protections for public land, Native American treaty obligations, recreation, and fisheries – are necessary to “expedite” the FERC licensing process. Members of the industry, arguing before this Committee, have consistently identified the hydropower licensing process – particularly sections of the law that protect these critical public values – as the greatest obstacle to new hydropower development.

We believe that the facts – demonstrated, in part, by the existence of these five bills – tell a very different story. FERC’s regulations envision a five-year licensing process, with three years of pre-filing activities and two years of processing after an application is filed. While some projects take longer, there are many examples of hydroelectric projects that receive FERC licenses in a much shorter period of time. Between 2006 and 2012, FERC issued 46 hydropower licenses in *fewer than twelve months* each.

All of the projects here are consistent with FERC’s ordinary licensing timelines. The completed license applications for each of these projects were processed in fewer than two years, with an average processing time of fewer than 16 months. All of the developers of these projects received their licenses within 10-21 months of filing an application that was complete and ready to be processed.<sup>1</sup> The two projects with the longest licensing times (Clark Canyon, at 38 months and W. Kerr Scott at 21 months) involved a “delay” between the filing of the licensing application and FERC’s determination that the license application was complete and ready for processing. FERC deemed the application for the W. Kerr Scott project deficient, and the application for the Clark Canyon project was deemed deficient *twice*.

At all five of these projects, post-licensing activities have been the primary obstacle to successful development. With the exception of the Cannonsville Dam project (where the license has not yet expired but where emergency repairs needed at the dam will prevent the project from being constructed anytime soon), each of the projects in question has held a FERC license for a period that is greater than the time it took for FERC to process the license in the first place, anywhere from 3 to 6 years. The average time it took for licensees to obtain their licenses for these projects (16 months) is far less than the time that has elapsed since they received those licenses and failed to commence construction (an average of 46 months and counting). On average, these developers have held these licenses without generating a single kilowatt or even breaking ground on the facility for nearly *three times as long as* it took FERC to process their licenses in the first place. The FERC licensing process is not holding back any of these projects.

The National Hydropower Association (NHA) continues to argue before Congress that the licensing process – particularly those portions of the process are intended to protect the environment – are the greatest source of delay in bringing new hydropower online. Yet elsewhere, NHA downplays this concern. In a recent letter regarding the Administration’s Clean

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<sup>1</sup> Time from FERC “notice of ready for environmental analysis” to issuance of license order.

Energy Incentive Program (CEIP), NHA argues that many hydropower projects can be licensed and constructed without significant delay:

Even under hydropower's current licensing process there are many examples of projects being licensed and built within the timeframes outlined in the CEIP. For example, the Federal Energy Regulatory Commission (FERC) maintains a list of projects that were expedited in less than one year, and between 2006 and 2012, 46 hydropower licenses were issued in under twelve months representing over 39,000 kW. For small hydropower developers seeking a FERC exemption the median project timeline between exemption application and commercial operation is 2.5 years, and the median timeline between start construction to placed-in-service is 17 months. Similarly, under the Hydropower Regulatory Efficiency Act of 2013 (HREA), Congress removed certain small conduit hydropower projects from FERC jurisdiction and since HREA's passage, 57 projects have received "qualifying conduit" status, representing over 24,000 kW's. For these projects it takes FERC between two and three months to issue a determination. Finally, the Bureau of Reclamation's Lease of Power Privilege (LOPP) process demonstrates hydropower projects can meet the CEIP's timeframes. Under the LOPP, Reclamation has approved a number of projects representing over 49,000 kW's. On average, these projects, from project initiation to operation, takes between 2.5 and 3 years.<sup>2</sup>

NHA argues elsewhere that the licensing process is *not* the most significant source of delay in developing new hydropower projects. In a recent comment letter before FERC, NHA referenced the Department of Energy's 2014 Hydropower Market Report<sup>3</sup> in support of its argument that FERC's annual charges for hydropower licensees (which fund FERC's licensing activities) should not apply to unconstructed hydroelectric projects:

**"Examining the major licensing milestones of sixteen projects between 2005 and 2013, the Market Report found that the phase of licensing and project development between license issuance and the start [sic] construction took the most time, more than four years, typically, longer than obtaining the license itself."** [emphasis added]

