



Testimony of Wm. Robert Irvin  
President and Chief Executive Officer  
American Rivers, Inc.

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Committee on Energy and Commerce  
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Thank you for the opportunity to testify today on hydropower legislation before the Subcommittee. My name is William Robert Irvin, and I am President and CEO of American Rivers. In addition, I recently served as a member of the Department of Energy’s Senior Peer Review Group for the Department’s Hydropower Vision Report.

American Rivers is one of the leading national conservation organizations involved in hydropower. Our staff have been involved in hundreds of new and original license proceedings since our founding, and we have seen the best and worst that the federal licensing process has to offer. Since 1973, American Rivers has protected and restored more than 150,000 miles of rivers through advocacy efforts, on-the-ground projects, and an annual America’s Most Endangered Rivers ® campaign. Headquartered in Washington, DC, American Rivers has offices across the country and more than 250,000 members, supporters, and volunteers.

My testimony will be confined to those pieces of legislation related to hydropower, specifically: Discussion Draft: Hydropower Policy Modernization Act of 2017; Discussion Draft: Promoting Hydropower Development at Existing Non-Powered Dams Act; Discussion Draft: Promoting Closed-Loop Pumped Storage Hydropower Act; Discussion Draft: Promoting Small Conduit Hydropower Facilities Act of 2017; H.R. 1538, Supporting Home Owner Rights Enforcement Act; H.R. 446, To extend the deadline for commencement of construction of a hydroelectric project; H.R. 447, To extend the deadline for commencement of construction of a hydroelectric project; and H.R. 2122, To reinstate and extend the deadline for commencement of construction of a hydroelectric project.

Following the conclusion of my comments on the aforementioned legislation, I will offer some thoughts on how to constructively improve the hydropower licensing process.

Before I begin discussing the specifics of each bill before the Committee today, let me lay out some core principles of American Rivers with respect to hydropower and legislation to improve the permitting and licensing process. First, American Rivers is not anti-hydropower. We have supported and promoted legislation that promotes the development of sustainable hydropower projects. We also participate in FERC relicensing proceedings that result in the continued generation of hydroelectricity at existing facilities while improving the environmental performance of hydropower dams. Hydropower is and will remain a key component of the United States' energy portfolio. And while hydropower is not carbon free energy due to emissions of methane gas from reservoirs, it is low carbon, particularly when compared to fossil fuel generation.

When sited and operated responsibly, hydropower can have enormous benefit. When sited and operated irresponsibly, hydropower can have enormous adverse consequences.

Hydropower dams have extirpated species, and many continue to push endangered fish to the brink of extinction. Hydropower dams can have toxic effects on water quality. Hydropower dams can dewater stretches of river, and they have in the past been built with callous disregard of Native Americans who rely on a healthy river systems; Native American sacred and ancestral lands have been inundated by dams, and fisheries with great economic and spiritual value have been devastated.

Hydropower dams disrupt flows, degrade water quality, block the movement of a river's vital nutrients and sediment, destroy fish and wildlife habitat, impede migration of fish and other aquatic species, and eliminate recreational opportunities. Reservoirs slow and broaden rivers, making them warmer. The environmental, economic, and societal footprint of a dam and reservoir may extend well beyond the immediate area, impacting drinking water, recreation, fisheries, wildlife, and wastewater disposal.

Therefore, American Rivers, the Hydropower Reform Coalition, and indeed the entire environmental community will vigorously oppose:

- Any effort to limit the application of the Endangered Species Act or the Clean Water Act to hydropower dams;
- Any effort to federalize or otherwise infringe upon state water law and state authority to manage water rights;
- Any effort to limit the protections afforded to Native American tribes' territory, religious liberty, and reserved rights in hydropower licensing;

- Any effort to limit the ability of the United States to protect federally managed fisheries;
- Any effort to limit the ability of the United States to protect taxpayer owned public lands and waters, including the recreational use of those lands;
- Any effort to deny the United States Army Corps of Engineers the ability to protect Congressionally authorized infrastructure during the construction of hydroelectric projects at a Corps facility;
- And any effort to limit the authority of state agencies to protect fish, wildlife, or other natural resources within their state.

Unfortunately, H.R. 8, passed by the Committee in the last Congress, failed all of these tests, which is why we strongly opposed that legislation. Many of the bills before the Committee today also fail these tests. We hope that rather than moving these bills forward, the Committee will instead work with stakeholders, including American Rivers, to develop legislation to address those concerns of the hydropower industry which are legitimate and which can be solved in an environmentally responsible manner.

Please find, below, detailed thoughts on each of the hydropower bills before the Committee today.

**Discussion Draft: Hydropower Policy Modernization Act of 2017**

First, let me preface my remarks by saying that the Discussion Draft is improved when compared to H.R. 8 from the previous Congress. However it still fails two key tests: first, it undermines

key protections provided within the Federal Power Act, Clean Water Act, and Endangered Species Act for fish, wildlife, water quality, public lands, Native American trust and treaty obligations, and state water rights. Second, it creates an unrealistic and confusing rule-making and schedule process that would substantially complicate the licensing process while potentially preventing states, tribes, and federal resource agencies from making scientifically based and legally defensible oversight actions.

The broad reworking of the current licensing process would lead to an endless cycle of litigation because it upends often in confusing fashion, more than forty years of court decisions and settled case law, not to mention the 97-year history of the Federal Power Act. This legislation would do fail its stated purpose to to improve the licensing process while increasing costs to utilities and taxpayers and putting hydropower licenses first in line to use waters Congress has recognized as belonging to all Americans.

