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# HYDROELECTRIC LEGISLATION

## HEARING

BEFORE THE

SUBCOMMITTEE ON ENERGY AND POWER

OF THE

COMMITTEE ON COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

ON

**H.R. 2335, H.R. 1262, H.R. 3852,**
**S. 334, S. 422, S. 1236, and S. 1937**

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# CONTENTS


Page

Testimony of:
- Brouha, Paul, Associate Deputy Chief, Forest Service, U.S. Department of Agriculture ..... 100
- Burns, Allen, Vice President of Requirements Marketing, Bonneville Power Administration, U.S. Department of Energy ..... 34
- DeFazio, Hon. Peter A., a Representative in Congress from the State of Oregon ..... 12
- Fahlund, Andrew, Policy Director for Hydropower Programs, American Rivers ..... 76
- Grimm, Robert S., President, Alaska Power & Telephone Company ..... 86
- Hoecker, Hon. James J., Chairman, accompanied by Curt Hebert, Jr. and William L. Massey, Commissioners, Federal Energy Regulatory Commission ..... 17
- Kennedy, Lynne, Oregon Department of Environmental Quality ..... 96
- Leshy, John D., Solicitor, U.S. Department of the Interior ..... 29
- Lynch, Kevin A., Director of Government Affairs, Pacificorp ..... 74
- Murkowski, Hon. Frank, a United States Senator from the State of Alaska ..... 5
- Murphy, Michael A., President, National Hydropower Association ..... 60
- Piper, Dave E., Chief Executive Officer, Pacific Northwest Generating Cooperative ..... 89
- Radanovich, Hon. George P., a Representative in Congress from the State of California ..... 9
- Rosenberg, Andrew A., Deputy Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration, U.S. Department of Commerce ..... 36
- Waddington, Steve, Northwest Power Manager, Reynolds Metals Company ..... 93

Material submitted for the record by:
- American Public Power Association, prepared statement of ..... 114
- Brouha, Paul, Associate Deputy Chief, Forest Service, U.S. Department of Agriculture, responses for the record ..... 251
- Center for Energy Efficiency, Environmental Defense, Natural Resources Defense Council, and Sierra Club, letter dated March 30, 2000, to Hon. Joe Barton ..... 121
- Dingell, Hon. John D., a Representative in Congress from the State of Michigan:
  - Letter dated January 19, 2000, to Hon. Bill Richardson, enclosing questions for the record, and responses to same ..... 129
  - Letter dated March 27, 2000, to Hon. Bill Richardson ..... 133
  - Letter dated February 8, 2000, to Greg Booth, enclosing questions for the record, and responses to same ..... 146
  - Letter dated January 20, 2000, to Frank L. Cassidy, enclosing questions for the record, and responses to same ..... 155
  - Letter dated February 8, 2000, to Mark Gendron, enclosing questions for the record, and responses to same ..... 161
  - Letter dated February 23, 2000, to Robert G. Hayes, enclosing questions for the record, and responses to same ..... 169
  - Letter dated February 8, 2000, to Tom Kuhn, enclosing questions for the record, and responses to same ..... 174
  - Letter dated February 8, 2000, to David Piper, enclosing questions for the record, and responses to same ..... 178

Page

Fahlund, Andrew, Policy Director for Hydropower Programs, American Rivers, letter dated May 8, 2000, to Hon. Joe Barton, enclosing response for the record ..... 254
Hart, City of, prepared statement of ..... 113
Hebert, Curt, Jr. Commissioner, Federal Energy Regulatory Commission, letter dated May 8, 2000, to Hon. Joe Barton, enclosing response for the record ..... 200
Hoecker, Hon. James J., Chairman, Federal Energy Regulatory Commission, letter dated May 8, 2000, to Hon. Joe Barton, enclosing response for the record ..... 192
Hoekstra, Hon. Peter, a Representative in Congress from the State of Michigan, letter dated March 29, 2000, to Hon. Joe Barton ..... 113
Idaho Energy Authority, prepared statement of ..... 119
Kennedy, Lynne, Oregon Department of Environmental Quality, letter dated May 8, 2000, to Hon. Joe Barton, enclosing response for the record ..... 261
Knowles, Hon. Tony, Governor, State of Alaska, letter dated March 29, 2000, to Hon. Joe Barton ..... 112
Leshy, John D., Solicitor, U.S. Department of the Interior, letter dated May 16, 2000, to Hon. Thomas J. Bliley, Jr ..... 236
Lyder, Jane M., Legislative Counsel, Office of Congressional and Legislative Affairs, Department of the Interior, letter dated May 30, 2000, to Hon. Joe Barton ..... 220
Markey, Hon. Edward J., a Representative in Congress from the State of Massachusetts, letter dated April 10, 2000, to Hon. Joe Barton, enclosing material for the record ..... 189
Massey, William L., Commissioner, Federal Energy Regulatory Commission, letter dated May 8, 2000, to Hon. Joe Barton ..... 219
Michigan United Conservation Clubs, prepared statement of ..... 115
Oregon Utility Resource Coordination Association, prepared statement of ..... 117
Rosenberg, Andrew A., Deputy Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, responses for the record ..... 246
Souby, James M., Executive Director, Western Governors' Association, letter dated May 15, 2000, to Hon. Joe Barton and Hon. Rick Boucher .. 269
Taylor, Gary J., Legislative Director, International Association of Fish and Wildlife Agencies, letter dated March 28, 2000, to Hon. Joe Barton 122

# HYDROELECTRIC LEGISLATION

**THURSDAY, MARCH 30, 2000**

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON ENERGY AND POWER,
*Washington, DC.*

The subcommittee met, pursuant to notice, at 10:07 a.m., in room 2322, Rayburn Building, Hon. Joe Barton (chairman) presiding.

Members present: Representatives Barton, Shimkus, Wilson, Shadegg, Bryant, Sawyer, Markey, and Dingell (ex officio).

Also present: Representative Towns.

Staff present: Joe Kelliher, majority counsel; Kevin Cook, science advisor; Elizabeth Brennan, legislative clerk; and Rick Kessler, minority professional staff.

Mr. BARTON. The purpose of the hearing today is to consider various hydroelectric bills pending before the subcommittee.

Four of the 7 bills that are the subject of this hearing have passed the Senate, and I am pleased we are able to hold a hearing with sufficient time left in the year to act on these bills if it turns out they enjoy support among subcommittee members.

The most important bill before the subcommittee today is H.R. 2335, the Hydroelectric Licensing Process Improvement Act of 1999, which was introduced by our colleague, Representative Towns, and is co-sponored by four subcommittee members—Mr. Burr, Mr. Hall, Mr. Wynn, and Mr. Shadegg.

This hearing comes at an important time. Much of the country's hydroelectric capacity will be relicensed in the next 15 years. We need to understand how well or badly the licensing process is working. If the process is working badly, we need to know whether administrative reforms can improve the process or whether Congress must act in this area. If Congress must act, we need to know what a bill should look like.

As I mentioned earlier, 4 of the 7 bills that are the subject of our hearing today have passed the Senate. Some of these bills have repeatedly passed the Senate only to die as the House took no action. I believe as a general rule, the subcommittee should hold hearings on bills that have passed the Senate. That does not mean we'll necessarily pass a bill just because it passed the Senate. The subcommittee will show the Senate the courtesy of considering their bills. If the Senate bills referred to the subcommittee die, they will die as a result of conscious decisions, not out of neglect.

I understand that there is some controversy associated with the Senate bills we consider today. Federal resource agencies and environmental groups oppose the Alaska and Hawaii exemption bills

and the Michigan exemption bill. Some Bonneville customer groups oppose S. 1937, which apparently is also known as the JOE bill. I'm suspicious that Senator Craig gave the bill that name in order to maximize its chance of House action——

I'm wondering whether it was called the Dan bill in the last Congress.

Finally, I understand that the license extension bills are not controversial.

We look forward to hearing the testimony of the witnesses before us.

The Chair would now recognize the distinguished ranking member from the State of Michigan, Congressman Dingell, for an opening statement.

Mr. DINGELL. Mr. Chairman, thank you. I'd like to welcome our friend, the Senator from Alaska. Glad to see you here. And also Mr. DeFazio and the other witnesses. Thank you also for being here, Mr. Radanovich. Senator, I think with your legislation, there will be some small problems to work out. We will try and work with you.

Mr. BARTON. Mr. Chairman, you need to speak up a little bit so we can——

Mr. DINGELL. Mr. Chairman, I also have an opening statement which I ask be inserted into the record at this time.

[The prepared statement of Hon. John D. Dingell follows:]

PREPARED STATEMENT OF HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. Chairman, I want to welcome our guests, Mr. DeFazio, Mr. Radanovich, and, of course my good friend the Senator from Alaska.

Today's hearing covers a good deal of ground, most of it relating to the relicensing of hydroelectric facilities. Some of the bills are simple extensions of construction licenses. Because of the limitations set in the Federal Power Act, the Committee has had a long, bipartisan tradition of moving non-controversial license extensions, so long as the Commission raises no objections. I will say that it is very unusual—though not unheard of—for Congress to extend the license for more than six years beyond the four year period granted by FERC. One of the bills we are considering today, authored by my friend Senator Craig, would require us to deviate from those standards and I think we need to carefully consider the legislation to decide if it is appropriate to move forward.

Two of the bills before us would have us exempt small hydroelectric projects in the states of Hawaii and Alaska, respectively, from the possibility of FERC regulation under Section 4(e) and Section 23(b) of the Federal Power Act. This would leave these projects solely under the jurisdiction of these states. I am curious as to why these two states should be treated differently from the other 48 states. I am, however, certainly open to the arguments of my friend from Alaska and want to extend him every courtesy and consideration.

Another bill, H.R. 1262, authored by my colleague from the Michigan delegation, Mr. Hoekstra, would exempt from FERC relicensing and regulation for all time the Hart Lake project on the Pentwater River in Michigan. I would truly like to be helpful to my colleague, but the legislation has drawn strong objections from FERC, the resource agencies, and environmental groups. In particular, the Michigan United Conservation Clubs—which counts 100,000 members in my state—has submitted testimony in opposition to H.R. 1262 and other legislation before us today, and I ask that the testimony be made part of the record. Finally, the State of Michigan has informed the Majority staff, Mr. Hoekstra, and my staff that it opposes the bill. I regret that this leaves me with very little room to be of assistance.

The other hydroelectric bill on which we will hear testimony today is legislation offered by the Ranking Member of the Finance Subcommittee, Mr. Towns. As many of you know, I have long taken a strong interest in hydropower issues and the hydroelectric relicensing process. In the mid-1980s, I worked closely with several other committee members on enactment of the Electric Consumers Protection Act (ECPA),

which attempted to balance environmental values and the economic benefits of hydropower. This statute amended the Federal Power Act to direct FERC to give equal consideration to fish and wildlife, recreation, and other environmental benefits.

There are a number of factors that led to this change in 1986. For the 65 years prior to enactment of ECPA, the law more or less promoted the development of hydroelectric power, with little weight given to other uses of a waterway and its ecosystem. Now, the waters of the United States are public resources owned by all the people. The production of electric power is but one of many potential uses of a waterway, and FERC only the regulator of that particular use. The resource agencies and the states are mainly responsible for the management of these bodies of water and often the surrounding land, so they have been given an appropriate level of input into any FERC decision that would affect the disposition of that water and land. Another important factor to keep in mind is that these licenses can be issued for up to 50 years. That's a pretty long time. To put it in perspective, the last time some of these dams went through re-licensing, I wasn't in Congress and Strom Thurmond was a Democrat. So, I think a rigorous licensing process is not an undue burden.

Having said all this, if there is truly a problem that can't be handled by the regulatory process or readily resolved by the courts and that is causing real uncertainty or harm, then we should consider whether legislative action might be helpful on balance. That was the case in 1986 when we passed ECPA. But there should be a large body of evidence and a large, diverse group of stakeholders supporting legislative action. As of now, I do not think either of those conditions have been met, but I remain open to being convinced.

Finally, we have a bill before us that would amend the Pacific Northwest Electric Power Planning and Conservation Act to allow the Bonneville Power Administration (BPA) to sell electricity to joint operating entities (JOEs).

Our former colleague Ron Wyden first contacted me about this when the Senate was considering this legislation late last year. I know he, Mr. DeFazio, Rep. Hastings, and Rep. Walden are very interested in seeing this legislation move quickly through the legislative process. In an effort to assist them and expedite Congress' consideration of this matter, in mid-January I sent questions to seven stakeholders about the legislation and its impact.

I am happy to say that six of those stakeholders took this matter seriously and responded fully and quite promptly to my request. They had responses to me over a month ago. I believe their responses will help us as we continue to consider the legislation and I ask that my letters and their responses be made a part of the record.

Unfortunately, the one "stakeholder" that has yet to respond is the one that is responsible for administering the law: the Department of Energy. My friends from the Northwest should know that it is due to the Department's inability or unwillingness to respond in a timely fashion, that we lack the information necessary to fully consider their proposal. I am also disturbed by the lack of a response from DOE, because the information I requested from the Department is of a basic nature, on a proposal that had been considered previously by the Senate, and therefore I find it difficult to believe that my request was extraordinary. Yet, judging by the written testimony of Mr. Allen Burns, DOE still cannot answer these questions.

Mr. Chairman, I would like to submit for the record the two letters and questions I sent to the Department. I would also ask that you keep the record of this hearing open for a substantial amount of time because that may be our only hope for ever getting the Department to contribute something useful to this hearing.

With that Mr. Chairman, I thank you for your indulgence and will look forward to hearing from our witnesses.

Mr. BARTON. Without objection, so ordered. Does the gentleman from Arizona, Mr. Shadegg, wish to make an opening statement?

Mr. SHADEGG. I'll make a brief one, Mr. Chairman. I simply want to thank you for holding this hearing. I think it is extremely important. I am particularly interested in the issue of relicensing the pilot hydropower plants. With the current energy crisis we are suffering, the spike in the price of gasoline and crude oil, and with the recognition that many of our strategies to control air pollution and to avoid further damage to our air quality, I think it is incumbent upon this Congress to ensure that the process of relicensing dams is accomplished in an appropriate fashion and that that——

Mr. BARTON. You say relicensing dams or relicensing Dems?

Mr. SHADEGG. Dams.

Mr. BARTON. Just want to get it on the record.

Mr. SHADEGG. Relicensing hydroelectrical projects if you prefer, Mr. Chairman.

Mr. BARTON. That's more appropriate.

Mr. SHADEGG. And they affectionately labeled me "Mr. Hydro" last year.

Mr. BARTON. No. They actually labeled you "Hydro Man."

Mr. SHADEGG. I commend my colleague, Mr. Towns, for his legislation, and I'm anxious to hear the testimony here this morning.

Mr. BARTON. Thank you. The distinguished gentleman from New York, a member of the full committee, not of the subcommittee, but who is a distinguished guest today. Would you like to make an opening statement?

Mr. TOWNS. Thank you very much, Mr. Chairman, and I also thank you for holding this hearing. First I'd like to thank you again for holding this hearing on my bill, H.R. 2335, the Hydroelectric Licensing Process Improvement Act of 1999. This is an important issue, and it deserves the attention that we are giving it today.

I would also like to thank the witnesses. I have reviewed your testimony. I look forward to the opportunity to discuss these issues with you during the question and answer period.

Over half of all nonFederal hydroelectric capacity is scheduled to be relicensed in the next 15 years. If current trends continue, our country could lose a number of hydropower projects and with them enormous clean energy and other benefits. Congress must act, and it must act now, to improve the relicensing process.

I think that all of the witnesses today, regardless of whether they support my legislation, will acknowledge that there are serious problems with the current hydroelectric licensing process. The present process broken and should be fixed. While I commend FERC and the other agencies involved in the several well-known efforts to rationalize the licensing process, I do not believe that they are sufficient to bring the necessary level of accountability and responsibility to the process. Statutory changes are needed to require agencies to consider all important factors when setting mandatory conditions and to give applicants some procedural protections to ensure that the agencies abide by those requirements.

Without going into the description of H.R. 2335, I do want to emphasize, this legislation does not—and I emphasize that—does not propose to repeal mandatory conditioning. Neither does it modify or repeal the environmental laws of the resource agencies involved in the licensing process. Rather, the bill calls for the reasonable implementation of these laws to achieve a balance that will protect the environment while ensuring a viable hydroelectric industry.

Finally, Mr. Chairman, I would like to note also that since this bill was introduced, other problems facing companies trying to relicense hydro projects have come to my attention. For example, I recently learned about a problem of a utility company with respect to their efforts to relicense a project. Unfortunately, the State has used the authority delegated to them under section 401 of the Clean Water Act to impose license conditions without regard to the costs and benefits of the license conditions they would impose.

I believe this is an important issue that warrants additional consideration by this subcommittee. Once again, I would like to thank you for extending to me the courtesy to come and to make an opening statement and to indicate that I look forward to working with you to be able to bring about some changes.

Any time you have a situation where you try to relicense, you don't know how many lawyers you need, you don't know how much money you need or do you have any idea what year it will ever happen. So thank you very much, Mr. Chairman.

Mr. BARTON. Thank you, Congressman. All of the members not present have the requisite number of days to put their opening statement in the record at the appropriate point.

[Additional statement submitted for the record follows:]

PREPARED STATEMENT OF HON. TOM BLILEY, CHAIRMAN, COMMITTEE ON COMMERCE

Mr. Chairman, this hearing is indeed timely. It has been many years since the Subcommittee on Energy and Power reviewed legislative proposals to reform the Federal hydroelectric relicensing process.

This is not an issue that has gotten much attention. My first priority is to enact comprehensive electric restructuring legislation. I intend to push very hard for that to happen. Of course, 10 percent of U.S. electric generation comes from hydroelectric projects. Hydroelectric relicensing is an important issue in many States, and I applaud my good friend Mr. Towns' work.

Many believe the current relicensing process is hopelessly broken and there is a need to amend the Federal laws that govern this process. Others are concerned that legislation might undermine the level of protection for the environment and fish in the relicensing process.

In my view, a relicensing process that takes a decade or two has room for improvement. The process is a very complicated one, and involves Federal, State, and local officials. The history of the licensing process has been marked by State-Federal conflicts, and frictions between FERC and the Federal resource agencies.

I want to offer a special welcome to one of the witnesses today, Mr. Waddington of Reynolds Metals Company. I will give his comments on S. 1937 my close attention.

I look forward to hearing the testimony today.

Mr. BARTON. We're going to start with our first panel of legislators. We're going to start with Senator Murkowski. And we understand, Senator, that you are chairing a hearing in absentia at this moment. So after you give your statement you can leave, and we'll submit questions to you in writing. Or if you wish to stay and take oral questions, that'll be your prerogative.

We're going to recognize you for 7 minutes. Your written statement is in the record. Then we'll just go to Mr. Radanovich and then Congressman DeFazio.

## STATEMENTS OF HON. FRANK MURKOWSKI, A UNITED STATES SENATOR FROM THE STATE OF ALASKA; HON. GEORGE P. RADANOVICH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA; AND HON. PETER A. DeFAZIO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

Senator MURKOWSKI. Thank you very much, Mr. Chairman. Let me thank you for calling this hearing, and I think the topics that are before your committee are most appropriate, and as you indicated, they passed the Senate. Hydro relicensing, of course, is very meritorious and something we have to address and resolve.

First of all, let me thank Congressman Dingell for his remarks, and I certainly look forward to working with he and his staff as well as all the members of the committee to try and address our

little bill, which suggests, if you will, that Alaska's a little different, that a five megawatt exemption is justified, and I would hope that in my brief remarks I can convince the environmental community that it is a big plus for the environment.

Let me give you an example of why perhaps Alaska is different. You know, our pipeline has been in existence for 23 years. It's up for renewal. It needs to be relicensed. And the mandate of the Department of Interior was that it receive a full EIS. We were kind of surprised, because there's never been a pipeline that's been relicensed in this country, the hundreds of pipelines, that required anything more than environmental assessment. The explanation was, "Alaska is different."

That being the case, what we've got in the five megawatt or less bill that's before this committee is really needed for two reasons. It will help reduce the price of electricity to consumers, and it will help the environment in our State.

As you know, and those of you who have traveled in Alaska, we have a small—a potential for a small number of hydroelectric projects of five megawatts or less. These are for areas where there are no anadromous fish in the streams or the runoff, and they can meet the needs of our small communities of 2,500 to 3,000 people.

Now, FERC's licensing process is significant in case you're wondering. And as a consequence, it costs millions of dollars, and the burden of a FERC license is so great that the small projects simply can't afford the cost.

We have in my home town 18 feet of rainfall a year. That's over 220 inches. This is in southeastern Alaska. These are mountainous little streams that come down with a Pelton wheel plugged in. We can get power generation to these communities that are dependent currently on diesel power. And as a consequence, with that kind of rainfall, we're looking at projects like a black bear project on Prince of Wales at 4.5 megawatt, took 7 years to get it through FERC. In comparison, the construction only took a year.

The FERC licensing costs of $1.2 million comparison with, you know, $10 million to build the project, who pays that $1.2 million? It's the consumer through the licensing. And as a consequence, you know, it just isn't applicable in our small area. We only have 700,000 people in an area one-fifth the size of the United States that goes from Canada to Mexico, Florida to California, with the Aleutian Islands.

So what we want to make sure is that we're not bypassing any of the environmental oversight that is necessary. But we have high costs because much of our electric generation is by diesel. You know, the price, residential price of electricity in Alaska is 11.5 cents per kilowatt hour in our major cities as compared to 8.3 cents—that's 39 percent higher. In some of the villages it's up to 44 cents per kilowatt. And, you know, it's because we have to bring in the diesel fuel by barge during the summer season, or if we're short in the winter, we have to fly it in.

Now the consumers will benefit, the air quality will benefit. And finally, we do have the safeguards to ensure that in this legislation there is the necessary protection for the environment. It does not exempt Alaska's small hydro projects from regulation. Instead it allows the State to regulate in lieu of FERC. And obviously the

State's interested in its environmental consequences and responsibilities, more so than a distant FERC who, you know, sits here in Washington and looks at something 3,000 miles away a little different than the folks that are there looking at it.

In addition, because licensing and regulation for these small projects will be handled by the State instead of FERC, the processing time and the cost will be reduced.

Finally, this legislation allows Alaska to regulate the small projects only after FERC certifies that the State has in place a regulatory program which protects the public interest and the environment to the same extent provided by licensing and regulation.

Finally, the legislation specifically provides that full application of all Federal environmental natural resources or culture resource protection laws apply. Thus the environment in the legislation will provide full protection of the environment and the public interest while at the same time reducing the cost and time required to license a small hydro project in Alaska.

In summary, if enacted, this legislation would benefit Alaska, the environment and the economy, and I would encourage my environmental friends to join with me, and if they have differences, I'd be happy to discuss it with them. But this is a win-win-win, and it'll do a great benefit for Alaskans. And when you see 18—that's the year I learned to swim, when we had 18 feet of rain in 1947. Thank you, Mr. Chairman.

[The prepared statement of Hon. Frank Murkowski follows:]

PREPARED STATEMENT OF HON. FRANK H. MURKOWSKI, CHAIRMAN, COMMITTEE ON ENERGY AND NATURAL RESOURCES, UNITED STATES SENATE

Chairman Barton and the Members of the Subcommittee, I appreciate the opportunity to testify before your Subcommittee on S. 422, a bill to provide for Alaska state jurisdiction over small hydroelectric projects of 5 megawatts or less. This bill passed the Senate unanimously.

This legislation is needed for two reasons. First, it will help reduce the price of electricity to consumers in Alaska. Second, it will help the environment in Alaska. Let me explain.

Alaska has great potential for a number of small hydroelectric projects of five megawatts or less. These projects are generally run-of-the-river, meaning that no dam will be built, and they are generally located on non-anadromous rivers. A 5 megawatt generator can meet the needs of an Alaskan community of two to three thousand people.

But under existing law, in order for a hydroelectric project to be built—no matter how small or remote—it must obtain a license from the Federal Energy Regulatory Commission. And FERC's licensing process itself is a major impediment for these small projects, often killing otherwise beneficial ones.

For a large hydroelectric project costing tens or hundreds of millions of dollars, the burden of obtaining a FERC license is large, but relatively small as compared to the total cost. But that is not the case for a small project. Let me give some real world examples.

Take the Black Bear project on the Prince of Wales Island, a 4.5 megawatt generator. It took seven years to get through the FERC process; in comparison, construction of the project took only one year. The FERC licensing process cost $1.2 million; in comparison, it cost $10 million to build the project. And who pays that $1.2 million FERC licensing cost? You guessed it, consumers through higher electricity rates.

The Goat Lake project is another example. This 4 megawatt project took five years to get through the FERC process, which cost just over $1 million. Compare that to a construction cost of $10 million.

These are not exceptions to the rule—they represent the normal cost and time to obtain a license from the FERC. Thus, as you can see for a small project located in a remote region of Alaska, FERC's licensing process is a major expense. And for

too many small projects, this alone dooms an otherwise economically viable and environmentally beneficial project.

