

Testimony of

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**Committee on Energy and Commerce
Subcommittee on Energy, Climate & Grid Security
United States House of Representatives**

**“American Hydropower: Unleashing Reliable,
Renewable, Clean Power Across the U.S.”**

September 20, 2023

Chairman Duncan, Ranking Member DeGette, Chair Rodgers, and Ranking Member Pallone, and members of the Subcommittee:

My name is Terry Turpin and I am the Director of the Office of Energy Projects at the Federal Energy Regulatory Commission. The Office is responsible for taking a lead role in carrying out the Commission's responsibilities in reviewing applications for infrastructure projects, including: (1) the licensing, administration, and safety of non-federal hydropower projects; (2) the authorization of interstate natural gas pipelines and storage facilities; and (3) the authorization of liquefied natural gas (LNG) terminals. I appreciate the opportunity to appear before you to discuss the Commission's role in hydropower permitting and oversight. As a member of the Commission's staff, the views I express in this testimony are my own, and not necessarily those of the Commission or of any individual Commissioner.

In accordance with the Federal Power Act (FPA), the Commission currently regulates over 1,600 non-federal hydropower projects including over 2,500 dams, representing about 57,000 megawatts of authorized installed capacity, which is more than half of all developed hydropower in the United States. The Commission's hydropower work generally falls into three categories of activities: (1) licensing, which includes processing applications for preliminary permits, original licenses, and relicensing existing facilities; (2) administration and compliance, which includes providing regulatory oversight of projects to ensure compliance with license requirements and processing applications to amend, transfer, or surrender licenses; and (3) dam safety, which includes protecting life, health, and property.

I. The Commission's Role in Hydropower Oversight

Under the FPA, non-federal hydropower projects must be licensed by the Commission if they: (1) are located on a navigable waterway; (2) occupy federal land; (3) use surplus water or water power from a federal dam; or (4) are located on non-navigable waters over which Congress has jurisdiction under the Commerce Clause, involve post-1935 construction, and affect interstate or foreign commerce.

The Commission serves as the lead agency in all FPA hydropower proceedings and sets schedules for those proceedings. Prior to issuing a decision on a license application, the Commission conducts reviews of hydropower projects and project works and as the lead federal agency prepares the documentation required under the National Environmental Policy Act. The Commission has established three licensing processes and procedures that allow an applicant to request to use the process it believes best suited to its individual situation. Each of the licensing processes is designed to accommodate the stakeholder consultation needed to develop a record on which the Commission can base its licensing decision. The three processes¹ are the:

- Traditional Licensing Process: best for less complex or less controversial projects and is the process used for exemptions;
- Integrated Licensing Process: frontloads issue identification and decisions on information needs to the period before an application is filed and is suited to the more complex or more controversial cases; and

¹ After an original license application for certain qualifying hydropower projects at nonpowered dams or for qualifying closed-loop pumped storage projects has been prepared under one of the three noted processes and filed with the Commission, a license applicant can request an expedited Commission review process developed pursuant to the America's Water Infrastructure Act of 2018.

- *Alternative Licensing Process*: allows participants significant flexibility to tailor the licensing process in a manner that can work well for particular circumstances.

Currently, the Commission is processing 155 pending applications, of which approximately 92 percent are for relicenses of existing projects and less than 8 percent are for original licenses and exemptions.² Based on the license terms of existing projects, the number of projects that will begin the relicensing process will continue to be high well into the 2030s. Between fiscal years 2023 and 2035, over 440 projects, representing about 44 percent of the Commission's licensed projects and about 17 percent of licensed capacity under Commission jurisdiction, will begin the pre-filing consultation stages of the relicensing process. Additionally, original license applications may continue to be filed at the historical rate; since fiscal year 2013, the Commission has processed applications for 66 original licenses that involved the construction of new hydropower facilities.³

As part of the licensing process under the FPA, the Commission may also issue preliminary permits when requested by a potential project applicant; however, it is not necessary to obtain a permit in order to apply for or receive a license. Preliminary permits, issued for terms of up to four years, preserve the right of the permit holder to have the first priority in applying for a license for a project while it studies the feasibility of the project from an economic, engineering, and environmental perspective. A preliminary permit does not authorize the permit holder to perform any land-disturbing activities or otherwise

² Exemptions are a simpler form of license where the projects are not subject FPA Sections 4(e), 10(a), and 18 and the license does not convey eminent domain authority. The exempted project is subject to mandatory terms and conditions set by federal and state fish and wildlife agencies and by the Commission.

³ Of the 66 original licenses issued beginning FY 2013, ten projects have been constructed and are operating and two projects have commenced, but not yet completed, construction. Of the remainder, the licensees of 39 have not indicated to the Commission whether or when they intend to begin construction and 15 licenses have been terminated or surrendered.

enter upon lands or waters owned by others without the owner's express permission.