Since its passage in 1920, the Federal Power Act (FPA) has contained two critical resource management charges. Section 4(e) directs the Secretaries of Agriculture, Commerce, and the Interior to ensure that no federal reservations (anything from a national forest to an American Indian reservation) are negatively impacted by the construction or operation of a hydroelectric project. Section 18 of the Federal Power Act instructs the Secretaries of Commerce and the Interior to ensure that proper fish passage exists at a proposed or existing hydroelectric project, so that fish species inhabiting more than one stretch of a river, or migratory species such as salmon, herring, and some trout species are able to migrate between rivers and the ocean to complete their life cycle.

The Clean Water Act, enacted by Congress in 1973, recognized the inherent right of states to manage their water quality, and provided a mechanism for them to protect their resources in hydroelectric licensing via section 401 of that Act. A section 401 Water Quality Certification is employed by states to ensure enough water is in the river for fish, wildlife, recreation, human consumption, and project operation. The United States Supreme Court, in *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology* (511 U.S. 700 (1994)), affirmed that states issue both the standards and the mechanisms by which to enforce them. The Clean Water Act Amendments of 1987 recognized Native American tribes' right to manage water on their reservations, and enabled them to issue certifications as well.

To our knowledge, at no time since the Federal Power Act was passed in 1920, has the Federal Energy Regulatory Commission (FERC), or its antecedent agencies, placed conditions on a license more protective than those proposed by a mandatory conditioning agency. It is true that FERC can limit the construction or operation of a project in order to preserve or restore environmental quality, and it does, simply not as often or as vigorously as federal, state, and tribal resource agencies. In fact, over decades, FERC has acted to limit the Secretaries of Agriculture, Commerce, and the Interior from exercising their statutory responsibilities and has sought to prevent states and tribes from executing their sovereign rights. More often than not, the courts have ruled that FERC has overstepped its bounds and upheld the authority of federal natural resource agencies, states, and tribes. This is largely because Congress has never imbued the Commission with an environmental stewardship or resource management mission nor does the Commission have the same statutory obligations as the conditioning agencies. What the courts have repeatedly refused to do could now be accomplished by enacting legislation such as the Discussion Draft.

The Hydropower Reform Coalition, of which American Rivers is a co-founder and permanent Steering Committee member, testified before this subcommittee in March and identified five ways in which hydroelectric licensing could be improved. They are:

- Presumptive inclusion in FERC study plans of study requests submitted by federal, state, and tribal resource management agencies;
- Promotion of memoranda of understanding (MOU) between FERC tribes, and states to improve coordination and prevent unnecessary delay;
- Increasing appropriations to federal resource management agencies to fund the staff positions allowing for efficient and thorough evaluation of hydroelectric licenses;
- Delegation of §§4(e) and 18 authority to technically qualified and capable tribes;
- Improved coordination between FERC and the U.S. Army Corps of Engineers (ACE) to expedite the powering of non-powered dams owned and operated by that agency.

Each of these policy suggestions are intended to increase communication and cooperation between applicants, FERC, and resource agencies. Each preserves existing authorities while decreasing confusion and ensuring the availability and sharing of information necessary to complete environmental reviews. By comparison, the Discussion Draft elevates FERC's power above that of every co-ordinate federal, state, and tribal oversight agency, potentially sacrificing substantive environmental protections and responsible resource management.

I would like to address some of the most worrisome portions of this draft legislation:

### *Expanding FERC's Jurisdiction*

The proposed new §34 of Part I of the Federal Power Act would enlarge the jurisdiction of FERC by adding to the definition of “federal authorization” (now understood to be mandatory conditions and prescriptions under §§4(e) and 18 of the FPA, §401 of the Clean Water Act, and the Endangered Species Act) , “any permits, special use authorizations, certifications, opinions, or other approvals as may be required under federal law to approve or implement the license, license amendment, or exemption under this part.” Whereas currently FERC manages—but does not control—the licensing process with respect to conditions placed onto a license under §§4(e), 18, and 401 and the ESA, it does not have the ability to manage the ancillary aspects of access and operation. In other words, FERC manages the Forest Service’s review of a license and the Secretary of Agriculture’s placement of a condition to preserve the function and purpose of a national forest, but FERC does not manage the local forest’s road use rules, which it potentially could if this language were to become law. In another context, if the Solicitor of the Department of the Interior issued an opinion stating that, due to the wording and history of a particular treaty with a Native American tribe, sufficient protection of its reservation requires specific language to be included in a condition or prescription inserted into the license under the Secretary’s §§4(e) or 18 authority, , this definitional expansion may mean that FERC would have authority over the DOI Solicitor’s opinion.

### *Resolving Disputes Between FERC and Agencies*

The proposed new FPA §34 creates a dispute resolution process that, while perhaps well-intentioned, is almost certainly guaranteed to unnecessarily complicate and prolong a licensing review while not providing for an actual resolution. As proposed, the proposed FPA §34(c) sets out that FERC shall set a schedule for evaluation of a license under every applicable statute (please see below), and instructs each state, tribal, and federal agency that would have a problem

adhering to that schedule for a given project inform FERC and the applicant of such. Currently, the most protective condition or prescription placed on a license supersedes the less protective conditions (if for instance, the Secretary of the Interior's condition requires a particular amount of in-stream flow/water be kept in the stretch river and the state requires more for a different purpose, the state's flow requirement overrules the Secretary's). FERC has no ability to overrule a state, tribe, or Secretary, and the individual Secretaries do not necessarily coordinate on which conditions or prescriptions they place on a license. Some applicants (and often FERC) seek to have the least restrictive condition adopted, arguing that what is good enough for the Secretary of Commerce, for instance, should be good enough for the State Department of the Environment, regardless of the fact that the oversight entities have differing responsibilities.

