

HYDROPOWER POLICY MODERNIZATION ACT OF 2017

OCTOBER 31, 2017.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. WALDEN, from the Committee on Energy and Commerce, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 3043]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 3043) to modernize hydropower policy, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE.**

This Act may be cited as the “Hydropower Policy Modernization Act of 2017”.

**SEC. 2. HYDROPOWER REGULATORY IMPROVEMENTS.**

(a) SENSE OF CONGRESS ON THE USE OF HYDROPOWER RENEWABLE RESOURCES.—It is the sense of Congress that—

(1) hydropower is a renewable resource for purposes of all Federal programs and is an essential source of energy in the United States; and

(2) the United States should increase substantially the capacity and generation of clean, renewable hydropower that would improve environmental quality in the United States.

(b) MODIFYING THE DEFINITION OF RENEWABLE ENERGY TO INCLUDE HYDROPOWER.—Section 203 of the Energy Policy Act of 2005 (42 U.S.C. 15852) is amended—

(1) in subsection (a), by striking “the following amounts” and all that follows through paragraph (3) and inserting “not less than 15 percent in fiscal year 2017 and each fiscal year thereafter shall be renewable energy.”; and

(2) in subsection (b), by striking paragraph (2) and inserting the following:

“(2) RENEWABLE ENERGY.—The term ‘renewable energy’ means electric energy generated from solar, wind, biomass, landfill gas, ocean (including tidal, wave, current, and thermal), geothermal, or municipal solid waste, or from a hydropower project.”

(c) PRELIMINARY PERMITS.—Section 5 of the Federal Power Act (16 U.S.C. 798) is amended—

(1) in subsection (a), by striking “three” and inserting “4”; and

(2) by amending subsection (b) to read as follows:

“(b) The Commission may—

“(1) extend the period of a preliminary permit once for not more than 4 additional years beyond the 4 years permitted by subsection (a) if the Commission finds that the permittee has carried out activities under such permit in good faith and with reasonable diligence; and

“(2) if the period of a preliminary permit is extended under paragraph (1), extend the period of such preliminary permit once for not more than 4 additional years beyond the extension period granted under paragraph (1), if the Commission determines that there are extraordinary circumstances that warrant such additional extension.”.

(d) TIME LIMIT FOR CONSTRUCTION OF PROJECT WORKS.—Section 13 of the Federal Power Act (16 U.S.C. 806) is amended in the second sentence by striking “once but not longer than two additional years” and inserting “for not more than 8 additional years.”

(e) LICENSE TERM.—Section 15(e) of the Federal Power Act (16 U.S.C. 808(e)) is amended—

(1) by striking “(e) Except” and inserting the following:

“(e) LICENSE TERM ON RELICENSING.—

“(1) IN GENERAL.—Except”; and

(2) by adding at the end the following:

“(2) CONSIDERATION.—In determining the term of a license under paragraph (1), the Commission shall consider, among other things, project-related investments to be made by the licensee under a new license issued under this section, as well as project-related investments made by a licensee over the term of the existing license (including any terms under annual licenses). In considering such investments, the Commission shall give the same weight to—

“(A) investments to be made by the licensee to implement a new license issued under this section, including—

“(i) investments in redevelopment, new construction, new capacity, efficiency, modernization, rehabilitation, and safety improvements; and

“(ii) investments in environmental, recreation, and other protection, mitigation, or enhancement measures that will be required or authorized by the license; and

“(B) investments made by the licensee over the term of the existing license (including any terms under annual licenses), beyond those required by the existing license when issued, that—

“(i) resulted in, during the term of the existing license—

“(I) redevelopment, new construction, new capacity, efficiency, modernization, rehabilitation, or safety improvements; or

“(II) environmental, recreation, or other protection, mitigation, or enhancement measures; and

“(ii) did not result in the extension of the term of the existing license by the Commission.”.

(f) ALTERNATIVE CONDITIONS AND PRESCRIPTIONS.—Section 33 of the Federal Power Act (16 U.S.C. 823d) is amended—

(1) in subsection (a)—

(A) in paragraph (1), by striking “deems” and inserting “determines”;

(B) in paragraph (2)(B), in the matter preceding clause (i), by inserting “determined to be necessary” before “by the Secretary”;

(C) by striking paragraph (4); and

(D) by striking paragraph (5);

(2) in subsection (b)—

(A) by striking paragraph (4); and

(B) by striking paragraph (5); and

(3) by adding at the end the following:

“(c) FURTHER CONDITIONS.—This section applies to any further conditions or prescriptions proposed or imposed pursuant to section 4(e), 6, or 18.”.

**SEC. 3. HYDROPOWER LICENSING AND PROCESS IMPROVEMENTS.**

(a) HYDROPOWER LICENSING AND PROCESS IMPROVEMENTS.—Part I of the Federal Power Act (16 U.S.C. 792 et seq.) is amended by adding at the end the following:

**“SEC. 34. HYDROPOWER LICENSING AND PROCESS IMPROVEMENTS.**

“(a) DEFINITION.—In this section, the term ‘Federal authorization’—

“(1) means any authorization required under Federal law with respect to an application for a license under this part; and

“(2) includes any permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal law to approve or implement the license under this part.

“(b) DESIGNATION AS LEAD AGENCY.—

“(1) IN GENERAL.—The Commission shall act as the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

“(2) OTHER AGENCIES AND INDIAN TRIBES.—

“(A) IN GENERAL.—Each Federal, State, and local government agency and Indian tribe considering an aspect of an application for Federal authorization shall coordinate with the Commission and comply with the deadline established in the schedule developed for the license under this part in accordance with the rule issued by the Commission under subsection (c).

“(B) IDENTIFICATION.—The Commission shall identify, as early as practicable after it is notified by the applicant for a license under this part, any Federal or State agency, local government, or Indian tribe that may consider an aspect of an application for a Federal authorization.

“(C) NOTIFICATION.—

“(i) IN GENERAL.—The Commission shall notify any agency and Indian tribe identified under subparagraph (B) of the opportunity to participate in the process of reviewing an aspect of an application for a Federal authorization.

“(ii) DEADLINE.—Each agency and Indian tribe receiving a notice under clause (i) shall submit a response acknowledging receipt of the notice to the Commission within 30 days of receipt of such notice and request.

“(D) ISSUE IDENTIFICATION AND RESOLUTION.—

“(i) IDENTIFICATION OF ISSUES.—Federal, State, and local government agencies and Indian tribes that may consider an aspect of an application for Federal authorization shall identify, as early as possible, and share with the Commission and the applicant, any issues of concern identified during the pendency of the Commission’s action under this part relating to any Federal authorization that may delay or prevent the granting of such authorization, including any issues that may prevent the agency or Indian tribe from meeting the schedule established for the license under this part in accordance with the rule issued by the Commission under subsection (c).

“(ii) ISSUE RESOLUTION.—The Commission may forward any issue of concern identified under clause (i) to the heads of the relevant State and Federal agencies (including, in the case of an issue of concern identified by a State or local government agency or Indian tribe, the Federal agency overseeing the delegated authority, or the Secretary of the Interior with regard to an issue of concern identified by an Indian tribe, as applicable) for resolution. If the Commission forwards an issue of

concern to the head of a relevant agency, the Commission and the relevant agency shall enter into a memorandum of understanding to facilitate interagency coordination and resolution of such issues of concern, as appropriate.

“(c) SCHEDULE.—

“(1) COMMISSION RULEMAKING TO ESTABLISH PROCESS TO SET SCHEDULE.—Not later than 180 days after the date of enactment of this section the Commission shall, in consultation with the appropriate Federal agencies, issue a rule, after providing for notice and public comment, establishing a process for setting a schedule following the filing of an application under this part for a license for the review and disposition of each Federal authorization.

“(2) ELEMENTS OF SCHEDULING RULE.—In issuing a rule under this subsection, the Commission shall ensure that the schedule for each Federal authorization—

“(A) includes deadlines for actions by—

“(i) any Federal or State agency, local government, or Indian tribe that may consider an aspect of an application for the Federal authorization;

“(ii) the applicant;

“(iii) the Commission; and

“(iv) other participants in any applicable proceeding;

“(B) is developed in consultation with the applicant and any agency and Indian tribe that submits a response under subsection (b)(2)(C)(ii);

“(C) provides an opportunity for any Federal or State agency, local government, or Indian tribe that may consider an aspect of an application for the applicable Federal authorization to identify and resolve issues of concern, as provided in subsection (b)(2)(D);

“(D) complies with applicable schedules established under Federal and State law;

“(E) ensures expeditious completion of all proceedings required under Federal and State law, to the extent practicable; and

“(F) facilitates completion of Federal and State agency studies, reviews, and any other procedures required prior to, or concurrent with, the preparation of the Commission’s environmental document required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

“(d) TRANSMISSION OF FINAL SCHEDULE.—

“(1) IN GENERAL.—For each application for a license under this part, the Commission shall establish a schedule in accordance with the rule issued by the Commission under subsection (c). The Commission shall publicly notice and transmit the final schedule to the applicant and each agency and Indian tribe identified under subsection (b)(2)(B).

“(2) RESPONSE.—Each agency and Indian tribe receiving a schedule under this subsection shall acknowledge receipt of such schedule in writing to the Commission within 30 days.

“(e) ADHERENCE TO SCHEDULE.—All applicants, other licensing participants, and agencies and Indian tribes considering an aspect of an application for a Federal authorization shall meet the deadlines set forth in the schedule established pursuant to subsection (d)(1).

“(f) APPLICATION PROCESSING.—The Commission, Federal, State, and local government agencies, and Indian tribes may allow an applicant seeking a Federal authorization to fund a third-party contractor selected by such an agency or tribe to assist in reviewing the application. All costs of an agency or tribe incurred pursuant to direct funding by the applicant, including all costs associated with the third party contractor, shall not be considered costs of the United States for the administration of this part under section 10(e).

“(g) COMMISSION RECOMMENDATION ON SCOPE OF ENVIRONMENTAL REVIEW.—For the purposes of coordinating Federal authorizations for each license under this part, the Commission shall consult with and make a recommendation to agencies and Indian tribes receiving a schedule under subsection (d) on the scope of the environmental review for all Federal authorizations for such license. Each Federal and State agency and Indian tribe shall give due consideration and may give deference to the Commission’s recommendations, to the extent appropriate under Federal law.

“(h) EXTENSION OF DEADLINE.—

“(1) APPLICATION.—A Federal, State, or local government agency or Indian tribe that is unable to complete its disposition of a Federal authorization by the deadline set forth in the schedule established under subsection (d)(1) shall, not later than 30 days prior to such deadline, file for an extension with the Commission.

“(2) EXTENSION.—The Commission shall only grant an extension filed for under paragraph (1) if the agency or Indian tribe demonstrates, based on the

record maintained under subsection (i), that complying with the schedule established under subsection (d)(1) would prevent the agency or tribe from complying with applicable Federal or State law. If the Commission grants the extension, the Commission shall set a reasonable schedule and deadline, that is not later than 90 days after the deadline set forth in the schedule established under subsection (d)(1), for the agency or tribe to complete its disposition of the Federal authorization.

“(i) CONSOLIDATED RECORD.—The Commission shall, with the cooperation of Federal, State, and local government agencies and Indian tribes, maintain a complete consolidated record of all decisions made or actions taken by the Commission or by a Federal administrative agency or officer (or State or local government agency or officer or Indian tribe acting under delegated Federal authority) with respect to any Federal authorization. Such record shall constitute the record for judicial review under section 313(b).

“(j) SUBMISSION OF LICENSE RECOMMENDATIONS, CONDITIONS, AND PRESCRIPTIONS.—

“(1) SUBMISSION OF RECOMMENDATIONS.—Any Federal or State agency that is providing recommendations with respect to a license proceeding under this part shall submit to the Commission for inclusion in the consolidated record relating to the license proceeding maintained under subsection (i)—

“(A) the recommendations;

“(B) the rationale for the recommendations; and

“(C) any supporting materials relating to the recommendations.

“(2) WRITTEN STATEMENT.—In a case in which a Federal agency is making a determination with respect to a covered measure (as defined in section 35(a)), the head of the Federal agency shall submit to the Commission for inclusion in the consolidated record, in addition to the information required under paragraph (1), a written statement demonstrating that the Federal agency gave equal consideration to the effects of the covered measure on—

“(A) energy supply, distribution, cost, and use;

“(B) flood control;

“(C) navigation;

“(D) water supply; and

“(E) air quality and the preservation of other aspects of environmental quality.

“(3) INFORMATION FROM OTHER AGENCIES.—In preparing a written statement under paragraph (2), the head of a Federal agency may make use of information produced or made available by other agencies with relevant expertise in the factors described in subparagraphs (A) through (E) of that paragraph.

“(k) DELEGATION.—A Secretary may delegate the authority to determine a condition to be necessary under section 4(e), or to prescribe a fishway under section 18, to an officer of the applicable department based, in part, on the ability of the officer to evaluate the broad effects of such condition or prescription on—

“(1) the applicable project; and

“(2) the factors described in subparagraphs (A) through (E) of subsection (j)(2).

“(l) NO EFFECT ON OTHER LAWS.—Nothing in this section shall be construed to affect any requirement of the Federal Water Pollution Control Act, the Fish and Wildlife Coordination Act, the Endangered Species Act of 1973, section 14 of the Act of March 3, 1899 (commonly known as the Rivers and Harbors Appropriation Act of 1899), and those provisions in subtitle III of title 54, United States Code commonly known as the National Historic Preservation Act, with respect to an application for a license under this part.

