

Testimony of

**Jeff C. Wright
Director, Office of Energy Projects**

**Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC, 20426
202-502-8700**

**Before the
Committee on Energy and
Natural Resources**

United States Senate

Oversight Hearing on

S. 545, “Hydropower Improvement Act of 2013”

And the

H.R. 267, “Hydropower Regulatory Efficiency Act of 2013”

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Chairman Wyden, Ranking Member Murkowski, and Members of the Committee:

My name is Jeff Wright and I am the Director of the Office of Energy Projects at the Federal Energy Regulatory Commission (Commission or FERC). I appreciate the opportunity to appear before you to discuss the following legislation: S. 545, “Hydropower Improvement Act of 2013” and H.R. 267, “Hydropower Regulatory Efficiency Act of 2013.” As a member of the Commission’s staff, the views I express in this testimony are my own, and not those of the Commission or of any individual Commissioner.

I. Background

The Commission regulates over 1,600 hydropower projects at over 2,500 dams pursuant to Part I of the Federal Power Act (FPA). Together, these projects represent 54 gigawatts of hydropower capacity, more than half of all the hydropower in the United States. Hydropower is an essential part of the Nation's energy mix and offers the benefits of an emission-free, renewable, domestic energy source with public and private capacity together totaling about seven percent of U.S. electricity generation.

Under the FPA, non-federal hydropower projects must be licensed by the Commission if they: (1) are located on a navigable waterway; (2) occupy federal lands;

(3) use surplus water from a federal dam; or (4) 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 the Commission to issue either licenses or exemptions for projects within its jurisdiction. Licenses are generally issued for terms of between 30 and 50 years, are renewable, and carry with them the right to exercise federal eminent domain to obtain property necessary for the construction, operation, and maintenance of a project. Exemptions are perpetual, and thus do not need to be renewed, but do not permit the use of eminent domain.

Congress has established two types of exemptions. First, section 30 of the FPA allows the Commission to issue exemptions for projects that use, for generation, the hydroelectric potential of manmade conduits that are operated for the distribution of water for agricultural, municipal, or industrial consumption, and not primarily for the generation of electricity. Conduit projects must be located on non-federal lands, and have a maximum capacity of 15 megawatts (40 megawatts if the exemptee is a state or local government entity). Second, in section 405(d) of the Public Utility Regulatory Policies Act, Congress authorized the Commission to grant exemptions for small hydroelectric power projects having an installed capacity of 5,000 kilowatts or less. To qualify for this type of exemption, a project must be located at an existing dam that does not require construction or the enlargement of an impoundment, or must use the hydropower potential

of a natural water feature, such as a waterfall. Both types of exemptions are subject to mandatory fish and wildlife conditions provided by federal and state resource agencies.

The Commission has established three licensing processes, with the intent of allowing parties to select the process that is best suited to individual proceedings. The integrated licensing process (ILP) frontloads issue identification and environmental study to the period before an application is filed, and is thus well-suited to complex cases with substantial issues. The alternative licensing process (ALP) allows participants significant flexibility to tailor licensing procedures in a manner that may work well for unique cases. The traditional licensing process (TLP), in which environmental and other work can occur after the application is filed, appears to work best for less controversial matters. The TLP may be the process that is best-suited for many simple cases involving exemptions or small, low impact licenses. Commission staff has also developed a pilot licensing process for marine and hydrokinetic projects in which, with the assistance of federal and state resource agencies, a project can be licensed in as little as six months.

It is extremely important to note that project developers and other stakeholders, not the Commission, in most instances play the leading role in determining project success and whether the regulatory process will be short or long, simple or complex. The first key issue is site selection and proposed project operation. For example, the processing of applications tends to be expedited when applicants propose projects that: (1) are located at an existing dam where hydropower facilities do not currently exist, (2) would result in

little change to water flow and use, (3) are unlikely to affect threatened and endangered species and are unlikely to need fish passage facilities, and (4) involve lands and facilities that are already owned by the applicant. To the extent that a proposed project, even one of small size, raises concerns about water use and other environmental issues, it may be difficult for the Commission to quickly process an application.

Another, and related, factor is the extent to which project developers reach out to affected stakeholders. If a developer contacts concerned citizens, local, state, and federal agencies, Indian tribes, and environmental organizations, and works with them to develop consensus as to what information is needed to understand the impacts of a project and what environmental measures may be appropriate, and to develop support for the project, the application and review process is likely to be simpler and quicker. Where a project comes as a surprise to affected entities or where a developer does not respond to expressed concerns, the Commission's job becomes much more difficult.