These small hydro projects are critically important to consumers and for the economic development of Alaska. Alaskans have the most expensive electricity in the United States, and anything we can do to reduce that would be very helpful. According to Department of Energy data, the average residential price of electricity in Alaska is 11.5 cents per kilowatt hour as compared to a U.S. residential average of 8.3 cents per kilowatt hour—39 percent higher. And in some parts of Alaska the residential price reaches a stunning 44 cents per kilowatt hour—5 times the U.S. average. A key reason for this high cost of electricity is that a large share of Alaska's electrical supply—particularly in rural and remote regions—is provided by diesel-fired internal combustion engines. If high-priced diesel-fired electric generators could be replaced with low-cost hydroelectric power, consumers would enjoy significant reductions in the electrical bills. That would be particularly beneficial to Alaskans on fixed incomes.

Not only would Alaska's consumers benefit from low-cost hydroelectric power, Alaska's environment would also benefit. Diesel-fired generators produce significant amounts of unhealthy air emissions—hydroelectric power produces none.

Let me turn now to the legislation itself. Its most important aspect is that it provides for the full protection of the environment. The legislation does not exempt Alaska's small hydro projects from regulation. Instead, it allows the State of Alaska to regulate in lieu of FERC. I ask: Who is more interested in the environment of Alaska—Alaskans or a distant FERC? In addition, because licensing and regulation of these small projects will be handled by the State of Alaska, instead of FERC, processing time and costs will be reduced significantly.

Moreover, the legislation allows Alaska to regulate these small projects only after FERC certifies that the State of Alaska has in place a regulatory program which "protects the public interest . . . and the environment to the same extent provided by licensing and regulation . . . [by the FERC]." Finally, the legislation specifically provides for the full application of all "Federal environmental, natural resources, or cultural resources protection laws . . ." Thus, enactment of this legislation will provide for full protection of the environment and the public interest, while at the same time reducing the cost and time required to license a small hydro project in Alaska.

In summary, if enacted this legislation will benefit both Alaska's environment and its economy.

Mr. BARTON. Thank you, Senator. I just want to——

Senator MURKOWSKI. And thank you, gentlemen.

Mr. BARTON. Thank you.

Senator MURKOWSKI. Thank you, John.

Mr. BARTON. I just—we have a new timing system, and we went from the old timing system to an egg timer to this high tech system, and it's supposed to give a certain amount of time into the statement, usually at the end where you sum up and the little yellow light goes on. As soon as Senator Murkowski started speaking, the yellow light went on to sum up.

Senator MURKOWSKI. Well, that's because I'm from the Senate.

I was winding up.

Mr. BARTON. All right.

Senator MURKOWSKI. Would you excuse me?

Mr. BARTON. Yes. We'll submit any questions to you in writing for the record.

Senator MURKOWSKI. I'm conducting a hearing on climate change.

Mr. BARTON. If you learn anything, send us a copy.

Senator MURKOWSKI. It's pretty cold in Barrow this winter.

Mr. BARTON. Thank you, Senator.

Senator MURKOWSKI. Thank you very much.

Mr. BARTON. We'd now like to hear from our distinguished colleague from California, Mr. Radanovich. You will be recognized for 7 minutes also, and then your statement's in the record in its entirety.

**STATEMENT OF HON. GEORGE P. RADANOVICH**

Mr. RADANOVICH. Thank you so much, Mr. Chairman. And I appreciate the opportunity to testify before your subcommittee.

I want to voice my support, my strong support for Congressman Towns' bill, 2335, The Licensing Process Improvement Act of 1999.

I appear before you today in two capacities, first as a representative who is concerned about our national energy policy, but also here as chairman of the Western Caucus, a bipartisan group of 56 Members of Congress concerned about improving the quality of life for Western and rural Americans.

The environmental vision of the Western Caucus is grounded in the belief that sound scientific evidence, not politics, should be the determining factor in environmental decisionmaking, and that environmental protection should be achieved in a cooperative manner rather than through conflict and wasteful litigation.

That is precisely the philosophy behind H.R. 2335, and that's why I support the bill, and I urge others to support it as well.

Our Nation is at a precarious crossroads with energy—with regard to its energy policy. On need look no further than the local gas station, where gas prices are reaching levels close to $2 a gallon in some areas of the Nation, to recognize the serious repercussions of our ongoing dependency on foreign sources of energy. This dependence is even more perplexing when one considers that domestic generation of hydropower, our Nation's largest emissions-free renewable energy resource, is diminishing as a result of FERC licensing process that most, if not all, parties agree is in need of repair.

Since the late 1800's when the first hydroelectric plant in the American West—the Folsom Powerhouse—opened in California, hydropower has played a vital role in California's energy mix. According to the Energy Information Administration, California hydroelectric facilities generated about 88.5 billion kilowatt hours of hydropower in the 2-year period of 1997 to 1998, representing approximately 40 percent of the net electric utility generation in the State.

The benefits of hydropower to my State and to the Nation go well beyond clean, efficient, renewable energy—renewable electric power. Our Nation's hydro projects provide drinking water, flood control, fish and wildlife habitat, irrigation and environmental enhancement funding, and recreation to benefit all Americans.

In my district in California, Hunting Lake and Shaver Lake re reservoirs that were created by and exist solely because of the Big Creek hydro project. In total, my district comprises over 20 major hydro projects, generating about 3,000 megawatts of hydropower. Due to its unique load following capability, peak capacity and voltage stability attributes, hydropower plays a critical role in maintaining reliable electric service in the region that I represent as well as throughout the Nation.

In spite of the benefits our country derives from hydropower, an enormous problem exists. The problem is that overly burdensome, costly and litigation-prone FERC licensing process is threatening our Nation's nearly 60,000 megawatts of nonFederal hydro capacity.

A typical hydro license application can take from 8 to 10 years to weave its way through the complex licensing process. Some have taken more than 20 years. Certain Federal agencies are allowed to set mandatory conditions on FERC licenses without regard to their effects on project economics, energy benefits and values protected by other statues or regulations, or FERC-imposed license conditions.

There is no referee other than the Federal courts, which can resolve conflicts between these agencies and reconcile their inconsistent demands. Often the result is license conditions that have nothing to do with project impacts. Hydropower licensees, and even the FERC, have no opportunity to effectively appeal or even question the basis of mandatory conditions set by the agencies except through litigation.

The unfortunate result is higher costs, loss of operational flexibility and lost generation due to new constrains imposed on other operations.

Earlier this year in its Energy Outlook 200 report, the Energy Information Administration, the independent statistical branch of the U.S. Department of Energy, for the first time forecast decreased hydroelectric capacity as regulatory actions limit capacity at existing projects.

My colleagues, this is troubling—and it's a very troubling and urgent state of affairs. Troubling because this is a clean, wholly domestic source of energy we are talking about. Urgent because over the next 15 years, over half of all nonFederal hydro capacity—nearly 29,000 megawatts of hydropower—must go through this FERC relicensing process. That, my friends, are why we are here today and why this bill is so important.

By enacting H.R. 2335, Congress can do its part to ensure that this important renewable resource continues to operate in a cost-effective and environmentally compatible manner. If current trends continue, my State our country will lose a number of hydropower projects, and with them, enormous clean energy benefits. Moreover, consumers could faced increased energy replacement costs.

Let me talk briefly about what this bill is and what it isn't. This is a moderate bill that enjoys bipartisan support in the House of Representatives. It will not change or modify any existing environmental laws nor remove regulatory authority from Federal resource agencies. Rather, it will give these agencies the responsibility to consider and to be accountable for the full effects of their actions before imposing mandatory conditions on a hydro license. This bill also requires that resource agency conditions reflect sound scientific evidence.

In closing, I want to reiterate that H.R. 2335 is a balanced bill. It emphasizes sound scientific evidence as the determining factor in environmental decisionmaking. the measure also achieves environmental protection in a cooperative manner, without costly lawsuits. By providing reasonable relicensing of hydroelectricity projects, H.R. 2335 is a benefit to the future of this clean, renewable energy resource. For these reasons, I encourage you to support this bill.

I commend Congressman Towns for his leadership in introducing this important bill and urge that the subcommittee and all of my

colleagues in the House work toward the enactment of this bill in this session.

Thank you, Mr. Chairman.

[The prepared statement of Hon. George P. Radanovich follows:]

PREPARED STATEMENT OF HON. GEORGE RADANOVICH, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Chairman Barton, members of the Subcommittee, thank you very much for giving me the opportunity to appear before you today to voice my strong support for Congressman Towns' bill, H.R. 2335, "The Licensing Process Improvement Act of 1999".

I appear before you today in two capacities. First, as a representative who is concerned about our national energy policy; but I am also here as the Chairman of the Western Caucus, a bipartisan group of 56 Members of Congress concerned about improving the quality of life for Western and rural Americans. The environmental vision of the Western Caucus is grounded in a belief that "sound scientific evidence, not politics, should be the determining factor in environmental decision-making," and that environmental protection should be achieved "in a cooperative manner, rather than through conflict and wasteful litigation." That is precisely the philosophy behind H.R. 2335. That is why I support this bill. And that is why I urge you to support it as well.

Our nation is at a precarious crossroads with regard to its energy policy. One need look no further than the local gas station—where gas prices are reaching levels close to $2.00/gallon in some areas of the nation—to recognize the serious repercussions of our ongoing dependency on foreign sources of energy. This dependency is even more perplexing when one considers that domestic generation of hydropower—our nation's largest, emissions-free, renewable energy resource—is waning as a result of a FERC licensing process that most, if not all, parties agree is in need of repair.

Since the late 1800s, when the first hydroelectric plant in the American West—the Folsom Powerhouse—opened in California, hydropower has played a vital role in California's energy mix. According to the Energy Information Administration, California hydroelectric facilities generated about 88.5 billion kilowatt hours of hydropower in the two year period 1997-98, representing approximately 40 percent of net electric utility generation in the state.

The benefits of hydropower to my state and to the nation go well beyond clean, efficient, renewable electric power. Our nation's hydro projects provide drinking water, flood control, fish and wildlife habitat, irrigation. environmental enhancement funding, and recreation benefits to all Americans. In my district in California, Huntington Lake and Shaver Lake are reservoirs that were created by and exist solely because of the Big Creek hydro project. Also, due to its unique load-following capability, peaking capacity and voltage stability attributes, hydropower plays a critical role in maintaining reliable electric service throughout the nation.

It seems like hydropower is a good deal for the country and its citizens. So, what is the problem?The problem is that an overly burdensome, costly and litigation-prone FERC licensing process is threatening our nation's nearly 60,000 megawatts of non-federal hydro capacity.

A typical hydro license application can take from eight to 10 years to weave its way through the complex licensing process-some have taken more than 10 years. Certain federal agencies are allowed to set "mandatory" conditions on FERC licenses without regard to their effects on project economics, energy benefits and values protected by other statutes or regulations, or FERC imposed license conditions. There is no "referee" other than the federal courts, which can resolve conflicts between these agencies or reconcile their inconsistent demands. Often, the result is license conditions that have nothing to do with project impacts. Hydropower licensees, and even the FERC, have no opportunity to effectively appeal, or even question, the basis of mandatory conditions set by the agencies, except through litigation.

The unfortunate result is higher costs, loss of operational flexibility, and lost generation due to these constraints imposed on operations. Earlier this year, in its Energy Outlook 2000 report. the Energy Information Administration—the independent, statistical branch of the U.S. Department of Energy—*for the first time* forecasts decreased hydroelectric capacity as "regulatory actions limit capacity at existing projects . . ."

My colleagues, this is a troubling and urgent state of affairs. Troubling because this is a clean, wholly domestic source of energy we are talking about. Urgent because over the next 15 years, over half of all non-federal hydro capacity—nearly 29,000 megawatts of hydropower—must go through this FERC relicensing process.

That, my friends, is why we are here today, and why this bill is so important. By enacting H.R. 2335, Congress can do its part to ensure that this important renewable resource continues to operate in a cost-effective and environmentally compatible manner. If current trends continue, my state and our country could lose a number of hydropower projects and, with them, enormous clean energy benefits. Moreover, consumers could face increased energy replacement costs.

Let me talk briefly about what this bill is and what it isn't. This is moderate bill that enjoys bipartisan support in the House of Representatives. It will not change or modify any existing environmental laws, nor remove regulatory authority from federal resource agencies. Rather, it will give these agencies the responsibility to consider, and be accountable for, the full effects of their actions before imposing mandatory conditions on a hydro license. The bill also requires that resource agency conditions reflect sound, scientific evidence.

In closing, I want to reiterate that H.R. 2335 is a balanced bill. It emphasizes sound scientific evidence as the determining factor in environmental decision-making. The measure also achieves environmental protection in a cooperative manner, without costly lawsuits. By providing reasonable relicensing of hydroelectricity projects, H.R. 2335 is a benefit to the future of this clean, renewable energy source. For these reasons, I encourage you to support the bill.

I commend Congressman Towns for his leadership in introducing this important bill and urge the subcommittee and all of my colleagues in the House to work towards enacting this bill this session.

Thank you.

Mr. BARTON. Thank you, Congressman.

Mr. RADANOVICH. I, too, do have a hearing in the Resources Committee that is of specific interest to my constituents, so if I may excuse myself.

Mr. BARTON. Yes, sir.

Mr. RADANOVICH. Thank you very much.

Mr. BARTON. Thank you. We'd now like to hear from Congressman DeFazio. We'll put your statement in the record and recognize you for 7 minutes.

**STATEMENT OF HON. PETER A. DeFAZIO**

Mr. DEFAZIO. Thank you, Mr. Chairman. I'm here today to talk about the JOE bill.

Mr. BARTON. Oh, no.

Mr. DEFAZIO. Sometimes known as Senate bill 1937. I commend the committee on bringing the bill to the attention of the subcommittee and am hopeful that you'll act favorably upon it in the near future.

There is a time sensitivity to this legislation. The bill is quite simple, actually. It would establish a JOE, or Joint Operating Entity, in the Pacific Northwest, which will allow the smaller, consumer-owned utilities to aggregate their demand and purchase their power from the Bonneville Power Administration and achieve some efficiency in their operations that could be passed on as cost savings to consumers, both residential and business consumers of those utilities.

The legislation is very, very narrow in scope. It does—you know, although it amends the Northwest Electric Power Planning Conservation Act, it does not go to the issue of preference. It does not entitle the utilities who would enter into the Joint Operating Entities to purchase more power than they could individually from the Bonneville Power Administration. It does not change their rights in terms of resale of the preference power. It just allows them to aggregate—these are very, for the most part, very small utilities that do not have a tremendous amount of technical expertise.

They're dealing with a very large Federal agency, the Bonneville Power Administration, which is proposing rather complex new contractual arrangements, including some things called slice which nobody quite understands, and other things. And it just would be of great utility to these small entities to be able to aggregate their purchasing power and to also pool their funds to higher the technical expertise they need to better negotiate with the Bonneville Power Administration.

In my opinion, it will not disadvantage any other customers or potential customers of the Bonneville Power Administration since all these utilities are entitled to full preference and generally are all full requirements customers getting all of their power from the Bonneville Power Administration. Yet you will hear from the aluminum industry, who are raising some procedural concerns, as I understand, not particularly substantive concerns, and asking that consideration be delayed til such a time as it could be part of a greater overhaul or discussion of the Bonneville Power Administration's operating statutes.

The problem is that the Bonneville Power Administration is on a short timeline for these contracts. The current contracts are expiring. In order to meet their obligations both to bondholders and to the Federal treasury and to the region, the Bonneville Power Administration is going to have to complete the contracts in the not-too-distant future. And therefore, if this legislation is not quickly adopted, it will just disadvantage one small group of ratepayers in the contractual discussions.

So I would urge the subcommittee's favorable preference—or favorable action. It does not, again, alter the status between and among Bonneville's other customers.

[The prepared statement of Hon. Peter A. DeFazio follows:]

PREPARED STATEMENT OF HON. PETER DEFAZIO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OREGON

As co-chair of the Northwest Energy Caucus, I would first like to thank the members of the Commerce Committee for their thorough and efficient work on Senate Bill 1937. It has been a pleasure to work with this committee on Federal Power Marketing Agency issues, in particular trying to establish joint Operating Entities. I am particularly appreciative of Mr. Barton's involvement with the Northwest Energy Caucus as the House struggles with energy restructuring. I am grateful to Mr. Dingell for bringing this issue before the Commerce Committee so that everyone might better understand the merits of establishing joint Operating Entity in the Pacific Northwest and its importance to many rural Oregonians.

The energy market in the Pacific Northwest is unique compared with other regions of the country. Over 45% of the power used by residential and industrial customers is generated and marketed by Bonneville Power Administration (BPA). Many rural areas in my district are serviced by rural electric cooperatives and other consumer-owned utilities that rely almost exclusively from on power provided by BPA.

Establishing a Joint Operating Entity in the Pacific Northwest, will allow smaller, consumer-owned utilities to more effectively purchase their power from BPA and achieve more efficiency in their operations which should be passed on as cost savings to consumers.

While S. 1937 amends the Pacific Northwest Electric Power Planning and Conservation Act, the legislation does not amend statutes governing preference. The Joint Operating Entity will not have the ability to purchase more power than individual utilities already receive from BPA. In addition, S. 1937 does not expand the rights of BPA's consumer-owned utilities to purchase and resell BPA power. It simply allows a joint Operating Entity to manage power purchases from BPA.

BPA and its customers have been working for two years to negotiate contacts and establish rates for the future sale of power. This spring and summer, BPA will com-

plete its subscription and rate negotiations. Oregon consumer-owned utility customers will greatly benefit from the establishment of joint Operating Entities before contracts and rates are finalized.

I understand that the Direct Service Industries do not support moving the legislation although they have no substantive objections. I find this and other recent actions of the Direct Service Industries at odds with many of the consumer-owned and investor-owned utilities in the Pacific Northwest. I urge this committee to support S. 1937 and quickly move this legislation before the entire House.

Again, I appreciate the attention this Committee has given to this important issue.

Mr. BARTON. Thank you, Congressman. The Chair will now recognize members for questions for Congressman DeFazio. I don't have any. Congressman Towns?

Mr. TOWNS. Do not have any.

Mr. BARTON. Congressman Shadegg?

Mr. SHADEGG. I don't have any.

Mr. BARTON. Congressman Markey?

Mr. MARKEY. Good job. Excellent job.

Mr. BARTON. Congressman Bryant?

Mr. BRYANT. I don't have any. We could call it the ED, though, bill, JOE-ED bill, you know, if you'd like.

Mr. DEFAZIO. If that'll help, anything. We're flexible on the name, Mr. Chairman.

Mr. BARTON. I understand.

Mr. DEFAZIO. As long as JOE is part of it.

Mr. BARTON. That's—you know, success has many fathers, and failure none, so we'll see.

Mr. DEFAZIO. All right.

Mr. BARTON. Thank you for your testimony.

Mr. DEFAZIO. Thank you, Mr. Chairman.

Mr. BARTON. Good job. We now want to hear from our second panel, but before I bring them forward, I want to make a statement. We have been in a continuing battle with members of the executive branch about getting their testimony in on time. Our primary problems have been with the Department of Energy. It got so bad with the Department of Energy that I called the Secretary and said, "If your testimony's not on time this time, don't bother coming." And it got here on time.

Today, of our administration witnesses, all but one had their testimony in on time. The Department of Agriculture testimony came in at 8:30 this morning. So we're going to ask Mr. Paul Brouha, who's the associate deputy chief, to wait until the third panel to give staffs on both sides the opportunity to read the testimony.

My briefing book was given to me last night at 10:30. Didn't have it in it. So hopefully by the time the first—the second panel gets their—goes through their testimony and answers questions, we will have had a chance to digest the Department of Agriculture's testimony. Mr. Brouha can be on the third panel. If he has other things he needs to do, he can go back to the Department of Agriculture.

So, will Mr. Hoecker of the Federal Energy Regulatory Commission and Mr. Leshy from the Department of Interior come forward. Mr. Hoecker is accompanied by Commissioners Hebert and Massey. Mr. Burns, who is with the Bonneville Power Administration, the Department of Energy, and Ms. Penelope Dalton, who is with the National Marine Fisheries Service, if you gentlemen and ladies will come forward.

Do you want to make an opening statement?

Mr. MARKEY. Delighted to.

Mr. BARTON. While they're coming forward, we will let Congressman Markey make a brief statement.

Mr. MARKEY. Thank you, Mr. Chairman. I appreciate it. Over 200 years ago, Sir Isaac Newton told us, every body continues in its state of uniform motion unless it is compelled to change that state by forces impressed upon it. Little did Mr. Newton know how relevant that finding would be to today's hearing.

Salmon swimming upstream know how relevant it is. They abut Mr. Newton's first law head on, literally, as they try to pass rivers and streams blocked by hydroelectric facilities. The hydropower industry knows what it means, too. They know that FERC's relicensing procedures may force them to consider the environmental and the resource values of their hydroelectric plants. The process provides the public with an opportunity to assess the critical environmental, recreational, navigational, flood control, irrigation, and other values that are also in contention with the process of producing electricity.

So they're trying to rewrite Sir Isaac Newton's first law of motion by diminishing the resource agency's involvement in the relicensing of these hydropower facilities by letting the hydropower industry continue with less resistance and Federal oversight.

Now while I understand that the industry finds the complexity of the relicensing process frustrating, I must note that licensees held their licenses for up to 50 years. In 1985, in 1986 when I was chairman of this subcommittee——

Mr. BARTON. Oh, the golden years.

Mr. MARKEY. The good old days. I spent considerable time and effort in forging the consensus that became the Electric Consumers' Protection Act of 1986, or ECPA. That legislation included provisions that required that the FERC base its recommendations for mitigating the adverse effects of a license on the recommendations of Federal and State resource agencies and mandated that FERC negotiate with those agencies in the event of disagreements.

ECPA also required FERC to give equal consideration to the environment, to fish, wildlife and other nonelectricity values as it gives to the development objectives in making licensing decisions.

Congress enacted these reforms.

Mr. BARTON. Can the gentleman speed it up a little bit? I see you've got about four more pages of this brief statement.

Mr. MARKEY. I'll be glad to do it. I'll be glad to do it. That became the law of the land, and it became the new constitution for constructing this balance between the environment——

Mrs. WILSON. Would the gentleman yield for just a question?

Mr. MARKEY. Sure. I'd be glad to.

Mrs. WILSON. Does this Newtonian theory mean that the gentleman is still living in the world before Einstein and the discovery that energy and mass are interchangeable and perhaps we might be able to move at the speed of light to——

Mr. BARTON. See, no good deed goes unpunished.

Mr. MARKEY. No. It only means that as an English major, it was the best metaphor available on short notice.

And again, you know, congressional expert is an oxymoron. We're only experts compared to each other, not the real experts out here.

Mr. BARTON. That's true.

Mr. MARKEY. So I just do my best to illuminate, you know, as best I can the contentions on both sides.

Mr. BARTON. Well, we'll put the gentleman's complete formal statement in the record.

Mr. MARKEY. So I'm not—all right. So I'll conclude by saying I am not saying torpedo all the dams. All I'm saying is we shouldn't be saying damn the environment, full speed ahead, that we have to construct a balance. I think the 1985-'86 act was a good balance, and I think that we should be very careful if we try to alter that balance. And I thank you, Mr. Chairman.

[The prepared statement of Hon. Edward J. Markey follows:]

PREPARED STATEMENT OF HON. EDWARD J. MARKEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MASSACHUSETTS

Thank you, Mr. Chairman. Over 200 years ago Sir Isaac Newton told us

> "Every body continues in its state . . . of uniform motion . . . unless it is compelled to change that state by forces impressed upon it."

Little did Mr. Newton know how relevant that finding would be for today's hearing.

Salmon swimming upstream know how relevant it is. They abut Mr. Newton's first law head-on—literally—as they try to pass rivers and streams blocked by hyrdopower facilities.

The hydropower industry knows what it means too. They know that FERC's relicensing procedures may force them to consider the environmental and resource values of their hydroelectric plants. The process provides the public with an opportunity to assure that critical environmental, recreational, navigational, flood control, irrigation, other values are being properly served. So they're trying to rewrite Sir Isaac Newton's first law of motion by diminishing the resource agencies' involvement in the relicensing of these hydropower facilities—by letting the hydropower industry continue with less resistance and federal oversight.

While I understand that the industry finds the complexity of the relicensing process frustrating, I must note that licensees hold their licenses for up to 50 years. From 1985 to 1986, I spent considerable time and effort, as the Chairman of the Energy Conservation and Power Subcommittee, in forging the consensus that became the Electric Consumers Protection Act of 1986, or ECPA.

That legislation included provisions that required that FERC base its recommendations for mitigating the adverse effects of a license on the recommendations of Federal and State resources agencies and mandated that FERC negotiate with those agencies in the event of disagreements. ECPA also required FERC to give equal consideration to the environment, fish and wildlife, and other nonpower values as it gives to power and development objectives in making licensing decisions. Congress enacted these reforms then because it was concerned that FERC was not according sufficient weight to environmental and nonpower concerns as it reviewed requests for relicensing of hydroelectric facilities.

I would note that when we passed EPCA, we did so with unanimous bipartisan support of Members of the Committee and of the House and with the endorsement of both the environmental community and the support of the electric utility industry, including the Edison Electric Institute and other industry trade associations. Indeed, the legislative history of the bill shows that it had the support of such wild-eyed liberals as Frank Murkowski, Mike Oxley, and Ted Stevens. There were no calls at the time for repeal or weakening of the resource agencies mandatory conditioning authority back then, even though this authority had been exercised by the agencies for decades.