Under proposed FPA new §34(b)(2)(D)(ii), “the Commission may forward any issue of concern...to the relevant state and federal agencies for resolution.” It is possible that this language is an attempt to ensure that conflicts between agencies are referred to the relevant individuals in those agencies, but it is not clear. It is a mechanism where FERC, and not the Secretaries, states, or tribes, wish to resolve a ‘conflict.’ Following FERC’s referral of issues of concern to relevant states and federal agencies, FERC and the agency would enter into a memorandum of understanding (MOU) “to facilitate interagency coordination and resolution of such issues of concern as appropriate.” It appears that the intention of this section is to resolve disputes in such a way as to prevent the most protective condition from automatically becoming the controlling language. . It is necessary to note that this is not a single MOU per agency, or per licensing, this is a single *MOU per issue in a given licensing*.

For contrast, the Hydropower Reform Coalition has suggested that MOUs be executed as soon as practicable to ensure proper communication, cooperation, and transmission of expectations

between FERC and the coordinating oversight entities. What this draft legislation proposes to do is have the agencies with differing conditions on related issues negotiate and execute MOUs for every issue of concern, mid-licensing and under FERC's schedule. It is unlikely that a schedule promulgated by FERC via rule in order to improve "discipline" and "ensure[s] expeditious completion of all proceedings required under federal and state law, to the extent practicable" is going to leave a lot of time for attorneys from federal and state agencies to negotiate and execute a legally binding agreement for each issue of concern. The Hydropower Reform Coalition's suggestion, to execute the MOU up front, and to let the most protective condition or prescription control, seems more likely to allow the licensing to proceed at a steady pace.

Additionally, this subsection does not allow Indian tribes with treatment as state (TAS) under the Clean Water Act engage in the same sort of consultation or MOU adoption as the states and federal agencies. They are simply not consulted. Instead, FERC may forward issues identified by the Indian tribe to the Secretary of the Interior or "the federal agency overseeing the delegated authority," presumably the Environmental Protection Agency. It is important to note that the EPA does not currently have a role in water quality evaluations carried out by states and tribes. This draft legislation brings the EPA into a process in which it does not have experience.

Additionally, issues that are raised by state agencies operating through the CWA and state and local agencies operating under other federal law would be forwarded to the agency 'overseeing' that law, potentially involving agencies who have never participated in a licensing and have no current authority to inform a state CWA certification. A relevant example here is culverts used in transportation planning. A project upstream of a culvert through which water, fish, and wildlife pass, may have, as a part of its Clean Water Act certification, requirements to keep instream flows at a level sufficient to enable passage. If the construction of the culvert requires a higher

instream flow in the river so a fish may pass through it than if the culvert were not present in the river, would the U.S. Department of Transportation, which provided funds to the state to build the road, become implicated in the hydroelectric license review?

### *Setting a Schedule*

American Rivers opposes an enforceable schedule set by FERC for state, tribal, and federal resource agencies to exercise their statutory authority. American Rivers has taken this position because in the 97 years since the Federal Power Act became law, FERC (and its antecedent agencies) has consistently sought insufficient environmental protections and declined to pursue recovery measures necessary to restore fisheries and limit unnecessary damage to resources. This is because FERC's mission is, and always has been, to ensure for the delivery of energy into the wholesale market. FERC is not qualified to carry out the responsibilities of state, tribal, and federal resource management agencies and has declined at almost every opportunity requests to assist them in collecting necessary information and offering sufficient protections.

Subsection 3(c) of the draft bill instructs FERC to establish a rulemaking to set a schedule for the evaluation of each *statute* that is relevant to processing an application. That is one schedule to evaluate an application under the Magnuson-Stevens Act, a separate schedule under the Marine Mammal Protection Act, a separate schedule under the Coastal Zone Management Act, etc. This would replace the single timeline employed by the Department of Commerce, etc. for the total review each Department, state, and tribe currently employs. It is unclear how FERC would overlay these schedules, or how the final schedule would track which statutory evaluation was completed at which point by which agency. For a draft bill that is attempting to eliminate

bureaucratic review and uncertainty, requiring an agency to keep track of FERC's schedule for every statute under which it—but not FERC—operates, seems like an incredible distraction.

As previously stated, as FERC has never had the same responsibilities for natural resources as states, federal resource agencies and tribes, it is inappropriate to allow FERC the ability to set deadlines for those oversight entities' evaluations. The greatest impediment to an expeditious evaluation is *not* the absence of an enforceable schedule; rather it is the lack information necessary for agencies to provide scientifically based and legally defensible conditions on hydroelectric licenses. In order to ensure that the agency's findings cannot be overturned in court for being arbitrary or capricious, the agency needs to show that it based its findings in science and followed a legally defensible process. Due to miscommunication—and occasional intransigence—agencies are sometimes denied the information they need to conduct such an evaluation in a timely manner.

Because FERC requires only the minimal amount of information required to conduct its analysis under its authority, it does not request information states, federal, and tribal agencies will need to conduct their analyses. As a result, some licensees—especially those new to hydroelectric development or operating in a new jurisdiction—may be surprised when, following the completion of FERC's evaluation of a license, a state, federal, or tribal resource agency instructs them to collect new information. While the Hydropower Reform Coalition seeks to prevent this confusion and surprise by promoting MOUs and having FERC include agency study requests (which are generally provided to FERC before FERC issues its study plan to an applicant) in FERC's study plan, this draft legislation seeks to provide a finite amount of time during which the information can be evaluated and, if it cannot be, for no prescription or condition to result. It trades concerns about water quality, fish, and wildlife for the certainty of a license.

