QUALIFYING CONDUIT HYDROPOWER FACILITY

JULY 11, 2018.—Ordered to be printed

Ms. MURKOWSKI, from the Committee on Energy and Natural Resources, submitted the following

R E P O R T

[To accompany H.R. 2786]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Natural Resources, to which was referred the bill (H.R. 2786) to amend the Federal Power Act with respect to the criteria and process to qualify as a qualifying conduit hydropower facility, having considered the same, reports favorably thereon with an amendment, and recommends that the bill, as amended, do pass.

AMENDMENT

The amendment is as follows:
On page 2, strike lines 7 through 12 and insert the following:

(2) in paragraph (3)(C)(ii), by striking “5” and inserting “40”.

PURPOSE

The purpose of H.R. 2786 is to amend the Federal Power Act (FPA) with respect to the criteria and process to qualify as a qualifying conduit hydropower facility.

BACKGROUND AND NEED

The Hydropower Regulatory Efficiency Act of 2013 (Public Law 113–23) amended the FPA to allow FERC to issue “exemptions” (which are licenses granted in perpetuity) for hydroelectric projects of five megawatts or less utilizing manmade conduits that are operated primarily for purposes other than electricity generation.
Under current law, the Federal Energy Regulatory Commission (FERC) must make an initial determination on project eligibility within 15 days of a filing and publish a public notice of intent. Following the notice, a period of 45 days is provided for public comment on FERC’s initial determination as to whether a facility meets the qualifying criteria. If no entity contests whether the facility meets the qualifying criteria within 45 days, the facility is deemed to meet the criteria and its license is approved.

Since its 2013 enactment, the process outlined above has resulted in 83 qualifying projects that have received the one-time license known as an “exemption,” with an average total processing timeline of just over two months (45-day public notice period). According to FERC, it has rarely received comments on a project’s qualifications, and supports Congress shortening the 45-day notice period and lifting the five megawatt cap in order to benefit a broader range of projects.

**LEGISLATIVE HISTORY**

H.R. 2786 was introduced in the House of Representatives by Representative Hudson and Degette, on June 6, 2017, and referred to the Committee on Energy and Commerce. The Energy and Commerce Committee favorably reported the bill, as amended, by voice vote on July 12, 2017. H.R. 2786 passed the House of Representatives by a vote of 420–2 on July 18, 2017, and the bill was received by the Senate and referred to the Committee on Energy and Natural Resources on July 19, 2017.

The Subcommittee on Water and Power held a legislative hearing on H.R. 2786 on February 28, 2018.

The Committee on Energy and Natural Resources met in an open business session on May 17, 2018 and ordered H.R. 2786 favorably reported as amended.

**COMMITTEE RECOMMENDATION**

The Senate Committee on Energy and Natural Resources, in open business session on May 17, 2018, by a majority voice vote of a quorum present, recommends that the Senate pass H.R. 2786, if amended as described herein.

**COMMITTEE AMENDMENT**

During its consideration of H.R. 2786, the Committee adopted an amendment to increase the installed capacity for a qualifying conduit facility from five to 40 megawatts, instead of eliminating the cap altogether.

**SECTION-BY-SECTION ANALYSIS**

*Section 1. Qualifying conduit hydropower facilities*

Section 1 amends Section 30(a)(2)(C) of the FPA to reduce the time period to contest whether the conduit facility meets the qualifying criteria from 45 to 30 days. This section further amends section 30(a)(3)(C)(ii) of the FPA to raise the maximum installed capacity from five to 40 megawatts.
COST AND BUDGETARY CONSIDERATIONS

The following estimate of the costs of this measure has been provided by the Congressional Budget Office:

Under the Federal Power Act, the Federal Energy Regulatory Commission (FERC) licenses and regulates most nonfederal hydroelectric facilities. Under current law, hydroelectric projects with a capacity of less than 5 megawatts that generate power using water flowing through agricultural, municipal, or industrial conduits are exempt from FERC's licensing requirements. H.R. 2786 would expand that exemption to include facilities with capacities of up to 40 megawatts and would modify procedures for determining whether proposed facilities qualify for that exemption.