**“SEC. 35. TRIAL-TYPE HEARINGS.**

“(a) DEFINITION OF COVERED MEASURE.—In this section, the term ‘covered measure’ means—

“(1) a condition determined to be necessary under section 4(e), including an alternative condition proposed under section 33(a);

“(2) fishways prescribed under section 18, including an alternative prescription proposed under section 33(b); or

“(3) any action by the Secretary to exercise reserved authority under the license to prescribe, submit, or revise any condition to a license under the first proviso of section 4(e) or fishway prescribed under section 18.

“(b) AUTHORIZATION OF TRIAL-TYPE HEARING.—An applicant for a license under this part (including an applicant for a license under section 15) and any party to a license proceeding shall be entitled to a determination on the record, after opportunity for a trial-type hearing of not more than 120 days, on any disputed issues of material fact with respect to an applicable covered measure.

“(c) DEADLINE FOR REQUEST.—A request for a trial-type hearing under this section shall be submitted not later than 60 days after the date on which, as applicable—

“(1) the Secretary determines the condition to be necessary under section 4(e) or prescribes the fishway under section 18; or

“(2) the Secretary exercises reserved authority under the license to prescribe, submit, or revise any condition to a license under the first proviso of section 4(e) or fishway prescribed under section 18, as appropriate.

“(d) NO REQUIREMENT TO EXHAUST.—By electing not to request a trial-type hearing under subsection (c), a license applicant and any other party to a license proceeding shall not be considered to have waived the right of the applicant or other party to raise any issue of fact or law in a non-trial-type proceeding, but no issue may be raised for the first time on rehearing or judicial review of the license decision of the Commission.

“(e) ADMINISTRATIVE LAW JUDGE.—

“(1) IN GENERAL.—All disputed issues of material fact raised by a party in a request for a trial-type hearing submitted under subsection (c) shall be determined in a single trial-type hearing to be conducted by an Administrative Law Judge within the Office of Administrative Law Judges and Dispute Resolution of the Commission, in accordance with the Commission rules of practice and procedure under part 385 of title 18, Code of Federal Regulations (or successor regulations), and within the timeframe established by the Commission for each license proceeding (including a proceeding for a license under section 15) under section 34(d).

“(2) REQUIREMENT.—The trial-type hearing shall include the opportunity—

“(A) to undertake discovery; and

“(B) to cross-examine witnesses, as applicable.

“(f) STAY.—The Administrative Law Judge may impose a stay of a trial-type hearing under this section for a period of not more than 120 days to facilitate settlement negotiations relating to resolving the disputed issues of material fact with respect to the covered measure.

“(g) DECISION OF THE ADMINISTRATIVE LAW JUDGE.—

“(1) CONTENTS.—The decision of the Administrative Law Judge shall contain—

“(A) findings of fact on all disputed issues of material fact;

“(B) conclusions of law necessary to make the findings of fact, including rulings on materiality and the admissibility of evidence; and

“(C) reasons for the findings and conclusions.

“(2) LIMITATION.—The decision of the Administrative Law Judge shall not contain conclusions as to whether—

“(A) any condition or prescription should be adopted, modified, or rejected; or

“(B) any alternative condition or prescription should be adopted, modified, or rejected.

“(3) FINALITY.—A decision of an Administrative Law Judge under this section with respect to a disputed issue of material fact shall not be subject to further administrative review.

“(4) SERVICE.—The Administrative Law Judge shall serve the decision on each party to the hearing and forward the complete record of the hearing to the Commission and the Secretary that proposed the original condition or prescription.

“(h) SECRETARIAL DETERMINATION.—

“(1) IN GENERAL.—Not later than 60 days after the date on which the Administrative Law Judge issues the decision under subsection (g) and in accordance with any applicable schedule established by the Commission under section 34(d), the Secretary proposing a covered measure shall file with the Commission a final determination to adopt, modify, or withdraw any condition or prescription that was the subject of a hearing under this section, based on the decision of the Administrative Law Judge.

“(2) RECORD OF DETERMINATION.—The final determination of the Secretary filed with the Commission shall identify the reasons for the decision and any considerations taken into account that were not part of, or were inconsistent with, the findings of the Administrative Law Judge and shall be included in the consolidated record maintained under section 34(i).

“(i) RESOLUTION OF MATTERS.—Notwithstanding sections 4(e) and 18, if the Commission finds that a final determination under (h)(1) of the Secretary is inconsistent with the purposes of this part or other applicable law, the Commission may enter into a memorandum of understanding with the Secretary to facilitate interagency coordination and resolve the matter.

“(j) JUDICIAL REVIEW.—The decision of the Administrative Law Judge and the record of determination of the Secretary shall be included in the record of the applicable licensing proceeding and subject to judicial review of the final licensing decision of the Commission under section 313(b).

**“SEC. 36. LICENSING STUDY IMPROVEMENTS.**

“(a) IN GENERAL.—To facilitate the timely and efficient completion of the license proceedings under this part, the Commission shall, in consultation with applicable Federal and State agencies and interested members of the public—

“(1) compile current and accepted best practices in performing studies required in such license proceedings, including methodologies and the design of studies to assess the full range of environmental impacts of a project that reflect the most recent peer-reviewed science;

“(2) compile a comprehensive collection of studies and data accessible to the public that could be used to inform license proceedings under this part; and

“(3) encourage license applicants, agencies, and Indian tribes to develop and use, for the purpose of fostering timely and efficient consideration of license applications, a limited number of open-source methodologies and tools applicable across a wide array of projects, including water balance models and streamflow analyses.

“(b) USE OF STUDIES.—To the extent practicable, the Commission and other Federal, State, and local government agencies and Indian tribes considering an aspect of an application for Federal authorization (as defined in section 34) shall use studies and data based on current, accepted science in support of their actions. Any participant in a proceeding with respect to such a Federal authorization shall demonstrate that a study requested by the participant is not duplicative of current, existing studies that are applicable to the project.

“(c) INTRA-WATERSHED REVIEW.—The Commission shall establish a program to develop comprehensive plans, at the request of project applicants, on a watershed-wide scale, in consultation with the applicants, appropriate Federal agencies, and affected States, local governments, and Indian tribes, in watersheds with respect to which there are more than one application for a project. Upon such a request, the Commission, in consultation with the applicants, such Federal agencies, and affected States, local governments, and Indian tribes, may conduct or commission watershed-wide environmental studies, with the participation of at least 2 applicants. Any study conducted under this subsection shall apply only to a project with respect to which the applicants participate.

**“SEC. 37. LICENSE AMENDMENT IMPROVEMENTS.**

“(a) QUALIFYING PROJECT UPGRADES.—

“(1) IN GENERAL.—As provided in this section, the Commission may approve an application under this section for an amendment to a license issued under this part for a qualifying project upgrade.

“(2) APPLICATION.—A licensee filing an application for an amendment to a project license, for which the licensee is seeking approval as a qualified project upgrade under this section, shall include in such application information sufficient to demonstrate that the proposed change to the project described in the application is a qualifying project upgrade.

“(3) NOTICE AND INITIAL DETERMINATION ON QUALIFICATION.—Not later than 30 days after receipt of an application under paragraph (2), the Commission, in consultation with other Federal agencies, States, and Indian tribes the Commission determines appropriate, shall publish in the Federal Register a notice containing—

“(A) notice of the application filed under paragraph (2);

“(B) an initial determination as to whether the proposed change to the project described in the application for a license amendment is a qualifying project upgrade; and

“(C) a request for public comment on the application and the initial determination.

“(4) PUBLIC COMMENT AND CONSULTATION.—The Commission shall, for a period of 45 days beginning on the date of publication of a notice under paragraph (3)—

“(A) accept public comment regarding the application and whether the proposed license amendment is for a qualifying project upgrade; and

“(B) consult with each Federal, State, and local government agency and Indian tribe considering an aspect of an application for any authorization required under Federal law with respect to the proposed license amendment, as well as other interested agencies and Indian tribes.

“(5) FINAL DETERMINATION ON QUALIFICATION.—Not later than 15 days after the end of the public comment and consultation period under paragraph (4), the

Commission shall publish in the Federal Register a final determination as to whether the proposed license amendment is for a qualifying project upgrade.

“(6) FEDERAL AUTHORIZATIONS.—In establishing the schedule for a proposed license amendment for a qualifying project upgrade, the Commission shall require final disposition of all authorizations required under Federal law with respect to an application for such license amendment, other than final action by the Commission, by not later than 120 days after the date on which the Commission publishes a final determination under paragraph (5) that the proposed license amendment is for a qualifying project upgrade.

“(7) COMMISSION ACTION.—Not later than 150 days after the date on which the Commission publishes a final determination under paragraph (5) that a proposed license amendment is for a qualifying project upgrade, the Commission shall take final action on the license amendment application.

“(8) LICENSE AMENDMENT CONDITIONS.—Any condition or prescription included in or applicable to a license amendment for a qualifying project upgrade approved under this subsection, including any condition, prescription, or other requirement of a Federal authorization, shall be limited to those that are—

“(A) necessary to protect public safety; or

“(B) 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.

“(9) RULEMAKING.—Not later than 180 days after the date of enactment of this section, the Commission shall, after notice and opportunity for public comment, issue a rule to implement this subsection.

“(10) DEFINITIONS.—For purposes of this subsection:

“(A) QUALIFYING PROJECT UPGRADE.—The term ‘qualifying project upgrade’ means a change to a project licensed under this part that meets the qualifying criteria, as determined by the Commission.

“(B) QUALIFYING CRITERIA.—The term ‘qualifying criteria’ means, with respect to a project licensed under this part, a change to the project that—

“(i) if carried out, would be unlikely to adversely affect any species listed as threatened or endangered under the Endangered Species Act of 1973 or result in the destruction or adverse modification of critical habitat, as determined in consultation with the Secretary of the Interior or Secretary of Commerce, as appropriate, in accordance with section 7 of the Endangered Species Act of 1973;

“(ii) is consistent with any applicable comprehensive plan under section 10(a)(2);

“(iii) includes only changes to project lands, waters, or operations that, in the judgment of the Commission, would result in only insignificant or minimal cumulative adverse environmental effects;

“(iv) would be unlikely to adversely affect water quality or water supply; and

“(v) proposes to implement—

“(I) capacity increases, efficiency improvements, or other enhancements to hydropower generation at the licensed project;

“(II) environmental protection, mitigation, or enhancement measures to benefit fish and wildlife resources or other natural and cultural resources; or

“(III) improvements to public recreation at the licensed project.

“(b) AMENDMENT APPROVAL PROCESSES.—

“(1) RULE.—Not later than 1 year after the date of enactment of this section, the Commission shall, after notice and opportunity for public comment, issue a rule establishing new standards and procedures for license amendment applications under this part. In issuing such rule, the Commission shall seek to develop the most efficient and expedient process, consultation, and review requirements, commensurate with the scope of different categories of proposed license amendments. Such rule shall account for differences in environmental effects across a wide range of categories of license amendment applications.

“(2) CAPACITY.—In issuing a rule under this subsection, the Commission shall take into consideration that a change in generating or hydraulic capacity may indicate the potential environmental effects of a proposed license amendment but is not determinative of such effects.

“(3) PROCESS OPTIONS.—In issuing a rule under this subsection, the Commission shall take into consideration the range of process options available under

the Commission’s regulations for license applications and adapt such options to amendment applications, where appropriate.”.

**SEC. 4. TECHNICAL AND CONFORMING AMENDMENTS.**

(a) LICENSES.—Section 4(e) of the Federal Power Act (16 U.S.C. 797(e)) is amended—

(1) by striking “adequate protection and utilization of such reservation” and all that follows through “That no license affecting the navigable capacity” and inserting “adequate protection and utilization of such reservation: *Provided further*, That no license affecting the navigable capacity”; and

(2) by striking “deem” and inserting “determine”.

(b) OPERATION OF NAVIGATION FACILITIES.—Section 18 of the Federal Power Act (16 U.S.C. 811) is amended by striking the second, third, and fourth sentences.

PURPOSE AND SUMMARY

H.R. 3043, Hydropower Policy Modernization Act of 2017, was introduced by Representative McMorris Rodgers (R-WA) on June 23, 2017. H.R. 3043 would modernize the regulatory permitting process and encourage the expansion of hydropower generation by improving administrative efficiency, accountability, and transparency; promoting new hydropower infrastructure; requiring balanced, timely decision making; and reducing duplicative oversight.

BACKGROUND AND NEED FOR LEGISLATION

Hydropower is an essential component of an “all of the above” energy strategy for the United States. In 2015, hydropower accounted for about 6 percent of total U.S. electricity generation and 46 percent of electricity generation from renewables.<sup>1</sup> There is tremendous opportunity to expand hydropower production. Less than 3 percent of the dams in the U.S.—approximately 2,200 dams—produce electricity. A recent report by the Department of Energy (DOE) found that U.S. hydropower production could grow by almost 50 percent from current levels by 2050 from a combination of upgrading existing hydropower facilities, adding generation capacity to existing non-powered dams and canals, and developing new hydropower facilities.<sup>2</sup> The benefits of hydropower to the nation’s economy and energy security are numerous. The hydropower industry employs a workforce of about 143,000, which, combined with the affordable electricity produced by hydropower projects, brings multiple economic benefits to the communities in which they are located and those that they serve.<sup>3</sup> Hydropower also contributes to flexible and reliable operations of the electric grid with energy, capacity, and ancillary services such as baseload power, peaking generation, load-following, energy storage, and black-start capability.