The deadlines enacted under this subsection would be applicable to the federal, state, and tribal agencies, the applicant, the Commission, and other participants in a proceeding (although these “other participants” are not permitted to participate in setting the deadlines). While requiring FERC and the applicant to conform to the deadlines is an improvement over the schedule language in H.R. 8 (which only applied to the resource agencies), it is an insufficient improvement to save the concept. It must also be noted that only those agencies that submitted acknowledgement of notification from FERC of their ability to participate in a licensing under proposed new FPA section 34(b)(2)(C) would be permitted to participate in the consultation preceding of the schedule. More process, more deadlines, more work.

A single deadline-extension of 90 days could be granted by FERC, although if a natural event, such as a drought or a super storm, upends the evaluation of the environmental impact—or if the applicant fails to provide the information from one season to an agency conducting the standard two-season study, 90 days is of little help.

Finally, the ambiguity contained in this section will lead to substantially more litigation by eliminating the certainty decades of court decisions have provided in hydroelectric licensing. For example, by the language of this draft bill, it is unclear what will happen if a state, federal, or tribal resource agency is unable to place its condition or prescription on a license within the timeframe set out by FERC. If events beyond the control of the agency, such as a severe weather event, insufficient information provided by the applicant, or insufficient appropriations to maintain necessary staffing at the agency, prevent the issuance of a license within the FERC schedule, the agency is entitled to a single 90-day extension (if it sufficiently demonstrates its need to FERC and requests and extension more than 30 days prior to the deadline). It is a certainty that following the missed deadline, a less environmentally conscious applicant would

sue should the agency subsequently attempt to place its condition on the license, that the agency would sue to ensure it has not forfeited its authority, or that an external stakeholder would sue to preserve oversight authority. If the condition that is implicated is one allowing for tribal fishery protection, or of a Native American reservation's protection, for example, a tribe, the tribal fishing commission, or the United States may also sue. They would sue for the clarity that enacting this draft bill would erase. More litigation means more costs for utilities, their ratepayers, federal, state, and tribal taxpayers, and interested parties, including American Rivers. The outcome of legislation to improve the licensing process should not be more time consuming process, longer and more expensive proceedings, and more litigation. As currently written, the only parties to a license proceeding that will benefit from this section are energy and water rights attorneys.

### *Trial-Type Hearings*

In order to dispute prescriptions and conditions placed onto a license by the Secretaries of Agriculture, Commerce, and the Interior, trial-type hearings were added to the hydroelectric licensing process via the Energy Policy Act of 2005. To date, there has been *one* trial-type hearing that resulted in a formal determination (it upheld the Secretary's decision). All other trial-type hearings to date have ended in settlement. The resource agencies unfortunately do not have the same time and resources available as some litigious licensees, and have accepted settlement in order to evaluate other licenses needing review in a timely manner. The trial-type hearings for alternative conditions and prescriptions currently take place before an Administrative Law Judge (ALJ) in the Department that placed the condition on the license (with the exception of those imposed by the Secretary of Commerce; those trial-type hearings take place before a Coast Guard Judge Advocate General, due to historical, organizational reasons).

Trial-type hearings benefit from the expertise that ALJs and their staff have developed in evaluating the science required and the knowledge of how statutes beyond the Federal Power Act play into the Secretaries' determinations. Additionally, ALJs offer only conclusions as to law and fact, and cannot overrule a Secretarial decision (and neither can FERC). If a trial-type hearing is sought, the §§4(e) or 18 process is not concluded until, following the ALJ's determination, the Secretary's final condition or prescription is issued.

The Discussion Draft changes the trial-type hearing process in several key ways. First, *all* disputed issues of material fact supporting a condition on a license will be decided by a *single* ALJ at FERC. FERC ALJs typically hear disputes about interstate power, transmission lines, and rates set by utilities for payment of services. FERC ALJs do not—and have never—considered the implications of project construction or operation for threatened and endangered species, flows necessary to ensure safe boating or recreational swimming, or for preventing flooding of and damage to Native American reservations. This legislative change would put disputes relating to Indian treaty obligations, the ESA, and FLPMA in front of one FERC ALJ, who may not have experience with any of the issues or statutes. These proceedings (which, per §35(b), cannot last longer than 120 days, 30 days longer than currently allowed), would be required to fit into the schedule established by FERC pursuant to §34(c)—which is to say, the schedule would dictate whether *any* time were permitted for a trial-type hearing. It is possible that the schedule would not allow any trial-type hearing, which would in turn present a conundrum: the §§4(e) and 18 processes are not considered complete until the final Secretarial decision is offered following a trial-type hearing. If the trial-type hearing is not able to be completed before FERC's deadline, can the original condition or prescription legally be placed

on the license? **It is possible that the schedule would *not* allow for a final Secretarial determination.**

Not later than 60 days after the ALJ decision, the Secretary who issued the disputed condition or prescription “*in accordance with the schedule established by the Commission,*” shall file with the Commission a final determination on the condition or prescription. The final determination of the Secretary must explain why it was changed or not changed; the determination will be included in the consolidated record. Beyond changing the venue for these hearings, this legislation would allow FERC, if the Commission “finds that the final condition or prescription of the Secretary is inconsistent with the purposes of this part or other applicable law” [to] seek resolution of the matter under the above-described MOU process for dispute resolution. That section would enable FERC to seek an MOU between the Secretary and FERC on the issue in dispute, all during the administrative process, pushing up against FERC’s FPA rule-determined deadline.

It is simply not possible for FERC and the agencies in question to complete all of this new process in the time allotted by the Discussion Draft. The consequence will be legally indefensible conditions or increased delay, both of which will lead to more litigation.