While a permittee holds a permit for a site, any other interested entity is barred from filing a license application for a project at the site. Between fiscal years 2015 and 2023, the Commission issued almost 300 preliminary permits. So far, approximately 5 percent of those have resulted in a project sponsor moving forward to file a license application.⁴

The Commission's second role is to provide regulatory oversight of licensed projects during their license term. This post-licensing workload involves ensuring compliance with license requirements, processing requests for extensions of time to comply with these requirements, and processing applications to amend licenses by modifying project facilities and operations. License requirements include environmental and public use provisions resulting from terms and conditions set by the Commission, including measures specified by state and federal resource agencies. Typical examples include requirements establishing minimum flows, reservoir elevations, water quality metrics, fishery measures such as passage facilities, and recreation measures. Specialized Commission staff review and analyze plans and reports filed pursuant to the license conditions, process engineering and environmental amendment requests, and review complaints and non-compliance allegations. The Commission's post-licensing workload also entails processing requests for license transfers as well as applications to surrender a project license. Currently, the Commission is processing over 3,500 license-related compliance filings per year.

⁴ Permittees provide multiple reasons for a permit never resulting in a license application, with the more common ones being: inadequate return on investment to develop the site; inability to obtain permits from other governmental entities; inability to obtain permission from landowners to access and study the site; stakeholder opposition to development at the site; and anticipated funding to develop the site not materializing.

The Commission's third role is in overseeing the safety of licensed hydropower dams. Under the FPA, the Commission is responsible for ensuring that the water-retaining features of hydropower projects are designed, constructed, operated, and maintained using current engineering standards and meet federal guidelines for dam safety.

Highly-trained Commission engineers review designs, plans, and specifications of the facilities and proposed modifications. Through regularly scheduled inspections during construction and operation, Commission engineers verify that dams meet stipulated design criteria and identify necessary remedial modifications or required maintenance. When issues are found, the Commission requires the licensee/exemptee to develop a plan and schedule for addressing the matter and conducting follow-up activities. The Commission incorporates a risk-informed decision-making approach that provides the capability to assess non-traditional failure modes, provides levelized risk across different loading conditions, focuses inspections and surveillance on projects' specific potential failure modes and monitoring programs, and guides remediation projects to provide an overall reduced level of risk to the public. In fiscal year 2023, Commission staff will have conducted 1,895 inspections related to incident response, construction, and the operation of dams with high, significant, or low hazard potentials. Commission staff will also have conducted 79 physical security inspections and six cybersecurity audits in fiscal year 2023.

II. Complexity in the Licensing Process

Hydroelectric licensing proceedings under the FPA are multi-faceted and complex, requiring the Commission to consider and balance many competing interests.

Section 10(a) of the FPA establishes the comprehensive development standard which each

project must meet to be licensed, and which appears to be unique among federal infrastructure permitting requirements. Under this standard, a licensed project must be best adapted to a comprehensive plan for improving or developing a waterway for the use or benefit of interstate or foreign commerce, not only for the improvement and utilization of waterpower development, but also for the protection and enhancement of other beneficial public uses. Typical uses for a waterway, such as power generation, irrigation, flood control, fish and wildlife protection or enhancement, water supply, and recreation, are often in direct competition for the waterway resources associated with a project. To meet the statutory requirement of balancing these competing uses, the Commission must explore all issues relevant to the public interest, including both those associated with waterpower development as well as those related to nondevelopment uses of a waterway.⁵

As the Commission has noted in multiple reports, policy statements, and rulemakings since 2001, it is the complexity of the resource issues and the amount of available information about project impacts that set the stage for whether the regulatory process is short or long, simple or complex.⁶ The location of a proposed project and its mode of operation may be at least as significant as project size: a small project that alters the natural flow of a river in a sensitive area may be harder to license than a larger, run-of-river project on a site where there are few environmental issues. The Commission is

⁵ In the Electric Consumers Protection Act of 1986, Congress modified the FPA to require the Commission to give equal consideration to developmental and nondevelopmental values at hydropower projects.