The Federal Energy Regulatory Commission (FERC) exercises jurisdiction over non-Federal hydropower projects. FERC is authorized under Part I of the Federal Power Act (FPA) to review applications for the construction of hydropower projects and oversee their operation and safety. Licensing new hydropower facilities and relicensing existing facilities requires extensive consultation with multiple Federal, State, and local government entities to balance a wide range of issues, including potential impacts on environmental

<sup>1</sup> U.S. Energy Information Administration, *Hydropower Explained*.

<sup>2</sup> U.S. Department of Energy, *Hydropower Vision (2016)*. DOE found that U.S. hydropower could grow from 101 gigawatts (GW) of combined generating and storage capacity to nearly 150 GW by 2050, with more than 50 percent of this growth realized by 2030.

<sup>3</sup> *Testimony of Mr. Jeffrey Leahy, Deputy Executive Director, National Hydropower Association*, before the Subcommittee on Energy, May 3, 2017.

and wildlife resources, recreation, aesthetics, cultural resources, and land use. FERC regulates over 1,600 non-Federal hydropower projects at over 2,500 dams, which together represents about 56 gigawatts of hydropower capacity, more than half of all the hydropower capacity in the United States. Under the FPA, non-Federal hydropower projects must be licensed by FERC if they are located on a navigable waterway; occupy Federal land; use surplus water from a Federal dam; or 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 FPA authorizes FERC to issue licenses for projects within its jurisdiction, and exemptions for projects that would be located at existing dams or within conduits that meet specific qualifying criteria. Licenses are generally issued for terms of between 30 and 50 years, and are renewable. Exemptions are perpetual, and thus do not need to be reviewed. According to FERC, Commission staff currently has a full workload processing original license, relicense, and exemption applications, as well as its compliance and dam safety work. The relicensing workload, in particular, has started to increase and will continue to remain high well into the 2030s. Between FY 2017 and FY 2030, about 480 older projects, which represent approximately 45 percent of FERC licensed projects, will begin the relicensing process. Currently, FERC is processing about 4,999 licensing and exemption-related filings per year, which will substantially increase commensurate with the increased relicensing workload.<sup>4</sup>

The Committee on Energy and Commerce has examined the role of Federal agencies, States, and Tribes in the Federal hydropower licensing process. Testimony before the Committee has shown that the duration, complexity, and regulatory uncertainty of the licensing process creates significant challenges and has the potential to delay or prevent investments that would expand hydropower production.<sup>5</sup> Upgrading the performance of existing dams and utilizing current non-powered dams, canals, and conduits would enable investments, which would address aging dams and improve overall safety.<sup>6</sup> The licensing process for a new hydropower development project can last over a decade and costs tens of millions of dollars, while natural gas-fired generating capacity can be approved in considerably less time. Testimony on behalf of the National Hydropower Association before the Subcommittee on Energy stated:

While there is some variability with regard to size and location, the regulatory approval processes for simple cycle turbine or combined cycle plants are generally 1–2 years—even in urban areas like New York City. The FERC licensing process for hydro plants is generally 8 years or more, including both licensing and pre-filing activities. With regard to licensing costs, a combined cycle plant is approximately \$1 to \$2 million; whereas, some studies alone can

<sup>4</sup> *Testimony of Mr. John Katz, Deputy Associate General Counsel, Office of the General Counsel, Federal Energy Regulatory Commission*, before the Subcommittee on Energy, May 3, 2007.

<sup>5</sup> See e.g. hearings entitled “*Modernizing Energy Infrastructure: Challenges and Opportunities to Expanding Hydropower Generation*” held on March 15, 2017; and “*Legislation Addressing Pipeline and Hydropower Infrastructure Modernization*” held on May 3, 2017.

<sup>6</sup> *Testimony of the American Society of Civil Engineers* before the Subcommittee on Energy, March 15, 2017.

cost multiples of that figure for a hydropower project. It is not uncommon for a hydropower license applicant to spend \$10 million or more on just the licensing process.

While FERC serves as the lead agency to coordinate hydropower reviews and convene stakeholders to participate in collaborative, transparent public proceedings, FERC lacks authority to improve the hydropower licensing process by helping to resolve disputes among agencies and enforce scheduling deadlines. Testimony on behalf of FERC before the Subcommittee on Energy stated that “in many instances, it is applicants, Federal and State agencies, and other stakeholders that determine project success, and control whether the regulatory process is short or long, simple or complex.”<sup>7</sup>

In response to questions for the Subcommittee’s hearing record, FERC reported 26 separate cases where the Commission has finished its environmental review and is currently waiting for an action to be completed by another agency before FERC can issue a decision on the project (Table 1).<sup>8</sup> These situations fall into two categories: (1) waiting for either the National Marine Fisheries Service or U.S. Fish and Wildlife Service to complete consultation under section 7(a) of the Endangered Species Act and/or; (2) waiting for a State water quality agency to issue water quality certification under section 401 of the Clean Water Act. In some instances, applications have been stalled for more than a decade due to an agency’s failure to act.

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<sup>7</sup> *Testimony of Mr. John Katz, Deputy Associate General Counsel, Office of the General Counsel, Federal Energy Regulatory Commission, before the Subcommittee on Energy, May 3, 2017.*

<sup>8</sup> *Response to Questions for the Record, Testimony of Mr. John Katz, Deputy Associate General Counsel, Office of the General Counsel, Federal Energy Regulatory Commission, before the Subcommittee on Energy, May 3, 2017.*

Table 1: Cases Requiring Other Agency Action						
Project No.	Project Name	State	FERC NEPA Completed	Time Since NEPA Completion (Years)	Authorization Type Needed	Federal / State Agency Responsible
2086	Vermilion Valley	CA	5/3/2004	13	ESA / WQC	FWS / CA
2105	Upper N. Fork Feather	CA	11/10/2005	11.5	WQC	CA
2174	Portal	CA	4/27/2006	11.1	ESA / WQC	FWS / CA
11810	Augusta Canal	SC	9/22/2006	10.7	ESA	NMFS
2107	Poe	CA	3/29/2007	10.2	WQC	CA
1971	Hells Canyon	ID/OR	8/31/2007	9.8	ESA / WQC	NMFS and FWS / OR and ID
199	Santee Cooper	SC	10/26/2007	9.6	ESA	NMFS
67	Big Creek	CA	3/13/2009	8.2	ESA / WQC	FWS / CA
120	Big Creek 3	CA	3/13/2009	8.2	ESA / WQC	FWS / CA
2085	Mammoth Pool	CA	3/13/2009	8.2	ESA / WQC	FWS / CA
2175	Big Creek 1 and 2	CA	3/13/2009	8.2	ESA / WQC	FWS / CA
2088	South Feather	CA	6/4/2009	7.9	WQC	CA
2244	Packwood Lake	WA	7/1/2009	7.8	ESA	NMFS
803	DeSabra Centerville	CA	7/24/2009	7.8	ESA	NMFS
516	Saluda	SC	7/20/2010	6.8	ESA	NMFS
2106	McCloud-Pit	CA	2/25/2011	6.3	WQC	CA
2615	Brassua	ME	9/14/2011	5.7	WQC	ME
12965	Wickiup Dam	OR	11/2/2012	4.5	ESA / WQC	FWS / OR
2079	Mid-Fork American	CA	2/22/2013	4.3	ESA / WQC	FWS / CA
2266	Yuba Bear	CA	12/19/2014	2.4	ESA / WQC	FWS / CA
2310	Drum Spaulding	CA	12/19/2014	2.4	ESA / WQC	FWS / CA
12796	R.C. Byrd	OH	1/23/2015	2.3	ESA	FWS
405	Conowingo	MD	3/11/2015	2.2	ESA/WQC	NMFS and FWS / MD
2179	Merced	CA	12/4/2015	1.4	ESA/WQC	NMFS and FWS / CA
2467	Merced Falls	CA	12/4/2015	1.4	ESA/WQC	NMFS and FWS / CA
2335	Williams	ME	11/9/2016	0.5	WQC	ME

ESA = Endangered Species Act Consultation  
WQC = Section 401 of the Clean Water Act Water Quality Certification  
FWS = U.S. Fish and Wildlife Service  
NMFS = National Marine Fisheries Service

The Committee has identified ways to modernize the permitting process and encourage the expansion of hydropower generation by improving administrative efficiency, accountability and transparency; promoting new hydropower infrastructure; requiring balanced, timely decision making, and reducing duplicative oversight. H.R. 3043 brings certainty and timeliness to the licensing process by enhancing consultation with Federal, State, and local agencies and Indian tribes with applicable Federal authorization responsibilities, and requiring FERC to establish a process for setting a schedule for the review and disposition of each Federal authorization. H.R. 3043 streamlines and improves procedures to identify scheduling issues, proposing conditions and prescriptions, resolving disputes, and conducting trial-type hearings regarding mandatory conditions and fishway prescriptions under FPA sections 4(e) and 18, respectively. H.R. 3043 also contains provisions to expedite the approval process for an amendment to a license for qualifying hydropower project upgrade.

#### COMMITTEE ACTION

On May 3, 2017, the Subcommittee on Energy held a hearing on a discussion draft entitled “Hydropower Policy Modernization Act of 2017.” The Subcommittee received testimony from:

- Terry Turpin, Director, Office of Energy Projects, Federal Energy Regulatory Commission;
- John Katz, Deputy Associate General Counsel, Office of the General Counsel, Federal Energy Regulatory Commission;
- Jeffrey Leahey, Deputy Executive Director, National Hydropower Association;
- Donald Santa, President and CEO, Interstate Natural Gas Association of America;
- Andy Black, President and CEO, Association of Oil Pipe Lines;
- Jeffrey Soth, Legislative and Political Director, International Union of Operating Engineers;
- Bob Irvin, President and CEO, American Rivers; and
- Jennifer Danis, Senior Staff Attorney, Eastern Environmental Law Center.

On June 22, 2017, the Subcommittee on Energy met in open markup session and forwarded the discussion draft, Hydropower Policy Modernization Act of 2017, without amendment, to the full Committee by a voice vote. The discussion draft was substantially similar to H.R. 3043. On June 28, 2017, the full Committee on Energy and Commerce met in open markup session and ordered H.R. 3043, as amended, favorably reported to the House by a voice vote.

#### COMMITTEE VOTES

Clause 3(b) of rule XIII requires the Committee to list the record votes on the motion to report legislation and amendments thereto. There were no record votes taken in connection with ordering H.R. 3043 reported.

## OVERSIGHT FINDINGS AND RECOMMENDATIONS

Pursuant to clause 2(b)(1) of rule X and clause 3(c)(1) of rule XIII, the Committee held a hearing and made findings that are reflected in this report.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX  
EXPENDITURES

Pursuant to clause 3(c)(3) of rule XIII, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, July 21, 2017.*

Hon. GREG WALDEN,  
*Chairman, Committee on Energy and Commerce,  
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3043, the Hydropower Policy Modernization Act of 2017.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Megan Carroll.

Sincerely,

MARK P. HADLEY  
(For Keith Hall, Director).

Enclosure.

*H.R. 3043—Hydropower Policy Modernization Act of 2017*

The Federal Energy Regulatory Commission (FERC) regulates nonfederal hydropower projects. Under the Federal Power Act the agency reviews and approves licenses to construct and operate such facilities in consultation with a variety of federal, state, and local entities with regulatory responsibilities across a broad range of issues.

H.R. 3043 would specify a variety of timeframes and procedures for FERC and other affected agencies to follow in carrying out regulatory functions related to nonfederal hydropower projects. Based on information from FERC and other affected federal agencies, CBO estimates that implementing the bill would have no significant net effect on the federal budget. The bill would not significantly affect the scope of federal agencies' regulatory responsibilities, though CBO expects that meeting the timeframes specified in the bill might require additional funding, particularly for FERC. However, because FERC recovers 100 percent of its costs through fees, any change in that agency's costs (which are controlled through annual appropriation acts) would be offset by an equal change in fees that the commission charges, resulting in no net change in federal spending.

Enacting H.R. 3043 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. CBO estimates that enacting H.R. 3043 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 3043 would impose intergovernmental and private-sector mandates, as defined in the Unfunded Mandates Reform Act (UMRA). If FERC increases fees to offset the costs of implementing the bill, the cost of an existing mandate to pay those fees would increase for public and private entities. Based on information from FERC about the potential costs of implementing the bill, CBO estimates that any incremental change in fees collected would be small. The bill would impose another mandate on state, local, and tribal agencies by requiring them to respond to FERC and acknowledge receipt of an invitation to participate in the review of a federal authorization for a hydropower project. Based on information from FERC, CBO estimates that the cost of the notification mandate would be small. In total, CBO estimates that the cost of complying with all mandates in the bill would fall below the annual thresholds established in UMRA for intergovernmental and private-sector mandates (\$78 million and \$156 million in 2017, respectively, adjusted annually for inflation).

The CBO staff contacts for this estimate are Megan Carroll (for federal costs), Jon Sperl (for intergovernmental mandates), and Amy Petz (for private-sector mandates). The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

#### FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

#### STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

Pursuant to clause 3(c)(4) of rule XIII, the general performance goal or objective of this legislation is to modernize the regulatory permitting process and encourage the expansion of hydropower generation by improving administrative efficiency, accountability, and transparency; promoting new hydropower infrastructure; requiring balanced, timely decision making; and reducing duplicative oversight.

