

Hearing before the U.S. House of Representatives, Committee on Energy and Commerce,
Subcommittee on Energy: *Modernizing Energy Infrastructure: Challenges and Opportunities to
Expanding Hydropower Generation*

Testimony of American Rivers

March 15, 2017

Thank you for the opportunity to submit testimony regarding hydropower generation and operation in the United States. American Rivers is one of the leading national conservation organizations involved in hydropower. Our staff has been involved in hundreds of licensings since our founding, and we have seen the best and worst that the federal licensing process has to offer. Since 1973, American Rivers has protected and restored more than 150,000 miles of rivers through advocacy efforts, on-the-ground projects, and an annual America's Most Endangered Rivers ® campaign. Headquartered in Washington, DC, American Rivers has offices across the country and more than 250,000 members, supporters, and volunteers.

Before delving into a discussion on how hydropower works in America today, we would like to identify for you five things that could improve the highly collaborative licensing process laid out in the Federal Power Act and attendant statutes:

- The Federal Energy Regulatory Commission (FERC) should presumptively grant study requests submitted by federal, state, and tribal agencies;
- FERC should promote the adoption of memoranda of understanding (MOUs) between the Commission, tribes, and states to improve coordination and prevent unnecessary delay;
- Congress should increase appropriations to the federal resource management agencies to fund the staff positions that allow them to efficiently and thoroughly evaluate applications for hydroelectric licenses; and
- Congress should extend its recognition of the right of Native American tribes and Alaska Native Corporations and Villages to manage water quality standards on tribal lands to include their rights to manage land use and fish and wildlife populations as well.
- Congress should consider whether FERC should relinquish jurisdiction over permitting projects on non-powered dams owned by the U.S. Army Corps of Engineers (Corps).

American Rivers is heartened that the Committee is examining the challenges and opportunities of hydropower in the United States. In the twelve years since the Energy Policy Act of 2005 was passed, there have been no hearings on how that act altered the licensing process. This includes the most recent Congress, when several changes to the Federal Power Act and the licensing

process were voted upon without the benefit of an oversight hearing into the current process, and without the benefit of informed stakeholders (industry, states, tribes, NGOs, and federal agencies) discussing what in their respective opinions works and what needs improvement. We are grateful that the Committee is taking the time to conduct an oversight hearing, although we are disappointed that no states, tribes, or federal agency witnesses were invited to testify, and we hope that the Committee will avail itself of their expertise before drafting legislation. Ideally, any legislation would be drafted pursuant to a stakeholder process that takes into account the perspectives, needs, and rights and responsibilities of all relevant parties to a hydropower license proceeding.

Hydropower provides approximately 7 percent of the overall energy production in the country, and comprises 50 percent of all non-fossil fuel energy consumed in the U.S. Over the course of what we expect will be a thorough and informed evaluation of how hydropower functions in the United States, we are confident that the Committee will arrive at the same conclusion that the U.S. Department of Energy did in the Hydropower Vision Report released last year: building new dams will cost more in both investment dollars and negative impacts to clean water, wildlife, and rural economies than it is worth. Efforts to expand hydropower production should instead focus on promoting efficiency, retrofitting suitable non-powered dams, and upgrading century-old technology present in far too many currently operating hydroelectric projects.

The licensing of hydroelectric dams is overseen by the Federal Energy Regulatory Commission (FERC), with the critical involvement of the federal Departments of Agriculture, Commerce, and the Interior, as well as state and tribal water quality agencies. FERC may grant a license for a term of 30 to 50 years, with the average life of a license being 45 years. For perspective, a dam coming up for relicensing in 2017 could have been last licensed during the Summer of Love in the administration of President Lyndon B. Johnson. That would be before the Apollo 11 moon landing, before Watergate, before Chernobyl, and before the fall of the Soviet Union. There is only one member of this 440-seat chamber who served in Congress at that time. He is the only person who could have voted on the National Environmental Policy Act of 1969 (NEPA), the Federal Water Pollution Control Act Amendments of 1972 (the Clean Water Act or CWA), and the Energy Consumers' Protection Act of 1986 (ECPA). None of the dams licensed in 1967 considered any of those federal laws—because they did not yet exist. The depth of scientific knowledge gained in the past 50 years cannot be addressed in this testimony, but must be considered by this Committee prior to altering hydroelectric licensing.

