

Written Testimony of Chairman Willie L. Phillips  
Federal Energy Regulatory Commission  
Senate Committee on Energy and Natural Resources' Subcommittee on Water and Power  
S. 1521, to amend the Federal Power Act to modernize and improve the licensing of non-Federal  
hydropower projects, and for other purposes  
July 19, 2023

Chair Wyden, Ranking Member Risch, Members of the Subcommittee: I appreciate the opportunity to comment on S.1521, which would amend Title I of the Federal Power Act (FPA). Hydropower is an essential generation source. It provides a reliable, renewable, and zero-emissions source of electricity that is and must continue to be an integral part of our nation's resource mix. I would like to emphasize how much I appreciate the effort and time that stakeholders put into this comprehensive proposal. I commend everyone involved with that effort, including the co-sponsors of the bill, Senators Cantwell and Daines. These kinds of bipartisan initiatives are essential if we, as a country, are to develop the energy infrastructure that we so desperately need.

The Commission's hydropower license will often have profound effects on power production, fish and wildlife, irrigation, flood control, water supply, and recreation, among other things, as well as on the communities that live, work, and recreate in the vicinity of that facility. A finding that a license is in the public interest and "best adapted to a comprehensive plan for improving or developing a waterway"<sup>1</sup> requires the Commission to balance these and other matters, taking into consideration the views, recommendations, and conditions provided by numerous federal and state agencies, Tribes, and other stakeholders. Notwithstanding that complexity, the Commission has an impressive track record. Over the last 15 years, the Commission has been able to issue more than 100 licenses in less than two years from the application date. One of my priorities as Chairman has been to make our infrastructure siting processes, including hydropower licensing, as efficient and fair as possible. I appreciate the Committee's attention and efforts to further that critically important goal.

I will comment generally on several key aspects of the bill. To the extent that further detail would be helpful to the Committee, the Commission's staff is ready to assist however possible.

As an initial matter, I support—and again commend—the efforts to ensure that Tribes have greater authority to protect their interests on tribal lands. I particularly support the S.1521 amendments that would elevate the roles and responsibilities of Tribes under the FPA. For example, the proposed changes in sections 3 and 13 (amending FPA section 4(e) and adding FPA section 37, respectively) would provide Tribes with the ability to submit mandatory 4(e) license conditions for projects that are located within any lands or interests in lands held in trust for the Tribes by the United States. These provisions would, in effect, extend to Tribal governments the same conditioning authority that the law provides to federal land management agencies. That would be an important step forward. Similarly, I also support the amendments in section 6(c) of the bill, which would amend FPA section 10(j) to give Tribes the authority to propose recommendations to protect, mitigate damages to, and enhance fish and wildlife affected by the project. One related issue that I encourage the Committee to consider clarifying involves the

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<sup>1</sup> 16 U.S.C. § 803.

possible exclusion of licensed projects from the Tribe's ability to impose section 4(e) license conditions under proposed FPA section 37 during relicensing. As drafted, it is unclear whether Tribes would have authority to impose mandatory 4(e) conditions in future relicensing proceedings regarding those facilities on tribal lands.<sup>2</sup>

I also support S.1521's goal of promoting hydropower at existing nonpowered dams. These can be true win-win opportunities in that they allow us to expand our hydropower capacity without constructing new impoundment structures or reservoirs. However, I encourage the Committee to consider section 11's revisions to FPA section 34 to remove the Commission's jurisdiction over the existing nonpowered dams once the new hydropower facilities are added. Although the proposed revisions to FPA section 34 provide that a qualifying facility will not include an existing dam, the bill suggests that those dams must be consistent with the Commission's dam safety standards but also that they must meet any applicable state dam safety rules and regulations. It is important to be clear which entity has authority to enforce safety standards. If, pursuant to section 11, that entity is not the Commission, then it is critical that the responsible entity has the necessary expertise and experience to ensure public safety.