#### DUPLICATION OF FEDERAL PROGRAMS

Pursuant to clause 3(c)(5) of rule XIII, no provision of H.R. 3043 is known to be duplicative of another Federal program, including any program that was included in a report to Congress pursuant to section 21 of Public Law 111–139 or the most recent Catalog of Federal Domestic Assistance.

#### COMMITTEE COST ESTIMATE

Pursuant to clause 3(d)(1) of rule XIII, the Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

#### EARMARK, LIMITED TAX BENEFITS, AND LIMITED TARIFF BENEFITS

Pursuant to clause 9(e), 9(f), and 9(g) of rule XXI, [the Committee finds that H.R. 3043 contains no earmarks, limited tax benefits, or limited tariff benefits.

#### DISCLOSURE OF DIRECTED RULE MAKINGS

Pursuant to section 3(i) of H.Res. 5, the following directed rule makings are contained in H.R. 3043:

- Section 3 provides that “[n]ot later than 180 days after the date of enactment of this section the Commission shall, in consultation with the appropriate Federal agencies, issue a rule, after providing for notice and public comment, establishing a process for setting a schedule following the filing of an application . . . for a license for the review and disposition of each Federal authorization.”

- Section 3 provides that “[n]ot later than 180 days after the date of enactment of this section, the Commission shall, after notice and opportunity for public comment, issue a rule to implement [new section 37(a), regarding Qualifying Project Upgrades].

- Section 3 provides that “[n]ot later than 1 year after the date of enactment of . . . section [27. License Amendment Improvements], the Commission shall, after notice and opportunity for public comment, issue a rule establishing new standards and procedures for license amendment applications . . . .”

#### ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

#### APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

#### SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

##### *Section 1. Short title*

This section provides that the Act may be cited as the “Hydropower Policy Modernization Act of 2017.”

##### *Section 2. Hydropower regulatory improvements*

Section 2(a) expresses the sense of the Congress that hydropower is a renewable resource for purposes of all Federal programs; hydropower is an essential source of energy in the United States; and that the United States should increase substantially the capacity and generation of clean, renewable hydropower that would improve environmental quality in the United States.

Section 2(b) amends section 203 of the Energy Policy Act of 2005 to include hydropower in the definition of “renewable energy.”

Section 2(c) amends section 5 of the Federal Power Act (FPA) by extending preliminary permit time periods to 4 years and by allow-

ing the Commission to extend the period of a preliminary permit once for an additional 4 years. In the event of extraordinary circumstances, the Commission may extend the preliminary permit for an additional 4 years beyond the extension described in paragraph 2(c)(1).

Section 2(d) amends section 13 of the FPA to allow the Commission to extend the period for the commencement of construction by up to 8 years.

Section 2(e) amends section 15(e) of the FPA to allow the Commission to consider, among other things, project-related investments to be made by the licensee under a new license, as well as project-related investments made by a licensee over the term of the existing license. To ensure that all of the licensee's project-related investments are treated equally when considering the license term length, this section requires the Commission to give the "same weight" to these pre-licensing and post-relicensing project-related investments.

The Committee is aware that the Commission recently issued a notice of inquiry and invited public comment on what changes, if any, the Commission should make to its existing policies for establishing the length of license terms for non-federal hydropower projects subject to the jurisdiction of the FPA.<sup>9</sup> Among the several opportunities identified is the possibility of the Commission establishing a "default" term of 50-years. Because a 50-year term is the maximum allowed under the FPA, any decision by the Commission to establish a default 50-year license term would necessarily account for both pre- and post-relicensing project investments to the fullest extent allowable under the FPA, and therefore meet the requirements of Section 2(e) of this bill in an administratively efficient manner. Moreover, the evaluation of both pre- and post-relicensing project investments required under Section 2(e) will assist the Commission in making the public interest determination required under Section 15(a) of the FPA, as well as in its environmental review.

Section 2(f) amends FPA section 33 to require the Secretary to make a determination regarding alternate conditions and prescriptions. This section also strikes paragraphs 4 and 5 to conform with new FPA Section 34(j).

### *Section 3. Hydropower Licensing and Process Improvements*

Section 3(a) amends Part I of the FPA by adding at the end the following: "Section 34. Hydropower Licensing and Process Improvements"; "Section 35. Trial-Type Hearings"; "Section 36. Licensing Study Improvements"; and, "Section 37. License Amendment Improvements."

FPA section 34(a) provides a definition for the term "Federal authorization."

FPA section 34(b) directs the Commission to act as the lead agency for the purposes of coordinating all applicable Federal authorizations and for purposes of complying with the National Environmental Policy Act of 1969. It instructs agencies and Indian

<sup>9</sup>See *Establishing the Length of License Terms for Hydroelectric Projects*, 81 Fed. Reg. 85218 (Nov. 25, 2016).

tribes considering an aspect of an application for Federal authorization to coordinate with the Commission and to comply with the Commission-established schedule. The Commission shall identify, as early as practicable, any Federal or State agency, local government, or Indian tribe that may consider an aspect of an application for a Federal authorization. The Commission shall notify any agency and Indian tribe of the opportunity to participate in the process of reviewing an aspect of an application for a Federal authorization. Each agency and Indian tribe receiving a notice from the Commission shall submit a response acknowledging receipt within 30 days of receipt of such notice. Section 34(b) also sets forth provisions directing Federal, State, and local government agencies and Indian tribes to identify and resolve any issues of concern as early as possible that may delay or prevent the granting of a Federal authorization.

FPA section 34(c) directs the Commission to issue a rule, after providing for notice and public comment, establishing a process for setting a schedule following the filing of an application under Part I of the FPA. The Commission shall ensure that the schedule for each Federal authorization includes deadlines for actions, is developed in consultation with the applicant and any agency and Indian tribe, and complies with applicable schedules established under Federal and State law.

FPA section 34(d) instructs the Commission to publically notice and transmit the final schedule to the applicant and each identified agency and Indian tribe. Each agency and Indian tribe receiving a schedule under this subsection shall acknowledge receipt of such schedule in writing to the Commission within 30 days.

FPA section 34(e) requires all applicants, other licensing participants, and agencies and Indian tribes considering an aspect of an application for a Federal authorization to meet the deadlines set forth in the Commission's schedule.

FPA section 34(f) sets forth that the Commission, Federal, State, and local government agencies, and Indian tribes may allow an applicant seeking a Federal authorization to fund a third-party contractor to assist in reviewing the application.

FPA section 34(g) instructs the Commission to consult with and make a recommendation to agencies and Indian tribes receiving a schedule on the scope of the environmental review for the Federal authorization.

FPA section 34(h) requires a Federal, State, or local government agency or Indian tribe that is unable to complete its disposition of a Federal authorization by the deadline set forth in the established schedule to file for an extension with the Commission not later than 30 days prior to such deadline. The Commission shall only grant an extension if the agency or Indian tribe demonstrates that complying with the schedule would prevent the agency or Indian tribe from complying with applicable Federal or State law.

FPA section 34(i) directs the Commission to maintain a complete consolidated record of all decisions made or actions taken by the Commission, a Federal administrative agency or officer, State or local government agency, and Indian tribe with respect to any Federal authorization. Such record shall constitute the record for judicial review under FPA section 313(b).

FPA section 34(j) directs any Federal or State agency that is providing recommendations with respect to a license proceeding to submit their recommendations, the rationale for the recommendations, and supporting materials to the Commission for inclusion in the consolidated record. This section also specifies that, in a case where a Federal agency is making a determination with respect to a covered measure, the head of the Federal agency shall submit to the Commission for inclusion in the consolidated record a written statement demonstrating that the Federal agency gave equal consideration to the effects of the covered measure.

FPA section 34(k) specifies that a Secretary may delegate the authority to determine a condition to be necessary under section 4(e), or to prescribe a fishway under section 18, to an officer of the applicable department based, in part, on the ability of the officer to evaluate the broad effects of such condition or prescription on the applicable project, energy supply, distribution, cost, use, flood control, navigation, water supply, air quality, and other aspects of environmental quality.

FPA section 34(l) clarifies that nothing in this section shall be construed to affect any requirement of the Federal Water Pollution Control Act, the Fish and Wildlife Coordination Act, the Endangered Species Act of 1973, the Rivers and Harbors Appropriation Act of 1899, and the National Historic Preservation Act, with respect to an application for a license under this act.

FPA section 35(a) provides a definition for the terms used in the section.

FPA section 35(b) directs that an applicant for a license and any party to a license proceeding shall be entitled to a determination on the record, after opportunity for a trial-type hearing of not more than 120 days, on any disputed issues of material fact with respect to an applicable covered measure.

FPA section 35(c) requires a request for a trial-type hearing to be submitted within 60 days after the date the Secretary determines the condition to be necessary under section 4(e) or prescribes the fishway under section 18, or the date the Secretary exercises reserved authority under the license to prescribe, submit, or revise any condition to a license under section 4(e) or section 18.

FPA section 35(d) specifies that a license applicant or any other party to a license proceeding shall not be considered to have waived the right to raise any issue of fact or law in a non-trial type proceeding when they elect not to request a trial-type hearing under subsection (c). No issue may be raised for the first time on rehearing or judicial review of the license decision of the Commission.

FPA section 35(e) directs that all disputed issues of material fact raised by a party in request for a trial type hearing shall be determined in a single trial-type hearing conducted by an Administrative Law Judge (ALJ) in accordance with the Commission rules of practice and procedure under part 385 of title 18, Code of Federal Regulations, and within the timeframe established by the Commission. The trial-type hearing shall include the opportunity to undertake discovery and to cross-examine witnesses as applicable.

FPA section 35(f) specifies that the ALJ may impose a stay of a trial-type hearing for a period of not more than 120 days to facilitate settlement negotiations.

FPA section 35(g) directs that the decision of the ALJ shall contain findings of fact on all disputed issues of material fact, conclusions of law necessary to make the findings of fact, including rulings on materiality and the admissibility of evidence, and reasons for the findings and conclusions. The decision of the ALJ shall not contain conclusions as to whether any condition or prescription should be adopted, modified, or rejected, or any alternative condition or prescription should be adopted, modified, or rejected. A decision of an ALJ under this section shall not be subject to further administrative review.

FPA section 35(h) requires the Secretary proposing a covered measure to file with the Commission a final determination to adopt, modify, or withdraw any condition or prescription within 60 days after the date the ALJ issues the decision. The final determination of the Secretary filed with the Commission shall identify the reasons for the decision and any considerations taken into account that were not part of, or were inconsistent with, the findings of the ALJ and shall be included in the consolidated record.

FPA section 35(i) allows for the Commission to enter into a memorandum of understanding with the Secretary to facilitate interagency coordination to resolve issues if the Commission finds that a final determination of the Secretary is inconsistent with the purposes of this part or other applicable law.

FPA section 35(j) provides that the decision of the ALJ and the record of determination of the Secretary shall be included in the record of the applicable licensing proceeding and subject to judicial review of the final licensing decision of the Commission under FPA section 313(b).

FPA section 36(a) directs the Commission, in consultation with applicable Federal and State agencies and interested members of the public, to compile current and accepted best practices in performing studies required in license proceedings, compile a comprehensive collection of studies and data accessible to the public that could be used to inform license proceedings, and encourage license applicants, agencies, and Indian tribes to develop and use a limited number of open-source methodologies and tools applicable across a wide array of projects.

FPA section 36(b) instructs the Commission and other Federal, State, and local government agencies and Indian tribes to use studies and data based on current, accepted science in support of their actions. Any participant in a proceeding shall demonstrate that a study requested is not duplicative of current, existing studies that are applicable to the project.

FPA section 36(c) directs the Commission to establish a program to develop comprehensive plans, at the request of project applicants, on a watershed-wide scale, in consultation with applicants, appropriate Federal agencies, affected States, local governments, and Indian tribes, in basins or regions where there are more than one application for a project.

FPA section 37(a) specifies that the Commission may approve an application for an amendment to a license issued for a qualifying

project upgrade. An application for an amendment to a project license shall include information sufficient to demonstrate that the proposed change to the project is a qualifying project upgrade. Not later than 30 days after receipt of an application, the Commission, in consultation with other Federal agencies, States, and Indian tribes the Commission determines appropriate, shall publish a notice in the Federal Register. The Commission shall, for a period of 45 days beginning on the date of publication of a notice, consult with each Federal, State, and local government agency and Indian tribe considering an aspect of an application for any authorization, and shall accept public comment regarding the application and whether the proposed license amendment is for a qualifying project upgrade. Not later than 15 days after the end of the public comment and consultation period, the Commission shall publish in the Federal Register a final determination as to whether the proposed license amendment is for a qualifying project upgrade. In establishing the schedule for a proposed license amendment for a qualifying project upgrade, the Commission shall require final disposition of all Federal authorization, other than final action by the Commission, by no later than 120 days after the date on which the Commission publishes a final determination that the proposed license amendment is for a qualifying project upgrade.

Not later than 150 days after the Commission publishes a final determination that a proposed license amendment is for a qualifying project upgrade, the Commission shall take final action on the license amendment application. Any condition or prescription included in or applicable to a license amendment for an approved qualifying project upgrade shall be limited to those that are necessary to protect public safety, or are 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. Not later than 180 days after the date of enactment of this section, the Commission shall issue a rule, after providing for notice and public comment, to implement this subsection. A qualifying project upgrade must meet the qualifying criteria specified under this section.

FPA section 37(b) directs the Commission to issue a rule, after providing for notice and public comment, establishing new standards and procedures for license amendment applications within 1 year after the date of enactment of this section. In issuing a rule, the Commission shall take into consideration that a change in generating or hydraulic capacity may indicate the potential environmental effects of a proposed license amendment but is not determinative of such effects.