#### *Licensing Study Improvements*

The licensing study improvements section, proposed new FPA section 36, is one element of the Discussion Draft which makes some progress towards solving areas of concern with the licensing process. By instructing FERC to compile current and accepted best practices and compile a comprehensive collection of studies and data accessible to the public, and encouraging license applicants, agencies, and tribes to develop a limited number of methodologies and tools applicable across an array of projects, this bill comes closest to what American Rivers and the

Hydropower Reform Coalition believes offers the greatest area for improvement: increased communication and cooperation. While this language falls short of promoting MOUs and presumptively granting study requests, pursuing similar language in future legislative drafts is more likely to truly solve the shared difficulties in hydroelectric licensing than any changes to the trial-type hearing process or the existing schedule under the integrated licensing process.

Although identifying and sharing best practices and core studies (please see Dave Steindorf, American Whitewater/Hydropower Reform Coalition, Questions for the Record regarding the March 15, 2017 Subcommittee on Energy hearing, “Modernizing Energy Infrastructure: Challenges and Opportunities to Expanding Hydropower Generation”) is a step in the right direction, language included in proposed new section 36(b) presents a troubling issue. Currently, some applicants dispute whether they should be required to provide information necessary for a resource agency to offer a scientifically based and legally defensible condition or prescription on a license; they offer as evidence that such information is already available to the agency and the applicant need not expend time and resources in order to provide it. While it is currently the responsibility of the applicant to produce the study it believes answers the questions the agency needs to in order to complete the review, the Discussion Draft places the onus on the agency. This is impractical. Rather than the agency expending time and energy (all while burning through time on FERC’s schedule) to locate a study the applicant believes exists, the burden should be on the applicant to produce the study.

I would also like to take this opportunity to voice American Rivers’ support for a basin-wide or regional review. American Rivers believes that as no river is defined by the segment between two dams and creating the proper system for watershed-scale management planning would be a

transformative step forward. Therefore, we support in concept proposed Section 36(c) in the Discussion Draft, however, we have concerns about its practicability as drafted.

### *Qualified Project Upgrades*

Qualified Project Upgrades are alterations to a project or its operation that are not required by the license, but improve the project or provide additional mitigation to fish, wildlife, and water quality impacts. While it is clear that the impetus for the proposed new FPA section 37 is to reward licensees who improve their projects mid-license and to ensure a timely evaluation of these applications, this section sets out an odd and practically unworkable timeline for review. It also establishes some criteria that could degrade environmental protections and proper resource management.

The process by which FERC publicizes the application for a qualified project upgrade and notifies the public and agencies is extremely convoluted. First, the applicant must include in the application sufficient information to demonstrate that the alteration to the project qualifies. FERC shall then, within 15 days of receiving the application, “make an initial determination” as to whether it qualifies, and will publish such determination. It shall solicit public comment for 45 days. This section does not direct FERC to notify any states, tribes, or federal resource agencies that have placed a condition on a license on which the applicant is seeking an upgrade.

If, at the end of the 45 days provided for above, no entity comments on the proposed upgrade, FERC shall “immediately” publish a notice stating a lack of contest or, if there is a contest, FERC shall have 30 days from the date of the publication of its initial determination in proposed new FPA §37(a)(3) to “issue a written determination as to whether the proposed license amendment is for a qualifying project upgrade.” This means that although there are two different

processes for disputed versus non-disputed applications, the time permitted to issue a statement of non-dispute or an explanation of why the dispute is not credible is the same. It's difficult to understand how the timeline allows for 45 days of public comment, but within the 45 days, FERC must respond to an objection made as to the project's qualifications. If an objection comes on day 45 of the solicitation period, and the draft bill only allows FERC 30 days from the date of publication of the initial determination to rebut and analyze, given the incredibly tight turn-around and necessity to complete the entire process in 120 days, the only way that FERC can analyze and rebut an objection at the end of the public solicitation period is to burn the time the agencies have for review (see below). To keep the process moving, it is unclear whether FERC would have sufficient time to analyze and rebut while simultaneously allowing the resource agencies to perform their own oversight. This bill requires consideration to overlap in such a way that there is no time for thoroughness, let alone delay.

The Discussion Draft allows FERC has 45 days from publicizing the initial determination to solicit public comments. It then has 30 days following a contested initial determination to analyze and rebut, but those thirty days count down from the overarching 45 days allotted for the public comment process. Simultaneously, from the day on which FERC publishes the initial determination, it has 60 days to send a notice to the resource agencies that have placed a condition or prescription on the license, or could, given the upgrade, place a condition or prescription on the license. That means that FERC could have had the application for 75 days before it is required to tell the resource agencies it has received it.

Starting from the date of initial publication, the resource agencies have 90 days to consider the application and determine whether the proposed upgrade is acceptable or whether a license amendment is required to preserve the scientifically based and legally defensible condition or

prescription. While this draft legislation gives the resource agencies 90 days at FERC's discretion, it only requires them to have 30 days. Thereafter, FERC has 30 additional days to consider the license. Outdoor recreationalists and other common intervenors/participants (such as American Rivers) are specifically excluded from this consultation process. Total time guaranteed to FERC: 120 days. Total time guaranteed to the resource agencies: 30 days.

No condition may be placed on an upgrade judged to be qualifying except those that are: necessary to public safety, "reasonable, *economically feasible, and essential* to prevent loss of or damage to, or to mitigate adverse effects on fish and wildlife resources, water supply, and water quality that are *directly* caused by the construction and operation of the qualifying project upgrade, as compared to the environmental baseline existing *at the time the Commission approves the application for the license amendment.*" While I expect this language is an attempt to prevent agencies from placing conditions on the upgrade that the applicant believes to be too expensive or unnecessary, it vests in FERC authority to make that decision. FERC's area of expertise is regulation of the wholesale energy market, not ensuring that a Native American reservation is preserved or that threatened and endangered salmon populations are protected. Giving FERC the decision-making power will ensure that all decision making is in the pursuit of power generation.