So what has changed? Little that I can see, other than the fact that FERC, at the direction of Congress, must now give greater weight to the adverse environmental effects of a dam when it considers relicensing. Since many of the dams that are coming up for relicensing were first licensed before Congress enacted many of the environmental laws now on the books, it is inevitable that the industry will in some cases be required to take actions to rectify harm to fish and wildlife, natural habitat, recreational or other values. In my view, industry has a very high burden of proof to meet if it is to seek alterations in the process that might sacrifice these critical nonpower values.

Let me be clear: I'm not saying we should "torpedo all the dams". But I'm also not saying "damn the environment—full speed ahead" with relicensing. What I am saying is that we have a relicensing process administered by FERC that holds water and should continue.

I look forward to the testimony of the witnesses this morning on this matter, and to assuring that the integrity of the hydroelectric relicensing process remains intact.

Mr. BARTON. Well, we actually do value your expertise as past chairman of this subcommittee. And as we move to mark-up, we will call on that expertise.

Mr. MARKEY. Thank you, Mr. Chairman.

Mr. BARTON. This will be a bipartisan basis—process, and I'm sure your institutional memory will be of considerable value, actually.

All right. Let's start with the honorable chairman of the Federal Energy Regulatory Commission. Did Mr. Massey and Commissioner Hebert, are you all going to give statements also or are you just here to help the distinguished chairman? Okay. So we'll go with Mr. Hoecker, then Mr. Leshy and Mr. Burns, then Dr. Rosenberg. Okay.

Chairman Hoecker, we'll recognize you for 5 minutes, put your statement in the record, and ask you to summarize it. Welcome to the subcommittee again.

**STATEMENTS OF HON. JAMES J. HOECKER, CHAIRMAN, FEDERAL ENERGY REGULATORY COMMISSION, ACCOMPANIED BY CURT HEBERT, JR. AND WILLIAM L. MASSEY, COMMISSIONERS; JOHN D. LESHY, SOLICITOR, U.S. DEPARTMENT OF THE INTERIOR; ALLEN BURNS, VICE PRESIDENT OF REQUIREMENTS MARKETING, BONNEVILLE POWER ADMINISTRATION, U.S. DEPARTMENT OF ENERGY; ANDREW A. ROSENBERG, DEPUTY ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE**

Mr. HOECKER. Thank you, Chairman Barton and members of the subcommittee. It's a pleasure to be here. Thank you for the opportunity to discuss the proposed legislation and how it might affect the commission's hydropower program.

I am pleased, of course, to be joined by my colleagues, Commissioners Massey and Hebert, who will be available to answer questions. And I convey the regrets of Commissioner Breathitt, who could not be here today.

The commission's hydropower program faces significant challenges today, particularly in relicensing the major projects whose licenses expire in the next 10 years. Although the commission is ostensibly responsible for balancing all competing interests when it authorizes hydropower project operations, it effectively shares that responsibility with other agencies which have critical environmental conditioning authority.

The commission often lacks the ability to control the timetable for license issuance and often has only very limited discretion to exercise its own judgment in determining the appropriate balance of economic efficiencies, environmental protection, and all the other public purposes the Federal Power Act identifies.

So hydropower licensing proceedings can be contentious, prolonged and costly. While I am persuaded that such problems nec-

essarily accompany any administrative proceeding that attracts such diverse, multiple interests, I believe that it is incumbent upon us in government to continue working to make licensing decisions more timely and to develop better support for them.

I am proud of what the commission has accomplished in that regard and what we propose to achieve through further collaboration with other resource agencies.

The commission takes very seriously its responsibilities to fully analyze developmental and environmental impacts, to give equal consideration to these impacts, and to exercise its balancing responsibilities in a manner that protects the environment.

It encourages the use of its alternative licensing procedures in individual cases as tools for reaching settlements to satisfy both public and private interests in a timely manner.

My written testimony today cites examples of our success. And because we respect the challenges and responsibilities faced by the resource agencies, which are assigned by the Congress to be stewards of the environment, the commission has dedicated much of its limited much of its limited resources to the pursuit of interagency agreements that will help us all serve the public better.

The commission is a key sponsor and participant with six executive branch departments in the Interagency Task Force on Improving Hydroelectric Licensing Processes. The ITF now also has a chartered advisory committee that is gathering advice from States, licensees, Indian tribes, counties, and nongovernmental organizations on how to improve the process, and I expect great things from this effort.

The principal legislation before you today, H.R. 2335, is designed to increase the efficiency of the licensing process and to promote outcomes that are in the public interest. I certainly support that intent, although some parts of the bill are more likely than others to achieve these outcomes, I believe. For instance, having the resource agencies consider a range of public interest factors in developing mandatory conditions would lead to a better informed decisionmaking, unquestionably. The commission is required to take into account a similar set of factors for matters within its discretion.

The requirement for resource agencies to document their decisonmakings is essential for due process in my view. Subjecting resource agencies to deadlines for submitting conditions, as the commission's regulations now provide, also could help improve licensing processes. These sensible requirements could make licensing more timely and efficient while developing the record that supports well-reasoned licensing decisions.

I am concerned that other provisions unnecessarily add burdensome, time-consuming steps to the process, however, and thereby add to the burden and cost placed on licensees and other participants without a compensating benefit.

I've also been asked today to testify on six other bills. And in that regard, I rely on my written testimony and have nothing further to add about them at this time.

I want to thank the chairman and the subcommittee for its interest in hydropower licensing at the Commission, and I will be very pleased to answer whatever questions you may have.

[The prepared statement of Hon. James J. Hoecker follows:]

PREPARED STATEMENT OF JAMES J. HOECKER, CHAIRMAN, FEDERAL ENERGY REGULATORY COMMISSION

Mr. Chairman and Members of the Subcommittee: I appreciate the opportunity to appear before you to discuss proposed legislation, and how it might affect the Commission's hydropower program.

The Commission's hydropower program faces significant challenges today, particularly in relicensing the important projects whose licenses expire in the next 10 years. Although the Commission is ostensibly responsible for balancing all competing interests when it authorizes hydropower project operations, its authority is statutorily circumscribed. Other agencies have critical environmental conditioning authority, and the multiple interests involved in relicensing cases require extensive due process. As we have seen, hydropower licensing cases can lead to contentious debates among the interested parties and, at times, among different elements of the Federal government with statutory roles in the process. Concerns have been voiced about whether licensing decisions can be more timely, and whether support for decisions can be better developed.

In response, the Commission has advanced approaches that favor collaboration and balance. First, the Commission takes seriously its own responsibilities, for decisions within its discretion, to fully analyze developmental and environmental impacts, to give equal consideration to these impacts, and to exercise its balancing responsibilities in a manner that protects the environment. Second, the Commission encourages the use of its alternative licensing procedures in individual cases. This innovative approach is a tool for reaching settlements that satisfy public and private interests in a timely manner. Third, the Commission is working hard to enhance its procedures for working with the resource agencies, so the licensing process under the Federal Power Act (FPA) is as smooth and productive as possible. Legislation that will help us achieve these objectives and meet the FPA's objective of balancing all public interest considerations is helpful.

My prepared testimony today will survey the Commission's statutory responsibilities and the overlap of regulatory authorities which are involved in the licensing process. My objective is to share with the Subcommittee an assessment about how that process has worked in practice, and what we are doing to improve our productivity and our responsiveness to the needs of various participants in future cases. I will then turn to the specific bills before you.

I. THE COMMISSION'S LICENSING PROGRAM

Hydropower is the oldest area of Commission jurisdiction. The Commission's predecessor began Federal regulation of private hydroelectric generation in 1920. The Commission currently regulates over 1,600 hydropower projects at over 2,000 dams pursuant to Part I of the FPA. Those projects represent more than half of the Nation's approximately 100 gigawatts (GW) of hydroelectric capacity and over 5 percent of all electric power generated in the United States. Hydropower is an essential part of the Nation's energy mix and offers the benefits of an emission-free, renewable energy source.

I am proud of the Commission's ability to meet the challenges in this area. The Commission's hydropower work generally falls into three categories of activities. First, the Commission licenses and relicenses projects. Relicensing is of particular significance because it involves projects that originally were licensed from 30 to 50 years ago. In the intervening years, enactment of numerous environmental, land use, and other laws has begun to significantly affect the Commission's ability to control the timing of licensing and the conditions of a license. The Commission's second role is to manage hydropower projects during their license term. This post-licensing workload has grown in significance as new licenses are issued and as environmental standards become more demanding. Finally, the Commission oversees the safety of licensed hydropower dams. This program is widely recognized for its leadership in dam safety.

Non-federal hydropower projects have been required by the Congress to obtain Commission authorization if they are on lands or waters subject to Congress' authority. Original licenses are issued for terms of 30-50 years. Under the standards of the FPA, projects can be authorized if, in the Commission's judgment, they are "best adapted to a comprehensive plan" for improving or developing a waterway for beneficial public purposes, including power generation, irrigation, flood control, navigation, fish and wildlife, municipal water supply, and recreation. The Congress last spoke to the Commission's role in balancing these purposes in the Electric Consumers Protection Act of 1986 (ECPA), which amended the FPA to require the Com-

mission to give "equal consideration" to developmental and non-developmental values.

The number of applications for original licenses has steadily declined to a handful per year for a number of reasons, including the diminished availability of attractive sites and current economic conditions. The Commission does not expect this situation to change. Most licensing activity currently before the Commission therefore involves the relicensing of existing projects.

As I stated earlier, while the Commission's overarching responsibility under the FPA is to strike an appropriate balance among the many competing power and non-power interests, as required by the public interest standards of §§ 4(e) and 10(a) of the FPA, various statutory requirements give other agencies a powerful role in licensing cases. Those requirements include:

- Section 4(e) of the FPA, which authorizes the Departments of Agriculture and the Interior to impose mandatory conditions on projects located on Federal reservations they supervise.
- Section 18 of the FPA, which authorizes the Departments of Commerce and the Interior to impose mandatory fishway prescriptions.
- Section 10(j) of the FPA, which authorizes federal and state resource agencies to propose conditions to protect fish and wildlife.
- Section 401 of the Clean Water Act, which authorizes States to impose mandatory conditions as part of the State water quality certification process.
- The Coastal Zone Management Act, which authorizes States to impose conditions on projects affecting their coastal resources.
- The Endangered Species Act, which directs the Departments of the Interior and Commerce to propose measures to protect threatened and endangered species.
- The National Historic Preservation Act, which requires Commission consultation with Federal and State authorities to protect historic sites.

Thus, licenses typically contain requirements that are developed by a variety of agencies other than the Commission, and that often are imposed through those agencies' mandatory conditioning authority.

I recognize and respect the importance of the mandates of our sister Federal agencies, and appreciate the constraints under which they operate. However, the current regulatory structure suggests at least two things to me. First, the Commission often lacks the ability to control the timetable for license issuance. Second, the Commission often has only very limited discretion to exercise its own judgment in determining the appropriate balance of economic efficiencies, environmental protection, and all the other public purposes the FPA identifies. These concerns have been heightened by a series of court decisions that have held that the Commission has essentially no authority to reject or modify mandatory conditions, even where, in the Commission's view, they are not consistent with the public interest. *See Escondido Mut. Water Co. v. LaJolla Band of Mission Indians*, 466 U.S. 765 (1984) (Commission cannot reject Section 4(e) conditions); *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700 (1994) (States may include in Clean Water Act certifications conditions to protect all designated uses contained in water quality standards); *American Rivers v. FERC*, 129 F.3d 99 (2d Cir. 1997) (Commission cannot modify or reject State conditions under the Clean Water Act); *American Rivers v. FERC*, 187 F.3d 1007 (9th Cir. 1999) (Commission cannot determine if Section 18 conditions fall within the scope of that provision). The Commission's only discretion with respect to mandatory conditions it might conclude are not in the public interest is simply to deny the license application. I am sure you understand what a difficult position that puts the agency in.

## II. MEETING NEW CHALLENGES

In determining whether and how to relicense a project upon expiration of its original license, the Commission must strike a balance among many legitimate but sometimes competing interests. Development and utilization of hydropower must now adjust to an increasingly competitive electric marketplace and heightened environmental scrutiny, as well as to a decisionmaking process characterized by shared authorities. Projects coming up for relicense in the next several decades were originally licensed before the enactment of ECPA, the National Environmental Policy Act (NEPA), the Endangered Species Act, the Federal Water Pollution Control Amendments of 1972 (the Clean Water Act), and the Coastal Zone Management Act. I think it is fair to say that consideration of non-power values has come to dominate most relicensing proceedings in the modern era.

The Commission has responded to this modern era of relicensing with orders crafted to fully sustain environmental resources. For licenses issued since the passage of ECPA in 1986, the Commission has included approximately 95 percent of

all fish and wildlife agency recommendations. Increased flows to provide for the needs of fish have been provided in thousands of miles of streams, boat launches and camping areas have been created for public recreation, and thousands of acres of wildlife habitat have been set aside and protected as a result of the licensing process. All of these environmental improvements have been implemented while maintaining the viability of the hydropower industry. No license issued since the Commission began relicensing the large group of projects in the so-called "class of '93" has been surrendered. Thus, licensing can achieve the balance between developmental and non-developmental values mandated by Congress.

In order to achieve optimum outcomes in hydropower licensing proceedings, the Commission has placed increased emphasis on promoting settlements and the more collaborative, alternative licensing process. The alternative process allows license applicants and other parties to collaborate on the preparation of environmental documentation and other matters early on—before an application is filed—with the goal of developing consensus on the terms and conditions of the license. Several licenses have been completed under the alternative process, and many more are currently underway. Figure 1, attached to my testimony, shows the growth in the use of the alternative licensing process, while Figure 2 shows a similar increase in the number of licenses based on settlement agreements.

The most recent example of successful use of a collaborative process is Avista Corporation's 700-MW Clark Fork Project located in Idaho and Montana. In July 1997, Avista decided to use a collaborative process for relicensing this project and formed a relicensing team consisting of Federal, State, and non-governmental organizations. The members of the relicensing team met regularly, with Commission staff providing guidance and support, to address resource concerns and ultimately develop a comprehensive settlement agreement that resulted in the protection and enhancement of the natural and human environment. A license incorporating Avista's settlement agreement was issued by the Commission in February 2000, only one year after the license application was filed.

Additional examples of successful collaborative processes include Georgia Power Company's 5.4-MW Flint River Project No. P-1218 located on the Flint River in Georgia, and International Paper Company's 23-MW Riley-Jay-Livermore Project No. P-2375 and Otis Hydroelectric Company's 10-MW Otis Hydroelectric Project No. P-8277, both located on the Androscoggin River in Maine. Licenses for each of these projects also were issued less than one year from the date the applications were filed.

I have attached to my testimony a map, Figure 3, which shows the 220 project licenses that will expire in the years 2000 through 2010. The Commission began receiving these relicense applications in 1998. They will comprise a significant "class" of projects and another spike in the Commission's workload. This group of projects has a combined capacity of approximately 22 GW, or 20 percent of the Nation's installed hydroelectric capacity.

In addition to supporting collaboration in individual cases, the Commission is also working hard to improve coordination among the disparate authorities involved in hydropower licensing. By way of example, for the past two years, the Commission, the Department of the Interior, the Department of Commerce, the Department of Agriculture, the Department of Energy, the Council on Environmental Quality, and the Environmental Protection Agency have convened an Interagency Task Force on Improving Hydroelectric Licensing Processes to address problems in licensing. The Interagency Task Force's agenda includes matters such as the manner in which the Commission issues notice of license applications, how to determine which environmental studies should be performed, environmental review under the NEPA, coordination of Endangered Species Act review, guidelines for participants in the Commission's collaborative process, the crafting of clear and enforceable license conditions by state agencies and other participants, a review of the economic techniques used by various federal agencies as they participate in the licensing process, and input to the reform of the Commission's ex parte rule. At the Task Force's request, Secretary Babbitt and I chartered an advisory committee, pursuant to the Federal Advisory Committee Act, to obtain input from states, licensees, Indian Tribes, counties, and non-governmental organizations.

I expect that the Task Force will continue to generate important work products and, perhaps just as important, foster a spirit of collaboration among the agencies involved, with the goal of making the licensing process as efficient as possible within the existing statutory framework.

From the Commission's vantage point, the Task Force has led to some encouraging developments. For instance, the resource agencies have indicated that they are exploring concrete reforms to enhance their participation in the licensing process, including establishing procedures for obtaining public input, such as notice and

comment on draft mandatory conditions, and committing to participate in cases where the collaborative process is used, subject to resource constraints. I support these reforms, and have every reason to believe they will be implemented.

III. COMMENTS ON PENDING LEGISLATION

My comments above relate to the Commission's diligent efforts to make the current statutory framework, as interpreted by the courts, work as effectively as possible. Now let me turn to comments on proposals to change Federal statutes. I will discuss each of the several bills under consideration in turn.

*A. H.R. 2335: Improving the Hydroelectric Licensing Process*

H.R. 2335 would amend the FPA with the respect to mandatory license conditions submitted by the Secretaries of the Interior and Commerce under Sections 4(e) and 18 of that Act, and by federal agencies supervising lands on which project works are located. The bill would require them to take into consideration various factors, including the impacts of proposed conditions on economic and power values, electric generation capacity and system reliability, air quality, drinking water, flood control, irrigation, navigation, or recreation water supply, compatibility with other license conditions, and means to insure that conditions address only direct project environmental impacts at the lowest project cost. The Departments would be required to provide written documentation for their conditions, submit them to scientific review, and provide administrative review of proposed conditions.

H.R. 2335 would provide for the Commission to establish a deadline for the submittal of mandatory conditions in each case, to be no later than one year after the Commission issues notice that a license application is ready for environmental review. If an agency fails to submit a final condition by the deadline, the agency loses the authority to recommend or establish license conditions. The Commission must conduct an economic analysis of conditions proposed by consulting agencies, and, upon request of license applicants, must make a written determination whether such conditions are in the public interest, were subjected to scientific review, relate to direct project impacts, are reasonable and supported by substantial evidence, and are consistent with the FPA and other license conditions.

In addition, the bill provides that the Commission shall be the lead agency for environmental review under the NEPA, and that other Federal agencies will not perform additional environmental review.

Finally, the bill provides that the Commission shall submit to Congress a study of the feasibility of establishing a separate licensing procedure for "small hydroelectric projects," which term the Commission may define by regulation, but which must at a minimum include projects with generating capacities of five megawatts or less. I comment on this study requirement in my discussion of S. 422.

I support the underlying purpose of the bill, which is to promote sensible and timely decisions by all agencies involved in licensing matters. Reasoned decisionmaking with respect to mandatory conditions must be the responsibility of the resource agencies, given the Commission's very limited discretion with respect to such conditions. As Congress considers any legislation, however, it should be careful to ensure that any procedures that could add time or expense to the process are justified by improved outcomes.

Several portions of H.R. 2335 could improve the process. For instance, having the resource agencies consider a range of public interest factors in developing mandatory conditions would lead to better-informed decisionmaking. The Commission is required to take into account a similar set of factors for matters within its discretion. The requirement for resource agencies to document their decision making is essential for due process. *See Bangor Hydroelectric Co. v. FERC*, 78 F.3d 659 (D.C. Cir. 1996). Subjecting resource agencies to deadlines for submitting conditions (as the Commission's regulations now provide) also could help improve the licensing process. These sensible requirements could make licensing more timely and efficient, while developing the record that supports well-reasoned licensing decisions.

I am less sanguine about some other procedures that would be established by the bill, such as those requiring scientific peer review of conditions, mandating detailed administrative review procedures, and requiring the Commission to review the economic impact of proposed conditions and whether the resource agencies have complied with the bill's requirements. I am concerned that adding burdensome, time-consuming steps to the licensing process could lengthen and increase the expense of the process, and thereby add to the burden placed on licensees and other participants, without a compensating benefit. I am also concerned about the portion of the bill that would permit only the Commission to conduct NEPA environmental analyses. This might prevent individual agencies from performing the review that they need to support their portion of the licensing process in a timely fashion. Further,

the Commission would be required to do NEPA analysis on the agencies' behalf, which would not only increase the Commission's workload, but could lead to disputes as to whether the Commission's efforts are sufficient for the agencies' purposes.

If all parties in a hydropower licensing case do not work harmoniously, resolution of substantive and procedural issues will tend to become more time-consuming and more expensive. I believe that, within the general framework of the FPA, the Commission and its expert staff are well-suited to bring proceedings to closure even if there is a sustained level of disagreement and to render timely judgments that will meet the public interest. To the extent that H.R. 2335 will help the resource agencies to be effective partners in this difficult licensing process, it could improve that process.

*B. S. 422: Small Hydroelectric Projects in Alaska*

S. 422 provides (with certain exceptions discussed below) that, at such time as the Commission determines that the State of Alaska has in place a process for regulating hydropower project works having a power production capacity of 5,000 kilowatts (5 megawatts or MW) or less, according to specified public interest standards, Alaska shall have exclusive authority to authorize all such project works that are not under Commission license or exempted from licensing, and are not within an application for preliminary permit or license that has been accepted for filing as of the date of the provision's enactment. If such project works are under a Commission license as of the date of enactment, then the licensee may elect to transfer the project to state regulation.

The bill provides that project works are not removed or removable from Commission jurisdiction if they are located in whole or in part on any Indian reservation, unit of the National Park System or other federal designated system, or component of the Wild and Scenic Rivers System, or segment of a river designated for study for potential addition to such system. State authorizations for project works located in whole or in part on other Federal lands shall be subject to the approval of, and terms and conditions imposed by, the Secretary having jurisdiction with respect to such Federal lands. Finally, the transfer to the State of the above-described authority does not preempt the application of Federal environmental, natural, or cultural resources protection laws according to their terms.

There are currently 22 licensed projects in Alaska. Of these, 17 projects occupy National Forest lands administered by the U.S. Forest Service, and 5 projects occupy federal lands administered by the U.S. Bureau of Land Management (BLM). Of the total of 22 licensed projects, 10 projects are 5 MW or less, and 12 projects are larger than 5 MW. There are 3 exempted projects in Alaska, all under 5 MW. One project occupies National Forest lands, and two occupy non-federal lands. There are currently pending before the Commission five Alaska license applications, three of which have been accepted for filing. One application, for a 0.5 MW project will be located on lands managed by the U.S. Fish and Wildlife Service. The other four—a 2.2-MW project, a 3.0-MW project, a 4.2-MW project, and a 6.0-MW project, will be located on National Forest lands.

Finally, there are a number of potential Alaska projects at the pre-development application stage. Eight project proposals are currently being studied under issued preliminary permits. Of these, two would be projects over 5 MW, of which one would occupy National Forest lands, and one would occupy Bureau of Land Management lands. Six would be projects of 5 MW or less, of which three would occupy National Forest lands, and three would occupy non-federal lands.

As a general matter, I do not support legislation removing non-federal hydropower projects from the Commission's jurisdiction based on the size of the project. A project with a small capacity can have a significant impact both at the project site and beyond its immediate environs. Pursuant to the mandates of the Federal Power Act, the Commission evaluates that impact, and, in rendering a licensing decision, gives equal consideration to development interests and environmental resources in determining whether, and with what requirements, to authorize hydropower development.

The underlying premise of the legislation is that Alaska presents the Congress with a special case that favors local control over projects that would otherwise be subject to the Commission's jurisdiction. Inasmuch as Alaska is not interconnected with the interstate electric grid in the lower 48 states, that environmental impacts of projects located in Alaska are relatively unlikely to affect the lower 48 states, and that the bill requires a state program that will adequately evaluate project impacts, I do not object to this legislation. However, I would oppose a generic 5-MW exemption for projects located in the lower 48 states. Because some 70 percent of the projects the Commission regulates are 5 MW or smaller, such an exemption would

have a deleterious effect on the Commission's ability to address the cumulative environmental effects of all non-federal hydropower projects in a river basin or watershed.

S. 422 also raises one technical issue. The bill provides for the transfer to the State of Alaska of the Commission's jurisdiction over the hydroelectric "project works" of certain categories of projects. Section 3(12) of the Federal Power Act defines "project works" as "the physical structures of a project," and Section 3(11) of the Act defines "project" as a "complete unit of improvement of development" consisting of project works . However, the bill provides no standard for defining "project works having a power production capability of 5,000 kilowatts (5 megawatts) or less." Absent statutory criteria to the contrary, there is the potential for abuse in "packaging" proposed project works in a manner that artificially segregates into 5-megawatt groupings the power production components of what is in fact a single unit of development, in order to evade Commission jurisdiction. Creating these incentives would not in my view foster public interest objectives. I therefore recommend that the bill specify that the power production capacity of a project be determined in accord with the Federal Power Act's definition of a project.

*C. S. 334: Voluntary Licensing of Hydroelectric Projects in the State of Hawaii*

S. 334 would amend Section 4(e) of the Federal Power Act by inserting the following parenthetical limitation: "(except fresh waters in the State of Hawaii, unless a license would be required by section 23 of the Act)". These words would modify the reference to "several States," so as to partially limit the authority of the Commission to issue licenses under Section 4(e) with respect to proposed hydropower projects in Hawaii.

Section 4(e) of the Act contains the Commission's authority to issue licenses for hydropower projects. Section 23(b)(1) sets forth the circumstances under which a project cannot be constructed, operated, or maintained without a license. In certain circumstances, the Commission has authority to issue a license for a hydropower project in response to a voluntary application under Section 4(e), even though licensing is not required under Section 23(b)(1). *See Cooley v. Federal Energy Regulatory Commission,* 843 F.2d 1464, 1469 (D.C. Cir. 1988).