#### *Section 4. Technical and conforming amendments*

Section 4 specifies technical and conforming amendments to section 4(e) and section 18 of the FPA.

#### CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omit-

ted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

**ENERGY POLICY ACT OF 2005**

\* \* \* \* \*

**TITLE II—RENEWABLE ENERGY**

**Subtitle A—General Provisions**

\* \* \* \* \*

**SEC. 203. FEDERAL PURCHASE REQUIREMENT.**

(a) REQUIREMENT.—The President, acting through the Secretary, shall seek to ensure that, to the extent economically feasible and technically practicable, of the total amount of electric energy the Federal Government consumes during any fiscal year, **the following amounts shall be renewable energy:**

**[(1) Not less than 3 percent in fiscal years 2007 through 2009.**

**[(2) Not less than 5 percent in fiscal years 2010 through 2012.**

**[(3) Not less than 7.5 percent in fiscal year 2013 and each fiscal year thereafter.] *not less than 15 percent in fiscal year 2017 and each fiscal year thereafter shall be renewable energy.***

(b) DEFINITIONS.—In this section:

(1) BIOMASS.—The term “biomass” means any lignin waste material that is segregated from other waste materials and is determined to be nonhazardous by the Administrator of the Environmental Protection Agency and any solid, nonhazardous, cellulosic material that is derived from—

(A) any of the following forest-related resources: mill residues, precommercial thinnings, slash, and brush, or non-merchantable material;

(B) solid wood waste materials, including waste pallets, crates, dunnage, manufacturing and construction wood wastes (other than pressure-treated, chemically-treated, or painted wood wastes), and landscape or right-of-way tree trimmings, but not including municipal solid waste (garbage), gas derived from the biodegradation of solid waste, or paper that is commonly recycled;

(C) agriculture wastes, including orchard tree crops, vineyard, grain, legumes, sugar, and other crop by-products or residues, and livestock waste nutrients; or

(D) a plant that is grown exclusively as a fuel for the production of electricity.

**[(2) RENEWABLE ENERGY.—The term “renewable energy” means electric energy generated from solar, wind, biomass, landfill gas, ocean (including tidal, wave, current, and thermal), geothermal, municipal solid waste, or new hydroelectric generation capacity achieved from increased efficiency or additions of new capacity at an existing hydroelectric project.]**

(2) *RENEWABLE ENERGY.*—The term “renewable energy” means electric energy generated from solar, wind, biomass, landfill gas, ocean (including tidal, wave, current, and thermal), geothermal, or municipal solid waste, or from a hydro-power project.

(c) *CALCULATION.*—For purposes of determining compliance with the requirement of this section, the amount of renewable energy shall be doubled if—

(1) the renewable energy is produced and used on-site at a Federal facility;

(2) the renewable energy is produced on Federal lands and used at a Federal facility; or

(3) the renewable energy is produced on Indian land as defined in title XXVI of the Energy Policy Act of 1992 (25 U.S.C. 3501 et seq.) and used at a Federal facility.

(d) *REPORT.*—Not later than April 15, 2007, and every 2 years thereafter, the Secretary shall provide a report to Congress on the progress of the Federal Government in meeting the goals established by this section.

\* \* \* \* \*

**FEDERAL POWER ACT**

**PART I**

\* \* \* \* \*

SEC. 4. The Commission is hereby authorized and empowered—

(a) To make investigations and to collect and record data concerning the utilization of the water resources of any region to be developed, the water-power industry and its relation to other industries and to interstate or foreign commerce, and concerning the location, capacity, development cost, and relation to markets of power sites, and whether the power from Government dams can be advantageously used by the United States for its public purposes, and what is a fair value of such power, to the extent the Commission may deem necessary or useful for the purposes of this Act.

(b) To determine the actual legitimate original cost of and the net investment in a licensed project, and to aid the Commission in such determinations, each licensee shall, upon oath, within a reasonable period of time to be fixed by the Commission, after the construction of the original project or any addition thereto or betterment thereof, file with the Commission in such detail as the Commission may require, a statement in duplicate showing the actual legitimate original cost of construction of such project, addition, or betterment, and of the price paid for water rights, rights-of-way, lands, or interest in lands. The licensee shall grant to the Commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, profiles, contracts, reports of engineers, accounts, books, records, and all other papers and documents relating thereto. The statement of actual legitimate original cost of said project, and revisions thereof as determined by the Commission, shall be filed with the Secretary of the Treasury.

(c) To cooperate with the executive departments and other agencies of State or National Governments in such investigations; and for such purpose the several departments and agencies of the National Government are authorized and directed upon the request of the Commission to furnish such records, papers, and information in their possession as may be requested by the Commission, and temporarily to detail to the Commission such officers or experts as may be necessary in such investigations.

(d) To make public from time to time the information secured hereunder and to provide for the publication of its reports and investigations in such form and manner as may be best adapted for public information and use. The Commission, on or before the 3d day of January of each year, shall submit to Congress for the fiscal year preceding a classified report showing the permits and licenses issued under this Part, and in each case the parties thereto, the terms prescribed, and the moneys received if any, on account thereof.

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall **[deem]** *determine* necessary for the **[adequate protection and utilization of such reservation: *Provided further*, That no license affecting the navigable capacity] adequate protection and utilization of such reservation: *Provided further*, That no license affecting the navigable capacity** of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts

and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection. In deciding whether to issue any license under this Part for any project, the Commission, in addition to the power and development purposes for which licenses are issued, shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.

(f) To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 9 hereof: *Provided, however*, That upon the filing of any application for a preliminary permit by any person, association or corporation the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated.

(g) Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands, reservations, or streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States by any person, corporation, state or municipality and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

SEC. 5. (a) Each preliminary permit issued under this Part shall be for the sole purpose of maintaining priority of application for a license under the terms of this Act for such period or periods, not exceeding a total of ~~three~~ 4 years, as in the discretion of the Commission may be necessary for making examinations and surveys, for preparing maps, plans, specifications, and estimates, and for making financial arrangements.

**[(b) The Commission may extend the period of a preliminary permit once for not more than 2 additional years beyond the 3 years permitted by subsection (a) if the Commission finds that the permittee has carried out activities under such permit in good faith and with reasonable diligence.]**

*(b) The Commission may—*

*(1) extend the period of a preliminary permit once for not more than 4 additional years beyond the 4 years permitted by subsection (a) if the Commission finds that the permittee has carried out activities under such permit in good faith and with reasonable diligence; and*

*(2) if the period of a preliminary permit is extended under paragraph (1), extend the period of such preliminary permit*

*once for not more than 4 additional years beyond the extension period granted under paragraph (1), if the Commission determines that there are extraordinary circumstances that warrant such additional extension.*

(c) Each such permit shall set forth the conditions under which priority shall be maintained.

(d) Such permits shall not be transferable, and may be canceled by order of the Commission upon failure of permittees to comply with the conditions thereof or for other good cause shown after notice and opportunity for hearing.

\* \* \* \* \*

SEC. 13. That the licensee shall commence the construction of the project works within the time fixed in the license, which shall not be more than two years from the date thereof, shall thereafter in good faith and with due diligence prosecute such construction, and shall within the time fixed in the license complete and put into operation such part of the ultimate development as the Commission shall deem necessary to supply the reasonable needs of the then available market, and shall from time to time thereafter construct such portion of the balance of such development as the Commission may direct, so as to supply adequately the reasonable market demands until such development shall have been completed. The periods for the commencement of construction may be extended [once but not longer than two additional years] *for not more than 8 additional years*, and the period for the completion of construction carried on in good faith and with reasonable diligence may be extended by the Commission when not incompatible with the public interests. In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or as extended by the commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the Commission. In case the construction of the project works, or of any specified part thereof, have been begun but not completed within the time prescribed in the license, or as extended by the commission, then the Attorney General, upon the request of the Commission, shall institute proceedings in equity in the district court of the United States for the district in which any part of the project is situated for the revocation of said license, the sale of the works constructed, and such other equitable relief as the case may demand, as provided for in section 26 hereof.

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SEC. 15. (a)(1) That if the United States does not, at the expiration of the existing license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in section 14 hereof, the commission is authorized to issue a new license to the existing licensee upon such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the existing license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such con-

tracts as the United States is required to do, in the manner specified in Section 14 hereof: *Provided*, That in the event the United States does not exercise the right to take over or does not issue a license to a new licensee, or issue a new license to the existing licensee, upon reasonable terms, then the commission shall issue from year to year an annual license to the then licensee under the terms and conditions of the existing license until the property is taken over or a new license is issued as aforesaid.

(2) Any new license issued under this section shall be issued to the applicant having the final proposal which the Commission determines is best adapted to serve the public interest, except that in making this determination the Commission shall ensure that insignificant differences with regard to subparagraphs (A) through (G) of this paragraph between competing applications are not determinative and shall not result in the transfer of a project. In making a determination under this section (whether or not more than one application is submitted for the project), the Commission shall, in addition to the requirements of section 10 of this Part, consider (and explain such consideration in writing) each of the following:

(A) The plans and abilities of the applicant to comply with (i) the articles, terms, and conditions of any license issued to it and (ii) other applicable provisions of this Part.

(B) The plans of the applicant to manage, operate, and maintain the project safely.

(C) The plans and abilities of the applicant to operate and maintain the project in a manner most likely to provide efficient and reliable electric service.

(D) The need of the applicant over the short and long term for the electricity generated by the project or projects to serve its customers, including, among other relevant considerations, the reasonable costs and reasonable availability of alternative sources of power, taking into consideration conservation and other relevant factors and taking into consideration the effect on the provider (including its customers) of the alternative source of power, the effect on the applicant's operating and load characteristics, the effect on communities served or to be served by the project, and in the case of an applicant using power for the applicant's own industrial facility and related operations, the effect on the operation and efficiency of such facility or related operations, its workers, and the related community. In the case of an applicant that is an Indian tribe applying for a license for a project located on the tribal reservation, a statement of the need of such tribe for electricity generated by the project to foster the purposes of the reservation may be included.

(E) The existing and planned transmission services of the applicant, taking into consideration system reliability, costs, and other applicable economic and technical factors.

(F) Whether the plans of the applicant will be achieved, to the greatest extent possible, in a cost effective manner.

(G) Such other factors as the Commission may deem relevant, except that the terms and conditions in the license for the protection, mitigation, or enhancement of fish and wildlife

resources affected by the development, operation, and management of the project shall be determined in accordance with section 10, and the plans of an applicant concerning fish and wildlife shall not be subject to a comparative evaluation under this subsection.

(3) In the case of an application by the existing licensee, the Commission shall also take into consideration each of the following:

(A) The existing licensee's record of compliance with the terms and conditions of the existing license.

(B) The actions taken by the existing licensee related to the project which affect the public.

(b)(1) Each existing licensee shall notify the Commission whether the licensee intends to file an application for a new license or not. Such notice shall be submitted at least 5 years before the expiration of the existing license.

(2) At the time notice is provided under paragraph (1), the existing licensee shall make each of the following reasonably available to the public for inspection at the offices of such licensee: current maps, drawings, data, and such other information as the Commission shall, by rule, require regarding the construction and operation of the license project. Such information shall include, to the greatest extent practicable pertinent energy conservation, recreation, fish and wildlife, and other environmental information. Copies of the information shall be made available at reasonable costs of reproduction. Within 180 days after the enactment of the Electric Consumers Protection Act of 1986, the Commission shall promulgate regulations regarding the information to be provided under this paragraph.

(3) Promptly following receipt of notice under paragraph (1), the Commission shall provide public notice of whether an existing licensee intends to file or not to file an application for a new license. The Commission shall also promptly notify the National Marine Fisheries Service and the United States Fish and Wildlife Service, and the appropriate State fish and wildlife agencies.

(4) The Commission shall require the applicant to identify any Federal or Indian lands included in the project boundary, together with a statement of the annual fees paid as required by this Part for such lands, and to provide such additional information as the Commission deems appropriate to carry out the Commission's responsibilities under this section.

(c)(1) Each application for a new license pursuant to this section shall be filed with the Commission at least 24 months before the expiration of the term of the existing license. Each applicant shall consult with the fish and wildlife agencies referred to in subsection (b) and, as appropriate, conduct studies with such agencies. Within 60 days after the statutory deadline for the submission of applications, the Commission shall issue a notice establishing expeditious procedures for relicensing and a deadline for submission of final amendments, if any, to the application.

(2) The time periods specified in this subsection and in subsection (b) shall be adjusted, in a manner that achieves the objectives of this section, by the Commission by rule or order with respect to existing licensees who, by reason of the expiration dates of their licenses, are unable to comply with a specified time period.

(d)(1) In evaluating applications for new licenses pursuant to this section, the Commission shall not consider whether an applicant has adequate transmission facilities with regard to the project.