CBO estimates that implementing H.R. 2786 would have no significant net effect on the federal budget. Expanding the size of projects that would be exempt from FERC’s licensing requirements could reduce the agency’s workload and costs to review and approve applications for licenses. However, because FERC recovers 100 percent of its costs through user 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. 2786 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting H.R. 2786 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

H.R. 2786 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

On July 18, 2017, CBO transmitted a cost estimate for H.R. 2786 as reported by the House Committee on Energy and Commerce on July 12, 2017. Although the two versions of the legislation differ with regard to the capacity of projects that would be exempt from licensing requirements, neither would have a significant net effect on the federal budget. Thus, the estimated costs are the same for both pieces of legislation.

The CBO staff contact for this estimate is Megan Carroll. The estimate was reviewed by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out H.R. 2786. The bill is not a regulatory measure in the sense of imposing Government-established standards or significant economic responsibilities on private individuals and businesses.

No personal information would be collected in administering the program. Therefore, there would be no impact on personal privacy.

Little, if any, additional paperwork would result from the enactment of H.R. 2786, as ordered reported.

CONGRESSIONALLY DIRECTED SPENDING

H.R. 2786, as ordered reported, does not contain any congressionally directed spending items, limited tax benefits, or limited tariff
benefits as defined in rule XLIV of the Standing Rules of the Senate.

EXECUTIVE COMMUNICATIONS

The testimony provided by the Federal Energy Regulatory Commission at the February 28, 2018, hearing on H.R. 2786 follows:

FEDERAL ENERGY REGULATORY COMMISSION

Re S. 1142, H.R. 2457 and H.R. 2786.
Hon. LISA MURKOWSKI,
Chairman, Committee on Energy and Natural Resources,
Washington, DC.

DEAR CHAIRMAN MURKOWSKI: This letter is in response to a request by the Senate Committee on Energy and Natural Resources for my views on S. 1142 and H.R. 2457, two bills to authorize the extension of the time to begin construction of the original licenses for the Red River Lock and Dam No 3. (FERC Project No. 12756), Red River Lock and Dam No. 4 (FERC Project No. 12757), and Red River Lock and Dam No. 5 (FERC Project No. 12758), and H.R. 2786, a bill to amend the Federal Power Act (FPA) with respect to criteria and process for a proposed project to qualify as qualifying conduit hydropower facility.

H.R. 2786

Section 30(a) of the FPA exempts certain conduit hydropower facilities from the licensing requirements of the FPA. The provision requires an entity proposing to construct a qualifying conduit hydropower facility to file with the Commission a notice of intent to construct the facility, including sufficient information to demonstrate the facility meets the qualifying criteria. Once the notice of intent is filed with the Commission, section 30(a)(2)(B) requires the Commission to make an initial determination as to whether the facility meets the qualifying criteria within 15 days of receiving the notice of intent. The qualifying criteria, as defined in Hydropower Regulatory Efficiency Act (HREA) of 2013, include:

i. the facility is constructed, operated, or maintained for generation of electric power and uses for such generation only the hydroelectric potential of a non-federally owned conduit;
ii. the facility has an installed capacity that does not exceed 5 megawatts (MW);
iii. on or before the date of the enactment of HREA of 2013 (August 9, 2013), the facility is not licensed under, or exempted from the license requirements.

If the Commission makes an initial determination that the facility meets the qualifying criteria, section 30(a)(2)(B) requires the Commission to publish a public notice of the notice of intent to construct a qualifying conduit facility, giving the public the opportunity to comment on whether the facility meets the qualifying criteria. The FPA further
states that if, not later than 45 days after the date of the publication of public notice, no entity contests whether the facility meets the qualifying criteria, the facility shall be deemed to meet the criteria. Although an uncontested facility is automatically deemed to qualify at the end of the notice period, as a matter of general practice the Commission issues a letter confirming that the facility qualifies. If an entity contests whether the facility meets the qualifying criteria, section 30(a)(2)(C) requires the Commission to promptly issue a determination as to whether the facility meets the criteria.