A final, and again related, matter is the development of the full record that the Commission needs to act on an application. A potential applicant needs to work with Commission staff and with federal and state resource agencies and other stakeholders to determine what information is needed to support an application, and to provide the Commission with a complete application. Where Commission staff or other stakeholders must ask an applicant to provide information that is missing from an application, the regulatory process slows down.

The other entities with roles in the licensing and exemption process regarding small hydropower projects are also key to its success. The quickest, most efficient process can be achieved only where federal and state agencies, as well as other stakeholders, devote the resources early on to help project review move ahead, and where they display the flexibility to look at the merits of individual projects and the willingness to shorten the process in appropriate cases. Commission staff is dedicated to making the regulatory process as short and cost-effective as possible. We can only do that where applicants, resource agencies, and other stakeholders serve as willing partners in the process.

II. Commission Efforts Regarding Small and Innovative Projects

The majority of the hydropower projects regulated by the Commission are small projects, with about 70 percent having an installed capacity of 5 megawatts (MW) or less. In recent years, the Commission has seen a greatly increased interest in small hydropower projects at existing dams, in innovative marine and hydrokinetic projects, and in pumped storage projects, particularly closed-loop pumped storage, which does not involve regular water withdrawals from rivers or other water sources. The Commission has responded by implementing a number of measures to facilitate efficient review of project proposals. In 2007, in order to provide personalized, responsive service to entities seeking to develop small hydropower projects, Commission staff established a dedicated phone line and email address for inquiries on small hydropower, developed a brochure to provide guidance to

potential developers of small, low impact hydropower projects, and put these resources and a list of frequently-asked questions on the Commission's website.

In light of the continued growing interest in such development, the Commission held a technical conference on December 2, 2009, at its Washington, D.C. headquarters to explore issues related to licensing, and exempting from licensing, small non-federal hydropower projects in the U.S. The technical conference generated discussion on recommendations that could improve the process for authorizing small hydropower projects. In addition to insights received from the panelists and attendees at the technical conference, written comments were solicited and over 40 comment letters were received from industry representatives; federal, state, and local agencies; private citizens; and non-governmental organizations. At the Commission's April 15, 2010 meeting, staff reported on the conference and the comments received, and presented an action plan to assist and expedite the review of small hydropower proposals. The action plan adopted the following immediate changes: (1) adding new web-based resources to the Commission's website (www.ferc.gov) to make it easier for applicants to understand and complete the licensing process; (2) updating or creating Memoranda of Understanding (MOUs) with other agencies to improve coordination; (3) continuing to maintain our small hydropower contact list on our web site to answer applicant questions; and (4) educating potential small hydropower developers through a new education and outreach program. The Commission has, under its small hydro initiative, held numerous outreach meetings with small hydropower developers and interested stakeholders, and implemented web based

tools, such as application templates and application checklists, which potential applicants can use to prepare their applications. The small hydro website further contains guidance and sample letters that applicants can use to obtain waivers from fish and wildlife agencies for part of the prefiling consultation process. The Commission staff has also relaxed some of the standards, under Section 4.39 of its regulations, for exhibits and drawings for exemption applications. For those applicants that have filed complete and adequate applications, and for which the Commission has determined that impacts are minimal, the Commission has reduced the public notice period from 60 days to 30 days and the reply period from 45 days to 15 days. A number of conduit and small hydro exemptions have been approved in as short as two months and original licenses in as short as 6 months from the date that an application has been deemed complete.

Since the April 15, 2010 Commission meeting, we have updated our MOU with the U.S. Army Corps of Engineers (March 2011) and entered into an MOU with the U.S. Coast Guard (March 2013); launched a small hydro program website (August 2010); participated in small hydro workshops across the U.S.; conducted webinars on our small hydro website (November 2010, December 2010, June 2011, and January 2012); and updated our small hydro brochure. Upcoming outreach efforts will include participating on a small hydro panel at the National Hydropower Association's annual conference in Washington, D.C., working with the state of Colorado on providing state guidance documents on our small hydro licensing process; and updating our small hydro licensing web site in response to user input. As a result of these efforts, consultation has improved,

applications are more complete, and application processing times have been reduced.

With this background, I will turn to the draft legislation.

III. Hydropower Improvement Act of 2013 (S. 545) and Hydropower Regulatory Efficiency Act of 2013 (H.R. 267)

The Hydropower Improvement Act of 2013 and the Hydropower Regulatory Efficiency Act of 2013 have the commendable goal of increasing hydropower production in the United States. I strongly support this goal, and offer comments on specific sections of the draft legislation.

