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Hydropower Licenses and Relicensing Conditions: Current Issues and Legislative Activity

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Contents

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SUMMARY

In the next ten years, more than 40% of the nation's non-federal hydropower projects will require new federal licenses to continue operating. New licenses will establish facilities' allowed generation capacity, operating parameters, and environmental protection requirements for the next 30 to 50 years. These operating parameters will affect the total quantity and timing of electricity production, flood control, irrigation, municipal water supplies, recreation, fish and wildlife habitat, and transportation.

Under the 1920 Federal Power Act (FPA), the Federal Energy Regulatory Commission (FERC) has primary responsibility for balancing multiple water uses and evaluating relicensing applications. However, the FPA also creates a role in the licensing process for federal agencies that are responsible for managing fisheries or federal reservations (*e.g.* national forests, etc.). Specifically, sections 4(e) and 18 of the FPA give certain federal agencies the authority to attach conditions to FERC licenses. For example, federal agencies may require applicants to: build passageways through which fish can travel around the dam, schedule periodic water releases for recreation, release constant minimum flows of water for fish migration, control water release rates to reduce erosion, or limit reservoir fluctuations to protect the reservoir's shoreline habitat. Once an agency issues such conditions, FERC must include them in its license. While these conditions often generate environmental or recreational benefits, they may also require construction expenditures and may increase costs by reducing operational flexibility.

Reflecting recommendations by FERC and the hydropower industry, legislation has been passed by both chambers of the 108th Congress (H.R. 6) to alter federal agencies' license-conditioning authority. Both bills would allow stakeholders to propose alternative license conditions and would require federal agencies to consider alternatives proposed by license applicants. The legislation would also require an agency to accept the applicant's proposed alternative if it found that the alternative: 1) provides for the adequate protection and utilization of the federal reservation, or will be no less protective of the fish resource than the fishway initially prescribed, and 2) costs less to implement, and/or will result in improved operation of the project for electricity production.

Response to the proposed legislation has been mixed. While FERC and the hydropower industry generally support the legislation, some environmental organizations oppose the bills, and officials within some conditioning agencies have expressed concerns. Opponents of the legislation argue that resource agencies are taking adequate steps to improve the conditioning process, and that the legislation could increase relicensing time, weaken environmental protections, give applicants undue standing in the conditioning process, and weaken FERC's proposed licensing process. On the other hand, proponents of the legislation argue that it would create accountability on the part of conditioning agencies, decrease the cost of license conditions without diminishing agencies' conditioning authority, and enhance FERC's proposed licensing process.

The House passed H.R. 6 on April 11, 2003. The Senate passed another version of H.R. 6 on July 31, 2003.

MOST RECENT DEVELOPMENTS

On July 31, 2003, the Senate passed H.R. 6, the Energy Policy Act of 2003. Title III of H.R. 6 amends the Federal Power Act to provide for alternative conditions and alternative fishways in hydroelectric dam licenses. Title III of the Senate-passed bill differs from Title III of H.R. 6 , the comprehensive energy bill passed by the House on April 11, 2003.

BACKGROUND AND ANALYSIS

Hydropower is one of the multiple benefits the nation's waters provide. It accounts for nearly 7% of all electricity produced in the United States and 15% or more of the electricity produced in Idaho (27%), Maine (15%), Montana (34%), Oregon (43%), South Dakota (30%), Vermont (37%), and Washington (44%).[1] Hydroelectric power is generated by releasing water through a set of turbines; thus, it does not produce air pollutants and can be turned on or off in a matter of minutes. By storing water behind dams and controlling water releases, hydropower facilities can generate electricity during periods of high energy demand (so called peaking power).

While these facilities are important sources of clean peaking power, the construction and management of dams are contentious because dams affect other beneficial water uses and resources. The construction of dams alters the river by blocking downstream flows and creating reservoirs. While reservoirs can provide recreational opportunities and habitat for certain fish species, they increase the effort migratory fish must exert to travel up or down river and increase the exposure of young fish to predators. Once a hydropower facility is built, its management also affects water uses. For example, the decision of when, how, and how much water to release from a hydroelectric facility affects flood control, irrigation, municipal water supplies, recreation, fish and wildlife habitats, and transportation (See CRS Report RL31536, *Licensing of Non-Federal Hydroelectric Projects: Background and Current Issues*).