(2) When the Commission issues a new license (pursuant to this section) to an applicant which is not the existing licensee of the project and finds that it is not feasible for the new licensee to utilize the energy from such project without provision by the existing licensee of reasonable services, including transmission services, the Commission shall give notice to the existing licensee and the new licensee to immediately enter into negotiations for such services and the costs demonstrated by the existing licensee as being related to the provision of such services. It is the intent of the Congress that such negotiations be carried out in good faith and that a timely agreement be reached between the parties in order to facilitate the transfer of the license by the date established when the Commission issued the new license. If such parties do not notify the Commission that within the time established by the Commission in such notice (and if appropriate, in the judgment of the Commission, one 45-day extension thereof), a mutually satisfactory arrangement for such services that is consistent with the provisions of this Act has been executed, the Commission shall order the existing licensee to file (pursuant to section 205 of this Act) with the Commission a tariff, subject to refund, ensuring such services beginning on the date of transfer of the project and including just and reasonable rates and reasonable terms and conditions. After notice and opportunity for a hearing, the Commission shall issue a final order adopting or modifying such tariff for such services at just and reasonable rates in accordance with section 205 of this Act and in accordance with reasonable terms and conditions. The Commission, in issuing such order, shall ensure the services necessary for the full and efficient utilization and benefits for the license term of the electric energy from the project by the new licensee in accordance with the license and this Part, except that in issuing such order the Commission—

(A) shall not compel the existing licensee to enlarge generating facilities, transmit electric energy other than to the distribution system (providing service to customers) of the new licensee identified as of the date one day preceding the date of license award, or require the acquisition of new facilities, including the upgrading of existing facilities other than any reasonable enhancement or improvement of existing facilities controlled by the existing licensee (including any acquisition related to such enhancement or improvement) necessary to carry out the purposes of this paragraph;

(B) shall not adversely affect the continuity and reliability of service to the customers of the existing licensee;

(C) shall not adversely affect the operational integrity of the transmission and electric systems of the existing licensee;

(D) shall not cause any reasonably quantifiable increase in the jurisdictional rates of the existing licensee; and

(E) shall not order any entity other than the existing licensee to provide transmission or other services.

Such order shall be for such period as the Commission deems appropriate, not to exceed the term of the license. At any time, the

Commission, upon its own motion or upon a petition by the existing or new licensee and after notice and opportunity for a hearing, may modify, extend, or terminate such order.

**[(e)] [Except] (e) LICENSE TERM ON RELICENSING.—**

(1) *IN GENERAL.—Except for an annual license, any license issued by the Commission under this section shall be for a term which the Commission determines to be in the public interest but not less than 30 years, nor more than 50 years, from the date on which the license is issued.*

(2) *CONSIDERATION.—In determining the term of a license under paragraph (1), the Commission shall consider, among other things, project-related investments to be made by the licensee under a new license issued under this section, as well as project-related investments made by a licensee over the term of the existing license (including any terms under annual licenses). In considering such investments, the Commission shall give the same weight to—*

(A) *investments to be made by the licensee to implement a new license issued under this section, including—*

(i) *investments in redevelopment, new construction, new capacity, efficiency, modernization, rehabilitation, and safety improvements; and*

(ii) *investments in environmental, recreation, and other protection, mitigation, or enhancement measures that will be required or authorized by the license; and*

(B) *investments made by the licensee over the term of the existing license (including any terms under annual licenses), beyond those required by the existing license when issued, that—*

(i) *resulted in, during the term of the existing license—*

(I) *redevelopment, new construction, new capacity, efficiency, modernization, rehabilitation, or safety improvements; or*

(II) *environmental, recreation, or other protection, mitigation, or enhancement measures; and*

(ii) *did not result in the extension of the term of the existing license by the Commission.*

(f) In issuing any license under this section except an annual license, the Commission, on its own motion or upon application of any licensee, person, State, municipality, or State commission, after notice to each State commission and licensee affected, and after opportunity for hearing, whenever it finds that in conformity with a comprehensive plan for improving or developing a waterway or waterways for beneficial public uses all or part of any licensed project should no longer be used or adapted for use for power purposes, may license all or part of the project works for nonpower use. A license for nonpower use shall be issued to a new licensee only on the condition that the new licensee shall, before taking possession of the facilities encompassed thereunder, pay such amount and assume such contracts as the United States is required to do, in the manner specified in section 14 hereof. Any license for nonpower use shall be a temporary license. Whenever, in the judgment of the Commission, a State, municipality, interstate agency,

or another Federal agency is authorized and willing to assume regulatory supervision of the lands and facilities included under the nonpower license and does so, the Commission shall thereupon terminate the license. Consistent with the provisions of the Act of August 15, 1953 (67 Stat. 587; 16 U.S.C. 828–828c), every licensee for nonpower use shall keep such accounts and file such annual and other periodic or special reports concerning the removal, alteration, nonpower use, or other disposition of any project works or parts thereof covered by the nonpower use license as the Commission may by rules and regulations or order prescribe as necessary or appropriate.

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SEC. 18. The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of Commerce. [The license applicant and any party to the proceeding shall be entitled to a determination on the record, after opportunity for an agency trial-type hearing of no more than 90 days, on any disputed issues of material fact with respect to such fishways. All disputed issues of material fact raised by any party shall be determined in a single trial-type hearing to be conducted by the relevant resource agency in accordance with the regulations promulgated under this subsection and within the time frame established by the Commission for each license proceeding. Within 90 days of the date of enactment of the Energy Policy Act of 2005, the Secretaries of the Interior, Commerce, and Agriculture shall establish jointly, by rule, the procedures for such expedited trial-type hearing, including the opportunity to undertake discovery and cross-examine witnesses, in consultation with the Federal Energy Regulatory Commission.] The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this Act, whether at the expense of a licensee hereunder or of the United States, shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure as may be made from time to time by the Secretary of the Army, and for willful failure to comply with any such rule or regulation such licensee shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in section 316 hereof.

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**SEC. 33. ALTERNATIVE CONDITIONS AND PRESCRIPTIONS.**

(a) ALTERNATIVE CONDITIONS.—(1) Whenever any person applies for a license for any project works within any reservation of the United States, and the Secretary of the department under whose supervision such reservation falls (referred to in this subsection as the “Secretary”) [deems] *determines* a condition to such license to be necessary under the first proviso of section 4(e), the license applicant or any other party to the license proceeding may propose an alternative condition.

(2) Notwithstanding the first proviso of section 4(e), the Secretary shall accept the proposed alternative condition referred to in paragraph (1), and the Commission shall include in the license such alternative condition, if the Secretary determines, based on substantial evidence provided by the license applicant, any other party to the proceeding, or otherwise available to the Secretary, that such alternative condition—

(A) provides for the adequate protection and utilization of the reservation; and

(B) will either, as compared to the condition initially *determined to be necessary* by the Secretary—

(i) cost significantly less to implement; or

(ii) result in improved operation of the project works for electricity production.

(3) In making a determination under paragraph (2), the Secretary shall consider evidence provided for the record by any party to a licensing proceeding, or otherwise available to the Secretary, including any evidence provided by the Commission, on the implementation costs or operational impacts for electricity production of a proposed alternative.

[(4) The Secretary concerned shall submit into the public record of the Commission proceeding with any condition under section 4(e) or alternative condition it accepts under this section, a written statement explaining the basis for such condition, and reason for not accepting any alternative condition under this section. The written statement must demonstrate that the Secretary gave equal consideration to the effects of the condition adopted and alternatives not accepted on energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality); based on such information as may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.

[(5) If the Commission finds that the Secretary's final condition would be inconsistent with the purposes of this part, or other applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the reservation. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.]

(b) ALTERNATIVE PRESCRIPTIONS.—(1) Whenever the Secretary of the Interior or the Secretary of Commerce prescribes a fishway under section 18, the license applicant or any other party to the license proceeding may propose an alternative to such prescription to construct, maintain, or operate a fishway.

(2) Notwithstanding section 18, the Secretary of the Interior or the Secretary of Commerce, as appropriate, shall accept and pre-

scribe, and the Commission shall require, the proposed alternative referred to in paragraph (1), if the Secretary of the appropriate department determines, based on substantial evidence provided by the license applicant, any other party to the proceeding, or otherwise available to the Secretary, that such alternative—

(A) will be no less protective than the fishway initially prescribed by the Secretary; and

(B) will either, as compared to the fishway initially prescribed by the Secretary—

(i) cost significantly less to implement; or

(ii) result in improved operation of the project works for electricity production.

(3) In making a determination under paragraph (2), the Secretary shall consider evidence provided for the record by any party to a licensing proceeding, or otherwise available to the Secretary, including any evidence provided by the Commission, on the implementation costs or operational impacts for electricity production of a proposed alternative.

[(4) The Secretary concerned shall submit into the public record of the Commission proceeding with any prescription under section 18 or alternative prescription it accepts under this section, a written statement explaining the basis for such prescription, and reason for not accepting any alternative prescription under this section. The written statement must demonstrate that the Secretary gave equal consideration to the effects of the prescription adopted and alternatives not accepted on energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality); based on such information as may be available to the Secretary, including information voluntarily provided in a timely manner by the applicant and others. The Secretary shall also submit, together with the aforementioned written statement, all studies, data, and other factual information available to the Secretary and relevant to the Secretary's decision.]

[(5) If the Commission finds that the Secretary's final prescription would be inconsistent with the purposes of this part, or other applicable law, the Commission may refer the dispute to the Commission's Dispute Resolution Service. The Dispute Resolution Service shall consult with the Secretary and the Commission and issue a non-binding advisory within 90 days. The Secretary may accept the Dispute Resolution Service advisory unless the Secretary finds that the recommendation will not adequately protect the fish resources. The Secretary shall submit the advisory and the Secretary's final written determination into the record of the Commission's proceeding.]

(c) *FURTHER CONDITIONS.*—*This section applies to any further conditions or prescriptions proposed or imposed pursuant to section 4(e), 6, or 18.*

**SEC. 34. HYDROPOWER LICENSING AND PROCESS IMPROVEMENTS.**

(a) *DEFINITION.*—*In this section, the term "Federal authorization"—*

(1) *means any authorization required under Federal law with respect to an application for a license under this part; and*

(2) includes any permits, special use authorizations, certifications, opinions, or other approvals as may be required under Federal law to approve or implement the license under this part.

(b) DESIGNATION AS LEAD AGENCY.—

(1) IN GENERAL.—The Commission shall act as the lead agency for the purposes of coordinating all applicable Federal authorizations and for the purposes of complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(2) OTHER AGENCIES AND INDIAN TRIBES.—

(A) IN GENERAL.—Each Federal, State, and local government agency and Indian tribe considering an aspect of an application for Federal authorization shall coordinate with the Commission and comply with the deadline established in the schedule developed for the license under this part in accordance with the rule issued by the Commission under subsection (c).

(B) IDENTIFICATION.—The Commission shall identify, as early as practicable after it is notified by the applicant for a license under this part, any Federal or State agency, local government, or Indian tribe that may consider an aspect of an application for a Federal authorization.

(C) NOTIFICATION.—

(i) IN GENERAL.—The Commission shall notify any agency and Indian tribe identified under subparagraph (B) of the opportunity to participate in the process of reviewing an aspect of an application for a Federal authorization.

(ii) DEADLINE.—Each agency and Indian tribe receiving a notice under clause (i) shall submit a response acknowledging receipt of the notice to the Commission within 30 days of receipt of such notice and request.

(D) ISSUE IDENTIFICATION AND RESOLUTION.—

(i) IDENTIFICATION OF ISSUES.—Federal, State, and local government agencies and Indian tribes that may consider an aspect of an application for Federal authorization shall identify, as early as possible, and share with the Commission and the applicant, any issues of concern identified during the pendency of the Commission's action under this part relating to any Federal authorization that may delay or prevent the granting of such authorization, including any issues that may prevent the agency or Indian tribe from meeting the schedule established for the license under this part in accordance with the rule issued by the Commission under subsection (c).

(ii) ISSUE RESOLUTION.—The Commission may forward any issue of concern identified under clause (i) to the heads of the relevant State and Federal agencies (including, in the case of an issue of concern identified by a State or local government agency or Indian tribe, the Federal agency overseeing the delegated authority, or the Secretary of the Interior with regard to an issue

of concern identified by an Indian tribe, as applicable) for resolution. If the Commission forwards an issue of concern to the head of a relevant agency, the Commission and the relevant agency shall enter into a memorandum of understanding to facilitate interagency coordination and resolution of such issues of concern, as appropriate.

(c) SCHEDULE.—

(1) COMMISSION RULEMAKING TO ESTABLISH PROCESS TO SET SCHEDULE.—Not later than 180 days after the date of enactment of this section the Commission shall, in consultation with the appropriate Federal agencies, issue a rule, after providing for notice and public comment, establishing a process for setting a schedule following the filing of an application under this part for a license for the review and disposition of each Federal authorization.

(2) ELEMENTS OF SCHEDULING RULE.—In issuing a rule under this subsection, the Commission shall ensure that the schedule for each Federal authorization—

(A) includes deadlines for actions by—

(i) any Federal or State agency, local government, or Indian tribe that may consider an aspect of an application for the Federal authorization;

(ii) the applicant;

(iii) the Commission; and

(iv) other participants in any applicable proceeding;

(B) is developed in consultation with the applicant and any agency and Indian tribe that submits a response under subsection (b)(2)(C)(ii);

(C) provides an opportunity for any Federal or State agency, local government, or Indian tribe that may consider an aspect of an application for the applicable Federal authorization to identify and resolve issues of concern, as provided in subsection (b)(2)(D);

(D) complies with applicable schedules established under Federal and State law;

(E) ensures expeditious completion of all proceedings required under Federal and State law, to the extent practicable; and

(F) facilitates completion of Federal and State agency studies, reviews, and any other procedures required prior to, or concurrent with, the preparation of the Commission's environmental document required under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(d) TRANSMISSION OF FINAL SCHEDULE.—

(1) IN GENERAL.—For each application for a license under this part, the Commission shall establish a schedule in accordance with the rule issued by the Commission under subsection (c). The Commission shall publicly notice and transmit the final schedule to the applicant and each agency and Indian tribe identified under subsection (b)(2)(B).