⁶ *Hydroelectric Licensing Policies, Procedures, and Regulations: Comprehensive Review and Recommendations* (May 8, 2001) (FERC Report to Congress); *Hydroelectric Licensing under the Federal Power Act*, 104 FERC ¶ 61,109 (2003) (Order establishing the Integrated Licensing Process) *Settlements in Hydropower Licensing Proceedings under Part I of the Federal Power Act*, 116 FERC ¶61,270 (2006) (Policy Statement); *Report on the Pilot Two-Year Hydroelectric Licensing Process for Non-Powered Dams and Closed-Loop Pumped Storage Projects and Recommendations Pursuant to Section 6 of the Hydropower Regulatory Efficiency Act of 2013*, (May 26, 2017) (FERC Report to Congress); *Hydroelectric Licensing Regulations Under the America's Water Infrastructure Act of 2018*, 167 FERC ¶ 61,050 (2019) (Order establishing expedited process)

required to base its decisions on substantial evidence, which generally includes studies performed by applicants, studies put into the record by other parties, and material gathered by Commission staff. Whether an identified effect of a project is or is not a problem, and the extent of the problem, are often matters of perspective, and there are regularly disagreements between license applicants and other stakeholders concerning the extent to which projects will have negative effects on both developmental and nondevelopmental resources.

The Commission's licensing processes have evolved over the years as the agency has sought to address the issues that participants from every perspective have identified. These processes are designed, within the confines of the existing statutory scheme, to develop a record on which the Commission can reach a licensing decision that is both expeditious and legally durable. In addition to its duties under the FPA, the Commission must also ensure compliance with other statutes that involve a variety of processes ancillary to licensing, such as the Coastal Zone Management Act, the National Historic Preservation Act, the Endangered Species Act, and the Clean Water Act. Although the Commission incorporates these processes into the project review schedule, their timing is generally outside of the Commission's control.

Under the Coastal Zone Management Act, the Commission cannot authorize development of a hydropower project within or affecting a state's coastal zone, unless the state concurs with the applicant's certification of consistency with the state's Coastal Zone Management Act program (approved by the Secretary of Commerce).

The National Historic Preservation Act requires the Commission, before authorizing a project, to consider the project's effects on any site, structure, or object included in, or eligible to be included in, the National Register of Historic Places, and to afford the Advisory Council on Historic Preservation an opportunity to comment. In practice, this is generally handled through consultation with the State Historic Preservation Officers.

Under the Endangered Species Act, the Commission must ensure that its actions do not jeopardize protected species or adversely modify their habitat and must consult with the U.S. Fish and Wildlife Service or the National Marine Fisheries Service when determining what protection measures to take.

Finally, the Clean Water Act precludes the Commission from licensing a hydroelectric project until the project has first obtained a water quality certification, or a waiver thereof. The Clean Water Act further requires the Commission to adopt all conditions contained in the water quality certification.

In addition, if a project is located on U.S. lands such as a national forest, section 4(e) of the FPA authorizes the federal land managing agency to impose mandatory conditions to protect those lands. Section 18 of the FPA gives authority to the Secretaries of the Departments of the Interior and Commerce to prescribe fishways. With respect to exemptions, section 30(c) of the FPA allows federal and state agencies to impose conditions to protect fish and wildlife resources.

These statutory requirements give other agencies a significant role in the licensing process but do not require them to balance their legislatively-determined priorities with all other relevant factors affecting the public interest as the Commission must do under the FPA.

III. Conclusion

As the lead agency for FPA hydropower proceedings, the Commission has developed processes that take into consideration the views, recommendations, and conditions provided by federal and state agencies and other stakeholders while also meeting its own statutory obligation to license projects that are best adapted for improving or developing a waterway. Commission staff remains committed to working with all agencies and stakeholders to address licensing, compliance, and dam safety of projects to ensure the most effective processing of energy infrastructure matters before the Commission. This commitment has led to the Commission being able to authorize 100 projects in less than two years from the application date over the last 15 years. This concludes my remarks. I would be happy to answer any questions you may have.

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Testimony Summary Points

- The Commission serves as the lead agency in all Federal Power Act (FPA) hydropower proceedings, preparing the overall National Environmental Policy Act documentation, and setting schedules for those proceedings.
- Section 10(a) of the FPA establishes the comprehensive development standard which each project must meet to be licensed and requires the project be best adapted to a comprehensive plan for improving or developing a waterway, not only for the improvement and utilization of waterpower development, but also for the protection and enhancement of other beneficial public uses.
- Statutory requirements in the FPA and in other statutes, such as the Coastal Zone Management Act, the National Historic Preservation Act, the Endangered Species Act, and the Clean Water Act, give multiple agencies a significant role in the licensing process but do not require them to balance their legislatively-determined priorities with factors affecting the public interest as the Commission must do under the FPA.
- The Commission has developed processes, within the confines of the existing statutory scheme, that take into consideration the views, recommendations, and conditions provided by agencies and other stakeholders to produce a record on which the Commission can reach a licensing decision that is both expeditious and legally durable.
- The complexity of the resource issues and the amount of available information about project impacts set the stage for whether the regulatory process is short or long, simple or complex.