I also support the requirement in section 5 of the bill for the Commission to issue regulations providing specific steps for the surrender of a license. This would provide clarity and predictability for stakeholders, which are essential elements of an efficient regulatory process. Nevertheless, I recommend that the Committee consider allowing the Commission to waive certain statutory provisions in situations where it is appropriate (e.g., the surrender of a small hydro facility where the surrender would only involve disconnecting the leads and abandoning the facility in place). Such waiver authority would allow the Commission, in appropriate cases, to excuse license holders from going through unnecessary process and expense.

Section 14 of the bill would establish a proscriptive process by which the Commission and agencies with conditioning authority would coordinate the exercise of their respective responsibilities. Although interagency coordination is critical to an efficient permitting regime, the extensive process provided for in the bill, including the multiple technical conferences, may, in practice, frustrate the goal of expediting the Commission's hydropower permitting process. Relatedly, I recommend that the Committee consider clarifying section 3's amendments to FPA section 4(e), which would limit the scope of federal land management agencies' mandatory conditioning authority to only those conditions "reasonably related to project effects" on federal lands. Similarly, section 8's amendments to FPA section 18 require that any fishway prescribed by the Secretary of the Interior be "as appropriate to address project effects and other relevant factors." In particular, it is important to be clear regarding who decides whether a mandatory condition is "reasonably related to project effects" and the criteria by which that decision is made.

Section 4 of the bill would make substantial changes to the Commission's environmental review process. The bill currently introduces terms such as "nonrecurring past effect,"

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<sup>2</sup> New section 37 would provide that "[t]his section shall not apply to any project that, as of the date of enactment of the Community and Hydropower Improvement Act — (1) is licensed under this part . . . ;" and (2) is not located on any land or interest in land, the legal title to which is held by the United States in trust for the benefit of an Indian Tribe."

“ongoing effect,” and “reasonably foreseeable effect,” which are different than those established by the Council on Environmental Quality’s (CEQ) NEPA regulations (direct, indirect, and cumulative effects). I encourage the Committee to consider either using the same terminology as CEQ’s regulations or stating with particularity what is different about the new terminology contained in this bill and which terms the Commission should use in performing NEPA analyses. Doing so would help to avoid uncertainty—and litigation—regarding the meaning and effect of that new terminology.

I support considering ways to address off-site mitigation. Section 15 would override the Commission’s longstanding rule that lands and works used for long-term mitigation must be included as part of the project. Excluding those measures from the definition of the project could prevent the Commission from enforcing such measures. In addition, the Committee may also want to clarify whether section 15 intends to limit the use of off-site measures to “mitigation” of project effects only, and not allow such measures for “protection” and “enhancement” of resources, which the Commission currently permits consistent with its authority under FPA section 10.

In addition, some of the proposed timelines may be difficult to meet. Although, as noted, I strongly support efforts to accelerate our permitting processes and make them more efficient, some of the timelines in the bill could preclude the Commission from completing the high-quality work to which stakeholders are accustomed and that is necessary to provide legal durability. For example, section 11 of the bill would amend FPA section 34 to require that the Commission make a final decision regarding an application for a qualifying facility within two years of the Commission determining that the facility qualifies. However, an applicant may wait to file its application until a year after the Commission determines its project qualifies, which would leave the Commission only one year to act. Similarly, while the proposed amendments to FPA section 35 in section 12 of the bill would allow the Commission three years to review closed-loop pumped storage project applications, the review period would start as soon as the Commission determines that a project meets the statutory requirements. But an application may not be filed until months—or even years—after that determination is made, which could deprive the Commission of the time needed to fully analyze the application and render a reasoned decision on the license. To address this concern, the Committee may want to consider setting deadlines that run from the date on which the Commission determines that an application is complete, rather than the date on which the Commission determines an applicant eligible to pursue a particular application process.

Finally, S.1521 requires the Commission to complete several rulemakings on an expedited basis. These rulemakings would be significant undertakings, involving overlapping Commission personnel and resources. While I understand the need to implement legislation promptly after enactment, I am concerned that the rulemaking timelines might ultimately frustrate the purpose of the bill if they deprive the Commission of the time needed to carefully consider and hear from stakeholders regarding how to best to meet the requirements of this legislation.

I reiterate my thanks for the opportunity to testify on S.1521. As noted, Commission staff is prepared to assist the Committee however it may be useful as it considers this important legislation.