The Federal Power Act (FPA), passed by Congress and signed by President Woodrow Wilson in 1920, delineates the responsibilities for licensing at the federal level. FERC is responsible for regulating the wholesale energy market, including by granting licenses to individuals seeking to place a hydroelectric dam in a navigable waterway. FERC's expertise was and has remained in energy markets and the safety of non-nuclear energy facilities. FERC is not, and has never been, responsible for maintaining fish, wildlife, or federal lands.

The oversight requirements relevant to this testimony are laid out largely in FPA §§4(e) and 18. Section 4(e) requires those Cabinet Secretaries with authority over a “federal reservation” ensure that the proposed project doesn’t negatively impact the reservation or interfere with its Congressionally designated use. Federal reservations are all lands and marine reserves in the federal estate, from Indian reservations to National Forests and wildlife refuges. Section 18 of the FPA regards fish passage, or the ability of fish species to get from one side of a dam to the other, and charges the Cabinet Secretaries with authority over fisheries to provide it. As most fish species do not naturally inhabit only the section of a river between dams, for a population to survive the construction of a project, it must be afforded a way to either traverse it (e.g. a ladder or trap and haul) or an artificial means of completing its lifecycle (e.g. hatcheries). The third statutory oversight mechanism is via the §401 of the CWA, which recognizes the right of states and tribes to manage the water quality found within their borders.

Since the passage of the FPA, the Secretaries of Commerce (through the National Marine Fisheries Service) and the Interior (through the U.S Fish and Wildlife Service) have been responsible for fish and wildlife and the Secretaries of Agriculture (through the U.S. Forest Service) and the Interior (through the Bureau of Indian Affairs, the Bureau of Land Management, the U.S. Fish and Wildlife Service, and the National Park Service) have been responsible for managing lands held by the federal government (“federal reservations”). The expertise and experience these public servants, and their staffs, have accrued in the almost-100 years since the enactment of the Federal Power Act cannot be matched at FERC, and FERC has acknowledged before this Subcommittee that it does not seek to absorb their responsibilities.

The Federal Water Pollution Control Act Amendments of 1972, commonly known as the Clean Water Act (CWA), made an essential update to the hydroelectric licensing process by recognizing the right of states and tribes to regulate water quality within their boundaries. While the FPA itself only dictated evaluation of impacts to federal reservations and the ability of fish species to move through the river system, §401 of the CWA empowers states and tribes to preserve healthy waters and requires dam owners to assist in the repair of diminished water quality in systems impacted by projects. FERC also lacks the staff resources and expertise to enforce water quality standards, or to administer state water rights, which have been confirmed as a matter of state law with the passage of the McCarran Amendment of 1952.

Provided all participants in a licensing are committed to work together and provide necessary information in a timely manner, the hydroelectric licensing process provides a range of stakeholders the opportunity to shape the shared use of our nation’s rivers. The rivers do not belong to environmentalists or to electricity producers; they belong to all Americans, and they must be maintained to promote multiple uses. American Rivers supports the collaborative process currently in place, as well as the hard work done by all parties to produce electricity that does not destroy critical environment or clean water for humans and wildlife. It is true, however, that improvements could be made to the process. We highlight five of those improvements here.

Study Requests

It is essential that the impact of a given hydropower project be thoroughly examined for its impacts to water quality, federal reservations, and the health of the ecosystem. Because of the decades-long duration of federal licenses, many in effect today have only been updated once in the past fifty years. Many dams in operation today not only precede the bedrock environmental and health statutes previously mentioned, they were constructed between the Harding and Franklin Roosevelt Administrations. Although impacts to the river were considered in the decades when these projects were built, the federal government was more concerned with power generation, flood control, and irrigation than water quality, river connectivity, and fish and wildlife. The devastation of the Atlantic salmon population due to damming New England rivers from 1620 unfortunately did not inform consideration on how Pacific salmon and steelhead would fare once the rivers of the West were dammed. The impact to federal reservations too often focused on where the project was sited, and not how the project's construction and operation impacted the reservation.