Under S. 334, the Commission would continue to have jurisdiction to issue licenses to construct, operate, and maintain hydropower projects in Hawaii whenever Section 23(b)(1) would require a license for such activities. However, the Commission would be precluded from issuing a license for a project in Hawaii if Section 23(b)(1) did not require a license for such activities. In the absence of this legislation, an applicant might seek an FPA license if it wanted protection from competitors for a site, or if it concluded that federal regulation was preferable to state regulation.

Pursuant to Section 2408 of the Energy Policy Act of 1992, the Commission on April 13, 1994, submitted to the Senate and House Committees a study of regulation of hydropower projects in Hawaii. The study noted that the Commission has never licensed a hydropower project in Hawaii, and is thus not currently regulating any project in Hawaii. That is still the case. Therefore, S. 334 would not likely have any impact on the Commission's current operations, and I would not oppose its enactment.

*D. S. 1236: Extending Deadline to Commence Project Construction*

Section 13 of the Federal Power Act requires that construction of a licensed project be commenced within two years of issuance of the license. Section 13 authorizes the Commission to extend this deadline once, for a maximum additional two years. If project construction has not commenced by this deadline, Section 13 requires the Commission to terminate the license.

The project in question is the Arrowhead Project No. 4656, to be located at the Bureau of Reclamation's Arrowrock Dam, on the South Fork of the Boise River, in Idaho. The Commission issued a license for this project on March, 27, 1989, and granted a two-year extension of the commencement-of-construction deadline in 1991. In 1993, pursuant to section 1704(c) of the Energy Policy Act of 1992, the Commission extended the deadline until March 26, 1999. S. 1236 would authorize the Commission to extend the deadline an additional six years, until March 26, 2005.

As a general principle I do not support the enactment of bills authorizing or requiring construction extensions for individual projects. More particularly, where Congress has considered statutory extensions, the Commission has, as a matter of policy, objected to granting a licensee a total of more than 10 years from the issuance date of the license to commence construction. In my view, 10 years is a more than reasonable period for a licensee to determine definitively whether a project is economically viable and to sign a power purchase agreement. Moreover,

the Commission has a policy against "site-banking," that is, allowing a licensee who is not developing a site to prevent other potential applicants from doing so, and I am also concerned that a license issued more than 10 years ago may not reflect current circumstances. I note that, even if a license is terminated, the applicant is free to file a new application, based on current information. Since the bill in question would extend the deadline until 16 years after the license was issued, I think it is inadvisable on policy grounds.

*E. H.R. 3852: Extending Deadline to Commence Project Construction*

H.R. 3852 would require the Commission, upon the request of the licensee and in accordance with the good faith, due diligence, and public interest requirements of Section 13 of the Federal Power Act, to extend the deadline for commencement of construction of Project No. 7115 for up to six additional years after September 21, 2000, the current deadline.

As I noted with respect to S. 1236, as a matter of general principle, I do not support the enactment of bills authorizing or requiring construction extensions for individual projects. However, if such extensions are authorized by the Congress, I would object to granting a licensee more than 10 years from the issuance date of the license to commence construction. In my view, 10 years is a more than reasonable period for a licensee to determine definitively whether a project is economically viable and to sign a power purchase agreement. If a licensee cannot meet such a deadline, I believe the license should be terminated pursuant to Section 13, so that the site is once again available for whatever uses current circumstances may warrant.

Where the Commission has stayed the construction deadlines, or the entire license, for example pending judicial appeal of the license or the completion of preconstruction proceedings, the period of the stay is not counted in applying the 10-year policy.

Because H.R. 3852 would not extend the construction commencement date beyond 10 non-stayed years from the issuance of the Project No. 7115 license, I have no specific objection to its enactment.

*F. H.R 1262: Exempting from Licensing Facilities on the Pentwater River*

H.R. 1262 would exempt from Sections 23(b) and 4(e) of the FPA certain existing facilities located on the Pentwater River in Michigan, so that no license would be required under Part I of the FPA to operate and maintain those facilities.

I oppose this legislation. Congress' purpose in enacting the FPA was to provide "a complete scheme of national regulation" to "promote the comprehensive development of the water resources of the Nation" and to avoid the piecemeal federal and state regulation that had previously blocked that comprehensive scheme. *See First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 10 (1946). Exempting particular projects from regulation under the FPA would undercut the Commission's ability to ensure the optimum development of waterways, and would deny to the public the consideration of public interest factors that is the basis for all Commission licensing decisions. While the states of Alaska and Hawaii present special cases, in that they are geographically distinct from the rest of the Nation and are not connected to the interstate power grid, the same cannot be said for the lower 48 states. Thus, the features that distinguish S. 422 and S. 334 are not present for H.R. 1262.

*G. S. 1937: Sales of Bonneville Power Authority Energy to Joint Operating Entities*

This bill would amend the Pacific Northwest Electric Power Planning and Conservation Act to provide for sales of energy by the Bonneville Power Administration to joint operating entities composed of public bodies or cooperatives. The Commission has no jurisdiction over the matters that the bill addresses, and I have no comment on the bill.

CONCLUSION

In conclusion, I want to thank you for this opportunity to speak to you today about the hydropower program. The Commission stands ready to work with Congress and with all interested parties to make the hydroelectric licensing process as efficient as possible, while ensuring that we continue to balance all of the interests that surround this important national resource.

I will be happy to answer any questions you may have.

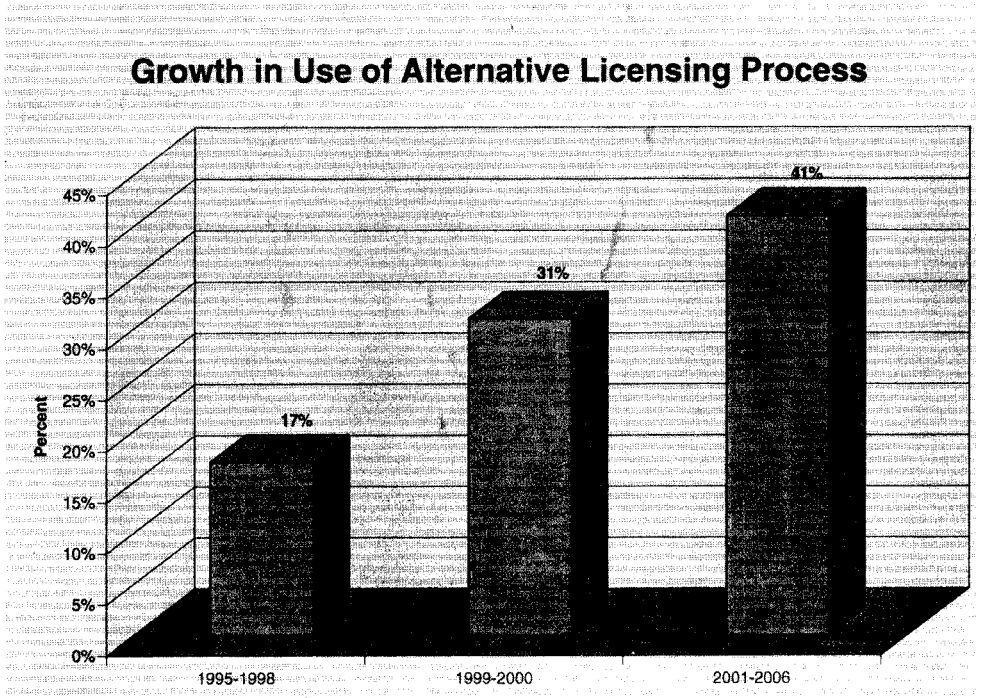
Growth in Use of Alternative Licensing Process
Percent
45%
40%
35%
30%
25%
20%
15%
10%
5%
0%
17%
31%
41%
1995-1998
1999-2000
2001-2006

FIGURE 1

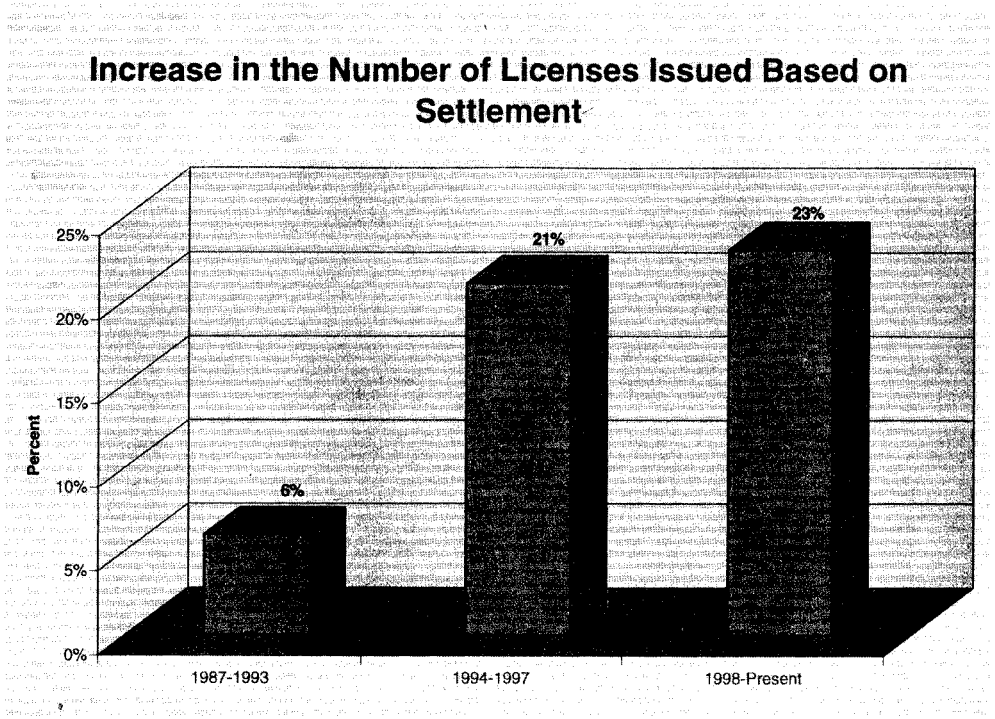
Increase in the Number of Licenses Issued Based on Settlement
Percent
25%
20%
15%
10%
5%
0%
6%
21%
23%
1987-1993
1994-1997
1998-Present

FIGURE 2

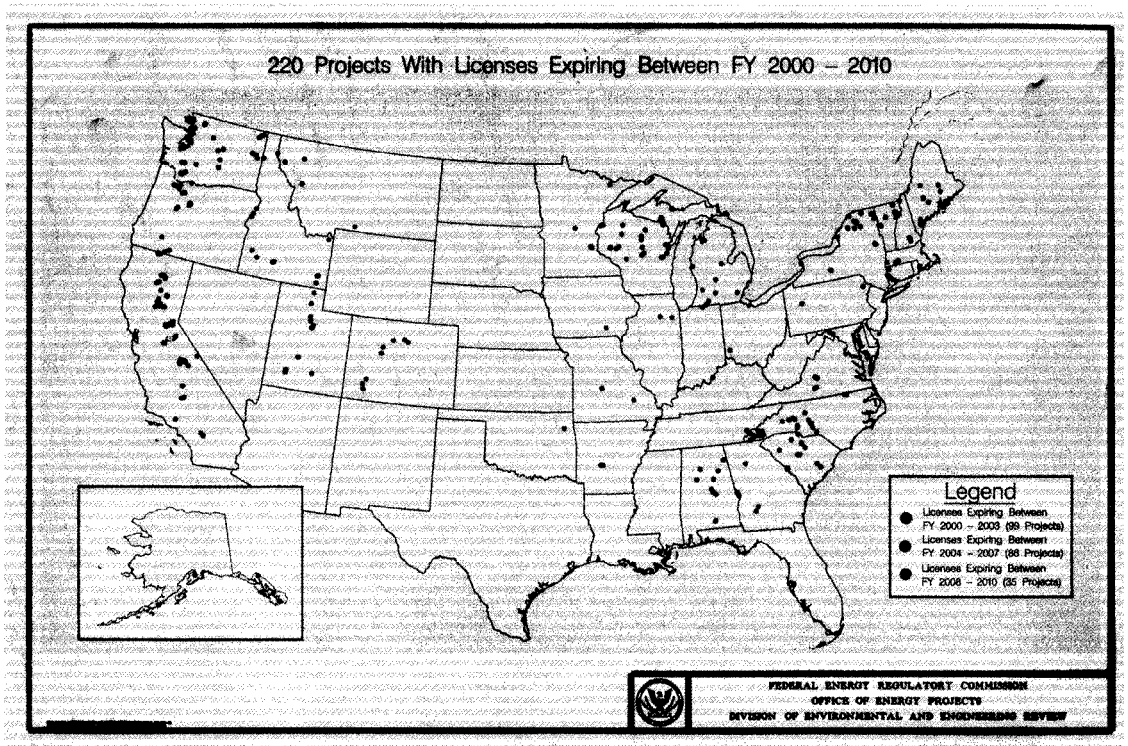
220 Projects With Licenses Expiring Between FY 2000 – 2010
Legend
Licenses Expiring Between FY 2000 – 2003 (99 Projects)
Licenses Expiring Between FY 2004 – 2007 (88 Projects)
Licenses Expiring Between FY 2008 – 2010 (35 Projects)
FEDERAL ENERGY REGULATORY COMMISSION
OFFICE OF ENERGY PROJECTS
DIVISION OF ENVIRONMENTAL AND ENGINEERING REVIEW

Figure 3

Mr. BARTON. Thank you, Chairman. We'd now like to hear from Mr.—is it Leshy or Leshy?

Mr. LESHY. It's Leshy, Mr. Chairman.

Mr. BARTON. Leshy. We'd like to hear from you, sir. Your statement's in the record, and we will recognize you for 5 minutes summarizing.

**STATEMENT OF JOHN D. LESHY**

Mr. LESHY. Thank you, Mr. Chairman. I'm very pleased to be here. I'm the Solicitor of the Department of the Interior, pinch-hitting today for Deputy Secretary David Hayes, who's on vacation this week.

I'm very pleased to be here and have the opportunity to comment and address the bills before the committee today, especially the principal bill, H.R. 2335.

The Department of the Interior, particularly under Secretary Babbitt, has made the Federal Power Act hydro relicensing process a very high priority over the last several years. Ever since 1920, our department has had an important role and responsibilities under that act to provide input into the hydro licensing and relicensing process. Our mission, as defined by Congress in 1920, is to ensure that certain resources are protected when the public resource of navigable waterways is dedicated to provide hydropower generation for a period of 30 to 50 years.

We recognize that this licensing and now relicensing process can be complex, time consuming, and can be resource intensive, but we also believe—and we are taking I think great strides to make sure—that the process can be improved to avoid inefficiencies and delays.

I certainly associate myself with the remarks of Chairman Hoecker and especially in his written testimony where he outlined at some length the work that our department and the other Federal agencies that work with FERC are doing with FERC to improve the process in a number of respects—the Interagency Task Force, the FACA committee that's been chartered under that task force. We are also working with the NHA and the Electric Power Research Institute to focus our attention on ways we can improve the process within the existing architectural structure of the Federal Power Act. And we think those collaborative efforts that we have undertaken in the last several years and the energy and time we're putting into this is really beginning to bear fruit. We have opened some really important lines of communication with FERC and with the National Hydropower Association and the environmentalists, and we think there are a number of ideas being batted around which will soon produce some really pretty dramatic improvements in the way the process of relicensing works, particularly as respects our mandatory conditioning authority, which has been talked about so much here today.

With that preface, let me make some comments on the principal bill in front of the committee, because we think that this bill would make some very fundamental changes in the structure of the act vis-a-vis the mandatory conditioning authority, and we are very troubled by those changes because we think effectively they would not streamline the existing process but would rather add a number

of layers of new process and cumbersome procedures that would in effect and ironically delay licensing still further.

It would go beyond, for example, the current well understood standard that we have to have substantial evidence for any conditions that we impose on projects and require a separate scientific peer review. There would be a mandated internal 6-month appeals process before some independent body before our conditions could be made final. Then when the conditions went over to the commission itself, the commission would have to do an economic analysis of each condition and would have to undertake an additional review process.

So there are a number of additional layers and steps that would be involved that we think would effectively be unworkable.

The basic structure of the act and our mandatory conditioning authority has existed, as I said, since 1920, for 80 years. We think it has stood the test of time. Of course today and in the modern era, more attention is being paid to environmental factors in the relicensing process. That's true, of course, of just about every decision made in the public and private sector throughout society.

Our job under the Federal Power Act for the last 80 years has been to set a mandatory floor of conditions for certain specified areas: The fishway protection of section 18 and mandatory conditioning to protect Federal reservations when there are Indians—Indian reservations or national parks or other Federal reservations of land involved. We do that to set the floor for how these projects can be operated. We do that in a cost conscious manner, and we do that as required by law only when we have substantial evidence to support the conditions that we impose.

We think the public today is demanding more, not less, environmental sensitivity in resource management, and we unfortunately regard the H.R. 2335 as a serious step backwards in that regard. I would be happy to answer any questions. Thank you very much for the opportunity to testify.

[The prepared statement of John D. Leshy follows:]

PREPARED STATEMENT OF JOHN D. LESHY, SOLICITOR, U.S. DEPARTMENT OF THE INTERIOR

Good morning Mr. Chairman, Members of the Subcommittee. I appreciate the opportunity to discuss the Federal Power Act hydropower licensing process, HR 2335, and several related bills before the Subcommittee today.

The Department of the Interior has made the Federal Power Act licensing process a high priority over the last several years. The Department has an important role and responsibilities under the Federal Power Act to provide input to the Federal Energy Regulatory Commission as it decides whether and how to license hydropower projects. Our mission is not to interfere with licensing, but to ensure that certain resources are protected when a public resource—a navigable waterway—is dedicated to private hydropower generation for thirty to fifty years under a Federal Power Act license.

The Department recognizes that the FERC licensing process can be complex, time-consuming and resource-intensive for all parties, but we also believe that the process can be improved to avoid inefficiencies and delays. In undertaking to improve the process, we have become convinced that the existing statutory framework is sound, and whatever inefficiencies or shortcomings may exist can and should be addressed administratively. Therefore, we would oppose each of the bills the Subcommittee is considering today that would revise the licensing process or exempt particular hydropower projects from all or part of the Federal Power Act requirements.

*Administrative Efforts on Hydropower Licensing*

For the last two years, the Department has worked in several different forums to improve the hydropower licensing process for all participants. I would like to point out several specific efforts in that regard.

First, the Department is actively engaged in the Interagency Task Force on Hydropower Licensing (ITF)—a cooperative effort initiated by Interior, Commerce, Agriculture, EPA, Energy, CEQ, and FERC to find administrative solutions for inefficiencies in the licensing process that can sometimes result from unclear procedures, poor communication, and the interaction of other federal statutes (e.g. NEPA, ESA) with the Federal Power Act process. The ITF has developed a variety of administrative solutions:

- facilitating and streamlining noticing procedures,
- standardizing the NEPA review process,
- implementing necessary studies of resource impacts from licensing,
- preparing trackable and enforceable license conditions pursuant to the Coastal Zone Management Act and Section 401 of the Clean Water Act.

The ITF also has produced a draft set of guidelines that should make the Commission's alternative licensing procedures (a.k.a., the "collaborative process") work better for all federal and non-federal stakeholders. Currently, the ITF is working on additional solution documents for Endangered Species Act consultation, various provisions of the Federal Power Act, and issues related to the post-licensing phase of hydropower operations.

Second, the Department has sought input from others affected by hydropower licensing (e.g., licensees, NGOs, tribes, states and counties) to better understand and address their concerns with the licensing process. As a member of the ITF, the Department was instrumental in establishing a federal advisory committee that enables these interests to advise the ITF. The advisory committee has met three times in the last seven months and will continue to make recommendations to the ITF through the end of this year, when the work of the ITF should be complete. As the advisory committee provides its input, the ITF sets about institutionalizing the agreed-upon reforms in each of our respective agencies.

One positive outcome of the ITF effort is that our relationship with many stakeholders in the licensing process has improved. For instance, the staffs of the Commission and the resource agencies have come to better understand each other's views and respective obligations under the Federal Power Act and other relevant statutes, which in turn has led to increased trust among our agencies and an enhanced ability to work together. In my view, this improved relationship will pay dividends in the field as we address the many projects scheduled for relicensing over the next ten years.

Our relationship with the licensees has also greatly benefitted from the Department's recent attention to hydropower licensing. The National Hydropower Association periodically visits with Department staff to discuss concerns they have about various aspects of our participation in the licensing process. Moreover, the Department is an active participant in the industry-sponsored Electric Power Research Institute effort, which brings together the full range of affected interests to explore our common goal of improving the hydropower licensing process.

Finally, the Department has taken concrete internal steps to further improve the constructive role that its bureaus play in the licensing process. These internal changes will facilitate better communication and coordination among Interior bureaus. Improving our own internal processes will help us avoid unnecessary delays and ensure consistent application of Department policies throughout the bureaus' regional offices.

*H.R. 2335*

Far from contributing to these efforts to improve hydropower licensing, we believe that H.R. 2335 as written would interfere with the Department's responsibilities under the Federal Power Act, add multiple delays to the licensing process, and make the Department's involvement in Federal Power Act licensing proceedings completely unworkable. We strongly oppose H.R. 2335, and if it were presented to the President in its current form the Secretary of the Interior would recommend that he veto it.

The most troubling feature of H.R. 2335 is that it would undercut the purposes of much of the Department's participation in federal hydropower licensing. The Department provides input to the Commission under several different sections of the Federal Power Act; this bill is principally directed at the prescriptions for "fishways" issued by the Fish and Wildlife Service under section 18, and at the responsibility of several bureaus that manage reserved lands to mandate conditions under section 4(e) "necessary for the adequate protection and utilization of such reservations." The

resource agencies' authority to protect the uses of reserved lands is an integral part of the Federal Power Act licensing scheme, going back 80 years to the original enactment of Act in 1920. While the Act allowed licensing of private hydro facilities on Federal lands, it also contemplated that the resource agencies would possess the necessary expertise to ensure that those facilities would not interfere with protection and use of the lands. That responsibility of Federal land managers to condition projects on the lands they manage remains in the statute to this day.

Section 4 of the bill (new section 32(b)(1) of the FPA) would change these mandates by requiring the Department to take into consideration a variety of factors, including air quality, drinking [sic], flood control, irrigation and navigation, in determining section 4(e) conditions and section 18 prescriptions. At the same time, the original purposes of sections 4(e) and 18—to protect and utilize reserved lands and to ensure that fish can survive passage through hydro projects—are not mentioned in the list of proposed new factors. Thus, there would be no mandate that the Department take these purposes into consideration. In effect, by emphasizing other factors, H.R. 2335 would potentially force the Department to ignore fishery needs in prescribing fishways. It might oblige us to ignore the project impacts to Indian tribal lands and resources when determining conditions necessary to protect Indian reservations, or the needs of parks, wildlife refuges and other conservation areas when setting conditions to protect those reserved lands.

Furthermore, as if to underscore this effort to ignore the original purposes of sections 4(e) and 18, H.R. 2335 would then require the Commission to make a separate determination based on the same factors. Under section 4 (new section 32(h)(1) of the FPA), if requested by the license applicant, the Commission would have to make a determination whether a 4(e) condition or section 18 prescription was in the public interest, based solely on this same list of other factors. Thus, the Commission could not take fisheries or land management needs into account in making this "public interest" determination.

H.R. 2335 would also undercut the purpose of recommendations made by state and federal fish and wildlife agencies for protection, mitigation and enhancement of fish and wildlife and their habitats under section 10(j) of the Federal Power Act. Section 4 (new section 32(g) of the FPA) would require the Commission to evaluate these section 10(j) recommendations as well against the list of factors set out above.

The combined effect of these various provisions of H.R. 2335 would be to subordinate resource needs and trust responsibilities to a wide range of other factors. The current structure of the Federal Power Act requires that a license be issued only with conditions that ensure protection of underlying resources. Once this floor is established to protect against unreasonable resource destruction, then the Commission balances various factors to determine whether and how to issue a license. This bill would turn that scheme on its head, allowing protection of underlying resources only if a laundry list of other needs were met.

In addition, rather than streamlining the licensing process under the Federal Power Act, the bill would add new and cumbersome procedures to the process, delaying license issuance still further. It would go beyond the current judicially required standard of "substantial evidence" for agency conditions and require separate scientific peer review (new section 32(c) of the FPA). It would mandate a six-month appeals process before "an administrative law judge or other independent reviewing body" before section 4(e) conditions and section 18 prescriptions could be made final (new section 32(e) of the FPA). It would require the Commission to conduct an economic analysis of each section 4(e) condition or section 18 prescription (new section 32(g) of the FPA), plus an additional review process if requested by the license applicant (new section 32(h) of the FPA).

Apart from these concerns about delay, the licensing procedure prescribed by H.R. 2335 is simply unworkable. Section 5 (new section 33(b) of the FPA) would prohibit the resource management agencies from doing any environmental analysis outside of the Commission's own NEPA analysis. This would make it impossible to formulate section 4(e) conditions and section 18 prescriptions. Our section 4(e) and 18 responsibilities can only be carried out through our own analysis of impacts to lands, fisheries, and other resources—though this is not a separate NEPA process, it is environmental analysis. The Bangor Hydro court decision held that we must have "substantial evidence" to support our 4(e) conditions and section 18 prescriptions—again, that substantial evidence is developed through environmental analysis. Without such analysis, we cannot do our job at all.