(2) RESPONSE.—Each agency and Indian tribe receiving a schedule under this subsection shall acknowledge receipt of such schedule in writing to the Commission within 30 days.

(e) *ADHERENCE TO SCHEDULE.*—All applicants, other licensing participants, and agencies and Indian tribes considering an aspect of an application for a Federal authorization shall meet the deadlines set forth in the schedule established pursuant to subsection (d)(1).

(f) *APPLICATION PROCESSING.*—The Commission, Federal, State, and local government agencies, and Indian tribes may allow an applicant seeking a Federal authorization to fund a third-party contractor selected by such an agency or tribe to assist in reviewing the application. All costs of an agency or tribe incurred pursuant to direct funding by the applicant, including all costs associated with the third party contractor, shall not be considered costs of the United States for the administration of this part under section 10(e).

(g) *COMMISSION RECOMMENDATION ON SCOPE OF ENVIRONMENTAL REVIEW.*—For the purposes of coordinating Federal authorizations for each license under this part, the Commission shall consult with and make a recommendation to agencies and Indian tribes receiving a schedule under subsection (d) on the scope of the environmental review for all Federal authorizations for such license. Each Federal and State agency and Indian tribe shall give due consideration and may give deference to the Commission's recommendations, to the extent appropriate under Federal law.

(h) *EXTENSION OF DEADLINE.*—

(1) *APPLICATION.*—A Federal, State, or local government agency or Indian tribe that is unable to complete its disposition of a Federal authorization by the deadline set forth in the schedule established under subsection (d)(1) shall, not later than 30 days prior to such deadline, file for an extension with the Commission.

(2) *EXTENSION.*—The Commission shall only grant an extension filed for under paragraph (1) if the agency or Indian tribe demonstrates, based on the record maintained under subsection (i), that complying with the schedule established under subsection (d)(1) would prevent the agency or tribe from complying with applicable Federal or State law. If the Commission grants the extension, the Commission shall set a reasonable schedule and deadline, that is not later than 90 days after the deadline set forth in the schedule established under subsection (d)(1), for the agency or tribe to complete its disposition of the Federal authorization.

(i) *CONSOLIDATED RECORD.*—The Commission shall, with the cooperation of Federal, State, and local government agencies and Indian tribes, maintain a complete consolidated record of all decisions made or actions taken by the Commission or by a Federal administrative agency or officer (or State or local government agency or officer or Indian tribe acting under delegated Federal authority) with respect to any Federal authorization. Such record shall constitute the record for judicial review under section 313(b).

(j) *SUBMISSION OF LICENSE RECOMMENDATIONS, CONDITIONS, AND PRESCRIPTIONS.*—

(1) *SUBMISSION OF RECOMMENDATIONS.*—Any Federal or State agency that is providing recommendations with respect to a license proceeding under this part shall submit to the Com-

mission for inclusion in the consolidated record relating to the license proceeding maintained under subsection (i)—

- (A) the recommendations;
- (B) the rationale for the recommendations; and
- (C) any supporting materials relating to the recommendations.

(2) **WRITTEN STATEMENT.**—In a case in which a Federal agency is making a determination with respect to a covered measure (as defined in section 35(a)), the head of the Federal agency shall submit to the Commission for inclusion in the consolidated record, in addition to the information required under paragraph (1), a written statement demonstrating that the Federal agency gave equal consideration to the effects of the covered measure on—

- (A) energy supply, distribution, cost, and use;
- (B) flood control;
- (C) navigation;
- (D) water supply; and
- (E) air quality and the preservation of other aspects of environmental quality.

(3) **INFORMATION FROM OTHER AGENCIES.**—In preparing a written statement under paragraph (2), the head of a Federal agency may make use of information produced or made available by other agencies with relevant expertise in the factors described in subparagraphs (A) through (E) of that paragraph.

(k) **DELEGATION.**—A Secretary may delegate the authority to determine a condition to be necessary under section 4(e), or to prescribe a fishway under section 18, to an officer of the applicable department based, in part, on the ability of the officer to evaluate the broad effects of such condition or prescription on—

- (1) the applicable project; and
- (2) the factors described in subparagraphs (A) through (E) of subsection (j)(2).

(l) **NO EFFECT ON OTHER LAWS.**—Nothing in this section shall be construed to affect any requirement of the Federal Water Pollution Control Act, the Fish and Wildlife Coordination Act, the Endangered Species Act of 1973, section 14 of the Act of March 3, 1899 (commonly known as the Rivers and Harbors Appropriation Act of 1899), and those provisions in subtitle III of title 54, United States Code commonly known as the National Historic Preservation Act, with respect to an application for a license under this part.

**SEC. 35. TRIAL-TYPE HEARINGS.**

(a) **DEFINITION OF COVERED MEASURE.**—In this section, the term “covered measure” means—

- (1) a condition determined to be necessary under section 4(e), including an alternative condition proposed under section 33(a);
- (2) fishways prescribed under section 18, including an alternative prescription proposed under section 33(b); or
- (3) any action by the Secretary to exercise reserved authority under the license to prescribe, submit, or revise any condition to a license under the first proviso of section 4(e) or fishway prescribed under section 18.

(b) **AUTHORIZATION OF TRIAL-TYPE HEARING.**—An applicant for a license under this part (including an applicant for a license under

section 15) and any party to a license proceeding shall be entitled to a determination on the record, after opportunity for a trial-type hearing of not more than 120 days, on any disputed issues of material fact with respect to an applicable covered measure.

(c) *DEADLINE FOR REQUEST.*—A request for a trial-type hearing under this section shall be submitted not later than 60 days after the date on which, as applicable—

(1) the Secretary determines the condition to be necessary under section 4(e) or prescribes the fishway under section 18; or

(2) the Secretary exercises reserved authority under the license to prescribe, submit, or revise any condition to a license under the first proviso of section 4(e) or fishway prescribed under section 18, as appropriate.

(d) *NO REQUIREMENT TO EXHAUST.*—By electing not to request a trial-type hearing under subsection (c), a license applicant and any other party to a license proceeding shall not be considered to have waived the right of the applicant or other party to raise any issue of fact or law in a non-trial-type proceeding, but no issue may be raised for the first time on rehearing or judicial review of the license decision of the Commission.

(e) *ADMINISTRATIVE LAW JUDGE.*—

(1) *IN GENERAL.*—All disputed issues of material fact raised by a party in a request for a trial-type hearing submitted under subsection (c) shall be determined in a single trial-type hearing to be conducted by an Administrative Law Judge within the Office of Administrative Law Judges and Dispute Resolution of the Commission, in accordance with the Commission rules of practice and procedure under part 385 of title 18, Code of Federal Regulations (or successor regulations), and within the time-frame established by the Commission for each license proceeding (including a proceeding for a license under section 15) under section 34(d).

(2) *REQUIREMENT.*—The trial-type hearing shall include the opportunity—

(A) to undertake discovery; and

(B) to cross-examine witnesses, as applicable.

(f) *STAY.*—The Administrative Law Judge may impose a stay of a trial-type hearing under this section for a period of not more than 120 days to facilitate settlement negotiations relating to resolving the disputed issues of material fact with respect to the covered measure.

(g) *DECISION OF THE ADMINISTRATIVE LAW JUDGE.*—

(1) *CONTENTS.*—The decision of the Administrative Law Judge shall contain—

(A) findings of fact on all disputed issues of material fact;

(B) conclusions of law necessary to make the findings of fact, including rulings on materiality and the admissibility of evidence; and

(C) reasons for the findings and conclusions.

(2) *LIMITATION.*—The decision of the Administrative Law Judge shall not contain conclusions as to whether—

(A) any condition or prescription should be adopted, modified, or rejected; or

(B) any alternative condition or prescription should be adopted, modified, or rejected.

(3) *FINALITY*.—A decision of an Administrative Law Judge under this section with respect to a disputed issue of material fact shall not be subject to further administrative review.

(4) *SERVICE*.—The Administrative Law Judge shall serve the decision on each party to the hearing and forward the complete record of the hearing to the Commission and the Secretary that proposed the original condition or prescription.

(h) *SECRETARIAL DETERMINATION*.—

(1) *IN GENERAL*.—Not later than 60 days after the date on which the Administrative Law Judge issues the decision under subsection (g) and in accordance with any applicable schedule established by the Commission under section 34(d), the Secretary proposing a covered measure shall file with the Commission a final determination to adopt, modify, or withdraw any condition or prescription that was the subject of a hearing under this section, based on the decision of the Administrative Law Judge.

(2) *RECORD OF DETERMINATION*.—The final determination of the Secretary filed with the Commission shall identify the reasons for the decision and any considerations taken into account that were not part of, or were inconsistent with, the findings of the Administrative Law Judge and shall be included in the consolidated record maintained under section 34(i).

(i) *RESOLUTION OF MATTERS*.—Notwithstanding sections 4(e) and 18, if the Commission finds that a final determination under (h)(1) of the Secretary is inconsistent with the purposes of this part or other applicable law, the Commission may enter into a memorandum of understanding with the Secretary to facilitate inter-agency coordination and resolve the matter.

(j) *JUDICIAL REVIEW*.—The decision of the Administrative Law Judge and the record of determination of the Secretary shall be included in the record of the applicable licensing proceeding and subject to judicial review of the final licensing decision of the Commission under section 313(b).

**SEC. 36. LICENSING STUDY IMPROVEMENTS.**

(a) *IN GENERAL*.—To facilitate the timely and efficient completion of the license proceedings under this part, the Commission shall, in consultation with applicable Federal and State agencies and interested members of the public—

(1) compile current and accepted best practices in performing studies required in such license proceedings, including methodologies and the design of studies to assess the full range of environmental impacts of a project that reflect the most recent peer-reviewed science;

(2) compile a comprehensive collection of studies and data accessible to the public that could be used to inform license proceedings under this part; and

(3) encourage license applicants, agencies, and Indian tribes to develop and use, for the purpose of fostering timely and efficient consideration of license applications, a limited number of open-source methodologies and tools applicable across a wide

array of projects, including water balance models and streamflow analyses.

(b) *USE OF STUDIES.*—To the extent practicable, the Commission and other Federal, State, and local government agencies and Indian tribes considering an aspect of an application for Federal authorization (as defined in section 34) shall use studies and data based on current, accepted science in support of their actions. Any participant in a proceeding with respect to such a Federal authorization shall demonstrate that a study requested by the participant is not duplicative of current, existing studies that are applicable to the project.

(c) *INTRA-WATERSHED REVIEW.*—The Commission shall establish a program to develop comprehensive plans, at the request of project applicants, on a watershed-wide scale, in consultation with the applicants, appropriate Federal agencies, and affected States, local governments, and Indian tribes, in watersheds with respect to which there are more than one application for a project. Upon such a request, the Commission, in consultation with the applicants, such Federal agencies, and affected States, local governments, and Indian tribes, may conduct or commission watershed-wide environmental studies, with the participation of at least 2 applicants. Any study conducted under this subsection shall apply only to a project with respect to which the applicants participate.

**SEC. 37. LICENSE AMENDMENT IMPROVEMENTS.**

(a) *QUALIFYING PROJECT UPGRADES.*—

(1) *IN GENERAL.*—As provided in this section, the Commission may approve an application under this section for an amendment to a license issued under this part for a qualifying project upgrade.

(2) *APPLICATION.*—A licensee filing an application for an amendment to a project license, for which the licensee is seeking approval as a qualified project upgrade under this section, shall include in such application information sufficient to demonstrate that the proposed change to the project described in the application is a qualifying project upgrade.

(3) *NOTICE AND INITIAL DETERMINATION ON QUALIFICATION.*—Not later than 30 days after receipt of an application under paragraph (2), the Commission, in consultation with other Federal agencies, States, and Indian tribes the Commission determines appropriate, shall publish in the Federal Register a notice containing—

(A) notice of the application filed under paragraph (2);

(B) an initial determination as to whether the proposed change to the project described in the application for a license amendment is a qualifying project upgrade; and

(C) a request for public comment on the application and the initial determination.

(4) *PUBLIC COMMENT AND CONSULTATION.*—The Commission shall, for a period of 45 days beginning on the date of publication of a notice under paragraph (3)—

(A) accept public comment regarding the application and whether the proposed license amendment is for a qualifying project upgrade; and

(B) consult with each Federal, State, and local government agency and Indian tribe considering an aspect of an

application for any authorization required under Federal law with respect to the proposed license amendment, as well as other interested agencies and Indian tribes.

(5) *FINAL DETERMINATION ON QUALIFICATION.*—Not later than 15 days after the end of the public comment and consultation period under paragraph (4), the Commission shall publish in the Federal Register a final determination as to whether the proposed license amendment is for a qualifying project upgrade.

(6) *FEDERAL AUTHORIZATIONS.*—In establishing the schedule for a proposed license amendment for a qualifying project upgrade, the Commission shall require final disposition of all authorizations required under Federal law with respect to an application for such license amendment, other than final action by the Commission, by not later than 120 days after the date on which the Commission publishes a final determination under paragraph (5) that the proposed license amendment is for a qualifying project upgrade.

(7) *COMMISSION ACTION.*—Not later than 150 days after the date on which the Commission publishes a final determination under paragraph (5) that a proposed license amendment is for a qualifying project upgrade, the Commission shall take final action on the license amendment application.