As a result of insufficient care and sometimes knowledge in the middle part of the 20th Century, many licensees submitted applications to FERC that were not thoroughly vetted for their impacts to fish, wildlife, and federal lands. Failure to recognize the prolonged harm possible to the environment, rural communities, and the federal estate only began to be corrected in the 1970's and 1980's. While there had long been cries from tribal communities, conservationists, and rural advocates, it took a long time—too long in many cases—for the federal resource management agencies to fulfill the responsibilities Congress charged them with in 1920. While in some cases, insufficient information was to blame, in many, especially as regarded Indian reservations and maintaining fisheries, it was not a sufficiently high priority to the federal government to prevent the damage it has now committed to repairing.

In order to evaluate the impact a project has had within their respective jurisdictions, FERC, the Secretaries of Agriculture, Commerce, and the Interior, as well as water quality agencies of the states and tribes where the project is sited, submit requests for information (studies). The standard length of a study is two years, although if the licensee presents insufficient information, the studies may go on longer. Under the traditional licensing process (TLP), study requests from the states, tribes, and federal agencies are only rendered to the applicant once FERC has evaluated its portion of the application. It is then that the application is referred from FERC to the agencies and they submit their study requests to the applicant.

The sequential nature of these study requests has proven frustrating to both applicants and to the resource agencies. Applicants sometimes accuse the agencies of springing unexpected requests for information on them, and argue that since FERC didn't request the information, it should not be relevant in considering the license. Recall, however, that FERC's mission is one of energy, and not one of environment. FERC often does not request information on the impact on fish, wildlife, federal reservations, and water quality because Congress specifically vested the

responsibility to manage those resources in the federal and state and tribal agencies, respectively. FERC, unproductively, has on occasion refused to exercise its statutory authority to request information sought by other regulators. FERC's refusal is based in its belief that, when the U.S. Code provides the state, tribal, and federal agencies their own authority to obtain information, it should not request information—even if it speeds up the process. The result is more backlog and more bureaucracy. It was these issues related to the implementation of the TLP that led Congress to enact the Integrated Licensing Process as part of the Energy Policy Act of 2005, which we discuss in more detail below.

Because FERC's mandate is one of energy and not one of environment, and because the role that the resource agencies play in the licensing process must not be removed or reassigned, American Rivers believes the most efficient way to obtain the information the agencies require is to have FERC presumptively include their study requests at the front-end of the review process. By FERC passing along the requests for information from the cabinet Secretaries, states, and tribes as soon as possible, it will eliminate the aspects of surprise and uncertainty that bedevil the process now. This change would not necessarily require action by Congress or the resource agencies; it could be enacted by FERC directly, although Congressional directive would clear up any confusion about the matter. American Rivers notes that this type of action is anticipated by the Integrated Licensing Process (ILP), discussed below.

Memoranda of Understanding

Congress understood when it passed the FPA that collaboration is essential, so the law wisely charges the relevant federal entities with responsibilities matched to their expertise. In the hydroelectric licensing process, the interplay between environmental stewardship, water quality and state water law, trust and treaty obligations, and preserving the use of public lands and waters is essential. While it is unfortunate that many projects were not evaluated appropriately in the past, or that there are often challenges in improving projects so they conform to the bedrock environmental statutes enacted almost half a century ago, it is imperative that the licensing process not simply be collaborative, but cooperative.

Stakeholders on all sides agree that disagreements and intransigence lead to litigation. Litigation is expensive and time-consuming. The extensive costs of time and money to the government, conservationists, tribes, outdoor economies, utilities, and ratepayers should be avoided whenever possible. The costs of licensing, monetary and otherwise, are ultimately borne by the people of the United States, and all parties should be interested in minimizing cost whenever possible and appropriate. That is why we believe FERC should promote the adoption of memoranda of understanding (MOUs) between itself, tribes, and states to incentivize collaboration rather than litigation. FERC and the California State Water Resources Control Board have recently signed just such an MOU to allow the ILP process and the §401 process to happen in parallel, rather than sequentially, which should substantially reduce the time to license California projects that are pending §401 certification.

