

**Statement for the Record
U.S. Department of the Interior**

**Senate Committee on Energy and Natural Resources
Water and Power Subcommittee**

Legislative Hearing

S. 1521, Community and Hydropower Improvement Act

July 19, 2023

The Department of the Interior appreciates the opportunity to submit this statement for the record on S. 1521, the Community and Hydropower Improvement Act.

Background

The Department and its bureaus have important roles and responsibilities to ensure that non-federal hydroelectric projects are operated in ways that are environmentally sound and that protect, mitigate, and enhance the lands and resources under the Department's jurisdiction. Under section 18 of the Federal Power Act (FPA), the Secretary of the Interior is responsible for issuing prescriptions to establish the terms for safe passage of fish at facilities licensed by the Federal Energy Regulatory Commission (FERC). Additionally, under section 4(e), the Secretary is responsible for establishing conditions necessary for the adequate protection and utilization of lands in Indian reservations, National Wildlife Refuges, certain units in the National Park System, lands managed by the Bureau of Land Management, and projects managed by the Bureau of Reclamation.

The Department also makes recommendations to FERC for environmental protections, which it believes should be included in a hydropower license, including measures under section 10 that are deemed necessary to protect, mitigate damages to, or enhance fish and wildlife and recommendations related to recreation, cultural resources, and other resource areas that are submitted for FERC's consideration.

Discussion

As discussed below, S. 1521 impacts the Department across bureaus. For purposes of this statement, we offer discussion on several of the more significant impacts and would like to work with the Committee and the bill's sponsors to address these issues.

S. 1521 would allow federal agencies to be directly reimbursed for the costs incurred in administering the Federal Power Act and directs FERC to develop regulations governing license surrender proceedings. It would also strengthen the role of Tribes in hydropower relicensing proceedings by authorizing Tribes to issue section 4(e) conditions when projects are located on tribal trust land.

The legislation also contains a number of provisions that would restrict the Department's ability to protect federal lands and Indian reservations as well as important natural and Tribal resources. S. 1521 would add a number of requirements that will require significant additional departmental and Tribal resources, would likely extend the licensing timeline, and have the potential to weaken the Department's ability to exercise its FPA responsibilities.

For example, section 3 would dilute the Secretary's authority to issue conditions necessary for the protection and utilization of a reservation by requiring that condition to also be "reasonably related to project effects on the reservation and the utilization of the reservation." This could limit the Secretary's ability to mitigate a hydropower project's impacts on migratory species, including fish. And section 8 contains language that would limit the Secretary's authority to prescribe fish passage.

Similarly, S. 1521 prohibits the Department from considering "nonrecurring past effects" when exercising its FPA authorities and responsibilities. The Department is concerned that the Secretary would be precluded from considering effects to species that have been extirpated from entire watersheds or upstream habitats or are less abundant than in the past. The Department should not be prohibited from considering information on historic species abundance or habitat conditions that no longer exist in its actions, including seeking to restore species no longer present in the hydropower project's area. Providing habitat connectivity to support a species' life history has often been the impetus for the Secretary to exercise the authority to prescribe fishways pursuant to section 18 of the FPA. For example, a fishway at the Milford Hydroelectric Project, the first dam on the Penobscot River in Maine, has resulted in the restoration of virtually extirpated river herring in that river. In 2023, the Milford Project passed 5.5 million river herring.

Based on section 15 of S. 1521, FERC will not require any off-site measure that is not proposed by the applicant. The Department notes that its bureaus should have the opportunity to recommend off-site measures pursuant to section 10 of the FPA that will not only be considered by FERC but may be included in any license issued by FERC. Maintaining these opportunities is not only consistent with section 10(a) and 10(j), but also critical to providing entities with subject matter and technical expertise, as well as providing affected stakeholders a chance for input.

The FPA currently provides licensing parties an opportunity to seek a trial-type hearing on any disputed issues of material fact when the Secretary exercises its authorities under sections 4(e) and 18. It also requires the Secretary to carefully consider alternative conditions and prescriptions and accept such alternatives if they are equally protective and either cost less or result in improved operations for electricity production. S. 1521 would add an opportunity to seek a trial-type hearing on the alternatives themselves, resulting in two separate trial-type hearings with full discovery and cross-examination. This is likely to prolong FERC's licensing process and would be costly and burdensome for Departmental bureaus. The Department is of the view that the existing requirements of the FPA are sufficient to ensure that proposed alternatives are given meaningful consideration.

S. 1521 would also require the Department to include, with the submission of its conditions or prescriptions, a written statement showing how the Secretary gave “equal consideration” to a number of topics, most of which are beyond the expertise of the Department’s biologists, outdoor recreation planners, and land and natural resource managers. Addressing the listed topics would require significant additional resources and staff. Importantly, with regard to this point, the Department already ensures its conditions are supported by substantial evidence and are reasonably related to the goals of adequately protecting and utilizing the Federal reservations and ensuring safe and timely fish passage. An “equal consideration” statement is unnecessary to ensure the Department’s conditions and prescriptions are sound and defensible.

Additionally, while the Department supports efforts to recognize Tribal sovereignty by extending FPA section 4(e) authority to federally recognized Indian Tribes, the provisions in S. 1521 would also impose upon Tribes a number of onerous and costly requirements without providing resources or funding to ensure Tribes can meet these new obligations.

In other ways, S. 1521 does not go far enough to recognize Tribal interests and authorities. For example, the legislation extends section 10(j) authority to certain Tribes, but only those with treaty-protected resources. This authority should be extended to all Tribes whose resources are impacted by a hydropower project’s operations, not just those with judicially confirmed treaty rights. Additionally, the legislation attempts to expand the FPA’s definition of “reservation” to include “land and interests in land held in legal title by the United States in trust for the benefit of an Indian Tribe.” This definition would still exclude reservations with restricted fee lands or lands that are not in trust status. It also would not include a Tribe’s usual and accustomed places.

The Department appreciates the Subcommittee’s interest in improving the hydropower relicensing process and would like to work with the Committee and the sponsors to address these and other technical issues.