The Department could not rely on the Commission's NEPA analysis to provide the evidence necessary to support our determinations under sections 4(e) and 18, because H.R. 2335 would require that the draft conditions and prescriptions be formulated before the license application is filed (new section 32(e) of the FPA). Not surprisingly, the Commission does its NEPA analysis after the license application is

filed. Obviously, if there is no application available, and consequently no Commission NEPA analysis, many of the necessary conditions and prescriptions could not be developed at all. Moreover, finalization of the conditions depends upon information provided in the Commission's NEPA analysis. H.R. 2335 would require that final conditions and prescriptions be issued within one year after the Commission determines the application is ready for environmental analysis (new section 32(f) of the FPA). But a condition could hardly be finalized if the Commission has not completed at least a draft NEPA analysis, which is often delayed more than one year after the application is determined ready for environmental analysis.

The most impractical aspect of this process described by this bill bears repeating: H.R. 2335 would require that the agencies formulate license conditions and prescriptions before the license application is filed (new section 32(e) of the FPA). Although license applicants circulate draft applications before filing, these are often altered substantially before they are filed before the Commission. An agency simply can't write a mandatory condition for a license application it hasn't yet seen.

*S. 422, S. 334, H.R. 1262, H.R. 3852, S. 1236*

The remaining hydro licensing bills before the Subcommittee today have one feature in common: each seeks to exclude a project or class of projects from some or all of the hydropower licensing requirements of the Federal Power Act. We oppose each of these exemptions.

The Department has commented at some length in the past on S. 422, which would place small hydroelectric projects in the State of Alaska solely under State jurisdiction. The Secretary's previous letters to Chairman Bliley are attached to my testimony. In brief, we strongly oppose S. 422 because it would fragment hydropower regulation and impair the Federal government's ability to protect federally managed lands and resources affected by the projects. Although certain land areas are exempted from application of S. 422, the bill's provision addressing tribal lands is confusing, since most Native lands in Alaska are not "reservations." Furthermore, it does not address the applicability of NEPA, the Endangered Species Act, or rights of way under the Federal Land Policy and Management Act.

We also oppose S. 334, which would exempt hydropower projects on fresh waters in the State of Hawaii from the Federal Power Act. Presumably, such an exemption would leave jurisdiction for licensing to the State of Hawaii, although there might be a question of Federal preemption. Whether or not the State would exert jurisdiction, this bill suffers from many of the same flaws as S. 422, in that it does not provide for continued Federal protection of federally managed resources, nor for NEPA and Endangered Species Act application in hydropower licensing. Hawaiian fresh water streams currently provide habitat for six candidate and one listed species. The streams also contain fish and shrimp that are harvested for subsistence. In addition, the proposed hydropower project on the Wailua River may impact the Hanalei National Wildlife Refuge and its fish and wildlife resources including endangered water birds, migratory waterfowl and shorebirds.

H.R. 1262, H.R. 3852 and S. 1236 each provide special exemptions for particular hydropower projects, and we oppose them. H.R. 3852 and S. 1236 provide extensions of time for project construction. The Federal Power Act allows a two-year window to begin construction after a license is issued, which may be extended another two years. If a licensee does not begin construction within that time frame, there is no reason to extend the benefit of the license for a longer period—if the site is appropriate for hydropower development, it should be available for another applicant to obtain a license. License extensions simply encourage speculation in hydropower development, as well as diminish the applicability of pre-licensing economic and environmental reviews, and we oppose them in general.

H.R. 1262 is an attempt to evade the relicensing policy of the Federal Power Act, exempting a single hydropower project owned by the City of Hart, Michigan, from the Commission's jurisdiction. Since we support the regulatory purposes of the Act, and oppose any attempt to avoid periodic review of the operations of hydropower projects, we oppose this bill as well.

Thank you. I would be happy to answer any questions.

Mr. BARTON. Thank you, sir. We appreciate that. We'd now like to hear from Mr. Burns. We're sooner or later going to get this clock right. We've managed to mess it up on everybody so far. Come on up. You're recognized for 5 minutes, and your complete statement's in the record in its entirety.

**STATEMENT OF ALLEN BURNS**

Mr. BURNS. Thank you, Mr. Chairman and members of the subcommittee. I'm the Vice President of Requirements Marketing at Bonneville Power Administration, responsible for power sales to our public customers. I appreciate the opportunity to convey some brief comments and thoughts on the proposed legislation on Bonneville selling to a Joint Operating Entity or a JOE. I have five quick points I want to leave with you. There's more in my testimony.

The first point is that BPA does not object to the proposed JOE legislation. It does not expand or diminish the rights of those members of the JOE to buy power from Bonneville. Also, we do not believe that it diminishes the rights of any other customers to buy or the cost of the power that they would be buying from us. Last, we do believe that the JOE will provide some administrative benefits, some efficiencies in O&M operation, and other things to membership of the JOE.

The second point I want to touch on briefly is the eligibility for a Joint Operating Entity. The proposed legislation applies only to BPA's preference customers. All of these customers were currently customers of ours in January 1999, so as the legislation is proposed, they would be eligible to participate in a JOE. Currently we are aware of four such entities. I think you're going to hear from one this afternoon, PNGC, that as currently formed would qualify as a JOE.

The third point I want to make is that JOEs currently are ineligible to purchase BPA requirements power. We've had over 60 years of interpreting our current statutes regarding this matter and believe this legislation is necessary if we are going to sell to a Joint Operating Entity.

The fourth point I want to make is there will be no change to preference customers' current rights. A JOE will have the rights to buy power from Bonneville, whether it be requirements power or surplus power, will remain the same as for their individual members. The JOE will still have those same requirements not to resell requirements power, and when it comes to surplus power, they'll have the same type of restrictions that any other customer would have.

The fifth point I want to make is in regards to comprehensive electricity energy restructuring, it is the administration's view that this should be done in a comprehensive manner. So the question arises, well, what about this legislation? It's our view at BPA and the Department that this is really minor legislation. And for all the reasons that I've currently mentioned, it has a very minor——

Mr. BARTON. Which is minor? The comprehensive electricity——

Mr. BURNS. No. Excuse me. The JOE language. Excuse me. Let me be clear about that. The proposed JOE legislation would be minor in scope and nature, and as such would not need to be held up or be part of any comprehensive electricity restructuring moving forward. That concludes my comments.

[The prepared statement of Allen Burns follows:]

PREPARED STATEMENT OF ALLEN BURNS, VICE PRESIDENT, REQUIREMENTS MARKETING, BONNEVILLE POWER ADMINISTRATION, U.S. DEPARTMENT OF ENERGY

INTRODUCTION

Mr. Chairman, distinguished members of the House Subcommittee, my name is Allen—Burns. I am the Vice President for Requirements Marketing at the Bonneville Power Administration (BPA), responsible to the BPA Administrator for BPA's power sales to its public utility customers. We appreciate this opportunity to appear today at this hearing on H.R. 3447, the proposed legislation to allow BPA to sell to Joint Operating Entities (JOE). We thank you for your continued support and attention to issues affecting BPA and its customers.

Today, I will be brief. BPA does not object to the proposed JOE legislation. The legislation will not expand or diminish the rights that our public preference utility customers currently have to buy BPA power.

The legislation would create a new type of BPA preference customer—a JOE—that could pool power purchases for customers who currently enjoy preference status for purchase of BPA power. Under this legislation, a JOE's member utilities might realize several benefits. They might be able to reduce their administrative overhead, combine their operations and maintenance work, or optimize their use of the interconnected transmission and distribution system. However, BPA does not believe the legislation would result in less BPA power or increased costs for BPA's other regional customers.

ELIGIBILITY FOR A JOE

The proposed JOE legislation would apply only to BPA's preference customers. These are public bodies and cooperative utilities, which, under current statutes, receive preference and priority in all sales of federal power. BPA must first meet requests of preference customers in all sales of power.

All of BPA's current preference customers would be eligible to be a member or participant of a JOE under this legislation, since they all were formed under state laws prior to January 1, 1999. We are aware of only four Northwest organizations that might qualify at this time to be a JOE under the requirements of the legislation, although there may be more. The four Northwest organizations are Pacific Northwest Generating Cooperative (PNGC); Oregon Utility Resource Coordination Association (OURCA); the Idaho Energy Authority (IdEA) and Western Montana Electric Generating and Transmission Cooperative. To qualify as a JOE, an entity must be organized under state law as a public body or cooperative on the bill's date of enactment.

JOE'S ARE CURRENTLY INELIGIBLE TO PURCHASE BPA REQUIREMENTS POWER

Section 5(b)(1) of the Northwest Power Act directs BPA to sell firm power to the region's utilities to meet each utility's retail consumer load that exceeds—or is *net* of—the amount of its firm power resources. This is referred to as a utility's *net firm load requirement,* or simply, requirements load. BPA's obligation is to provide power based on each utility's individual loads and resources, independent of the loads and resources of others. Utilities can only use that power to meet the load of their retail consumers.

The Bonneville Project Act limits BPA's authority to sell blocks of firm requirements power to an entity representing large groups of public bodies or cooperatives. Section—2(b) of the Project Act expresses the general purpose of encouraging the widest possible use of all electric energy marketed and preventing monopolization of such energy by limited groups. Sections 4(c) and (d) say that public bodies and cooperatives are to be both sellers and distributors of federal power—in other words, retail utilities with distribution systems.

For the past 60 years, BPA has interpreted the Project Act as precluding sales of firm requirements power to an entity which does not itself directly serve regional retail consumers, but which simply reallocates the power to retail utilities. The proposed JOE legislation would create a limited exception to these provisions by permitting a combined sale of power to a JOE for its members' requirements purchases. BPA does see the need to have an express authorization for such sales included in its statutes.

NO CHANGE TO PREFERENCE CUSTOMERS' CURRENT RIGHTS

In sum, the proposed JOE legislation does not affect our preference customers' rights under current law to buy BPA power. It simply allows a JOE to act as a purchasing agent for its member utilities.

When a JOE purchases from BPA on behalf of its members or participants, the JOE will have the same preference and priority status for those purchases as the member utilities currently have. Like its members, a JOE would be precluded under this legislation from reselling requirements power for any purpose other than its members' requirements loads. Similarly, the same restrictions that apply to customers, which purchase BPA's surplus power, would also apply to a JOE.

IMPACT ON ELECTRICITY RESTRUCTURING

Mr. Chairman, one of the questions that arises is whether this issue is one that should be addressed in broader national electricity restructuring legislation. It is the Administration's view that electricity restructuring would best be handled in a comprehensive manner.

It is our view, however, that JOE legislation is a minor issue. It simply creates a different way for existing preference customers to choose to purchase power from BPA that is consistent with their existing rights. Therefore, we believe the Committee could reasonably move this legislation independent of national restructuring legislation if it so chooses.

Mr. Chairman, members of the Subcommittee, thank you for your time and attention. I am available now to answer any questions about the JOE legislation that you may have.

Mr. BARTON. Thank you, Mr. Burns. We'd now like to hear from Dr. Rosenberg. Your statement's in the record in its entirety, and we recognize you for 5 minutes.

**STATEMENT OF ANDREW A. ROSENBERG**

Mr. ROSENBERG. Thank you, Mr. Chairman, and good morning to you and members of the subcommittee. Thank you for inviting me to testify on these seven hydropower bills under consideration.

I'm Andrew Rosenberg. I'm the Deputy Director of the National Marine Fisheries Service in the U.S. Department of Commerce.

NOAA, the National Oceanic and Atmospheric Administration, mandates under the Federal Power Act, includes some of our most important tools for protecting anadromous fish—that is, fish that migrate from rivers to the sea and back again—and mitigating damage to fish habitat. And through the Federal Energy Regulatory Commission's licensing process, resource agencies such as National Marine Fisheries Service prescribe fishways to meet a variety of objectives, including the passage of healthy existing populations, passage for depleted populations as part of a restoration program, and passage as a means of providing access to underutilized habitat areas.

Passage facilities must be constructed where they're needed, and deficient fishways must be improved by including—and by including effective fishways during relicensing, we can provide these fish stocks will long-denied access to historically important habitats.

We have been working to ensure that the Nation's fisheries resources receive the necessary protections, including those provided by the Federal Power Act, with its key protections for anadromous fish. And to effectively implement the Federal Power Act, NOAA has developed a nationally recognized biological engineering and legal expertise related to fish passage.

Many of our Nation's stocks of anadromous fish are in unhealthy condition, but we have a historic opportunity to change that prognosis because so many dams without passage facilities are soon to be considered for relicensing. The health of these stocks continues to decline, with several requiring listing as threatened or endangered under the Endangered Species Act. And therefore, now is the

time to strengthen our protections for anadromous fish, not diminish them. And by taking a preventive yet realistic approach, we can decease the likelihood of additional listings under the Endangered Species Act, which would be of even greater concern.

The commitment of the administration to the recovery of anadromous fish stocks is evident from the very significant resources that have been expended by the resource management agencies to restore fish habitat. Clearly, efforts to improve the health of aquatic ecosystems will be frustrated if fish cannot gain access to those improved habitats. And thus by improving fish passage, we make possible the ultimate success of the many regional and national large-scale planning initiatives to enhance fisheries' habitat by the U.S. Forest Service, Bureau of Land Management, our agency and others.

NOAA does oppose the bills being considered by the subcommittee today because they undercut the ability of the Federal Power Act to provide important protections for fish. We strongly oppose H.R. 2335 and its implication for the management of NOAA trust resources. We have grave concerns about the bill and will make those concerns known within the administration in concert with the position stated by the Department of Interior.

We believe that H.R. 2335 would complicate and lengthen the fishway prescription process as well as potentially remove any Federal obligation to provide fish passage at dams. The bill will cause delays in fishway prescription by adding additional and duplicative scientific and administrative reviews, and this could add many months to an already long process.

The bill would provide sanctions for late prescriptions in the form of changing the nature of the conditions from mandatory to advisory for late submission, thereby removing any assurance that fish passage will be implemented.

And most troubling of all, the sanction for late final prescription removes any requirement that the commission provide any fish passage, and this potentially could harm public fisheries resources that may be severely impacted by dams. Because licenses are issued for 30 to 50 years, that harm will be long-term for those public resources.

We oppose the other bills because they, with the exception of the JOE bill, where we have no position, because they all seek exemptions to the licensing requirements of the Federal Power Act, and these requirements include important protections for NOAA trust resources.

We do strongly support administrative changes for improving the licensing process and have been working intensively in the interagency task force mentioned by the other speakers already.

We will continue to work in that task force, continue to work to improve the licensing process with regard to communication, coordination and resolving outstanding issues in licensing.

NOAA is very deeply committed to the effort to restructure that licensing process, but we believe it can be done administratively, not through the legislative prescriptions provided here.

With that, Mr. Chairman, I would be happy to respond to any questions. Thank you very much.

[The prepared statement of Andrew A. Rosenberg follows:]

PREPARED STATEMENT OF ANDREW A. ROSENBERG, DEPUTY ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, U.S. DEPARTMENT OF COMMERCE

Mr. Chairman and members of the Subcommittee, thank you for inviting me to testify on the hydropower bills under consideration. I am Andrew A. Rosenberg, Deputy Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration (NOAA).

INTRODUCTION

**Role of NOAA Fisheries in Hydropower Relicensing**

Although hydropower is cleaner than fossil fuel and nuclear power, it is not free from adverse environmental effects. Efforts to reduce environmental problems associated with hydropower operations, such as providing safe fish passage and improved water quality, have received considerable attention in the past decade from the Federal Energy Regulatory Commission (Commission) and from Congress. The Federal Power Act (FPA) provides important safeguards for fish and wildlife resources from potentially serious harm that could be caused by hydropower projects. The Commission's relicensing process provides NOAA with an opportunity to reexamine operations and further the restoration of fisheries through the Department of Commerce's mandatory conditioning authority for prescribing fish passageways under the FPA. Fishways serve a variety of resource objectives including, but not limited to, passage for healthy existing populations, passage for depleted populations as part of a restoration program, and passage as a means of providing access to under-utilized habitat areas.

NOAA is responsible for conserving and managing anadromous and marine fishery resources and their habitats, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, and other statutes. Our authority with respect to hydropower licensing is provided by the FPA, including sections 10(j) and 18, and the Fish and Wildlife Coordination Act. The Commission must give due weight to NOAA's recommendations for the protection and mitigation of damages to, and enhancement of, fishery resources and their habitats. The Commission also must include any fishway prescriptions issued by the Secretary of Commerce pursuant to section 18 in their licenses.

**Two Initiatives to Streamline the Licensing Process**

Hundreds of dams were licensed decades ago with inadequate or no fish passage facilities. They will have to come into compliance with current environmental laws and FPA mandates when those facilities are relicensed. Given the large number of license expirations over the next decade, we have an unparalleled opportunity to reconfigure inadequate fishways, prescribe fishways for projects that have existed without them for as long as 50 years, and provide other fish protection measures. I will describe two initiatives in which we are already working to realize these opportunities.

First, there is the Interagency Task Force to Improve Hydroelectric Licensing Processes (ITF) convened by the Commission, NOAA, the Department of the Interior, and other resource agencies to develop administrative reforms to the licensing process. The ITF is playing a catalytic role between the Commission and the resource agencies, significantly improving communication and coordination. The ITF workgroups are developing administrative measures that should make the licensing process work more smoothly. They are being assisted by an advisory committee composed of industry, non-governmental organizations, tribes, and local, state, and Federal government agencies. Second, NOAA and our Federal partners are participating in an industry-led effort, sponsored by the Electric Power Research Institute (EPRI), to develop mutually acceptable means for improving the licensing process. The ITF and the EPRI initiatives collectively provide a means for stakeholders and agencies to identify and discuss improvements to the licensing process.

HYDROPOWER BILLS

**H.R. 2335—Hydroelectric Licensing Process Improvement Act of 1999**

While we agree with the objective of making the hydropower licensing process work smoothly, we disagree with the need for the proposed legislative changes and therefore strongly oppose H.R. 2335. We have grave concerns with the bill for the reasons outlined below. We believe that the ongoing, comprehensive efforts of the ITF and EPRI to streamline the licensing process via administrative reforms will improve the licensing process while still preserving the necessary environmental protections of the FPA. Until this process reaches completion, and ITF and EPRI

recommendations can be implemented and assessed, legislative changes to the FPA should be held in abeyance. I will now comment on several issues raised in the bill.

*General Comments*

Many anadromous fish stocks continue to decline, with several listed as threatened or endangered under the Endangered Species Act (ESA). By taking a preventative yet practical approach, the likelihood of additional listings under the ESA is decreased and chances for recovery are increased.

If mandates to provide passage for anadromous fish are diminished, our ability to protect fish, ensure sustainable fisheries, and maintain healthy river systems will be decreased. For nearly 30 years NOAA has been developing scientific capabilities in the area of fish passage that should continue to be applied to development of fishway prescriptions. It is appropriate that NOAA continue to provide for the protection of anadromous fish at hydropower projects because we have the statutory authorities and scientific expertise to manage these species throughout their range. It would be inefficient for the Commission to duplicate this expertise.

*Specific Comments*

**Sec. 32(b). Factors to be Considered**

NOAA recommends deleting sections A, B, and C of the bill because they are unnecessary and add confusion to the licensing process. The FPA requires the Commission to make decisions on licenses in the public interest by "balancing" varied and competing biological, economic, and social interests. H.R. 2335 would either shift the responsibility for balancing from the Commission to the resource agencies, or result in a duplicative system where the agencies and the Commission are separately considering the implications underpinning a licensing decision. All of the factors in A are appropriately considered by the Commission. NOAA already takes factors B and C into consideration when developing fishway prescriptions.

NOAA works closely with other consulting agencies when fishway prescriptions are developed. Additionally, in developing its mandatory conditions, NOAA already considers their compatibility with other mandatory conditions, relation to project impacts, and costs.

**Sec. 32(b)(2). Documentation**

NOAA considers this section unnecessary. The courts have stated that there must be substantial evidence to support mandatory conditions in the Commission's record. This standard is one used for review of Federal agency actions and it is appropriate for mandatory conditions to withstand legal challenge. Substantial evidence should include the scientific basis for the agency's conditions, as well as appropriate consideration of any other information provided to the consulting agency.

**Sec. 32(c). Scientific Review**

NOAA opposes this section because it would cause delays in an already lengthy process. Also, it is unnecessary because we already consider the results of peer reviews, and base our decisions on the best available science.

The process of developing a fishway prescription directly involves the applicant because it is an interactive, multi-phase process during which NOAA coordinates with the license applicant, who can provide any additional information when needed. We work with the applicant or their contractors to ensure that appropriate data are collected according to accepted scientific practice. If an applicant submits results of a peer review, the review is given due consideration. Adding one more step to this process would lengthen it unnecessarily.

NOAA is the world's largest fishery research and management agency, and has a scientific capability with diverse and highly specialized skills. As a science-based agency, we believe strongly that management and conservation decisions should be based on the best available science. Applicants can choose to provide us with their own scientific analyses and peer reviews. We will give those reviews appropriate consideration in our decisions, but believe we must retain the final decision for our prescriptions. The FPA appropriately assigns this responsibility to us.

**Sec. 32(e). Administrative Review**

The option of an Administrative Law Judge (ALJ) or other non-scientific reviewing body recommending a fish passage condition improperly places the responsibility for a technical decision on a person or review body without the requisite scientific background. NOAA has a number of other concerns as well. First, the time to provide conditions for review is unworkable because we typically would not have all the information needed to formulate fishway prescriptions at least 90 days before the applicant files its application. Second, the ALJ or other reviewing body would not have information available on energy or economic values of a project. Third, down-

grading a mandatory condition to a recommendation because an ALJ or independent reviewing body takes longer than 180 days potentially could significantly harm fishery resources and associated users. Fish passage prescriptions are mandatory measures needed to assure safe and effective fish passage. Fish passage needs do not change because a procedural timing requirement is not met. Upon being downgraded to 10(j) recommendations, the Commission would be allowed to accept, reject, or modify them. Such a practice would frustrate Congress's clear purpose of ensuring that fish passage is required as prescribed by Federal fishery experts.

**Sec. 32(f). Submission of Final Condition**

NOAA opposes this section because the deadlines do not take the Commission's National Environmental Policy Act (NEPA) analysis into consideration and the result of missing a deadline may adversely affect fishery resources. The deadline for submission of a final condition of no later than one year after the license application is ready for environmental review is unrealistic in relation to the Commission's NEPA analysis. Currently, when sufficient information is available, NOAA will submit preliminary fishway prescriptions in response to the Commission's notice that the project is ready for environmental analysis. The Commission can then include them in its NEPA analysis of the proposed project. NOAA may modify its prescriptions based on information developed during the NEPA analysis. As written, this section would deny this option.

Also, the "default" option, essentially our sanction for not making the deadline, is even more onerous. The consulting agency would not be able to recommend conditions for fish passage or alleviating impacts to a federal reservation. The result would be that fishery resources could lack passage, causing significant declines in their numbers. Many anadromous fishery resources are already in a precarious state and this would exacerbate the problems.

Additionally, this section would encourage applicants to delay in providing information requested by the resource agencies because it would increase the likelihood of the agencies missing a deadline. NOAA already makes every effort to meet its deadlines and will continue to do so.

**Sec. 32(g). Analysis by the Commission**

NOAA opposes this section because it would require NOAA to conduct an analysis that is duplicative with the Commission's NEPA analysis. NEPA analysis requires consideration of all impacts to the quality of the human environment, not only biological and physical impacts, but economic impacts as well. NOAA bases its conditions on the best available science, its expertise, and any other factors relevant to providing adequate fish passage. We take into account information regarding costs of the measures and will choose the least-costly option that provides adequate fish protection.

The FPA is clear in its requirement that the Commission consider the economic viability of a project as part of its "balancing" deliberations that precede the decision to issue a license. During balancing the Commission considers a multiplicity of issues affecting societal interests. NOAA does not have access to the varied types of information that the Commission applies to balancing. The Commission's decisions indicate that the economic viability of a project is not the only factor in their deliberations, as the Commission often issues licenses to applicants whose projects have been determined to have negative economic benefits.

**Sec. 32(g)(2). Consistency With This Section**

In regards to this section, the concerns stated above regarding section (b) and (c) apply equally to FPA section 10(j).

**Sec. 32(h). Commission Determination on Effect of Conditions**

NOAA disagrees with the characterization of the public interest being only those factors listed in section (b). There is no mention of the value of a resource protected by the condition. As to the rest of the factors listed, the Commission already reviews appropriate information on rehearing. Therefore, we recommend this section be deleted.

**Sec. 33. Coordinated Environmental Review Process**

NEPA and the President's Council on Environmental Quality (CEQ) regulations already provide deadlines for comments on NEPA documents. The Commission should not set different deadlines for governmental agencies to provide their comments, because this runs counter to the CEQ regulations.

**Sec. 6. Study of Small Hydroelectric Projects**

The size of a hydropower project is not necessarily related to the magnitude of its impacts on fish and habitat. Even small projects are major Federal actions and, regardless of the licensing process in use, require some level of NEPA review. While we would support consideration of processes for expediting the licensing process for small projects, we would not support any action that diminishes the role of the resource agencies from safeguarding the public's resources under their jurisdiction. Currently, the FPA does provide an exemption from the licensing process for small hydropower projects, and includes adequate protections for fish and wildlife.