Congress attempted to improve licensing when, in the Energy Policy Act of 2005, it created an alternative to the aforementioned TLP. This new process, the Integrated Licensing Process (ILP), brings all the resource agencies into the room with the licensee to facilitate information sharing and to encourage collaboration as early as possible. Projects whereby an applicant has chosen the ILP, and whereby the applicant has chosen to engage in a cooperative manner with relevant stakeholders and conditioning agencies, tend to be completed in a much shorter timeframe than projects following the TLP. As the ILP is not always selected by the licensee and because even in an ILP, cooperating across the state and federal divide can occasionally be difficult, FERC should initiate MOUs between itself, tribes, and states to expedite licensing and fulfill the promise of the ILP.

Increase Appropriations to Resource Agencies

As stated, it is a chief frustration of all participants in licensings that the process can drag on for far too long. While each stakeholder can provide a bevy of reasons why licensings may be unnecessarily prolonged, none can deny that when it comes to the federal resource agencies, the tightening of the monetary spigot has forced them to do much more with much less. While it is possible for these agencies to process applications and fulfill their statutory duties at their current level of funding, it takes more time. This is delay that injures water quality, wildlife, and prevents licensees and their ratepayers from receiving the certainty they deserve.

The experience housed within the resource agencies cannot survive in a funding vacuum. These employees are individuals whose expertise is borne of years of education and working on licensings. The value of sitting down with an applicant, of getting on the river and examining the wildlife, of cataloguing flows and releases over years and watersheds is immeasurable in the licensing process. In order for any of the Secretaries to fulfill their statutory obligations and place a scientifically informed and legally defensible condition on a license, there must be funding available to pay for the personnel necessary for the agencies to fulfill their responsibilities under the Federal Power Act, Endangered Species Act, Magnuson-Stevens Act, Coastal Zone Management Act, and other attendant and relevant federal statutes.

Failure to appropriate sufficient funds starves not only the managers of our public resources, but denies the agencies the information they need to make decisions in the public interest. A key function of the resource management agencies—and one of the reasons that the independent Commission, located in Washington, D.C. is not responsible for evaluating the potential or actual environmental impacts of a hydroelectric project—is to collect information from the project site. The Fish and Wildlife Service, the National Marine Fisheries Service, and the Forest Service, among others, are literally down in the reeds (or aboard scows) in every state of the nation. Failure to support them and their work only results in missed opportunities, wasted time, and money lost on the back end.

The United States is in the final stretch of reviewing licenses issued for projects before the Ford Administration. This is not the time to forego carrying the lessons learned over difficult relicensings and decades of tremendous strides made by committed and unwavering public servants, licensees, and citizen participants. Congress should increase appropriations to the federal resource management agencies to fund the staff positions that allow them to efficiently and thoroughly evaluate applications for hydroelectric licenses. It may be beneficial for Congress to consider statutorily required mandatory cost recovery for these agencies. If there is no one at the agency who knows how licensings work and what Congress has charged the Cabinet Secretaries to do, no one, including the applicants, can be served.

Recognize the Rights of Tribes and Native Corporations/Villages

Among those communities that have been most injured by the insufficient evaluation and ill considered operation of hydroelectric projects have been the Native American tribes of the United States. When the federal government failed to fulfill its statutory obligations under the FPA to ensure fish passage and preserve federal reservations, nowhere were the injuries more serious than on Indian reservations. While largely federally owned and partially federally maintained, these reservations are not public lands. Injuries to them are borne wholly by the tribes and their members. The Department of the Interior, through litigation, Presidential and Congressional direction, and the too-long realization that the fulfillment of trust and treaty obligations of the United States require dedicated action, has significantly improved in its evaluation of hydroelectric projects' impacts on Indian lands. The time has come to recognize tribes' right to determine the impact of actual and proposed projects on their lands and their reserved rights to fish and wildlife.

The trend since the end of the Termination Era (1970), when Congress sought to extinguish its recognition of tribes and its responsibilities under treaties and federal law, has been to assist tribes, when possible, in reclaiming their capacity to develop and execute policy at the local level. This is the foundation of what in Indian Country is described as "sovereignty." The current legal epoch, the Self-Determination Era, has seen Congress devolve unto tribes greater authority in health care, education, and public safety. The tribes have shown remarkable resilience as they recover from decades of government-sponsored devastation. Many federal and state natural resource managers who have partnered with tribes have discovered that many tribes (unsurprisingly) possess the academic and technical talent required. Furthermore, generational knowledge and the cultural connection to the land, water, and wildlife (commonly referred to as "traditional ecological knowledge" or "TEK") provide an edge to tribal resource managers. Federal and state managers are coming to learn what they previously dismissed as folklore or superstition is a highly nuanced understanding of how humans interact with the natural environment.