In order to make sure that navigable waters are managed for the public interest, Congress oversees the construction and operation of hydroelectric facilities. Congress directly authorizes federal hydropower projects and requires that private hydropower projects obtain federal licenses. This issue brief summarizes federal licensing and license-conditioning authority for non-federal projects, discusses key arguments for and against changing the process through which federal resource agencies issue license conditions, and reviews current legislative proposals to revise federal licensing authority. (Managers of federal dams may implement changes similar to those contained in hydropower licenses.)

Licensing Authority

Through the 1920 *Federal Power Act* (FPA) (16 U.S.C. 792), Congress created the Federal Power Commission (FPC), later renamed the Federal Energy Regulatory

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[1] Department of Energy Report DOE/EIA-0214, *State Energy Data Report 1999*, table 3, "Energy Consumption Estimates by Source," at [http://www.eia.doe.gov/emeu/sedr/contents.html].

Commission (FERC), which licenses all non-federal hydropower facilities. Using this authority, FERC granted 30 to 50 year licenses to projects located in 45 states (excluding Delaware, Hawaii, Mississippi, North Dakota, and South Dakota which have no non-federal dams). Many of the licenses for these projects were issued during the 1950s and 1960s, and are now expiring. In the next 10 years, 218 projects, or about 40% of all non-federal hydropower facilities, will need new licenses to continue operating.[2]

In order to help ensure that FERC licenses protect migratory fish and federally reserved lands (*e.g.*, lands, such as Indian reservations and national forests, that are set apart by the federal government for a special purpose), Congress created a role in the licensing process for certain federal agencies. The FPA requires that FERC include in its license certain agency-established operating conditions. For example, section 18 of the FPA (16 U.S.C. 811) stipulates that the Secretary of the Interior or the Secretary of Commerce may develop license conditions that direct the applicant to construct and maintain a passageway, called a fishway, through which fish can travel around barriers created by the dam. Furthermore, section 4(e), authorizes certain department secretaries to develop license conditions for facilities located in the federal reservations they manage (16 U.S.C. 797(e)). Under section 4(e), a secretary may stipulate provisions that are necessary to maintain the reservation for its federally designated purposes. Conditioning authority is not limited to FERC and Federal agencies. The 1970 Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA) (33 U.S.C. 1341) extends conditioning authority to state pollution-control agencies. Under the CWA, a FERC-issued license must include any conditions that the state deems necessary to maintain state-designated uses or water quality standards.

Federal Power Act §4(e) and §18 License Conditions

As noted above, sections 4(e) and 18 of the FPA grant federal agencies the authority to issue license conditions designed to preserve or enhance federally reserved lands, and to help fish travel around barriers created by hydropower facilities. The type of conditions issued pursuant to FPA sections 4(e) and 18 are described below.

License Conditions for Projects on Federal Reservations (FPA §4(e)). Section 4(e) of the FPA applies to hydropower facilities located on federally reserved lands (*e.g.*, Indian reservations and national forests, etc.). Under this section, the Secretary of the department with jurisdiction over the reserved land has the authority to issue any license conditions necessary to maintain the reservation. Depending on the purpose of the reservation, the agency's conditions may address a range of goals including the preservation or enhancement of recreation, federal lands, and aquatic habitat. Specifically, the Secretary could require the applicant to: schedule periodic water releases for recreation (white-water releases), release minimum quantities of water for fish migration (minimum flows), control the rate of water release to reduce habitat disruption (ramping requirements), and limit reservoir fluctuations to reduce erosion and maintain habitat (reservoir fluctuation limits). The Department of the Interior reports that the Bureau of Indian Affairs, Bureau of Reclamation, National Park Service, and Bureau of Land Management issued section 4(e) conditions for 6% of the projects relicensed between 1995 and 2000.