**S. 422—Alaska State Jurisdiction Over Small Hydroelectric Projects**

NOAA strongly opposes S. 422. This bill would eliminate certain hydropower protections for fish and wildlife by removing small hydropower projects in Alaska from the jurisdiction of the Commission. Enactment of S. 422 would prevent Federal fishery managers from being able to conserve and manage anadromous fish throughout their range. NOAA's statutory responsibility to protect anadromous fish is especially important in Alaska, which supports many of the remaining healthy stocks of anadromous fish in the Nation. Alaska is where most new hydropower projects are under development, presenting an opportunity to achieve compliance with fish protection measures from the outset. Removing the Commission from the licensing process would remove NOAA as well, thereby preventing the agency that is responsible for management of anadromous fish throughout their range from participating in development of fish passage measures. Management of issues such as cumulative impact assessment would be greatly complicated if responsibility for fish protections was split between Federal and state entities within the same watershed, as many watersheds cross the boundaries of several states. While this is not true for Alaska, the transboundry rivers shared with Canada (Yukon, Taku, Stikine) present an analogous and even more complex situation. Additionally, Canada has taken the position that failure by the United States to protect salmon from hydroelectric development is a principal cause for imbalance in salmon production between the two nations. Passage of S. 422 may make future negotiations under the U.S. and Canada salmon treaty more difficult.

**Consultations with Affected Agencies**

The bill states that the Commission shall consult with the Secretaries of Commerce and the Interior before certifying a state program. Apparently this is intended to ensure that Alaska's program would provide adequate protection for Federal interests. However, there is no statutory provision requiring the Secretaries to concur with the Commission's decision, merely that the Commission consults. While the bill provides for oversight by the Commission it does not give the Federal resource agencies a role in this review. This leaves NOAA with little recourse if anadromous fish are not receiving adequate protection under the state program.

**Exemption Unnecessary**

Small hydropower projects already can be exempted from the licensing process pursuant to provisions of the Federal Power Act and the Public Utility Regulatory Policies Act (PURPA). (*See* 16 U.S.C. 823a and 2705). Hydropower projects falling within a FPA and PURPA licensing exemption already may apply for a FERC license exemption. This alternative involves much less time and effort on the part of the license applicant than the licensing process. Such projects still remain subject to conditions for fish protection issued by Federal resource agencies. This is important because projects of 5,000 kilowatts or less may have significant environmental consequences and should, therefore, continue to be subject to the requirements of the FPA and protections deemed necessary by the resource managers. Damming of an anadromous fish stream has adverse impacts regardless of the project's size.

**Project Works on Federal Lands**

Although NOAA is not a land management agency, we have concerns regarding the direct and indirect effects of hydropower projects located in whole or in part on Federal lands. S. 422 would require that the Secretary having jurisdiction with respect to such lands must approve the State of Alaska's authorization for the hydropower project. However, S. 422 fails to require any consultation with the Federal fish and wildlife resource agencies before such approval is provided. Public resources under Commerce jurisdiction and management plans may be affected.

**S. 334—Removing FERC Jurisdiction to License Projects on Fresh Waters in Hawaii**

NOAA opposes S. 334 because it would eliminate important living marine resource protections provided by the FPA and could cause significant harm to fishery

resources. S. 334 would exempt hydropower projects on fresh waters in the state of Hawaii from the requirements of the FPA, and the Commission would no longer have licensing authority. As with Alaska, we oppose complete devolvement of licensing authority to the states because of the important role that Federal fishery managers play in the licensing process. Although NOAA currently has no current involvement in hydropower licensing in Hawaii, we should not be precluded from doing so in the future, where resources under Commerce jurisdiction are impacted.

**S. 1236 and H.R. 3852—Extensions of Deadline and Reinstatement of License**

NOAA opposes S. 1236 and H.R. 3852 "Extensions of Deadline and Reinstatement of License" because we believe that all projects should be constructed on time to ensure that environmental information is current. S. 1236 and H.R. 3852 would authorize the Commission to extend the time limits for construction of projects after issuance of a license in Idaho and Alabama, respectively. When Congress has authorized extensions of the construction deadlines for hydropower projects, the Commission generally has not objected to extensions of up to ten years from the date the project was licensed. Conditions may change substantially in that amount of time, thereby requiring supplementation of the Commission's environmental analysis. At a minimum, the Commission should ensure that their NEPA analysis is still valid, or prepare a supplemental NEPA document.

**H.R. 1262—FPA License Not Required for Pentwater River, Michigan**

NOAA opposes passage of H.R. 1262 for the same reasons we oppose S. 422 and S. 334. Specifically, the erosion of the Commission's authority, whether state by state or project by project, circumvents the FPA requirements that provide the Federal resource agencies with an important role in the licensing process.

**S. 1937—Allowing Bonneville Power Administration to Sell Electricity to Joint Operating Entities**

NOAA has no comment on this bill.

CONCLUSIONS

NOAA is working to ensure that the Nation's fishery resources receive necessary protections, including those provided by the FPA with its key protections for anadromous fish. By including effective fishways during relicensing, we can provide anadromous fish stocks with long denied access to historically important habitats. By combining this preventative approach under the FPA with the important curative measures under the ESA, we can decrease the decline in other populations and decrease the likelihood of additional listings under the ESA.

NOAA mandates under the FPA include some of our most important tools for protecting anadromous fish and mitigating damages to fish habitat. Our positions on these bills stem from our conviction that these mandates should not be diminished or removed.

The FPA mandates the Commission to make licensing decisions in the public interest, balancing the Nation's need for hydropower and the need to protect important natural resources. NOAA will continue our collaborative efforts with the Commission, industry, non-governmental organizations, tribes, and other interested entities to ensure that the hydropower licensing process provides a sound basis for the balancing of societal priorities, including the need for healthy habitats and productive fisheries. We will also continue our efforts to make administrative changes that will make the process work more smoothly.

NOAA views relicensing as an opportunity to increase, rather than retreat from, efforts to improve fish passage at dams and protection of aquatic ecosystems. H.R. 2335 proposes changes to the FPA that will diminish our ability to protect anadromous fish by providing passage at dams and meet statutory mandates to ensure the sustainability of stocks. Therefore, we strongly oppose H.R. 2335.

NOAA opposes S. 422 "Alaska State Jurisdiction Over Small Hydroelectric Projects" because we believe that the fish and wildlife protection provisions of the FPA should continue to apply to all hydropower projects, regardless of geographical location. Applicants in Alaska can already apply for an exemption from the full licensing process for small hydropower projects and still enjoy adequate protection for Federal resources.

NOAA opposes S. 334, "Removing FERC Jurisdiction to License Projects on Fresh Waters in Hawaii," because we are concerned that removing Hawaiian hydropower projects from the licensing requirements of the Federal Power Act would eliminate important resource protections that may be needed in the future. We believe that the provisions of the Federal Power Act should continue to apply to all non-Federal hydropower projects.

Thank you for the opportunity to provide testimony on these important issues. I would be happy to respond to any questions.

Mr. BARTON. Thank you, Dr. Rosenberg. We have two pending votes on the floor. We've got 10 minutes left in the first vote and then there will be a 5-minute second vote. The chair's going to try to get one round of at least one member ask some questions before we go vote, and then we'll come back.

Congressman Towns, we'll give you the option, if you wish, since you have been so maligned by this distinguished group of witnesses.

They all——

Mr. TOWNS. They strongly oppose.

Mr. BARTON. Strongly oppose. And they just—I know your ego is taking a beating. If you would like to go first to try to correct the record so that your reputation remains intact, we'll give you that option. And then when we come back, we'll give Mr. Shadegg the opportunity if he wishes.

Mr. TOWNS. Thank you very much, Mr. Chairman.

Mr. BARTON. Five minutes.

Mr. TOWNS. I really appreciate this, because it's strong language. Let me just begin by asking you, Dr. Rosenberg, do you support what's happening now?

Mr. ROSENBERG. If you mean do we support——

Mr. TOWNS. I want to find out what you're supporting. You strongly oppose change.

Mr. ROSENBERG. Yes. And we strongly support——

Mr. TOWNS. Do you support what's happening now?

Mr. ROSENBERG. We strongly support streamlining through administrative process, yes. If you mean do we support the current licensing process, we think that a lot of things need to be fixed, but we do not believe that that needs to be done legislatively. It can be done administratively, and we're working toward that end.

Mr. TOWNS. How long has the task force been in existence?

Mr. ROSENBERG. It's a year and a half? Two years? Two years, I believe, sir.

Mr. TOWNS. What have you accomplished up to this point?

Mr. ROSENBERG. There has been work in several areas including so-called ex partite rules, the rules that constrain discussion between the parties outside of a legal setting, the overall communication and licensing process. There's been discussion on economics. There's a fourth area which——

Mr. TOWNS. Would the commissioner agree with that? You know, let me—this is a very serious issue. I mean, and I'm hoping you realize, you know, how serious it is. Any time you have a situation where people do not know how many lawyers they will need, how much money they will have to spend, or what year they will ever be relicensed, I mean—I mean, to me, that's a very serious issue. And I think that to form a task force is one thing, but the question in my mind is what are you going to accomplish with this task force?

Mr. ROSENBERG. Well, one of the main focal areas, Congressman, for the task force has been development of a collaborative process for working through licensing issues with the applicants. It certainly is true that this is a complicated process, but these license

are issued for a very long period of time and cover a very wide range of issues as well as trust resources. So through that collaborative process, we believe that there can be much greater certainty in the licensing activity. We do not believe that that would occur through some of the legislative changes proposed. I certainly don't think I've done any damage to your reputation or anyone else's by making that statement.

Mr. BARTON. We're just kidding about the reputation. Don't take us seriously on that.

You cannot damage a Congressman's reputation.

Mr. TOWNS. Especially if that Congressman is from New York. Yes, Commissioner?

Mr. HEBERT. If I may, you had asked the commission, but what I'd rather do is yield to the chairman first and then answer after him unless he would like for me to go ahead.

Mr. HOECKER. No. Thank you, Commissioner. Do we agree that the task force and the advisory committee can be productive? Absolutely. The FERC was instrumental in asking for this process. We intend to help drive the process. And we are looking for some very specific results in terms of collaboration, in terms of how we apply the NEPA statute, in terms of what best practices we can adopt to expedite the development of conditions, noticing techniques, even model conditions under the Clean Water Act. A number of things have been talked about.

But you're absolutely right, Congressman, that your patience in regard—and ours—shouldn't be infinite. And at some point we need to produce some very specific results. I think that the collaborative process is assisted by the attention that this subcommittee has focused on this entire range of issues. And so I certainly applaud your efforts to shine that light.

Mr. TOWNS. Thank you. Commissioner.

Mr. HEBERT. Congressman Towns, you and I had an opportunity to speak together at a conference about a year ago and had the opportunity to speak about a couple of issues. And at that time I told you I did agree with you and I thought that the process was broken. I continue to think that way, and I do support 2335, and let me tell you quickly why I support it and why I think it moves us in the right direction.

Your comments in the beginning, your summary as to that it does not repeal mandatory conditioning, I think that's an important observation. I think it's something that everyone needs to understand, that it does not repeal mandatory conditioning, but that it requires a reasonable implementation of the law with regard to costs and benefits.

That is something similar to, I think, what we have certainly done when it comes to pipeline certification. And as you know, FERC has combined its offices of pipeline certification and hydro licensing into an office of projects now, so an office of one. So I certainly think that would be consistent. It would move us in the right direction.

But if I may point something out, too, which really alarms me——

Mr. BARTON. Point it out quickly, because we've got 5 minutes to vote.

Mr. HEBERT. I'll do that, Mr. Chairman. I've had an opportunity to look over the written testimony of Andrew Fahlund, Director of Hydropower Programs for American Rivers, and in his testimony on page three he says, "these decisions have a relatively small impact on energy generation, electric rates, or industry viability." And if you go over to page six where he qualifies that, "according to the chair of the Federal Energy Regulatory Commission, the relicensing of more than 140 hydropower projects resulted in an average reduction of generation of only 1 percent." Well, only 1 percent in a time where we not only have the administration but we certainly have Members of Congress concerned about reliability this summer, I'm asking who's going to lose that 1 percent?

And the Internet is a wonderful thing, and I had an opportunity to pull up some numbers this morning, and based on the 1 percent, I assume we should make a phone call to Idaho, Montana and Wyoming and tell them that over the years, they're not going to have their 1 percent. And if we're not willing to do that, what I suggest we do is make a phone call and say, well, perhaps you're going to have electricity, but we are going to have to burn something for you to have that electricity.

And the last point is this. And he makes it on page 7. "One would reasonably expect at least some loss with meeting environmental laws. A 1-percent loss in generation is a small price to pay for the benefits received. We need not trade healthy rivers for clean air." I think that's right. I think we need to have a balance. But nor do I think we should trade clean air for clean rivers necessarily. I think a balance is right. I think Congressman Markey said it right, not torpedo the dams, but not damn the environment. I think a balance of the laws in relicensing is what is necessary, and I think we can do that, and I don't see how anyone could suggest that balancing is a bad idea.

Mr. BARTON. Let the record show I think that gentleman's from Mississippi, so his one more comment took about 3 minutes.

Mr. HEBERT. We talk slower than the rest of you.

Mr. BARTON. We're going to recess briefly. We've got this vote, one more vote. We should be back, or at least the chairman intends to be back, by 11:30. So members that wish to ask questions, if you'll come back at 11:30. In recess till 11:30.

[Brief recess.]

Mr. BARTON. The subcommittee will come to order. I see we've been joined by the distinguished Congressman Sawyer. Glad to have you. As soon as we get our witnesses back at the table, we will recognize Congressman Shadegg for his 5 minutes of questions. And it looks like Commissioner Massey is about to be seated, so the Chair would recognize Congressman Shadegg for 5 minutes for questions.

Mr. SHADEGG. I thank the chairman. Let me begin with you, Dr. Rosenberg. You were in the room when Senator Murkowski testified that as a specific project, it took 7 years to get the license and a year to build the plant, I believe, were you not?

Mr. ROSENBERG. Yes.

Mr. SHADEGG. Do you think that that's appropriate?

Mr. ROSENBERG. Certainly not. But I don't know the specifics of the case at all.

Mr. SHADEGG. I don't, either. Do you—as I understand your testimony it is that you believe the statute or the process now is flawed and does not move quickly enough but you argue that Congress should simply defer to your efforts and the efforts of those involved to simply allow you to proceed with this now 2-year process to try to improve the relicensing process. Is that right?

Mr. ROSENBERG. Yes, sir.

Mr. SHADEGG. Okay. I guess I should begin by extending my welcome to John Leshy. John Leshy was a professor at ASU law school years ago when he and I worked together on projects.

Mr. LESHY. I still am, Congressman. I'm on leave and working on the world's longest leave.

Mr. SHADEGG. What's the doctrine that we worked together on? The doctrine that provides that the government owns the beds of all navigable——

Mr. LESHY. Oh, right. The public trust doctrine.

Mr. SHADEGG. The public trust doctrine.

Mr. LESHY. Right.

Mr. SHADEGG. We were shoulder to shoulder in that fight and had a lot of fun. Let me ask you, Mr. Leshy, you also heard the testimony of Senator Murkowski to the effect that it took 7 years to license a—what was evidently a very small plant, because they built it in a year—in Alaska. Do you feel that 7 years to license a plant that can be built in a year is appropriate?

Mr. LESHY. No, I don't, Congressman. And I'm happy to have the opportunity to talk about that a little bit. I don't know the specifics of that case.

There are many reasons for delay. It's part of this process. The conditioning authority, the Interior Department and its share is—and Forest Service's share is one aspect of delay, but it is by no means the only aspect. A lot of times in our experience, frankly, the problem is that we get applications that aren't fully developed and don't have enough information them.

Mr. SHADEGG. I appreciate that. My time is very limited, so if you'll just say what you have to say on that issue in a sentence, and if you want to expand your answer writing that's fine. But as you know, my time is——

Mr. LESHY. If I could make one quick other point, and that is, during the delay process, the existing project goes on, so the incentive of people who want to improve the project from an environmental standpoint such as our agencies is to get this process going forward. Because the existing process continues under annual licenses during this entire period of whatever delay is involved.

Mr. SHADEGG. You do agree, Professor Leshy—I'll call you that if you will—that the current law requires FERC to give equal consideration to the purposes of energy conservation, the protection and mitigation of damage to and enhancement of fish and wildlife, the protection of recreational opportunities and the preservation of other aspects of environmental quality. You do agree that the law requires equal consideration be given to essentially those two different aspects?

MR. LESHY. Yes. I think that was added by the legislation that Congressman Markey talked about.

Mr. SHADEGG. But you also agree, I guess I understand from your testimony, with Dr. Rosenberg that we should not pass 2335 at this time, we should simply trust you?

Mr. LESHY. Well, the existing conditioning authority that we have, we've had since 1920. And Congress did not change that in 1985, 1986 when it gave the Commission the direction to give equal consideration.

Mr. SHADEGG. Do you know if it took—in 1920, do you know if it took 7 years to license a project?

Mr. LESHY. I don't know, Congressman.

Mr. SHADEGG. I guess I just want to make a statement, and then I want to ask you a series of other questions. You are a part now of the administrative branch of the government and not the legislative branch. Is that correct?

Mr. LESHY. Yes.

Mr. SHADEGG. I just want to make it clear that——

Mr. BARTON. He had to think about it.

Mr. SHADEGG. I just want to make it clear that we have different responsibilities, and my concern is that the voters of the 4th Congressional District of Arizona when they see issues like this of a law that the Congress passes and then what appears to be inordinate delay—and I haven't heard a witness say yet that there isn't excessive delay—that it's a tough sell for me to go home to Arizona and say, yes, I recognize there's a problem here, but I didn't do anything about it because the administration, the other branch of government said, well, they were working on it and had been working on it for 2 years, and I ought to just trust them. So I hope you'll appreciate that I have to come at this from a different position than you do.

I also want to just clarify from your testimony and from your written statement that you oppose certain aspects of Mr. Towns' legislation. Specifically you oppose requiring scientific peer review. You oppose allowing an administrative law judge or other independent review body to be inserted in the process. You oppose requiring the Commission to conduct an economic analysis of each section 4(e) condition, and you do not want to be required to rely on the Commission's NEPA statement. Is that correct?

Mr. LESHY. Basically, yes, because we're concerned about essentially the layering and the delay that's involved in that process. You know, is the issue, should we take cost into account in setting our conditions? Of course we should. but should we have an elaborate independent appellate process——

Mr. SHADEGG. I just want it on the record that you oppose all of those. You don't want independent scientific peer review, you don't want an administrative law judge or independent review, you don't want an economic analysis of each section or of each section 4(e) condition, and you don't want to rely solely on the NEPA 4(a)—the NEPA analysis by the Commission.

If I can, Mr. Chairman, with your indulgence, I'd like to turn to the chairman, Mr. Hoecker, and say, I assume that you agree with the other two witnesses that 7 years to license a project which can be built in 1 year is too long?

Mr. HOECKER. Yes. We don't want the process to be any longer than necessary. And we have worked very hard to reduce the processing time for hydro licenses.

The average time for the class of 1993, the 160-some-odd projects whose licenses expired in that general timeframe, was about 3½ years. Under our new alternative licensing procedure, the average time in those few cases where we have actually applied it is a year.

Mr. SHADEGG. I want to make it clear that I support your efforts, the administrative efforts to try to improve the process. But Commissioner, I want to commend you for working in I think a good faith way with us to say, look, I applaud the goal of Congressman Towns' legislation, which you have done here today, and to come in and constructively say, these are things in the legislation that I think would help. And I heard your testimony and listened carefully to it and took notes on it. And I genuinely appreciate that you're not just saying, "trust us. We've been at this 2 years. We'll solve it someday."

I would conclude, Mr. Chairman, by commending Commissioner Hebert. I want to completely associate myself with your remarks, your support of this legislation, your thoughtful analysis of the testimony that's before us, including the analysis of the American Rivers testimony. You were pointing out that the notion that losing only 1 percent of generation is insignificant and shouldn't be worried about, and also associate myself with your remarks saying we can strike a balance here. I favor environmental protection and certainly don't diminish that.

And I think the current law where it says we must strike a balance between those is appropriate, but I also think it's important to understand that this is a Nation which needs more energy, and if we don't produce it through hydroelectric power, almost every other source that we know of results in the combustion of a fuel and damage to our air quality. So, I commend you for your testimony.

Mr. HEBERT. Thank you, Congressman.

Mr. BARTON. Mr. Sawyer for 5 minutes for questions.

Mr. SAWYER. Thank you, Mr. Chairman. I apologize for not being here earlier. I was in another meeting. And so if the matters I'm going to ask about have been covered, please don't hesitate to tell me.

I'd like to have you comment, both commissioners, on the kind of success that you've had in the use of settlements and whether there are other avenues that might be pursued in order to achieve collaborative processing.

Mr. HOECKER. I identified several projects in my written testimony where we've had some considerable success in advancing the timetable for resolving licensing—relicensing cases, the latest one being the Avista case, which was the Clark Fork Project in Montana and Idaho. A couple of very major projects, a lot of power at those sites.

We managed to license that project in a year because we did a tremendous amount of collaboration. The applicant selected a process, brought the consulting agencies, the other parties into the process, and a settlement was achieved. We've had other instances like that where we have achieved success.

It's my expectation that this procedure, coupled with what we will be able to achieve in the context of our task force, which hopefully will help develop licensing conditions more in the open through public process of some kind, will make our processes less of a mystery to all the affected parties and will encourage settlements. And that's where we're focused.

Within this existing statutory framework, our only choice is to try and reach some kind of administrative accommodations, and that's where we're putting our effort.

Mr. MASSEY. Congressman, to be brief, I will associate myself with the remarks of Chairman Hoecker. I think settlement is the key to getting the cases through the process very quickly. I think licensees and others know that we support settlements. They're hard to accomplish, but I am bullish with our alternative licensing process, that the chairman talked about, will bear substantial fruit.

I also believe that the interagency task force will bear fruit. I wouldn't expect Congress to wait forever, but I do believe it will ultimately result in processes and procedures that are more reasonable.

Mr. HEBERT. Congressman Sawyer, my comments will be very similar, and I'll attempt to be brief as well. The only problem that we continued to have with the collaborative process—and I do think it's working. I think it's been a wonderful benefit—is Section 18. Regardless of what we try to do with the collaborative process, if we have the mandatory conditioning requirement over our head, there's nothing we can do with that, and therein lies the problem.

I think the balancing should be the requirement, and I don't think anyone would argue that there is anything wrong with moving forward with objective criteria. I don't think we would have imposed $SO_X$ and $NO_X$ emission requirement had we not had some type of scientific evidence suggesting that something should be done, nor do I suggest we should do that with hydropower as well. And I think that is something that has to be considered.

And a comment that Dr. Rosenberg made as well, as far as the 30 to 40 years that they are strapped with these conditions or the lack thereof in his case, I would suggest the one thing that has to be considered as well is that the government can at any time move forward and reopen that license. The operator cannot.

Mr. SAWYER. Thank you, Mr. Chairman. Thank you all.

Mr. BARTON. Thank you, Congressman Sawyer. Congressman Dingell, would you wish to be recognized for questions now? Would you like to——

Mr. DINGELL. Mr. Chairman, thank you. I'd like to address first, if you please, with Mr.—I can't see the name there.

Mr. HEBERT. Hebert.

Mr. DINGELL. Hebert. On the question of fish and wildlife. Under the Towns bill, you get 180 days in which to respond. Is that right?

Mr. HEBERT. That's correct. Yes, sir.

Mr. DINGELL. Now, and can you do that in that period of time?

Mr. HEBERT. Yes, sir, I think we can.

Mr. DINGELL. You can? So the 180 days you're telling me is not a problem?

Mr. HEBERT. I think if it's a deadline, we can meet it, sir. It's been my experience that the only thing that forces us most of the time to make decisions is deadlines themselves.

Mr. DINGELL. All right. Now you've indicated, however, that you would recommend a veto on this legislation. Is that because—is it, Mr. Leshy, you've suggested that you'd recommend——

Mr. HEBERT. Yeah. No, sir, I would not recommend a veto. Quite the opposite.

Mr. LESHY. That's me, Congressman Dingell, from the Department of the Interior. We would recommend a veto of this legislation.

Mr. DINGELL. Why?

Mr. LESHY. Because we think it actually will result in more delay and more complication—more complicated structure in this already complicated process, and it will really be a step backwards. It won't serve the objective that I think we all share, including members of this committee, which is to make this a better, faster, more efficient process.

Mr. DINGELL. Can you make the 180 day limit that is imposed on you?

Mr. LESHY. In terms of—I'm not sure exactly which limit you're talking about.

Mr. DINGELL. You have 180 days in which to comment. Is that sufficient or not?

Mr. LESHY. Oh, okay. I see. I'm sorry. I don't think we can do that. Certainly if——

Mr. DINGELL. Why not?

Mr. LESHY. I'm sorry?

Mr. DINGELL. Why not?

Mr. LESHY. Setting these conditions can be a very complicated matter, and it depends in large part on what the applicant is proposing to do, which we often don't find out until much later, and we are—the way I understand this bill, it would require us essentially to set conditions at the very beginning of the process before we fully understand what the impacts of the license are going to be.