H.R. 2786 would modify the qualifying conduit hydropower facility process in two ways. First, the proposed bill would shorten the comment period for the public, including state and federal resource agencies, from 45 to 30 days. For your information, FERC staff, on average, completes review of qualifying conduit facility applications shortly after the 45-day notice period closes. In fiscal year 2017, Staff processed 22 notices of intent to construct qualifying conduits in an average of 58 days, and has processed four such notices, in an average of 56 days, thus far in fiscal year 2018. The shortened public notice period established by H.R. 2786 could slightly reduce the processing time.

The second modification to section 30 of the FPA would eliminate the existing 5-MW limit on qualifying facilities, thus allowing projects of unlimited capacity to meet the criteria for a qualifying conduit facility. This change could potentially establish a larger subset of hydropower projects that would not be required to be licensed or exempted by the Commission. Section 30, giving the Commission the authority to exempt certain small hydroelectric facilities from the requirements of Part I of the FPA, was added to the FPA in 1978, and since that time, the Commission has issued only a handful of conduit exemptions over 5 MW. Accordingly, I am uncertain how many projects will be affected by this revision.

Should Congress choose to remove the 5-MW ceiling on qualifying conduit hydropower facilities, such that these projects could be of any size, it might also consider removing the ceiling for conduit exemptions. Currently the maximum size of projects for which the Commission may issue conduit exemptions under its existing authority is 40 MW. It is not clear why there should be no limit on the size of qualifying conduit hydropower facilities and yet a 40-MW limit on conduit exemptions.

If I can be of further assistance to you on this or any other Commission matter, please let me know.

Sincerely,

KEVIN J. McINTYRE,
Chairman.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by H.R. 2786 as ordered reported, are shown as follows (existing law proposed to be
omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

THE FEDERAL POWER ACT

SEC. 29. That all Acts or parts of Acts inconsistent with this Act are hereby repealed: Provided, That nothing herein contained be held or construed to modify or repeal any of the provisions of the Act of Congress approved December 19, 1913, granting certain rights-of-way to the city and county of San Francisco, in the State of California: Provided further, That section 18 of an Act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes, approved August 8, 1917, is hereby repealed.

SEC. 30. (a)(1) A qualifying conduit hydropower facility shall not be required to be licensed under this part.

(2)(A) Any person, State, or municipality proposing to construct a qualifying conduit hydropower facility shall file with the Commission a notice of intent to construct such facility. The notice shall include sufficient information to demonstrate that the facility meets the qualifying criteria.

(B) Not later than 15 days after receipt of a notice of intent filed under subparagraph (A), the Commission shall—

(i) make an initial determination as to whether the facility meets the qualifying criteria; and

(ii) if the Commission makes an initial determination, pursuant to clause (i), that the facility meets the qualifying criteria, publish public notice of the notice of intent filed under subparagraph (A).

(C) If, not later than 45 days after the date of publication of the public notice described in subparagraph (B)(ii)—

(i) an entity contests whether the facility meets the qualifying criteria, the Commission shall promptly issue a written determination as to whether the facility meets such criteria; or

(ii) no entity contests whether the facility meets the qualifying criteria, the facility shall be deemed to meet such criteria.

(3) For purposes of this section:

(A) The term “conduit” means any tunnel, canal, pipeline, aqueduct, flume, ditch, or similar manmade water conveyance that is operated for the distribution of water for agricultural, municipal, or industrial consumption and not primarily for the generation of electricity.

(B) The term “qualifying conduit hydropower facility” means a facility (not including any dam or other impoundment) that is determined or deemed under paragraph (2)(C) to meet the qualifying criteria.

(C) The term “qualifying criteria” means, with respect to a facility—

(i) the facility is constructed, operated, or maintained for the generation of electric power and uses for such generation only the hydroelectric potential of a non-federally owned conduit;
(ii) the facility has an installed capacity that does not exceed [5] 40 megawatts; and
(iii) on or before the date of enactment of the Hydro-
power Regulatory Efficiency Act of 2013, the facility is not
licensed under, or exempted from the license requirements
contained in, this part.