We want to be clear that American Rivers is not opposed in concept to incentivizing license holders to make project upgrades mid-license term. We remain concerned that, as written, this section of the bill will not have that effect. Rather, it will sow yet more confusion in the licensing process, resulting in neither environmental nor power generation benefits.

*Technical and Conforming Amendments*

By changing “deems” to “determines” in these respective portions of the Discussion Draft, thus altering key components of the Federal Power Act that have been at the heart of so many important court cases, including the landmark *Tacoma Power v. FERC*, a risk is created that the corpus of §§4(e) and 18 court decisions of the past 97 years could be open to re-litigation. Altering the process by which the Secretaries engage in evaluating a proposed project is an unnecessary action that would potentially remove discretion from the Secretaries and would almost certainly guarantee a new point to litigate in licensing.

#### *Extension of Construction of Project Works and Preliminary Permit Timelines*

American Rivers supports sections 2(c) and 2(d) of the Discussion Draft. As we discuss more in our comments on H.R. 446, H.R. 447, and H.R. 2122, below, we believe that the delays in construction of new projects has little to do with the licensing process and more to do with other factors (please see discussion on H.R. 446, 447, and 2122 below), particularly in the case of powering non-powered dams. We also tend to object to Congressional earmarks for specific projects that have exceeded their deadlines for preliminary permits or project construction. Therefore we support changes to the FPA that will increase the likelihood of successful project development without developers being required to petition Congress for relief.

#### *Conclusion*

American Rivers opposes the Discussion Draft as written. While we have described our detailed concerns above, the summary is this: We object to the idea that we should federalize in the hands of FERC decisions with respect to state water law that are more appropriately left to states; we object to the idea that FERC should be allowed to impose its judgement onto federal agencies that have statutory mandates to protect natural resources, and we object to FERC being able to

override the concerns of Native American tribes when it comes to protecting their sovereign lands.

However, we acknowledge that there are improvements that could be made to a process that can be long and complex. We recognize that the Committee is seeking ways to improve the licensing process. If the Committee wishes to develop real solutions that will benefit all stakeholders, we would welcome the opportunity to engage with the Committee and any interested parties to try to achieve a mutually beneficial outcome.

**Discussion Draft: Promoting Hydropower Development at Existing Non-Powered Dams Act**

It is disappointing that after the Subcommittee's March 15 hearing on ways to improve the licensing process, particularly for powering non-powered dams, the Committee has chosen to ignore the recommendations not just of the Hydropower Reform Coalition (of which we are a part) but also Rye Development. Instead, the Subcommittee is recycling *verbatim* elements of the House Energy Bill from the previous Congress (H.R. 8) that received near universal condemnation from states, tribes, and the conservation and recreation community. President Obama threatened to veto the legislation because of its failure to respect environmental law and policy.

Specifically, the Discussion Draft:

- Narrows / limits protections for natural resources and other public values: Exemption conditions intended to address natural resource impacts would be limited to impacts on fish and wildlife resources directly caused by the construction and operation of the hydropower plant, and must be – in FERC's judgment – reasonable, economically feasible, and essential. Measures necessary to protect public safety are permissible.

However, exemption conditions would be prohibited from addressing the underlying natural resource impacts of the existing dam, diversion, or reservoir if one is involved. Exemption conditions to address the full range of impacts of the project on national parks, federal lands, recreational opportunities, cultural resources, water quality, and other values would be prohibited. Currently, FERC, states, tribes, and federal agencies have broad authority to protect these values at hydropower projects. All of these authorities would be significantly curtailed.

- Overrides the Endangered Species Act by limiting conditions for the protection of threatened and endangered species to conditions that are, in FERC’s judgment, “economically feasible.”
- Offers no flexibility to modify the “storage, control, withdrawal, diversion, release, or “flow operations” of the underlying dam, even if those changes are necessary to address natural resource impacts of the facility or of the underlying dam. This would limit any flow requirements as a condition of any federal authorization, including a CWA §401 water quality certification, or a Biological Opinion issued under the ESA.
- Prohibits FERC from preparing an Environmental Impact Statement; instead it would be limited to either an Environmental Assessment or a Categorical Exclusion.
- Limits FERC jurisdiction over essential project works. FERC’s jurisdiction would be limited to the powerhouse and primary transmission line. Conduits, dams, impoundments, shoreline, lands, or project works associated with the underlying facility would be exempt from any environmental or safety oversight.

Taken together, these provisions are an indirect yet effective attack on states, tribes, and federal agencies' conditioning authority under sections 4(e), 10(a), 10(j), and 18 of the Federal Power Act, section 401 of the Clean Water Act, section 7 of the Endangered Species Act, section 408 of the Rivers and Harbors Act, and other federal and state authorities for protecting public lands and other resources. The Committee should not limit the application of these statutes, and the protections they provide, in order to generate what will likely be a minimal amount of electricity.

The Discussion Draft also threatens public safety by shifting dam safety burdens to the states: FERC may include conditions in the exemption to protect public safety, but FERC does not have jurisdiction over the underlying dam, so cannot ensure that it is safe. Potential exemptees would be required to provide FERC with certification "by an independent consultant approved by the Commission" that the dam complied with "the Commission's dam safety requirements." However, this certification would only address the state of the dam at the time that the exemption was issued. Since exemptions are permanent and FERC would not have jurisdiction over the dam, ongoing responsibility for ensuring dam safety would fall to the states, or fall through the cracks, endangering lives and property.