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[2] Federal Energy Regulatory Commission, *Hydroelectric Projects Under Commission License*, updated March 11, 2003, at [http://www.ferc.gov/industries/hydropower/gen-info/projlic.pdf].

Fishway Provisions (FPA §18). Under section 18 of the FPA, the Secretary of the Interior and the Secretary of Commerce may require applicants to construct and operate a physical structure, facility, or levee, called a fishway,[3] that allows fish to swim around barriers created by the hydropower project. Fishways provide young migratory fish with somewhat safer passage around the dam on their way downstream. Without a fishway, migratory fish have no alternative to the more dangerous passage over the dam via spill or through the project's turbines. Adult fish also use fishways, such as fish ladders, to get past the dam on their way upstream to spawn. Without fishways, a hydropower project may block upstream migration. In order to preserve and enhance fish resources, the Fish and Wildlife Service (USFWS) issued section 18 conditions for 20% of the projects relicensed between 1995 and 2000. The Department of Commerce, through the National Marine Fisheries Service (NMFS) issued section 18 conditions for 7.6% of the projects licensed between 1995 and 2000. In some cases, the NMFS and the USFWS issued conditions for the same projects.[4]

License Conditioning Agencies and the Relicensing Process

Federal resource agencies establish FPA section 4(e) and 18 license conditions by working through and alongside FERC's licensing processes. FERC's regulations allow three licensing processes: a structured process known as the Traditional Licensing Process (TLP), a collaborative process known as the Alternative Licensing Process (ALP), and a new licensing process, called the Integrated Licensing Process (ILP), that is both structured and collaborative. Each of these processes has two phases: a pre-application phase led by the applicant and a post-application analysis phase led by FERC.[5] As described below, conditioning agencies participate in both licensing phases.

Pre-Application Phase. In order for agencies to evaluate a project and develop license conditions, they need information on how the project affects the resources they manage. The conditioning agency generally obtains this information from the applicant who conducts studies before a license application is submitted. Specifically, FERC's licensing process requires an applicant to consult with stakeholders, including conditioning agencies, before the applicant decides which studies to undertake.

The pre-application process can be delayed when the applicant disagrees with the conditioning agencies regarding the need for, or content of, particular studies. Agencies, unlike FERC, do not have the authority to require applicants to conduct studies. However, agencies' authority to issue license conditions does provide applicants with an incentive to resolve study disagreements. Applicants and conditioning agencies may utilize voluntary

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[3] Environmental Protection Agency, *Notice of Proposed Interagency Policy on the Prescription of Fishways under Section 18 of the Federal Power Act*, 65 *Fed.Reg.* 80898 (December 22, 2000). See also 16 U.S.C. §811.

[4] Letter by William D. Bettenberg (Interior) to David P. Boergers (FERC), *Hydroelectric Licensing Policies, Procedures, and Regulations: Comprehensive Review*, entered into FERC Docket No. PL01-1-000 on April 16, 2001.

[5] The Notice of Proposed Rulemaking is available under RM02-16-000 at [http://www.ferc.gov/industries/hydropower/indus-act/hydro-rulemaking-nopr.pdf] on August 27, 2003. (Hereafter referred to as FERC's NOPR.)

mechanisms for resolving these study disputes. Under the ALP, for example, conditioning agencies and applicants may use FERC's Dispute Resolution Service (DRS). The DRS is a FERC service that mediates license disputes. The DRS does not provide recommendations, but it may bring in FERC experts to help clarify issues. When agencies and the applicant do not resolve their disagreements using the DRS, the agency's study request may wait until FERC becomes involved during the post-application phase.