Our own review of the data used to inform figure 7 (p. 20) in DOE's Market Report – which involves projects that are very similar to the ones addressed in these five bills – suggests that NHA is correct: Hydropower projects can indeed be licensed and constructed quickly, and licensing is far from the greatest source of delay when it comes to getting new hydropower projects online. Rather, the period of time between the receipt of a FERC license and commencement of construction is a much more significant source of delay:

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<sup>2</sup> National Hydropower Association Comments on Docket No. EPA-HQ-OAR-2015-0199, Federal Plan Requirements for Greenhouse Gas Emissions from Electric Utility Generating Units Constructed on or Before January 8, 2014; Model Trading Rules; Amendments to Framework Regulations. <http://www.hydro.org/wp-content/uploads/2016/01/NHA-Comments-on-EPA's-Clean-Energy-Incentive-Program.pdf>

<sup>3</sup> <http://energy.gov/eere/water/downloads/2014-hydropower-market-report>

- The average time it took to license a project was just shy of 2.5 years (an average of four years for licenses and six months for exemptions).
- FERC's licensing process contemplates a five-year licensing period. Only six new projects exceeded this period. The average delay was 16 months; the maximum delay was slightly less than eight years (again, much less than the industry's "10 year delays" talking point).
- By contrast, the period of time between the receipt of a FERC license and commencement of construction was a much larger source of delay: on average 5.21 years (7.36 years for licenses and 2.5 years for exemptions). These delays are unrelated to environmental concerns, as Clean Water Act certifications, ESA consultation, and other environmental issues were resolved before license issuance.

The five bills currently under consideration by this committee provide further evidence that licensing is not the greatest of the hydropower industry's problems. Rather, the problem appears to be with developers' ability to actually get projects built once they have received a license.

We recognize that there are other legitimate factors beyond the control of these developers which may have contributed to the delay in the start of construction at these five projects. For example, two of the projects in question involve development at dams owned by the federal government and operated by the U.S. Army Corps of Engineers. Developers must comply with the Corps' section 408 permitting process, via which the Corps determines that constructing a hydropower project "will not be injurious to the public interest and will not impair the usefulness" of the underlying federal dam. The Corps' 408 process typically begins *after* the FERC licensing process is complete, and is a widely-acknowledged source of delay in licensing. In testimony before this committee in May of 2015, Ann Miles, the Director of FERC's Office of Energy Projects, suggested that it might be more efficient to take FERC out of the permitting of these projects altogether:

Many of those are Corps of Engineers or Bureau of Reclamation Dams, and one thing that is in my testimony is perhaps a suggestion for trying not to have duplicative federal agencies, is that those agencies whose dams those are take on the responsibility for siting the nonfederal projects at their dams and remove FERC's jurisdiction.<sup>4</sup>

The vast majority of potential hydroelectric capacity on non-powered dams is at Federal facilities. The U.S. Bureau of Reclamation is already successfully permitting hydropower on its facilities without FERC's involvement via its Lease of Power Privilege process. American Rivers would welcome a discussion with the hydropower industry on how we can jointly support legislation that, rather than undercutting bedrock environmental protections like H.R. 8 does, would instead allow agencies like Reclamation and the Corps to permit the expeditious non-federal development of hydropower on their own facilities without the need for FERC's involvement.

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<sup>4</sup> Hearing on Discussion Drafts Addressing Hydropower Regulatory Modernization And Ferc Process Coordination Under The Natural Gas Act. U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Energy and Power. Washington, D.C. Wednesday, May 13, 2015.  
<http://docs.house.gov/meetings/IF/IF03/20150513/103443/HHRG-114-IF03-Transcript-20150513.pdf>

We also understand that other post-licensing activities (securing financing, obtaining generating equipment, etc.) can result in delays, and we believe that the public interest might be served by giving developers more time to complete these activities before their licenses are terminated. We would be interested in potentially supporting legislation that – instead of weakening protections for clean water, public lands, and endangered aquatic species – would extend the statutory construction deadlines for all FERC licensees to better account for these unforeseen circumstances and encourage the responsible development of new hydropower capacity.

Thank you for the opportunity to provide comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Bradley". The signature is written in a cursive style with a large initial "J" and a distinct "B".

Jim Bradley  
Vice President for Government Relations and Policy  
American Rivers