That's why in fact we support and are important participants in this collaborative process, because the big advantage of the collaborative process is that we sit down with the applicant and the Commission before its plans get locked in stone and it submits an application. And we can work with the applicant through the development of the application to solve a lot of these problems. And we think that holds great promise. We have had some successes already, and there's a lot of interest among the license applicants in going through this process. Our agency has a lot of interest in using that alternative process, and we think it's going to solve a lot of the problems the committee is concerned about.

Mr. DINGELL. Now, Mr. Rosenberg, do you have any comments on these points that I've been just raising?

Mr. ROSENBERG. Yes, sir. I think that the deadline is problematic. We might be able to make a 180-day deadline if you had full information. But we rarely do. Most of the delay in developing the prescriptions is waiting for additional information from the appli-

cant, from FERC, additional analyses to be done by contractors and so on.

If you put in the timelines as in the bill, there is no incentive for them to complete those, because if we miss the timeline, then the prescriptions are no longer mandatory.

So there's no reason why they would want to be forthcoming with information more quickly if it would downgrade the actual prescriptions if they are not forthcoming with information. That's not a matter of ill will, it's just a matter of common sense.

Mr. DINGELL. You're saying what this does is to actually discourage cooperation by the applicant?

Mr. ROSENBERG. Yes, sir. I believe it does.

Mr. BARTON. Would the gentleman yield?

Mr. DINGELL. I don't know how much time I've got.

Mr. BARTON. Well, we'll give you extra.

Mr. DINGELL. But I'll be glad to yield——

Mr. BARTON. I think I'm pretty generous with extra time. You could still make a determination with imperfect information. And we do it every day in the Congress, so——

Mr. ROSENBERG. Yes, sir, we can. But those would then be mandatory prescriptions, and we would be worse off and the applicant would be worse off, so that's why we don't feel that those timelines are actually helpful either to the applicant or to us.

Mr. BARTON. But you understand that sometimes this quest for perfect knowledge drags the process on into infinity?

Mr. ROSENBERG. Yes, sir. But I don't believe we're——

Mr. BARTON. So there is some validity in Mr. Towns' idea of putting a timeline. And I know the bureaucracy hates to make decisions, but sometimes you can make a decision based on relevant information and don't have to wait for total, complete, perfect knowledge.

Mr. ROSENBERG. Sir, in this field, we always make decisions in that circumstance. And I believe that's the case for fishway prescriptions as well. But having a mandatory timeline with the consequence of that being an actual downgrading of the recommendation makes this a one-way process. There really does not seem to be any incentive at that point to engage in a full collaboration. If you had a timeline and reversed that process, maybe in fact you would get better cooperation, but I can't see how it would work in this circumstance.

Mr. DINGELL. Well, and in point of fact, the applicant would have every incentive to run the clock——

Mr. ROSENBERG. Yes, sir.

Mr. DINGELL. [continuing] to delay delivering the information, to deliver less than the required information. So as a result, that puts you in greater and greater difficulty in terms of your ability to address the problem. Isn't that right?

Mr. ROSENBERG. Yes, sir. And that's one of the primary reasons we oppose the bill.

Mr. DINGELL. Okay. Now I can understand that FERC would not object to this. They're in a different line of work. And I've had to deal with FERC over the years, and I find you gentlemen to be quite uncooperative in terms of preserving and protecting fish and

wildlife values, and that tends to—that was one of the reasons I directed the question at you that I did.

Having said these things, Mr. Burns, we have been requesting from the Department of Energy for a goodly period of time certain answers to certain questions. We finally wrote a nasty letter to the Secretary on Monday. Last night after close of business, we got your responses. The questions that were asked were essential to us achieving an understanding of the legislation so we could understand what it is that we ought to do about the legislation.

I hope that you will take back to the department that I'm very displeased, that I feel that this was not a lack of proper cooperation, and that you have essentially slowed down the process and made our business more difficult. I want you to know that I find this very displeasing. I hope you'll carry this thought from here with you and that were I the chairman of this committee, you would feel rather noticeably more pained on this matter than you are this morning.

So, Mr. Chairman, I thank you for your kindness.

Mr. BARTON. Thank you. The Chair recognizes himself. I'm going to—I have a series of questions. I'm not going to set the clock. But after my questions or during my questions if the members here wish to ask questions, we'll do that, and then we'll let this panel go so they can have lunch.

I want to make a statement first, and then I'll ask the questions. This is a hearing to get information on all these bills for potential mark-up. And I talked to Congressman Towns on the way to our vote and told him that I'm not afraid of controversy. I'm ready to go to mark-up if we can find a consensus that's a bipartisan consensus. I don't want for it to be a Republicans on one side and Democrats on the other. But if we can get—as I told Congressman Towns, I just want friends and enemies on both sides of the issue. And so, you know, the fact that these bills have been languishing tells me that if they can pass the Senate, we ought to be able to improve them in the House and then go to conference with the Senate if we can find consensus at all.

The second statement I want to make, it looks like we've got two categories of bills. We have a category of bills that tries to reform the process, and then we have a category of bills that tries to escape the process. I can understand why no one would support the bills that give specific exemptions from the regulatory process. I can understand the concerns of the regulatory agencies that you perhaps don't approve of Congressman Towns' approach, but it stuns me, Mr. Leshy, that the Department of the Interior would recommend a veto before we've even had a hearing.

I mean, that is a record for this subcommittee. We have had lots of veto threats by EPA and DOE, but it's normally after we've done something, not before we've even thought about doing something. So we'll give you the record for the earliest veto threat.

I also want to commend the Department of the Interior because at least you gave us a definite position. I mean, you didn't kind of waffle around. I mean, you know, we sometimes get 40 pages of testimony that tell us nothing. At least in Interior's case you told us why you opposed it and up front in language that even a Texan could understand, so I appreciate that.

So but now I want to get down to my questions. And this first question is a general question. I don't think anybody accepts that the current system really works. I think Congressman Towns has an excellent point when he says that it really takes an inordinate amount of time to relicense some of these hydro projects. Surely there are people in the administration that are thinking about ways to improve the process. And why not adopt an approach where you take one agency, perhaps the FERC, give them ultimate authority and let the other agencies work with them so that they all have jurisdictional input but you have one agency that makes the final decision. What's wrong with that? And I'll let anybody answer that.

Mr. LESHY. I'm happy to take a crack at it. My written statement addresses this to some extent. The decision that Congress made in 1920 that it has stuck by ever since is that on a couple of aspects of hydropower licensing, namely, where Federal Reservations are involved and where fishways are involved, there ought to be conditions set by agencies outside the Federal Power—what was then called the Federal Power Commission—to prescribe those conditions as the sort of baseline. This is the conditions these projects have to meet, and then you go on to the balancing that takes place by looking at all aspects of the project. We think that decision that Congress made then was sound, and we think it's still necessary.

Mr. BARTON. So your basic position is in the golden era of 1920, we had smarter congressmen, and if we'd just revert back to all laws that were established in 1920, the country would be better off? Is that your position?

Mr. LESHY. No. I'm not saying that, Mr. Chairman. But I'm saying in this instance we don't think the system has proved to work out badly in practice. That in fact it is important to retain a notion of mandatory conditioning for those aspects of——

Mr. BARTON. Do you happen to know—I didn't see this in any of the testimony, so any of the witnesses can answer this question. What's the average time it takes to relicense a hydro project? Dr. Rosenberg?

Mr. ROSENBERG. Thank you, Mr. Chairman. I believe that the commissioner noted that the average time was between 3 and 5 years if I heard him note that for the recent projects, and it was as short as 1 year in——

Mr. BARTON. For relicensing?

Mr. ROSENBERG. For relicensing, yes, sir.

Mr. BARTON. Three to 5 years.

Mr. ROSENBERG. If I may answer or contribute to the answer——

Mr. BARTON. You may answer or contribute or obfuscate. It's up to you, sir.

Mr. ROSENBERG. Well, I'll try not to do the latter if that's all right with you. I think that the reason why you would not include all of the decisionmaking in a single agency is because each of the agencies has different expertise. To do that, you would have to duplicate the expertise that's been built up in the Department of the Interior and the Department of Commerce with regard to specific——

Mr. BARTON. No, I'm not saying put it all in one agency. I would still let each agency have input, but I'd put one agency in charge to make the final decision.

Mr. ROSENBERG. If that agency had the mandate to in fact meet the mandates of the other agency as opposed to simply consult, then I think you could do that. And I would argue that is exactly what we do now, put effective decisionmaking authority. But they have to account for our mandates as well, for very specific sections and only those sections. So I think that's exactly the system we have. They are primarily responsible for relicensing. But with regard to our specific mandates, in our case, Section 18, then they must account for the mandates that we're required to meet.

Mr. BARTON. Let me ask the distinguished chairman of FERC, do you think you've got the ultimate decision and that you're supreme among equals? I was not aware of that from your testimony, but——

Mr. HOECKER. Well, it depends on which part of the Federal Power Act you read. I mean, we have authority to ensure that there is a comprehensive plan of development for any water resource. We are the agency that is given the responsibility to balance the competing interests. But we must include under the statute and under current case law any mandatory conditions that are developed elsewhere.

If I might, Mr. Chairman, a small history lesson, that in the era of 1920 to 1930, the Federal Power Commission indeed did have absolute control over the entire process because the Secretaries of Interior, War and Agriculture were the Federal Power Commission.

In 1930, this became a five-member body, and when the—Mr. BARTON. Well, those guys in 1920 were smarter than us today.

When the Secretaries went off to do things other than regulate the power market and hydroelectric projects, they took their mandatory conditioning authority with them, obviously.

I think it's important that we at the Commission acknowledge two things. No. 1, we have an excellent staff. We do a great job. We have a lot of environmental expertise, and we do care about the environment. But the resource agencies are on the ground. They have much larger staffs. They understand these projects and their environments as well as we do. And so it's not the mandatory conditioning authority that I necessarily would challenge. What it is is the opaqueness of the process for developing conditions for the licenses; conditions that we must include in the licenses.

And what I would advocate, what we are advocating in the context of the interagency task force, is more public process so that participants other than the resource agencies and the FERC can have input into the scientific adequacy and the environmental and cost justifiability, if you will, of these conditions.

Mr. BARTON. Okay. Mr. Massey? Commissioner Massey.

Mr. MASSEY. Yes, Mr. Chairman. I respect the environmental values that underlie the mandatory conditioning process, so I wouldn't necessarily change that. But I think the concept that is represented in this bill of requiring some balance in the conditions, requiring the other agencies to take into account additional factors, as we have to, would mean that the conditions are more balanced when they come to our agency. And so I would support that.

I would also support some tightening of the timelines. Having said that, I do believe this task force will bear fruit by the end of the year with rational and reasonable changes. And I look forward to that. But if the agencies were to balance more in their processes, I believe the proposed condition as it comes to our agency would be much more rational and reasonable.

Mr. BARTON. How much of these resource agency recommendations are based on jurisdictional and turf considerations as opposed to public policy as we go through this interagency task force? I mean, the testimony reeks of bureaucratic jurisdictional turf protection, quite frankly.

Mr. MASSEY. Yes, well, I can't endorse every word of their testimony, but I do endorse the environmental values that underlie their decisionmaking.

Mr. BARTON. We're not—I don't believe anybody on this subcommittee, Congressman Towns, who's not on the subcommittee, but the full committee, is trying to do away with the environmental protection.

Mr. MASSEY. I understand that.

Mr. BARTON. What we're trying to do is come up with a legislative vehicle that actually creates an executive administrative process that doesn't take 3 to 5 years. And I guarantee you, there are a lot of projects we've heard about that take a lot longer than 3 to 5 years.

Mr. MASSEY. Yes.

Mr. BARTON. So you must have some that go through in a month and some that take 15 years, because—so that your average comes out to that figure.

Mr. MASSEY. I respect that goal of this legislation. I think some of the processes and procedures in the bill will be too cumbersome. But I think a short bill that required the other agencies to balance as we do and that tightened up the timeframes would be very reasonable and would be one that I could fully endorse.

Mr. BARTON. Okay. Let me ask three or four questions that the staff put together, and then we'll let this panel go.

Would the FERC support legislation to require Federal resource agencies to consider a broad range of public interest factors as well as costs in their development of mandatory conditions, much as FERC is required to do under current law? FERC has concerns about the administrative review provisions of H.R. 2335, but we could work with the FERC to help alleviate those concerns.

Mr. HOECKER. I agree with Commissioner Massey that the resource agency should consider a range of factors. I'm not—I don't necessarily think the range of factors that are listed in the bill are the appropriate ones. But certainly economic and power values, low-cost alternatives and so forth that are mentioned there would be appropriate.

Mr. BARTON. Should legislation require mandatory conditions attached by the Federal resource agencies to a FERC license be limited to the mitigation of project impacts?

Mr. HOECKER. I believe they are.

Mr. BARTON. Mr. Massey?

Mr. MASSEY. I think they should. The agencies strive for that, but a statutory requirement to achieve that goal would not trouble me in any way.

Mr. BARTON. Commissioner Hebert?

Mr. HEBERT. Yes, sir, Mr. Chairman. I would agree with that. And what I'd like to point out to you as well is the fact that the problem we have had is in fact the balancing. And as much as we hear from the other agencies, the fact that they don't want to do away with mandatory conditioning, as Congressman Towns pointed out, his piece of legislation does not do that. It merely requires a balance. And we have circumstances like the Enlow Dam case that we heard just recently where in fact NMFs wanted one thing and then we even had the Northwest Council, Bonneville Power Association and the Bureau of Reclamation no longer advocating or suggesting removal of Enlow Dam. And continually we had to fight that. So I think the balance is the key, and I think it will work.

And if I can make one other qualifying remark. I don't want Congressman Dingell to think I didn't answer his question correctly. The 180 days that he's speaking of is the 180 administrative days. There are 90 days prior to that that the resource agency will have to give those mandatory conditioning requirements to the licensee, and then there's the 180 days. After that, there's a year that the Commission has to act, with at least one 30-day extension. So that's 1 year and 10 months. That's not too far afield of where we are today, but requiring balancing. And I don't think anyone could suggest that that couldn't be done.

Mr. BARTON. Okay. Dr. Rosenberg, you testified that the current exemptions in the Federal Power Act provide adequate protections for fish and wildlife. Would legislation that expanded current exemptions to include small hydroelectric projects in Alaska also provide adequate protection for fish and wildlife?

Mr. ROSENBERG. I think the answer to that question is no. We believe that it's not clear in the legislation whether the State conditions would provide the same protection for fish and wildlife as the Federal——

Mr. BARTON. Well, it would appear to me the answer would be yes, so why would you say it's no? Because you'd still—you and the other resource agencies would still have the same ability——

Mr. ROSENBERG. We only have a consultative authority in that case, and there's no requirement for them to consider our comments in the way the legislation is drafted.

Mr. BARTON. Well, we're not talking about the specific Murkowski bill.

Mr. ROSENBERG. Oh, I'm sorry, sir.

Mr. BARTON. We're talking about simply giving an exemption for small hydroelectric projects in Alaska, but you would still have the same ability to attach mandatory conditions, expanding the current exemptions in the Federal Power Act.

Mr. ROSENBERG. Well, then I guess the answer is I'm not sure.

Mr. BARTON. I'm not an expert on this. This is a question I'm reading. I want the audience to know that.

Mr. ROSENBERG. Yes. And I'm not sure, because I was thinking about the specifics of the Murkowski bill, how that would be structured. My understanding was that the current act provides that ex-

emption for small power projects in an abbreviated process. But if I could respond to your question in writing.

Mr. BARTON. Well, under current law in a project that is exempted, can your agency attach a mandatory condition?

Mr. ROSENBERG. Yes, I believe so.

Mr. BARTON. So I think you can, too. So it would seem like this question that I've probably garbled in asking you, if we could get where great minds understand the details, we might actually agree on the answer to this.

Mr. ROSENBERG. I think so. But the question I'd like to look into a little more is whether that's already a provision that does not require additional legislation.

Mr. BARTON. Right. I understand that. And Mr. Burns, you've been so quiet, we can't let you go without answering one question.

Mr. BURNS. That would be okay, but——

Mr. BARTON. There are some of your customers that want to limit Bonneville's authority to new contracts to 5-year terms. What impact would that have on Bonneville's financial stability?

Mr. BURNS. Well, there's a couple of reasons why we believe it's the best thing to proceed with contracts up to a 10-year term. One is it provides financial stability. Typically in the past, we've had the situation where every 5 years, 2, 3, and most recently 5 years, all of our contracts expire at a single point in time. That puts us under a lot of pressure to renegotiate those deals, and the uncertainty of market changes, prices rising and falling relative to our cost, and what our revenue stream is going to be like.

So having a split among customers signing 3, 5, 7, 10 years will help to mitigate that uncertainty we face.

Mr. BARTON. Final question unless Congressman Towns has a wrap-up question. Mr. Leshy, your statement was the most militant—or your agency statement was the most militant of the ones we received. Does that mean that you are not interested in working with the subcommittee to develop compromises, or are you willing to engage in a collaborative process?

Mr. LESHY. Mr. Chairman, we're happy to work with the subcommittee on this. I should note that—and Congressman Towns earlier raised—asked an important question and a useful question, which is, okay, we've seen all this interagency activity going on to try to improve this process. When are we going to see results?

And I think—my answer to that is, you're already seeing some results, and you're going to see many more results in the next few months. This interagency task force, we put a deadline on it of completing its work by the end of the year. We have about 6 or 7 initiatives underway. There are two I'm happy to share the results of with the committee—subcommittee in writing. Immediately in the next couple of months we'll have two more initiatives out in public I'm happy to share with you.

So we are moving forward. We're going to show this subcommittee results in terms of that process, and I'm happy to work with you on that.

Mr. BARTON. Well, our deadline's a little bit sooner. It's called the first Tuesday in November, and we'll actually adjourn in probably the third week in October if not sooner. And as I said before I asked questions, I would really like to see this subcommittee

move some of these bills to full committee if we can get some support from the administrations and from a bipartisan group of congressmen.

So we're going to help your task force as much as we can.

Congressman Towns and then Congressman Shadegg, if you've got a wrap-up question before we let this panel go.

Mr. TOWNS. Let me just say, Mr. Chairman, I'm willing to work with you to try to put together that bipartisan effort that you so eloquently described. And let me just say what my problem really is. You know, you mentioned the word "task force." You know, I'm not impressed with that word; not when it comes to the U.S. Congress after being around here close to all these—18 years, I'm not impressed with the word "task force." Because task force around here means, you know, shut up, be quiet, because we're not going to do anything about it. That's what it means.

And the other word that, you know, the "reform." Those are two words that, you know, I really don't feel too comfortable with the two of them. You know, when you say, you know, "reform" and "task force," I want to let you know that I'm not impressed with that for a lot of reasons. You know, when you say "reform," you know, the question is what are you going to do? You know, I mean—and reformers can be either positive or negative. You know, task force can—and you can do absolutely nothing.

You know, just the fact that you keep saying you have a task force. And every time we start to move forward with legislation, you have a bigger task force.

You know, and I'm concerned about that. You know, those words are like my dad used to tell my brother and I about prayer. He said, "Son, prayer is neither positive or negative. It's just if somebody asks and say they're going to pray for you, try to find out what they're going to say."

They might pray that you break your neck, you know.

So I just want to let you know that "reform" and "task force," you know, "reform" around here means cut the budget, you know what I mean, you know? So these are words that, you know, I must admit that doesn't hit me well. So I'm concerned, you know, about the fact that there has not been any movement.

And, Mr. Chairman, I'm hoping that we can put together a—and we can have some dialog as we move along, you know. But I think, Mr. Leshy, that those are strong terms. But I think we should talk about some aspects of it. But the point is, I think that we cannot continue to just sit and do nothing, you know. I think that that—we can't afford the luxury of that. And I'm hoping that, you know, at some point we can discuss this further. But, Mr. Chairman, I hope that we can move it forward, you know. I will work very hard on my side of the aisle to try and get support for it, and I think once you explain it and I think the way you explain it is important.

And I'm going to say this and I'm going to shut up. You see, I think the way you explain it is very, very important, too. You know, I remember years ago in Niagara Falls, New York, where they were changing the insurance policy, and everybody was signed up but one man. He flatly refused to sign, so they couldn't move it forward because this guy had been with the company like 30 years and he wanted to make certain he was a part of it. So the

foreman came by and asked him to sign it and he said, "No. I'm not signing it." And "No. Forget it. Get out. I'm not signing it." The supervisor—"I'm not signing." Then they took him to the general manager of the entire plant, and he said, "Look," he says, "we're moving to a new plant. Here's the application. If you do not sign it, you're fired." So he signed it. And he said, "Well, why did you put us through all this?" He said "Nobody never explained it to me like that before."

So we want to explain it to you right. You know, we're going to do something here. You know, I just want to explain it. Mr. Chairman, thank you very much for allowing me to have extra time. You can see I'm a little frustrated.

Mr. BARTON. Yes, well. For the last word before this panel is released, Congressman Shadegg.

Mr. SHADEGG. Mr. Chairman, I'll be very brief. First of all, I guess I have to be hypertechnical because, as Mr. Leshy knows, I used to do election law, and it's not technically the first Tuesday in November, it's the first Tuesday after the first Monday in November.

Mr. BARTON. All right.

Mr. SHADEGG. But I do want to make that——

Mr. BARTON. Hydro Man is also Election Expert Man.

Mr. SHADEGG. That's right. I do want to highlight the importance of that, because I think that highlights the fact that we are in different branches of the government, and I think there has to be a healthy respect for those two branches of the government. That people affected by what you do in the executive branch, what FERC does, have a right to appeal to you for a relief, and I commend them for doing that, and I commend you for putting together the task force and for doing what you're doing. And if you've reached conclusion on two issues and believe you'll have conclusion on two others soon, I commend you for that. And I'm anxious to look at your work product.

But the Constitution sets up three co-equal branches of government. We have our job. And I strongly concur, Mr. Chairman, with you, that it is a part of our duty to move forward with legislation. The fact that these problems exist, the fact that some people believe that serious reforms are needed, reforms beyond which the administration could itself enact are needed, suggest that we have a duty to move forward legislatively. And so I am encouraged that this is bipartisan legislation. I am anxious to hear the input of the administration and its representatives and everyone affected—those who operate dams, those who are affected by dams, those who regulate dams. And each of those was "dams."

Mr. BARTON. I understand.

Mr. SHADEGG. But I commend the chairman for this, and I'm anxious to work forward in moving legislation—work with him in moving legislation forward.

Mr. BARTON. All right. We want to thank the panel. We'll have written questions for the record. We appreciate your willingness to testify, and we look forward to working with you. So if Panel II would excuse itself, we'll now call forward Panel III.

All right. If we could get everybody up. And we also want, if our Department of Agriculture witness is still in the room, we'd like for him to come forward.

All right. Let's see here. See if we—we'll do a roll call. We have Mr. Michael Murphy, who's with the National Hydropower Association.

Mr. MURPHY. Good afternoon, Mr. Chairman.

Mr. BARTON. We have Mr. Kevin Lynch, who is with PacifiCorp. Is that correct, sir? We have Mr. Andrew Fahlund.

Mr. FAHLUND. Fahlund.

Mr. BARTON. Fahlund, who is with Hydropower Programs for American Rivers. We have Mr. Robert Grimm, who is the president of Alaska Power & Telephone. We don't show that Mr. Piper is here. Oh, he is here. He's standing up. He's the chief executive officer of the Pacific Northwest Generating Coop. Mr. Steve Waddington?

Mr. WADDINGTON. Yes, sir.

Mr. BARTON. Who's with Reynolds Metals Company. Ms. Lynn Kennedy, who is a hydroelectric specialist on behalf of the Western Governors' Association, and Mr. Paul Brouha, who is the associate deputy chief of the Forest Service of the U.S. Department of Agriculture. So we've got everybody here, and we have a young lady with Mr. Brouha. What's her name, sir?

Mr. BROUHA. Her name is Mona Janopaul. She is our national hydropower program manager.

Mr. BARTON. Okay. And I think we knew that she was—no we didn't? How did I know? I knew that. Ah, I read the testimony, that's how I knew. I read it this morning. All right. We're going to start with Mr. Murphy, give each of you gentlemen 5 minutes to summarize your statements, and then we'll have questions for the record. All statements are in the record in their entirety, so. Mr. Murphy, welcome to the subcommittee, and you're recognized for 5 minutes.

**STATEMENTS OF MICHAEL A. MURPHY, PRESIDENT, NATIONAL HYDROPOWER ASSOCIATION; KEVIN A. LYNCH, DIRECTOR OF GOVERNMENT AFFAIRS, PACIFICORP; ANDREW FAHLUND, POLICY DIRECTOR FOR HYDROPOWER PROGRAMS, AMERICAN RIVERS; ROBERT S. GRIMM, PRESIDENT, ALASKA POWER & TELEPHONE COMPANY; DAVE E. PIPER, CHIEF EXECUTIVE OFFICER, PACIFIC NORTHWEST GENERATING COOPERATIVE; STEVE WADDINGTON, NORTHWEST POWER MANAGER, REYNOLDS METALS COMPANY; LYNNE KENNEDY, OREGON DEPARTMENT OF ENVIRONMENTAL QUALITY; AND PAUL BROUHA, ASSOCIATE DEPUTY CHIEF, FOREST SERVICE, U.S. DEPARTMENT OF AGRICULTURE**

Mr. MURPHY. Good afternoon, Mr. Chairman and members of the committee. My name is Michael Murphy. I am a founder and principal of E/PRO Engineering & Environmental Consulting based in Augusta, Maine. I appear before you today as President of the National Hydropower Association. I'd like to thank you for holding today's hearing. I also want to commend Congressman Towns for his hard work and leadership on H.R. 2335, and I greatly appreciate this opportunity to appear.