Under the ILP, applicants and stakeholders would first try to resolve disputes through voluntary discussions. If this voluntary process fails, then the conditioning agencies, under the ILP, would have the opportunity to initiate a "formal study dispute resolution process." Under the ILP, FERC will become involved during the pre-application phase and will have the final say regarding the applicant's study development plan. (For more information on this process see CRS Report RL31903. *Relicensing of Non-Federal Hydroelectric Projects: Summary and Discussion of Procedural Reform Proposals*)

Post-Application Phase. Once the applicant completes its studies and submits its license application, conditioning agencies evaluate the study results and develop their conditions. At present, agencies develop license conditions that may or may not incorporate suggestions from other stakeholders. After the agency submits its conditions, FERC must include them in its license unless FERC finds that the conditions are unrelated to the agencies' FPA jurisdiction. If the conditions are outside the agencies' jurisdiction, FERC may refuse to include them in its license. A key issue prompting legislative proposals is that under the current processes, applicants and other stakeholders have little opportunity to contest agencies' conditions. However, the Department of the Interior is currently developing administrative appeals processes for license conditions.[6]

Another issue is that delay in the license-conditioning process may occur when the agency has insufficient information to evaluate the project. Specifically, some officials within conditioning agencies have voiced concern that some applicants do not provide sufficient information in their license applications for agencies to develop conditions. Insufficient information is often the result of unresolved study disputes. If a study is not conducted during the pre-application phase, a conditioning agency may ask FERC to require that the applicant conduct the study. The agency may also conduct the study itself, or may issue license conditions in the absence of full information. However, conducting studies often requires significant financial resources and the imposition of conditions without the underlying studies may lead to litigation. Therefore, a major goal of the proposed ILP is to resolve study disputes early in the pre-application phase.

Cost of Mandatory Conditions

Through the relicensing process, FERC and federal agencies establish license conditions designed to preserve and enhance the resources affected by hydropower projects. While these conditions often generate environmental, recreational, or other benefits, they also generate costs. FERC calculated the median cost of a license's protection, mitigation, and

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[6] Statement of Lynn Scarlett, Assistant Secretary of Policy, Management and Budget, U.S. Department of the Interior, to the Federal Energy Regulatory Commission, November 7, 2002. See also FERC's NOPR.

enhancement measures, including state agency conditions, as $246 per kilowatt (kW) of capacity under the TLP and as $58 per kW under the ALP. However, these figures have been criticized by the General Accounting Office because they are based on a sample of projects that submitted their costs to FERC and not on a representative sample.[7]

License conditions may generate two types of costs: fixed capital costs such as construction of installations, and variable costs that arise from changes in management techniques. For example, license conditions may require applicants to purchase or construct installations including fishways, boat ramps, and fish screens. Changing facility operations may also decrease total hydropower production. For example, minimum flow requirements, white water releases, or fishway releases reduce the facility's total generation when the water is not released through turbines. According to FERC, conditions placed in the license for environmental protection reduce average annual hydropower generation by 1.59%. While these conditions may decrease total electricity generation, they may also reduce the facility operator's leeway to store water behind the dam for release during periods of peak demand. If hydropower is removed from the supply of peaking power, additional generation by other higher cost producers would be required. At the same time, FERC estimates that efficiency improvements made during relicensing increase capacity by an average of 4.06%.

While hydropower license conditions often generate costs, other stakeholders would face costs if such conditions were not applied. For example, fishway requirements and minimum flow requirements reduce the dam's harm to migratory fish populations. Without such requirements, Native Americans, the commercial fishing industry, and individuals who fish for recreation would continue to pay the costs of decreased fish populations. Likewise, constraints on reservoir height fluctuations and water release rates reduce stream-bank and reservoir-bank erosion. Without such conditions, taxpayers, as owners of national forests, and other owners of shoreline or river-front property may continue to pay the costs of such erosion. Depending on the project's characteristics, license conditions may benefit a wide array of stakeholders that use the water for irrigation, transportation, fishing, boating.