(8) *LICENSE AMENDMENT CONDITIONS.*—Any condition or prescription included in or applicable to a license amendment for a qualifying project upgrade approved under this subsection, including any condition, prescription, or other requirement of a Federal authorization, shall be limited to those that are—

(A) necessary to protect public safety; or

(B) 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.

(9) *RULEMAKING.*—Not later than 180 days after the date of enactment of this section, the Commission shall, after notice and opportunity for public comment, issue a rule to implement this subsection.

(10) *DEFINITIONS.*—For purposes of this subsection:

(A) *QUALIFYING PROJECT UPGRADE.*—The term “qualifying project upgrade” means a change to a project licensed under this part that meets the qualifying criteria, as determined by the Commission.

(B) *QUALIFYING CRITERIA.*—The term “qualifying criteria” means, with respect to a project licensed under this part, a change to the project that—

(i) if carried out, would be unlikely to adversely affect any species listed as threatened or endangered under the Endangered Species Act of 1973 or result in the destruction or adverse modification of critical habitat, as determined in consultation with the Secretary of the Interior or Secretary of Commerce, as appropriate,

*in accordance with section 7 of the Endangered Species Act of 1973;*

*(ii) is consistent with any applicable comprehensive plan under section 10(a)(2);*

*(iii) includes only changes to project lands, waters, or operations that, in the judgment of the Commission, would result in only insignificant or minimal cumulative adverse environmental effects;*

*(iv) would be unlikely to adversely affect water quality or water supply; and*

*(v) proposes to implement—*

*(I) capacity increases, efficiency improvements, or other enhancements to hydropower generation at the licensed project;*

*(II) environmental protection, mitigation, or enhancement measures to benefit fish and wildlife resources or other natural and cultural resources; or*

*(III) improvements to public recreation at the licensed project.*

**(b) AMENDMENT APPROVAL PROCESSES.—**

*(1) RULE.—Not later than 1 year after the date of enactment of this section, the Commission shall, after notice and opportunity for public comment, issue a rule establishing new standards and procedures for license amendment applications under this part. In issuing such rule, the Commission shall seek to develop the most efficient and expedient process, consultation, and review requirements, commensurate with the scope of different categories of proposed license amendments. Such rule shall account for differences in environmental effects across a wide range of categories of license amendment applications.*

*(2) CAPACITY.—In issuing a rule under this subsection, the Commission shall take into consideration that a change in generating or hydraulic capacity may indicate the potential environmental effects of a proposed license amendment but is not determinative of such effects.*

*(3) PROCESS OPTIONS.—In issuing a rule under this subsection, the Commission shall take into consideration the range of process options available under the Commission’s regulations for license applications and adapt such options to amendment applications, where appropriate.*

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## DISSENTING VIEWS

Hydropower projects deliver affordable power to many communities across the country. We want these projects and facilities to continue to operate. However, this bill designates power generation as the primary determinant on whether to grant or extend a license to operate a hydropower project. It places private profits over the public interest. And, by significantly limiting the extent to which relevant federal agencies, other than FERC, participate in the licensing process, this bill moves us back in time, not forward.

Contrary to the claims of its supporters, H.R. 3043 will not modernize or improve the hydropower licensing process. It injects considerable uncertainty into the hydropower regulatory process by inserting the Federal Energy Regulatory Commission (FERC) into areas where it has no expertise or statutory authority. But, there is no justification for allowing hydropower facilities to use public water resources to generate power and profits without mitigating the negative impacts of their facilities on others who rely on our rivers and without complying with modern environmental laws. Such a situation contradicts Congress' clear intent to protect natural and cultural resources, as articulated in the 1986 amendments to the Federal Power Act (FPA) and in numerous laws enacted since the federal government granted the first hydropower licenses in the 1920s.

H.R. 3043 makes changes to the hydropower licensing process that adversely affect states, tribes, and the administration of numerous environmental statutes by the federal resource agencies in the Departments of Interior, Commerce, and Agriculture. Yet, in spite of repeated requests by Democratic members, the Committee did not invite state, tribal, or federal resource agency witnesses to its general oversight hearing on hydropower licensing or to the legislative hearing on this bill. The Committee received letters from numerous entities expressing concerns that the legislation could undermine their efforts to execute their responsibilities under the Clean Water Act. These entities include the Western Governors Association, the Environmental Council of the States, the Association of Clean Water Administrators, the Association of State Wetland Managers, and the states of Maryland, Vermont, and California. The Southern States Energy Board adopted a resolution in September opposing provisions of the bill that curtail state authority. The Committee also received letters from several tribal nations—the Yakama, the Puyallup, and the Skokomish—expressing their serious concerns about the impacts of this bill on tribal land and water rights. The unbalanced nature of the bill reflects the lack of input by and the absence of the Majority's concern for the views of these parties.

H.R. 3043 is targeted more toward relicensing older, existing hydropower facilities than new hydropower projects. As John Katz,

the Deputy Associate General Counsel of FERC testified, many of the projects entering the relicensing process were last licensed prior to the enactment of modern environmental laws and to the Electric Consumers Protection Act (ECPA) in 1986. ECPA amended the FPA to ensure that FERC fully considers all beneficial public uses of water and protection of fish and wildlife. The imposition of conditions and prescriptions on these existing projects often sets up a confrontation between the hydropower operator that wishes to renew a license with as few imposed conditions as possible and federal resource agencies, states, tribes, recreation, and environmental advocates who seek to protect water quality, fisheries, recreation, drinking water supply, and other private and public uses of water.

H.R. 3043 WOULD ESTABLISH A SEVERELY FLAWED SCHEDULE AND APPLICATION PROCESS

H.R. 3043 directs FERC to issue a rule that will govern schedule-setting for the evaluation and disposition of each hydropower license or relicense application. Certainly, a schedule that clearly lays out the responsibilities and deadlines of each party in the licensing process can be a valuable tool to facilitate identification and resolution of issues associated with a specific hydropower project. However, the schedule process under this bill favors the license applicant and does not provide assurance that federal agencies, states, and tribes will have sufficient time to fulfill their obligations under the statutes they administer. As a result, the process will not yield a completed license application that complies with all applicable environmental laws.

FERC itself disputes claims that the bill will streamline the licensing process. Mr. Katz stated: “I am concerned that proposed new FPA section 34 could increase the complexity and length of the licensing process, while giving the Commission the added responsibility of policing other entities’ compliance with statutory deadlines, without giving the Commission the authority to enforce the schedule that it establishes.”<sup>1</sup>

The newly proposed section 34 licensing process is built on two false assumptions. First, it assumes that the only major source of delay in these deliberations is inaction by federal agencies, states, and tribes. Section 34 directs FERC to establish a defined schedule that states, tribes and agencies must follow, yet applies no similar schedule discipline to hydropower applicants. Second, the bill wrongly assumes that all applicants have an incentive to move the licensing process to completion in the shortest time possible. But, in the case of a relicensing, there are often strong incentives for the applicant to delay the process for obtaining a new longterm license. The operator of a facility that was last licensed prior to 1986 received a license before FERC was required to include mandatory conditions and prescriptions developed by federal resource agencies to protect federal reservations and natural resources. In a number of cases, new conditions and prescriptions are likely to be imposed to address a variety of environmental mitigation issues. These con-

<sup>1</sup>House Committee on Energy and Commerce, Testimony of John Katz, Deputy Associate General Counsel, Office of the General Counsel, Federal Energy Regulatory Commission, *Hearing on Legislation Addressing Pipeline and Hydropower Infrastructure Modernization*, 115th Cong. (May 3, 2017).

ditions will require investments (e.g. fishways) or changes in operations (e.g. adjustments in water flow regimes) among other possibilities thereby imposing costs on the licensee.

Furthermore, during the period when the license application is pending, FERC provides the applicant with an open-ended, annual license under the existing terms that renews automatically until the new license is granted. This means, the applicant continues to sell power and operate its facility indefinitely under the older, more profitable conditions, creating a clear financial incentive for delaying any license process. H.R. 3043 includes provisions to discourage delays by federal agencies, states, and tribes. However, the lack of uniform incentive to all parties to adhere to an agreed schedule is unlikely to produce a completed application that complies with the requirements of all the relevant, current federal laws.

H.R. 3043 also does not address a major cause of delay in the licensing and relicensing process: an applicant's failure to provide all the information necessary for federal resource agencies, states, and tribes to make timely decisions. Disputes over the studies and information required to fulfill the obligations of all regulatory parties in the license process are often a source of delay. Although Mr. Katz testified that FERC has an obligation to ensure compliance with statutes administered by federal resource agencies<sup>2</sup> the Commission has frequently dismissed requests by resource agencies and states for studies to enable them to issue legally defensible decisions or permits under their statutory authorities.<sup>3</sup>

There is no point in setting a strict schedule for making decisions until an application is truly complete and ready to be evaluated.

#### H.R. 3043 INSTITUTES NEW, BURDENSOME, AND BIASED TRIAL-TYPE HEARING PROCEDURES

Trial-type hearings were instituted by the amendments to the Federal Power Act included in the Energy Policy Act of 2005 (P.L. 109–58). Congress made these changes in response to utilities' request that they have an opportunity to challenge the factual basis for conditions proposed by federal resource agencies prior to the issuance of the license. These provisions were opposed at the time by a wide array of environmental, tribal and state organizations that also have direct interests in the management of water and other natural resources within the affected watershed.

Despite these concessions, the industry is still not satisfied. Once again, industry has requested and receives special treatment in the form of a greatly expanded, biased provision on trial-type hearings

<sup>2</sup>Testimony of John Katz, *supra*, at note 1.

<sup>3</sup>House Committee on Energy and Commerce, Responses submitted by David Steindorf, California Stewardship Director, American Whitewater, to the questions for the record, *Hearing on Modernizing Energy Infrastructure: Challenges and Opportunities to Expanding Hydropower Generation*, 115th Cong. (Mar. 12, 2017). Mr. Steindorf stated that in his experience FERC orders studies to fulfill its own responsibilities. It is FERC's policy not to defer to what other agencies need to carry out their authorities. As an example, he cited a FERC order in which FERC wrote: "[I]t is up to the Commission to determine whether a particular study is necessary for the Commission to fully understand the effects of licensing or relicensing a project, and we are not obligated to require a study to support another agency's decision making." (FERC Order Denying Rehearing, 151 FERC ¶61,240, p. 9); House Committee on Energy and Commerce, Response Submitted by William Robert Irvin, President and Chief Executive Officer, American Rivers, Inc., to questions for the record, *Hearing on Legislation Addressing Pipeline and Hydropower Infrastructure Modernization*, 115th Cong. (May 3, 2017). Mr. Irvin provided examples from nine projects in nine states in which FERC denied study requests made by states or federal resource agencies needed to support their decisions under their statutes.

in H.R. 3043. This provision provides the industry with everything it believes it needs to secure decisions in its favor. Industry picks the venue, sets the rules, and secures additional points in the licensing process to challenge conditions that federal resource agencies or FERC seeks to impose on a license to protect public interests.

Under the new provision, hearings on conditions proposed by federal resource agencies will no longer be conducted by an Administrative Law Judge (ALJ) in the respective agency that proposed the condition. Instead, all trial-type hearings will be conducted before an ALJ at FERC. The industry perceives FERC to be more receptive to its concerns than the ALJs at the respective resource agencies. However, it is the ALJs at the resource agencies that have the relevant experience and knowledge of the laws, resources, and information on natural resource issues to evaluate the issues raised in these hearings.

This provision remains in spite of testimony opposing this change by Mr. Katz, who asserted that this change would not reduce the substantial expense associated with trial-type hearings. He also noted that moving the trials to FERC was likely to result in additional delay in the license process and would divert resources from processing applications to dealing with hearings. In fact, Mr. Katz recommended that Congress: “. . . consider eliminating trial-type hearings, thereby returning to the agencies the responsibility of supporting their conditions with substantial record evidence.”<sup>4</sup>

In stark contrast to FERC’s recommendation, the trial-type hearing provision in H.R. 3043 changes more than just the venue of the hearings. It also expands the scope of trial-type hearings beyond conditions imposed by resource agencies. Furthermore, the provision eliminates the restriction in current law to a single trial-type hearing on the issues of fact associated with a proposed condition. Under the provision in H.R. 3043, a utility could request multiple hearings on a condition and any respective alternative conditions that the resource agencies reject. This expansion of trial-type hearings would be extremely expensive and burdensome, and cause further licensing process delays.

Since being enacted in 2005, the experience with this provision has been mixed. It has encouraged settlement of disputes on conditions and prescriptions between licensees and agencies, but it has also diverted resources, lengthened the licensing process, and may have resulted in less resource protection than Congress intended in ECPA. There is no justification for further empowering industry in the license process to undermine environmental protection. We should follow the advice offered by Mr. Katz—either leave current law unchanged or repeal the provision on trial-type hearings altogether.

H.R. 3043 is an unbalanced bill that is far more likely to generate new controversy and lawsuits than to facilitate a timely and efficient hydropower licensing process. It will deliver neither the faster outcomes nor the improved environmental performance we need. It will encourage more confrontation among competing water users. Rivers belong to all of us. Water is required by every living

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<sup>4</sup>Testimony of Deputy AGC Katz, *supra*, at note 1.

thing and it is required for every private and public activity in which we engage. The hydropower licensing process can and should be more efficient, but the industry should not be permitted to operate without conditions to mitigate adverse impacts.

For the reasons stated above, we dissent from the views contained in the Committee's report.

FRANK PALLONE, Jr.,  
*Ranking Member.*

BOBBY L. RUSH,  
*Ranking Member,*  
*Subcommittee on Energy.*