The Clean Water Act identifies tribes that are judged to possess sufficient technical capability the designation of "treatment as state" (TAS), meaning that they have the same rights and

responsibilities as states do in evaluating water quality and the impact of hydroelectric projects thereon. Just as there is a crucial benefit to having state and federal regulators within proximity of the project site, there is a tremendous benefit to having regulators who live on or adjacent to the project site involved in the process. While in 2017 a Bureau of Indian Affairs (BIA) Superintendent may have close communication with the tribal department of environmental quality, it would serve both efficiency and self-determination to recognize the tribe's right to have its own representatives be at the licensing table..

American Rivers urges the Committee to consider, in full consultation with the appropriate tribal representatives, whether it would be advisable to devolve the authority to protect tribal resources from the Departments of Commerce and the Interior to the tribes themselves. Amending the FPA to recognize tribes' rights to manage their lands and fisheries—just as federal law recognizes their rights to manage their waters—could eliminate needless bureaucracy and ensure the proper stewardship of those resources. Doing so would be a continuation of prevailing policy trends, not a departure therefrom.

Corps vs. FERC Permitting Process at Non-Powered Dams

Section 408 of the Rivers and Harbors Act authorizes the Corps to permit modifications and alterations to existing Army Corps constructed public works projects. The Corps requires the permit applicant to meet their standards and to ensure there no injury to the public interest or any effect on the Corp's projects' ability to meet its intended purpose. The Corps will evaluate the projects impact on any alteration to flood conveyance, structural integrity, operation and maintenance, NEPA requirements, and flood absorption or blocking capabilities. The Corps oversight in allowing an outside party to use their infrastructure is necessary to ensure the integrity of the Corps' infrastructure as well as to ensure the outside party does not adversely impact the waterway or wetland where the project is located.

Recently there has been discussion about the Corps' 408 process being duplicative of FERC's ILP in the permitting and licensing of hydropower projects to be added to currently non-powered Corps infrastructure. American Rivers agrees with the statement of then-Director of FERC's Office of Energy Policy Ann Miles, who testified before this Subcommittee that it might be preferable for FERC to relinquish jurisdiction over hydropower projects to be added at Corps facilities, but it is inappropriate to transfer such authority from the Corps to FERC. American Rivers believes that the Committee should seriously consider simplifying the process of adding power to non-powered dams by exempting them from the FERC licensing process.

While some utilities may prefer the ILP to the 408 process, American Rivers agrees with FERC and the Corps that alterations to structures owned by the United States and operated and maintained by the Corps for purposes authorized by Congress should remain within the jurisdiction of the Corps of Engineers in order to best protect the interests of the taxpayers and the multiple users of the waterway.

Conclusion

It can be too easy to fall into the “us vs. them” trap, and to believe that the only way to achieve our objectives is by preventing another party from achieving theirs. That is not the position of American Rivers. We believe affordable energy can exist alongside robust fisheries, that flourishing outdoor economies can benefit from longstanding dams and impoundments, and that the lands held in trust pursuant to treaties between sovereign nations must not be compromised for the sake of convenience. It’s not a matter of the environmentalists versus industry. Everyone wants electricity, everyone wants clean water. In hydroelectric licensing, as in all things, we must seek consensus and compromise when possible.

As currently organized, the hydroelectric licensing process requires the involvement of federal, state, and tribal officials. It is collaborative, with shared responsibilities, and should remain that way. There are minor changes that should be made by FERC (including study requests from the federal, state, and tribal resource managers and pursuing MOUs when able) and by Congress (providing sustainable funding, recognizing tribal rights to manage land and wildlife, and possibly exempting non-powered Corps dams from the FERC licensing process). We urge the Committee to thoroughly examine the impacts of the Energy Policy Act of 2005 and to solicit the input of all relevant stakeholders before altering the licensing process.

On behalf of our members and supporters, we again thank the Committee for its attention to this important topic. We are happy to answer questions and provide further information as necessary. Please direct inquiries to Brendan Mysliwicz at bmysliwicz@americanrivers.org or at 202-243-7077.