Proposed Changes to the License-Conditioning Process

A number of issues emerged as the first wave of hydropower projects were relicensed throughout the 1990s. These issues have prompted Congress to hold hearings and take other actions to examine the licensing process. The 106th Congress directed FERC to conduct a comprehensive review of the policies, procedures, and regulations guiding the licensing process and report to Congress (section 603 of the Energy Act of 2000, P.L.106-469). FERC responded in May 2001, with recommendations on how to reduce the length and expense of obtaining a new license.[8] In addition to administrative proposals, which are the subject of CRS Report RL31903, the Section 603 Report proposed legislative changes to the relicensing process. One class of proposals focuses on agencies' mandatory conditioning authority. For

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[7] General Accounting Office Report, GAO-01-499, *Licensing Hydropower Projects: Better Time and Cost Data Needed to Reach Informed Decisions about Process Reforms,* May 2, 2001.

[8] Federal Energy Regulatory Commission, *Report to Congress on Hydroelectric Licensing Policies, Procedures, and Regulations — Comprehensive Review and Recommendations Pursuant to Section 603 of the Energy Act of 2000,* Section 603 Report (Washington, DC: May 2001). Available at [http://www.ferc.gov/legal/ferc-regs/land-docs/ortc_final.pdf] on August 27, 2003.

example, FERC suggested that Congress grant it the authority to reject or modify resource agencies' conditions and that Congress require agencies to better support their license conditions. While the hydropower industry tends to support these FERC recommendations, environmental organizations, and officials within federal and state agencies oppose these suggestions and any other proposed reduction in current license-conditioning authority. Opponents of FERC's legislative proposal argue that administrative reforms, such as FERC's proposed rule establishing the ILP and the development of agencies' administrative review processes, are adequate to improve the relicensing process.

Legislative proposals incorporating some of these suggestions have been introduced in Congress in recent years, but none has been enacted. For example, hydroelectric titles passed both chambers during the 107th Congress. (H.R. 4, the Securing America's Future Energy Act, passed the House August 2, 2001 and the Energy Policy Act, also H.R. 4, passed the Senate April 25, 2002.) Title III of each of these bills would have allowed license applicants to propose alternatives to agencies' mandatory conditions under the Federal Power Act. While a compromise was not achieved at the end of the 107th Congress, this legislation is the basis of all relicensing legislation proposed in the 108th Congress.

Hydroelectric Relicensing Legislation in the 108th Congress

Title III of H.R. 4 (107th Congress) was incorporated into the Senate-passed energy bill, H.R. 6, in the nature of a substitute. Title III of H.R. 6 also passed the House, though with substantive differences.[9] Each of these bills[10] focuses on federal agencies' license conditioning authority under section 4(e) or 18 of the FPA. The House-passed bill would provide license applicants with the opportunity for a trial-type hearing on facts related to agency-proposed license conditions. Furthermore, each bill would change the license-conditioning process by allowing stakeholders, including applicants, to propose alternative conditions. When the license applicant proposes an alternative, the conditioning agency would be required to consider it, and to adopt the alternative if it meets certain environmental and cost criteria. Specifically, the agency would have to accept an applicant's proposed alternative if it found that the alternative: 1) "provides for the adequate protection and utilization of the reservation" (H.R. 6 §33 (a)(2)(A)), and/or "will be no less protective of the fish resources than the fishway initially prescribed" (H.R. 6 §33 (b)(2)(A)); and 2) costs less to implement, and/or will result in improved operation of the project for electricity production (H.R. 6 §33 (a)(2)(B) and §33 (b)(2)(B)). The Senate-passed bill contains similar language, but it adds that improvements in project operations for electricity production are compared with the operations under the agency's proposed condition.

The House-passed bill would also require that the conditioning agency justify its decision to accept or reject the alternative after giving equal consideration to the effect of its

[9] "A bill to enhance energy conservation and research and development, to provide for security and diversity in the energy supply for the American people, and for other purposes."

[10] Two additional bills, H.R. 1013 and S. 14 (§511) were introduced in the 108th Congress and contain hydropower licensing titles that are identical to those in the House-passed bill.

condition and the alternative condition on a broad range of factors. These factors include energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality) (H.R. 6 §33 (a)(3)). This section of the proposed legislation differs from the Senate-passed bill, which would require the agency to include such factors in its justification, but not to consider them equally.