In conclusion, I reiterate that the Committee has before it an excellent opportunity to convene stakeholders interested in assisting the hydropower industry in facilitating powering of non-powered dams. American Rivers recommends that the Committee seek to bring interested parties together to achieve consensus on how to advance legislation to power non-powered dams rather than to attempt to advance the Discussion Draft as written.

### *Discussion Draft: Promoting Closed-Loop Pumped Storage Hydropower Act*

Similar to the Committee’s approach with the Discussion Draft related to Non-Powered Dams, this Discussion Draft also recycles provisions from H.R. 8 in the previous Congress that were universally condemned by states, tribes, and recreational and conservation interests because of their detrimental effect on fish, wildlife, public lands, Native American trust and treaty obligations, and state water rights. By deregulating closed-loop pumped storage projects, the Discussion Draft would allow for the construction of projects that, in the words of the State of California, “could have dramatic impact on the environment.”<sup>1</sup> In addition, the State of California correctly points out that due to a failure to define within the Discussion Draft “impacts directly caused by the construction and operations of the project,” enactment of the Discussion Draft could result in “increased predation or mortality of fish and wildlife,”<sup>2</sup> including threatened and endangered species. Finally, the State of California notes that the Discussion Draft’s provisions exclude consideration of the impacts of deregulated projects on water quality and public health, which in the State’s opinion is “inappropriate and will result in environmental impacts that could and should be addressed as part of the Commission’s hydropower licensing process.”<sup>3</sup>

Specifically, the Discussion Draft:

- Removes the Commission’s licensing and conditioning authority, comprehensive planning responsibility, equal consideration responsibility, and requirements for working with federal and state agencies to protect fish and wildlife under sections 4(e), 10(a), 10(g), and 10(j) of the Federal Power Act.

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<sup>1</sup> Letter from the Felicia Marcus, Chair of the California State Water Resources Control Board to Senators Murkowski and Cantwell, August 18, 2016; Attachment A, pg. 4. (Henceforth CA SWRCB Letter) Note: Section 1206 of H.R. 8 as reported in the Senate cited in the letter is identical to the Discussion Draft in question.

<sup>2</sup> CA SWRCB Letter, Attachment A, pg. 4

<sup>3</sup> CASWRCB Letter, Attachment A, pg 4-5

- Narrows / limits protections for natural resources and other public values: License conditions intended to address natural resource impacts would be limited to impacts on fish and wildlife resources directly caused by the construction and operation of the hydropower plant, and must be – in FERC’s judgment – reasonable, economically feasible, and essential. Measures necessary to protect public safety are permissible. License conditions would be prohibited from addressing the underlying natural resource impacts of the existing dam, diversion, or reservoir if one is involved. License conditions to address the full range of impacts of the project on national parks, federal lands, recreational opportunities, cultural resources, water quality, and other values would be prohibited. Currently, FERC, states, tribes, and federal agencies have broad authority to protect these values at hydropower projects. All of these authorities would be significantly curtailed.
- Allows the developers of closed-loop pumped storage facilities to avoid complying with the Clean Water Act, the Federal Land Policy and Management Act, and other federal authorizations by limiting natural resource protections as described above.
- Overrides the Endangered Species Act by limiting conditions for the protection of threatened and endangered species to conditions that are, in FERC’s judgment, “economically feasible.”

Taken together, these provisions are an indirect, yet effective, attack on states, tribes, and federal agencies’ conditioning authority under sections 4(e), 10(a), 10(j), and 18 of the Federal Power Act, section 401 of the Clean Water Act, section 7 of the Endangered Species Act, and other federal and state authorities for protecting public lands and other resources. The Committee should not limit the application of these statutes, and the protections they provide.

American Rivers recognizes the value of pumped storage projects for grid regulation and the integration of carbon free renewable energy. Unfortunately, this bill eliminates the balance that has been at the heart of the consideration of pumped storage projects since the Storm King Mountain project was rejected in *Scenic Hudson vs. Consolidated Edison*, thus leading to the enactment of the National Environmental Policy Act. We are willing to work with the Committee to develop incentives for the proper siting and construction of pumped storage projects, but not at the expense of half a century of environmental protections.

**Discussion Draft: Promoting Small Conduit Hydropower Facilities Act of 2017**

American Rivers supports the concepts contained within the Discussion Draft. We have been engaged in negotiations with the Colorado Small Hydropower Association over proposals to expedite the deployment of small conduit projects, and we want to commend them for working with us in a fair, open, and collaborative manner.

When successfully deployed, projects such as those intended by supporters of this legislation to be exempted from FERC jurisdiction can have a major beneficial impact on the health of a river system by increasing the efficiency and affordability of modern irrigation technologies. We want to ensure that legislation exempting projects from FERC jurisdiction does not exempt projects that are large enough, or environmentally sensitive enough, to warrant federal licensing. We believe that this can be achieved, and we look forward to working with the Committee to continue to refine this proposal to accomplish what we believe is a shared goal: the deployment

of more environmentally benign and in some cases environmentally beneficial conduit hydropower projects.

**H.R. 1538, Supporting Home Owner Rights Enforcement Act**

American Rivers is not opposed to legislation that would direct FERC to take into consideration the rights of private property holders along federally licensed reservoirs and impoundments.

However, we would note several concerns:

- All of the other non-project specific hydropower legislation under consideration in this hearing has been written to reduce the power of federal natural resource agencies to exercise their authority under Section 4(e) of the Federal Power Act to protect federal reservations, their multiple uses, and the taxpayers of the United States who use them (including the Native Americans whose sovereign tribal lands are held in trust by the Secretary of the Interior and protected by Section 4(e)). These Discussion Drafts uniformly transfer power from federal natural resource agencies to FERC for the express purpose of elevating power production, and the utilities that produce power, above all other interests. H.R. 1538 does the opposite; the bill is designed to weaken FERC's authority to manage reservoir levels and shorelines for the purposes of power production, among other beneficial uses, in order to advantage reservoir front landowners.
- Thus, we cannot support legislation that amends Section 4(e) to advance the interests of a small group of landowners while other bills are being considered which would amend the same section of the statute to strip away authorities that protect tribal trust and treaty lands as well as public lands belonging to all Americans.