A. Section 5 of S. 545 and Section 6 of H.R. 267

Section 5 of S. 545 and Section 6 of H.R. 267 would require the Commission to investigate the feasibility of implementing a two-year licensing process, in particular, with respect to hydropower development at existing, non-powered dams, and for closed-loop pumped storage projects.

I support the goal of an expedited licensing process. Indeed, as I have discussed, it is Commission staff's goal to act on all license applications as quickly as possible, and the Commission has established processes that allow for great flexibility and efficiency. I am thus not certain whether an additional licensing process is necessary. During the last few

years, we have been able to issue some licenses in a matter of a few months, where the project proponent had selected a site wisely, stakeholders had agreed on information needs, and state and federal agencies performed their responsibilities quickly. Moreover, the Commission operates under significant constraints imposed by the FPA, and by other legislation affecting the licensing process – the Clean Water Act, Coastal Zone Management Act, Endangered Species Act, and National Historic Preservation Act among them. In the absence of the ability to waive sections of the FPA and other acts, or to set enforceable schedules in licensing proceedings, it is not clear that the Commission, under its existing authorities, can mandate a shortened process.

B. Section 6 of S. 545 and Section 4 of H.R. 267

Section 6 of S. 545 and Section 4 of H.R. 267 would establish various measures to promote conduit hydropower projects. This goal is consistent with Commission policy and has been a major focus of Commission staff's effort in the last few years. These sections would amend section 30 of the FPA to establish a procedure whereby conduit projects with an installed capacity of 5 MW or less would not be required to be licensed, provided the applicant makes a showing that the project qualifies as a conduit project. These sections would also allow the Commission to grant conduit exemptions on federal lands and would permit the Commission to issue conduit exemptions for those projects with an installed capacity of up to 40 MW. This proposed upper limit would apply to non-

municipal, as well as municipal applicants. I support these provisions, which should serve to increase the amount of electric generation derived from conduits.

C. Section 7 of S. 545 and Section 3 of H.R. 267

Section 7 of S. 545 and Section 3 of H.R. 267 would amend Section 405(d) of the Public Utility Regulatory Policies Act of 1978 to increase the installed capacity of a project to which the Commission could grant a small hydropower exemption from 5,000 to 10,000 kilowatts. This change would promote the development of small hydropower at the nation's existing non-powered dams by allowing a larger pool of small, low-impact projects to qualify for small hydropower exemptions. Such exemptions are attractive to developers in that the exemptions are perpetual, and thus the developer need not expend the cost and effort to renew the authorization as is the case with licenses. I, therefore, support this provision.

D. Section 8 of S. 545 and Section 5 of H.R. 267

Section 8 of S. 545 and Section 5 of H.R. 267 would amend the FPA to authorize the Commission to extend the term of a preliminary permit issued under FPA Section 5 once for up to two years. Preliminary permits grant the permittee a "first-to-file" preference with respect to license applications for projects being studied under a permit. Commission staff has heard anecdotally that developers are concerned that the need for

environmental studies in some instances makes it difficult to complete a license application within the current maximum three-year term of a permit, with the result that a developer which has invested substantial time and money studying a project may face the possibility of losing its project based on competition from other entities -- particular those with statutorily-granted municipal preference -- if it needs to seek a subsequent permit. I therefore support the proposed FPA amendment, which could ameliorate this problem. It might be worth considering, as an alternative, authorizing the Commission to issue permits for terms of up to five years, which could avoid the need for developers to go through the process of seeking an extension.

E. Section 9 of S. 545 and Section 7 of H.R. 267

Section 9 of S. 545 and Section 7 of H.R. 267 would require the Department of Energy to study the flexibility and reliability that pumped storage facilities can provide and the opportunities and potential generation from conduits. While I cannot speak for the Department of Energy, I support this research.

IV. Conclusion

There is a great deal of potential for the development of additional hydropower projects throughout the country, including small projects and marine and hydrokinetic projects. Working within the authority given it by Congress, the Commission continues to

adapt its existing, flexible procedures to facilitate the review and, where appropriate, the approval of such projects. Commission staff remains committed to exploring with project developers, its sister federal agencies, Indian tribes, the states, local government, and other stakeholders every avenue for the responsible development of our nation's hydropower potential. The legislation under consideration will, as I have testified, assist in realizing that potential.

This concludes my remarks. I would be pleased to answer any questions you may have.