The House-passed bill also differs from the Senate-passed bill by establishing a system for reviewing the agency's condition when it rejects the applicant's alternative. Specifically, the House-passed bill states that FERC could refer the agency's decision to its Dispute Resolution Service (DRS). Unlike the DRS' mediation role under the alternative licensing process (ALP), the proposed legislation would require the DRS to review the facts and issue a non-binding advisory. The Secretary of the conditioning agency would then reconsider his or her decision and may or may not accept the advisory.

Discussion

Response to the relicensing legislation in the 108th Congress is mixed. FERC and the hydroelectric industry support the hydropower relicensing legislation, but some environmental organizations and some relevant officials within government agencies have expressed concerns. While the National Hydropower Association is more supportive of the House-passed bill than the Senate-passed bill, some environmental organizations view the Senate-passed bill as a modest improvement over the House-passed bill. According to FERC, the House-passed bill would provide accountability by making agencies justify their conditions in light of the proposed alternatives and the conditions' effects on multiple resources. The hydropower industry argues that this legislation would decrease the cost of license conditions. On the other hand, environmental organizations and officials within conditioning agencies have expressed concerns that the legislation would further increase the length of the relicensing process, diminish environmental protection, reduce the effectiveness of FERC's proposed ILP, and give license applicants more authority in the license conditioning process than other stakeholders. These issues are discussed below.

Length of Process. If enacted, the either relicensing bill would add additional steps to the licensing process. Specifically, the bills would require that federal agencies determine whether or not a proposed alternative meets the environmental and cost criteria described above, and determine how the alternative and agencies' conditions affect energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality). The House-passed bill would also allow license applicants to initiate a trial-type hearing on issues of material fact. Both of these provisions could add an undetermined amount of time to the licensing process. The legislation passed in the House, but not in the Senate, would also establish a 90-day process for the DRS and FERC to review the agency's conditions.

From the perspective expressed by industry and FERC, the House-passed bill would most improve the license conditions, thus justifying additional process time. Furthermore, supporters of the legislation argue that additional procedure on the front end could decrease delays at the end of the process. However, some environmental organizations, such as the Hydropower Reform Coalition, argue that the administrative hearings called for in the House-passed bill could take up to ten years. Furthermore, some opponents of the legislation

argue that new administrative appeals processes and FERC's July 2003 rule establishing the ILP will sufficiently improve the relicensing process.

Environmental Issues. Under the FPA, Congress granted FERC the authority to issue hydropower licenses, but gave federal land and water management agencies the responsibility for protecting federal reservations and maintaining fish resources. When issuing license conditions to fulfill their responsibilities under sections 4(e) and 18 of the FPA, conditioning agencies are not currently required to solicit stakeholder recommendations. Under the House and Senate-passed bills, the agency "must consider" the alternative conditions offered by the license applicant. After such consideration, the agency would not be required to accept the alternative if it found that the proposal does not meet specified environmental and cost criteria (*e.g.*, the proposed alternative does not adequately protect the resource).

Although federal conditioning agencies could reject an alternative condition that did not meet either bills' environmental and cost criteria, environmental organizations are concerned that the House-passed bill would distract agencies from their focus on protecting fish and federal reservations. These opponents of the House-passed bill argue that it would require conditioning agencies to expand their focus to give equal consideration to the conditions' effects on energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality). They further argue that the agencies do not have adequate resources to conduct these additional studies. However, supporters of the bills argue that requiring agencies to balance the multiple effects of their conditions would help ensure that license conditions are established in the public interest.

While the equal consideration clause may expand the agencies' focus, the effect of this language on the conditions designed to protect fish and federally reserved lands would depend on how the agencies interpret the phrase "no less protective of fish resources," and the phrase "adequate protection and utilization of the reservation." Environmental organizations are concerned that the phrase "no less protective of the fish resource than the fishway[11] initially prescribed," in either bill, could open the door for applicants to propose non-fishway alternatives to fishway conditions.[12] For example, environmental organizations are concerned that the legislation would allow the applicant to propose maintaining fish populations by stocking the river with hatchery fish or through other mechanisms that do not move native fish. Environmental organizations generally find these other mechanisms to be less successful than fishways in maintaining migratory fish populations. However, industry representatives argue that such concerns regarding the effectiveness of alternative conditions are unwarranted. Specifically, proponents of the legislation point out that it preserves agencies' authority to reject alternatives which are "less protective of the fish resources than the agencies' alternative." Therefore, the applicant's ability to substitute other mechanisms for fishways, would depend on the agency's determination of the protectiveness of the alternative.