- Further, as long as FERC retains the power to exercise eminent domain on behalf of licensees, it is unlikely that H.R. 1538 will have much practical effect. If H.R. 1538 were amended to strip away FERC's eminent domain authority, it would be more likely to actually benefit the property owners it seeks to protect.

In summary, American Rivers does not oppose H.R. 1538 on its own, primarily because it will have little practical effect without FERC also being stripped of its eminent domain powers. However American Rivers must oppose H.R. 1538 in the context in which it is being considered. We are willing to work with the Committee to provide real relief to the aggrieved parties who seek this legislation provided that we can do so in such a way that is equitable to all parties whose interests are at stake in the licensing and operation of federally licensed projects.

**Commence Construction Earmarks: H.R. 446, To extend the deadline for commencement of construction of a hydroelectric project; H.R. 447, To extend the deadline for commencement of construction of a hydroelectric project; and H.R. 2122, To reinstate and extend the deadline for commencement of construction of a hydroelectric project**

We address these three bills *en bloc*. American Rivers does not support individual extension bills like H.R. 446, H.R. 447, and H.R. 2122. 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 to 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 nonpowered water infrastructure.

The National Hydropower Association has argued that the provisions of the Discussion Draft with respect to Non-Powered Dams, — 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 three bills and the many others like them that the Committee considers every year — 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. For example, 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 11-23 months of filing an application that was complete and ready to be processed.<sup>4</sup> The two projects with the longest licensing times (Gathright at 23 months and Flannagan at 18 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, meaning that the applicant had not provided sufficient information in its original application.

At all three of these projects, post-licensing activities have been the primary obstacle to successful development. Each of the projects in question has held a FERC license for more than five years, much greater than the time it took for FERC to process the license in the first place, which was an average of 26 months, not counting the time that the applicant needed to provide sufficient information to FERC. 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 61 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 four 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.

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<sup>4</sup> Time from FERC "Notice of application ready for environmental analysis" to issuance of license order.

The National Hydropower Association (NHA) continues to argue before Congress that the licensing process — particularly those portions of the process that 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 Obama Administration's Clean 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's. 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>5</sup>

NHA argues elsewhere that the licensing process is not the most significant source of delay in developing new hydropower projects. In a comment letter to FERC in 2015, NHA referenced the Department of Energy's 2014 Hydropower Market Report<sup>6</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]<sup>7</sup>

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<sup>5</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/wpcontent/uploads/2016/01 \[NHA-Comments-on-EPA 's-Clean-Energy- Incentive-Program.pdf](http://www.hydro.org/wpcontent/uploads/2016/01/NHA-Comments-on-EPA's-Clean-Energy-Incentive-Program.pdf)

<sup>6</sup> <http://energy.gov/eere/water/downloads/2014-hydropower-market-report>

<sup>7</sup> Comments of National Hydropower Association on Commencement of Assessment of Annual Charges under RM15-18. FERC Accession No. 20150721-5150.

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 three 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:

- 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 three bills currently under consideration by the 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.

### **Solutions to Problems with the Licensing Process**

American Rivers acknowledges that there are improvements to the licensing process that could be made to expedite licensing, reduce costs to utilities and ratepayers, federal and state taxpayers, and other participants in licensing, while still maintaining protections for the environment. As noted in comments submitted for the record to the hearing the Committee held on March 15, we believe that there are several steps this Committee can take to substantially improve licensing:

- FERC should presumptively grant study requests submitted by federal, state, and tribal agencies, especially with those with statutory authorities under Federal Power Act, the Clean Water Act or the Endangered Species Act.
- FERC should promote the adoption of memoranda of understanding (MOUs) between the Commission, tribes, and states to improve coordination and prevent unnecessary delays;
- FERC's *ex parte* rules should be changed to allow for greater cooperation between the Commission and mandatory conditioning agencies;
- Congress should increase appropriations to the federal resource management agencies to fund the staff positions that allow them to efficiently and thoroughly evaluate applications for hydroelectric licenses;
- Congress should extend its recognition of the right of Native American tribes and Alaska Native Corporations and Villages to manage water quality

standards on tribal lands to include their rights to manage land use and fish and wildlife populations as well;

- Congress should consider whether FERC should relinquish jurisdiction over permitting projects on non-powered dams owned by the U.S. Army Corps of Engineers (Corps);
- Congress should consider some sort of additional exemption for small conduit projects;
- Congress should consider enacting comprehensive changes to the deadlines for preliminary permits and the construction of project works, as found in the sections 2(c) and 2(d) of the Discussion Draft: Hydropower Policy Modernization Act of 2017.

Unfortunately, few if any of those steps are taken in any of the bills before us today. Instead the Committee is reviewing legislation that will be a bonanza for energy and water attorneys, and will lead to legal gridlock and environmental degradation.

American Rivers stands ready to work with the Committee to improve the licensing process. We urge the Committee to consider convening a stakeholder process by which the interests of utilities large and small, conservation and recreation groups, states, tribes, and the Departments of the Interior, Commerce, Agriculture, Energy, and the Army, along with FERC and the Power Marketing Administrations, can all be balanced to achieve the dual outcomes of more hydroelectric power generation, and improved river health.

Thank you for the opportunity to testify today.