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[11] See footnote 3.

[12] See the Hydropower Reform Coalition's critique of the energy bill at [http://www.amrivers.org/docs/TitleIIICritique.pdf], available on July 18, 2003.

Effectiveness of Integrated Licensing Process (ILP). Environmental organizations and some officials within conditioning agencies also assert that proposed legislation, namely the House-passed bill, could weaken the new Integrated Licensing Process by reducing the incentives for applicants to engage actively in early consultations with resource agencies. Specifically, opponents of the legislation argue that license applicants would be less willing to consult and negotiate with resource agencies if the agencies do not have the authority to issue final license conditions. Conversely, FERC and the hydropower industry argue that this legislation would not reduce agencies' conditioning authority, and thus would not alter an applicant's incentive to negotiate with agencies. (For more information on the ILP, see CRS Report RL31536, *Licensing of Non-Federal Hydroelectric Projects: Background and Current Issues.*)

Participation in the Conditioning Process. Under current law, the recommendations of industry and non-industry stakeholders are given similar weight in agencies' conditioning process. A key concern of environmentalists and other nonutility stakeholder groups is that the bills would increase the applicant's input relative to other stakeholders. Specifically, the House-passed bill entitles license applicants, but not other stakeholders, to "a determination on the record, after opportunity for an agency trial-type hearing of any disputed issues of material fact." Furthermore, either bill would require that agencies consider the applicant's alternative conditions but not the conditions offered by "other interested parties."[13] Some non-industry stakeholders would prefer to see this section expanded to require that agencies consider alternatives offered by any stakeholder. However, some officials within conditioning agencies are concerned that they may have insufficient resources to consider all industry-proposed alternatives let alone other stakeholder-proposed alternatives.

The bills state that the agency shall accept the applicant's alternative if it meets the bills' environmental and cost requirements. Therefore, opponents are concerned that the legislation would require the conditioning agency to accept a proposed alternative condition with little regard for its effect on other water resource uses (*e.g.*, recreation, flood control, irrigation, etc.). However, FERC and the hydropower industry point out that FERC already has the responsibility to balance multiple water uses, and that the bill could decrease the cost of meeting agencies' section 4(e) and 18 objectives.[14]

Conclusion

Enactment of either relicensing bill would affect the conditioning process in a number of ways. Both bills would allow stakeholders to offer alternative license conditions. The House-passed bill would also create a mechanism for reviewing the decision of conditioning agencies and would entitle license applicants to a trial-type hearing on facts related to the agency's conditions. These changes could lengthen the conditioning process. The bills

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[13] U.S. Congress, House, Energy and Commerce Committee, Subcommittee on Energy and Commerce, testimony of Leon Szeptycki, General Council of Trout Unlimited, on the Role of the Federal Government in Licensing Hydropower Dams, hearing, March 12, 2003.

[14] U.S. Congress, House, Energy and Commerce Committee, Subcommittee on Energy and Commerce, testimony of J. Mark Robinson, Director, Office of Energy Products, Federal Energy Regulatory Commission, hearing, March 12, 2003.

could also increase the influence of applicants relative to other stakeholders. The effect of either bill on fish resources and on federal reservations is unclear and would depend on how conditioning agencies interpret the terms "adequate protection and utilization of the reservation" and "no less protective of the fish resources." The effect of the House-passed bill on other resources could depend on how the agencies balance their obligation to accept the applicant's alternative (*i.e.,* if it meets the two criteria) relative to their responsibility to justify the conditions they select based on equal consideration of multiple effects. It appears that these issues could lead to further review.

LEGISLATION

H.R. 6 (Tauzin)

Language in Title III is identical to H.R. 1013. Introduced April 7, 2003; referred to the House Energy and Commerce Committee. Passed the House on April 11, 2003, and was placed on the Senate Legislative Calendar.

H.R. 6 passed the Senate on July 31, 2003, incorporating language from H.R. 4 of the 107th Congress in the nature of a substitute. Title III of this Senate-passed bill establishes new requirements for federal agencies that set conditions or fishway prescriptions for hydroelectric licenses under sections 4(e) and 18 of the Federal Power Act. It requires federal agencies to consider alternative conditions proposed by the license applicant and accept the proposed alternative if it (1) provides for the adequate protection and utilization of the reservation, or will be "no less protective of the fish resources than the fishway initially prescribed" and (2) will either cost less, and/or will improve the project's operational efficiency as compared to the condition initially deemed necessary by the Secretary. Title III requires the agency to explain the basis for its decision to accept or to reject the alternative and to describe both conditions' effects on a broad range of factors. Title III of this bill will likely be subject to change during the House-Senate conference on H.R. 6.

H.R. 1013 (Radanovich)

Establishes new requirements for federal agencies that set conditions or fishway prescriptions for hydroelectric licenses under sections 4(e) and 18 of the Federal Power Act. Allows license applicants to initiate a trial-type hearing on factual issues related to the agency's conditions. Requires federal agencies to consider alternative conditions proposed by the license applicant and accept the proposed alternative if it: 1) provides for the adequate protection and utilization of the reservation, or will be "no less protective of the fish resources than the fishway initially prescribed" and 2) will either cost less, and/or will improve the project's operational efficiency. Requires the agency to justify its decision to accept or to reject the alternative after giving equal consideration to both conditions' effects on a broad range of factors. Establishes a system for reviewing an agency's decision when it rejects the applicant's alternative. Introduced February 27, 2003; referred to House Committee on Energy and Commerce, Subcommittee on Energy and Air Quality.

S. 14 (Domenici)

Section 511 is identical to H.R. 1013 and Title III of the House-passed bill, H.R. 6. Introduced April 30, 2003; returned to the Senate's Legislative Calendar on July 31, 2003.

In lieu of S. 14, the Senate passed H.R. 6, as amended, with language from H.R. 4 of the 107th Congress in the nature of a substitute.

CONGRESSIONAL HEARINGS, REPORTS, AND DOCUMENTS

Hearings

U.S. Congress. House. Committee on Energy and Commerce. Subcommittee on Energy and Air Quality. Hearing, March 12, 2003 on comprehensive energy policy at: [http://energycommerce.House.gov/108/Hearings/03122003hearing819/hearing.htm]

U.S. Congress. House. Committee on Energy and Commerce. Subcommittee on Energy and Air Quality. *Hydroelectric Relicensing and Nuclear Energy.* Hearing, June 27, 2001. 107th Congress, 1st session. 185p. (107-55)

U.S. Congress. Senate. Committee on Energy and Natural Resources. *National Energy Issues.* Hearing, July 19, 2001. 107th Congress, 1st session. 202 p.(107-144)

FOR ADDITIONAL READING

CRS Reports

CRS Report RL31536. *Licensing of Non-Federal Hydroelectric Projects: Background and Current Issues.*

CRS Report RL31903. *Relicensing of Non-Federal Hydroelectric Projects: Summary and Discussion of Procedural Reform Proposals.*

Other Documents

Federal Energy Regulatory Commission. *Hydroelectric License Regulations under the Federal Power Act: Notice Requesting Comments and Establishing Public Forums and Procedures and Schedule,* FERC Docket No. RM02-16-000 (Washington, DC: September 12, 2002)

Federal Energy Regulatory Commission. *Notice Requesting Comments and Establishing Public Forums and Procedures and Schedule pursuant to (18 CFR Parts 4 and 16),* Docket No. RM02-16-000 (Washington, DC: February 20, 2003). [http://www.ferc.gov/hydro/docs/hydro-rulemaking-nopr.pdf].