Before becoming president of NHA, and before I founded E/PRO, I worked for Central Maine Power in Maine and Green Mountain Power Corporation in Vermont. Since 1988 I have worked on environmental issues related to hydropower, and more importantly, I have been directly involved in the relicensing of dozens of hydroelectric projects.

It is from that experience that I can sit before you today and tell you that FERC's hydro relicensing process is in major need of repair. What's more, the time to repair that process is now.

Here are the facts. Within the next 15 years over two-thirds of the nonFederal hydro capacity must go through the relicensing process. Electricity consumption in America is increasing. The electric power industry is in the midst of a monumental restructuring that will lead to customer choice and competition, and in some places, as where I'm from in Maine, it already exists.

Our Nation faces rising energy prices. The need to reduce greenhouse gases and other air pollutants is greater than ever. Since the last committee hearing on relicensing, we have seen again and again cases where the process simply does not work. In the midst of all of this, for the first time DOE's Energy Information Administration is saying that hydropower capacity will decline through 2020, and I quote, "as regulatory actions limit capacity at existing sites." The relicensing process is in need of repair for many reasons. And I can assure you the hydropower industry isn't the only stakeholder who believes this. NHA, along with its partners at the Edison Electric Institute and the American Public Power Association, are members of WaterPower: the Clean Energy Coalition. WaterPower's membership consists of over 575 entities from all over the Nation, including hydro producers and suppliers, but more importantly, it includes environmental, labor, agricultural, recreational and consumer groups. WaterPower's message is clear: Congress must act now.

Let me briefly tell you what is wrong with the process. Federal agencies are allowed to set conditions on license without regard to their effects on project economics, energy benefits and values protected by other statutes or regulations, including other environmental benefits. Many times we have agencies fighting agencies and issuing inconsistent demands. All too often, conditions are placed on a license that have nothing to do with project impacts, merely because the licensee is a deep pocket. Hydropower licenses have no recourse to appeal or even question the basis of mandatory conditions set by the agencies except through a costly process we know as litigation.

The end result is a loss of operational flexibility and generation capacity which on average is not a negative 1 percent, but on average is a negative 8 percent.

The Towns bill, which enjoys broad, bipartisan support, is a moderate approach to reforming the process. It does not repeal mandatory conditioning authority nor does it attempt to undermine any environmental laws or diminish the power of the agencies to protect the environment. It does assign a new level of responsibility and accountability to the agencies with conditioning authority and requires agency conditions to reflect sound scientific evidence. It will bring a new discipline to the process, will prevent time-con-

suming and costly litigation, and will bring a general balance and efficiency to the relicensing process.

Let me tell you what has changed since ECPA was passed in 1986. First, a nonpartisan governmental statistical agency has projected a decline in hydropower generation due to regulatory actions. Second, as you shall hear in a moment, and with the written documentation I am providing today, we have many new cases showing how the process fails both industry and the environment.

Third, over 575 organizations across the country have told Congress it's time to improve the process. And fourth and most important, the hydro industry has modified its approach to resolving this problem and has embraced the moderate framework of Congressman Towns' bill.

In closing, let me state that the hydropower industry takes very seriously its role in promoting environmental stewardship of the rivers and lands we are so privileged to use. One of the reasons I enjoy working in this industry and why I'm so involved with the National Hydropower Association is I truly believe that supporting hydropower—an emissions-free, domestic, reliable, renewable and clean source of energy—is the right thing to do not only for our consumers but for our environment. By responsibly reforming the hydro relicensing process, we have an excellent opportunity to preserve the Nation's leading renewable resource and to protect the environment. But we need your help to do it, and without your action on reform legislation, it is safe to say hydropower could be facing a crisis in the not-too-distant future.

Thank you again.

[The prepared statement of Michael A. Murphy follows:]

PREPARED STATEMENT OF MICHAEL A. MURPHY, PRESIDENT, NATIONAL HYDROPOWER ASSOCIATION

INTRODUCTION

Good morning, Mr. Chairman and members of the Committee. My name is Michael A. Murphy, and I am founder and a principal of E/PRO Engineering & Environmental Consulting, based in Augusta, ME. I appear before you today as President of the National Hydropower Association.

NHA is the national trade association committed exclusively to representing the interests of the hydroelectric power industry. Our members represent 61% of domestic, non-federal hydroelectric capacity and nearly 80,000 megawatts overall. Its membership consists of more than 140 companies including public utilities, investor owned utilities, independent power producers, equipment manufacturers, engineers and consultants. NHA seeks to secure hydropower's place as an emissions-free, renewable and reliable energy source [1] which serves the nation's environmental and energy policy objectives.

I'd like to thank Chairman Barton for holding today's hearing. I also want to commend Congressman Towns for his hard work and leadership on H.R. 2335. And, I greatly appreciate the opportunity to appear before the Committee today to share with you the hydropower industry's views on the relicensing process, give some examples of how things have changed since the Committee's last hydro hearing, as well as to urge your broad support for Congressman Towns' bill.

Before becoming president of NHA, and before I founded E/PRO, I worked for Central Maine Power and Green Mountain Power Corporation. Since 1988, I have worked on environmental issues related to hydropower and, more importantly, I have been directly involved in the relicensing of dozens of hydropower projects. It is from that experience that I can sit before you today and tell you that FERC's hydro relicensing process is in *major* need of repair. What's more, the time to repair the process is now.

[1] Please see attached NHA policy papers on hydropower facts and benefits.

WHY WE MUST ACT NOW

Here are the facts: Within the next 15 years, over two-thirds of non-federal hydro capacity must go through the relicensing process. Electricity consumption in America is increasing. The electric power industry is in the midst of a monumental restructuring[2] that will lead to customer choice and competition. Our nation faces rising energy prices. The need to reduce greenhouse gases and other air pollutants is greater than ever. Since the last Committee hearing on relicensing, we have seen again and again, cases where the process simply does not work. And in the midst of all this, **for the first time**, DOE's Energy Information Administration is saying that hydropower capacity will decline through 2020 "as regulatory actions limit capacity at existing sites."

WHY THE RELICENSING PROCESS NEEDS TO BE REPAIRED

The relicensing process is in need of repair for many reasons—and I can assure you, the hydropower industry isn't the only stakeholder who believes this. NHA, along with its partners at the Edison Electric Institute and the American Public Power Association, are members of WaterPower: the Clean Energy Coalition. WaterPower's membership consists of over 575 entities from all over the nation, including hydro producers and suppliers, as well as environmental, labor, agricultural, recreational and consumer groups. WaterPower's message is clear: Congress must act now to improve the FERC hydro relicensing process if we are to preserve the future viability of hydropower.

So what is wrong with the relicensing process? Let me briefly tell you.

A multitude of statutes, regulations, agency policies and court decisions has made the process time-consuming, costly, contentious and generally frustrating for all. A typical hydro project can take from eight to 10 years to weave its way through the relicensing process—some have taken more than 20 years—and cost up to a million dollars a year. In comparison, gas fired plants which emit large amounts of CO2 can be sited and licensed in as little as 18 months.

Federal agencies are allowed to set conditions on licenses without regard to their effects on project economics, energy benefits and values protected by other statutes or regulations. Many times, we have agencies fighting agencies and issuing inconsistent demands. All too often, conditions are placed on a license that have nothing to do with project impacts. Hydropower licensees have no recourse to appeal, or even question, the basis of mandatory conditions set by the agencies, except through litigation. The end result is the loss of operational flexibility and generation capacity—on average 8%—possibly putting system reliability at risk and certainly resulting in the loss of clean, renewable power.

But there are other relicensing problems as important as the ones I just mentioned. Often we find that relicensing can lead to conflicting resource management goals between federal agencies, different objectives in managing resources between the state and federal agencies, species versus species conflicts and dealing with broader quality of life issues, such as recreation, air quality and regional economics. It's not as simple as power values versus fish values as some may believe.

Today you will hear from PacifiCorp, an NHA member company. They are here to share with you the details of the attempted relicensing of their North Umpqua project in Oregon. Their case illustrates how the relicensing process can break down, even when the parties try to use the collaborative process.

However, I can assure you they are not the only ones who have faced very difficult and troubling relicensing experiences. As NHA President, I have heard time and time again of relicensing efforts that unraveled with no clear benefit to the environment and where everyone goes to court to resolve matters. Below you will find several cases that point to the excessive length of the relicensing process, agencies inappropriately applying their authorities, judicial calls for legislative improvements, conditions making projects uneconomic, insufficient impact analysis and the overall duplicative and arbitrary nature of the process. I urge you take a very close look at these cases as you consider moving forward on this important issue.

WHAT'S WRONG WITH THE HYDROPOWER LICENSING PROCESS? REAL-LIFE EXAMPLES

Two-thirds of all federally-regulated hydroelectric capacity—284 projects in 39 states, representing 28,917 megawatts of electricity generation—is due to be relicensed by FERC in the next fifteen years. An inefficient licensing process that is time-consuming, arbitrary, and costly places all of these projects, and the future of hydropower as a clean, renewable energy source, at risk. The following examples,

[2] Please see attached NHA policy paper on electric industry restructuring.

taken from hydro projects around the nation, illustrate some of the many problems associated with the current hydropower licensing process.

*Arbitrary and Unilateral Exercise of Mandatory Conditioning Authority*

On February 23, 2000 FERC rescinded a license previously issued for the 4.1 MW Enloe Dam Project in Okanagan County, Washington. Although FERC was in the process of engaging all parties in addressing fish passage issues at the dam, the National Marine Fisheries Service (NMFS) challenged that process as encroaching its unilateral conditioning authority under Section 18 of the Federal Power Act. NMFS insisted on imposing a fish passage requirement in the project license despite i) opposition to such passage by the Washington Department of Fish and Wildlife, the Okanagan Indian Nation, and the Canadian government; and ii) the desire of the Congressionally authorized Northwest Power Planning Council to assign financial responsibility for fish passage at Enloe Dam to regional entities.

NMFS had stated that its preferred position in the proceeding was license denial and dam removal. By insisting on fish passage as a condition of the license and at the licensee's expense, NMFS not only acted, in the words of FERC Commissioner Massey, "out of sync with regional planning," but ultimately prevailed in gaining denial of the license application. As FERC Commissioner Hebert explained in his concurring opinion:

> "Unfortunately, the Commission's hope that this protracted dispute could result in a mutually-acceptable agreement has been undermined by the recalcitrance of a single agency . . . In today's order, the Commission states that it no longer has the discretion to continue to resist NMFS' overtures . . .
>
> One party, carrying mandatory conditioning authority, and focusing myopically on its own particular interest, can upset the collaborative process if so inclined. To a party opposing licensing, stalemate may mean victory for one party and defeat to the rest of America"
>
> I view this process, where some participants, bearing veto power, have more negotiating authority than others, if indeed inclined to negotiate at all, as absurd. As a result, I am encouraged by pending legislative efforts to rationalize this process, by requiring a greater level of cooperation among federal and state resource agencies. Such reform would benefit consumers by forcing all parties to the table in an effort to resolve such disputes in a fashion that is best suited for the benefit of all Americans."

*Arbitrary Nature of Process/Inappropriate Application of Agency Authorities*

PacifiCorp is currently seeking a new FERC license for its eight-dam, 185 MW North Umpqua project in Douglas County, Oregon. PacifiCorp initiated the process in 1992 and went far beyond the normal requirements for public involvement and science collection in the hope that the North Umpqua licensing process would become a model of how a utility could work collaboratively with all stakeholders.

After submitting its relicense application in 1995, PacifiCorp initiated the North Umpqua cooperative Watershed Analysis to identify and address specific resource concerns that emerged during the relicensing process. The watershed analysis was the first-of-its-kind for a hydro project and involved PacifiCorp, federal and state resource agencies, academic institutions and interested members of the public. PacifiCorp and other interested parties then entered detailed settlement discussions in 1997.

After two years of discussions, yielding little consensus, the U.S. Forest Service (USFS) insisted—without providing an adequate scientific explanation—that Soda Springs Dam (one of the eight dams on the project) be removed as a condition of settlement to meet objectives contained in the President's Forest Plan. This, despite the fact that removal of Soda Springs Dam would put the viability of the entire project at serious risk, from both an operational and economic standpoint, and despite there being other mitigation alternatives available. This also represents the first time that the Forest Service has indicated it intends to use its 4 (e) conditioning authorities under the Federal Power Act to require a dam removal. This would create a broad, adverse precedent for other hydroelectric projects in the West located wholly or in part on Forest Service lands.

PacifiCorp had recently agreed to remove its Condit Dam in south central Washington because compelling reasons existed. By contrast, no compelling reason exists for removal of Soda Springs. Citing an unreasonable bargaining position by USFS, and concerns over the precedential nature of the removal requirement, PacifiCorp walked away from settlement negotiations in November, 1999.

Despite its withdrawal from the settlement discussions, PacifiCorp remains committed to achieving a settlement that balances the need to mitigate for project impacts and the need for cost-effective renewable resources. FERC has since an-

nounced that it will restart the traditional licensing process—which had been on hold while the parties pursued settlement talks.

The most recent news though is that North Umpqua may yet have a happy ending: the Forest Service has now indicated it does not have an official policy of using 4(e) to compel dam removal and that it did not intend to create such a policy via the North Umpqua settlement talks.

In fact, the agency recently indicated it is willing to return to the settlement table to see whether a mutually-acceptable resolution for relicensing this project can be achieved. It also is saying that dam removal will not be a precondition to a return to the table.

PacifiCorp would like to return to the talks because they still believe that settlement and collaboration is a good approach to resolving the tough issues that will arise in any relicensing. *However, this is not to say the licensing process doesn't need fixing—it does*. In fact, PacifiCorp believes that settlement processes would work much better if there is more accountability built into the process throughout.

*Excessive Length of Process/Judicial Call for Legislative Improvements*

In March, 1997, the Eugene Water & Electric Board (EWEB) received a new FERC license for two projects (23.2 MW combined) on the McKenzie River in Oregon. In the license, FERC incorporated certain fishery conditions prescribed by federal resource agencies under Section 18 of the Federal Power Act (FPA)—at a cost to EWEB of $14,000,000—but rejected several conditions because they did not meet the requirements of the FPA for "fishway prescriptions."

Despite the $14,000,000 of project improvements, several interest groups and agencies requested an administrative rehearing of the license before FERC; upon denial of the requests, the parties challenged the license before the U.S. Court of Appeals for the Ninth Circuit. Among other claims, the parties contended the FPA does not authorize FERC to refuse to accept any condition prescribed under Section 18. In other words, the parties asked the court to rule that the resource agencies had absolute power to dictate license conditions under the FPA whether they met the intent of the FPA for a fishway prescription or not.

In its August, 1999 decision, the court did just that—concluding the FPA denied FERC the authority to modify, reject, or reclassify prescriptions submitted by resource agencies under Section 18, even while noting FERC's observation that the resource agencies "do not concern themselves with the delicate economic versus environmental balancing required in every license." The court went on to acknowledge Congressional "failure" to require agencies to develop improved "regulations, procedures or standards for implementing Section 18." The court noted that, absent Congressional action, the court was powerless to rewrite the statute. "Our task," the opinion stated, "is to apply the statute's text, not to improve upon it." The court's decision means that currently only a federal court of appeals has the authority to determine whether a fishery condition offered by a federal resource agency and required to be included in a license meets the requirements for a "fishway prescription" under the FPA.

With its hands thus tied, the court's decision will mean a remand of the license back to FERC to be re-written once the appeal is completed—8 years after EWEB first submitted its license application; with only the Ninth Circuit then having the authority to decide whether any condition prescribed by a resource agency meets the FPA requirements for "fishway prescriptions."

*Conditions Making Project Uneconomic/Arbitrary Nature of Process/Insufficient Impact Analysis*

In 1996, during the relicensing of the Edwards Dam near Augusta, Maine, the US Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) prescribed a fishway system on the dam to safeguard a few species of fish. The fishery agencies estimated this fishway system would cost approximately $9 million dollars while the licensee estimated the cost at $12 million—both of these estimates effectively rendered the project uneconomic. Lacking the authority to amend the prescription or otherwise balance it against the energy or other resource values of the project, FERC instead ordered the removal of the dam in November 1997.

During the relicensing process, the USFWS and NMFS also recommended that flows of 4,500 cubic feet per second be released annually in July into a deep hole below the dam they determined was a spawning and nursery habitat for the Atlantic sturgeon. This flow recommendation had severe economic implications on the project since it would force the project to forgo power generation completely in July most years. This deep hole was located just below the area where the dam was

eventually breached and this once-important spawning and nursery habitat is now assumed to be filled with rubble.

The US Department of Interior and segments of the environmental community have hailed FERC's decision as a means of restoring a 17-mile stretch of the Kennebec River to its "natural condition". Moreover, certain environmental groups are now claiming that the simple act of removing the dam has successfully restored this section of the river yet no comprehensive studies are being planned to actually measure the success of this dam removal on the restoration of the river ecosystem.

*Arbitrary Nature/Excessive Length of Process*

In an ongoing relicensing of a 35.5 MW facility in New York State, arbitrary fishway prescriptions have been proposed by the USFWS, at a cost of over $2 million. Why arbitrary?

- The blueback herring, the primary species on which the prescriptions were premised, is not native to the river where the project is situated.
- With an 80-foot waterfall blocking upstream fish passage, there would be no migration without the man-made lock system adjacent to the project.
- The project (and other hydro facilities on the river) have operated without fishways for several decades—and during that time the fish population has grown to over 100 million annually.

Pre-filing consultation started on this project in 1986, and a final license order still has not been issued. If the fishway prescription is included in the license along with other resource protection measures, the project would become economically unviable.

*Arbitrary Nature of Process/FERC Approval of Inappropriate Conditions*

In a recent relicensing of a Western project, the U.S. Forest Service imposed numerous conditions, including one that required the project owner to annually send the Forest Service a set payment, expected to cover all operation and maintenance costs associated with existing campgrounds in the project vicinity. The owner pursued an administrative appeal of this condition at the Forest Service, arguing that the Forest Service failed to demonstrate that most of the campgrounds' use was related to the project. Furthermore, the Forest Service did not attempt to justify the amount of the annual payment for the operation and maintenance costs it sought from the licensee.

Nonetheless, FERC included the condition in the project license, concluding that it lacked the authority to even consider if a relationship between the condition and the project justified the Forest Service condition. Similarly, FERC was unable to reject an instream flow release imposed upon the project by the Bureau of Land Management, even though FERC summarily dismissed as inappropriate and unsupported the same exact amount of instream flow release recommended by the California Department of Fish and Game.

After FERC issued the new license for the project, containing the contested condition, the owner challenged the condition at FERC and took the case before the U.S. Court of Appeals. Just prior to the case being heard and five years after the first of the two administrative appeals were filed with the Forest Service, the Forest Service decided that the operation and maintenance costs were indeed inappropriate and accepted an owner-proposed method for reimbursement of only those campground operation and maintenance costs related to the project—approximately 1.25% of the amount originally demanded by the Forest Service.

*Duplicative Nature of Process*

The Energy Policy Act of 1992 specifically prohibits federal land managing agencies from requiring an existing hydropower project to obtain a Special Use Permit. However, in a number of licenses, the Forest Service has taken the standard Special Use Permit terms and included them in the conditions submitted to FERC under section 4(e) of the Federal Power Act. In turn, FERC has had no choice but to impose these conditions on the project license. These Special Use Permit conditions are designed to allow the Forest Service to regulate the project in the same manner that FERC administers the licensed project. Thus, despite the Energy Policy Act prohibition, the Forest Service is duplicating FERC's legislative mandate to administer federally licensed hydropower projects.

*FERC Approval of Conditions That Result in "No Quantifiable Benefit"/Excessive Length of Process*

After FERC asserted jurisdiction over a 70 year old, 1.2 MW project in New England, the project owner reached agreement with one state agency on the level of minimum flows to be released from the project. However, a resource agency from an adjacent state and the USFWS prescribed a minimum flow that was nearly twice

the agreed upon level. In its final environmental assessment for the project, FERC concluded that the owner's minimum flow could be provided with existing project equipment and that there was no "quantifiable benefit" from requiring the USFWS flow level rather than the level proposed by the owner.

However, because the recommendation was made under section 10(j) of the FPA, and because the recommendation appeared "consistent with the FPA," FERC incorporated the higher minimum flow requirement in the license. FERC's rubber stamp approval of the USFWS 10(j) recommendation, along with other conditions imposed on the project, had the effect of reducing net revenue from the project by 60%, making the project economically marginal at best. (Note: Issuance of the license for this small project took more than 8 years.)

*Conditions Making Project Uneconomic*

In 1997, six years after the licensee filed its initial plan, FERC issued an order approving a mitigation and management plan for the 170 MW Kerr Project in Montana. The FERC plan incorporated conditions submitted by the Department of the Interior requiring a variety of non-operational measures, including: a fish and wildlife implementation strategy to be funded through a one-time payment of $12.5 million and annual payments of $1.27 million, a fish stocking plan, the acquisition of 6,800 acres to serve as replacement wildlife habitat, the construction of five islands to serve as waterfowl habitat and construction of erosion control structures.

The FERC environmental impact statement (EIS) on the mitigation and management plan concluded that the conditions imposed by Interior would "eliminate the project's positive economic benefits." The EIS found that the project's current annual net benefits were approximately $9 million, but that with Interior's conditions, the annual net benefits would be a negative $2.7 million. Not even Interior disputed that the conditions would reduce the project's net annual benefits by many millions of dollars. However, the Commission noted that "any economic analysis of the impact of Interior's conditions is of at best tangential relevance to our decision," since FERC was obligated to impose the Interior conditions.

*Conditions Making Project Uneconomic/Insufficient Impact Analysis/Arbitrary Nature of Process/Litigation As Only Recourse*

The 700kw Yaleville project in upstate New York is one of the smallest hydro facilities operated by Niagara Mohawk Power Corporation. In pre-filing consultation in connection with the 1988 licensing of the project, the USFWS raised the issue of fish passage. The agency recommendation was to provide for downstream passage of freshwater non-migratory resident species, namely bass and walleye. This, despite:

- spillage over the dam provided natural passage of fish at least 85% of the time;
- despite decades of hydro project operation,—an abundance of bass and walleye was evident on the river both above and below the project; and
- the $400,000 price tag for the agency-recommended fishway was prohibitive for such a small project.

Niagara Mohawk disputed the agency recommendation in its license application and FERC, in its 1991 draft Environmental Assessment (EA) for the project, agreed with the owner and recommended a lower cost fish protection alternative. USFWS, after failing to sway FERC away from its position in dispute resolution proceedings, responded by prescribing the downstream passage fishway under its Section 18 mandatory conditioning authority.

FERC denied the fishway prescription in its 1992 license order because it did not meet the day's definition of "fishway" [at the time, a fishway had to serve the purpose of passing fish whose life cycle depended entirely on migration past the hydro facility which was not the case with the Yaleville bass and walleye.] A broader "fishway" definition was established with the passage of the Energy Policy Act of 1992; accordingly, FERC had to rescind its prior denial and require Niagara Mohawk to install the fishway—despite the lack of biological basis and the fact that its cost would negate the economic operation of the project.

Niagara Mohawk promptly appealed the FERC order. Negotiations with USFWS ultimately led to an agreement to install a less expensive fishway design (at a cost one-tenth of that originally prescribed.) If the owner had not pursued an aggressive litigation action, USFWS would likely never had agreed to negotiate. Litigation, in this case, spawned reason; but only after more than 8 years of licensing process and a cost to the owner of nearly $300,000.

*Conditions Making Project Uneconomic*

In 1997, FERC issued a license for a 70 MW project in Washington state. In the text of the license itself, FERC noted that the prescribed resource agency conditions

would result in a yearly operating loss of over $6.5 million for the project owner. Indicating that the project as licensed would not be "economically beneficial", FERC issued the license with the conditions, leaving it to the owner to "make the business decision whether [to operate the facility] in view of what appear to be the net economic costs."

HOW TO FIX THE RELICENSING PROCESS

I've just given you several reasons why the relicensing process is in need of repair. But the real question is how do we fix it? Quite simply, enact H.R. 2335. By passing this legislation, Congress will ensure that the relicensing process is balanced, cost-effective, timely and environmentally sound. Without legislation, the country will undoubtedly lose the many benefits of hydropower, America's leading renewable resource.

The Towns bill, which enjoys broad bipartisan support, is a moderate approach to reforming the process. It **does not** repeal mandatory conditioning authority, attempt to undermine any environmental laws or diminish the power of the agencies to protect the environment. It **does** assign of new level of responsibility and accountability to the agencies with conditioning authority and **requires** agency conditions to reflect sound, scientific evidence.

It **will bring** a new discipline to the process, will prevent time consuming and costly litigation and will bring a general balance and efficiency to the relicensing process. Reform legislation will bring **certainty** to a process that desperately needs it while protecting the environment. In short, it will provide the balance that was sought in 1986 with the passage of the Electric Consumers Protection Act.

CHANGES SINCE THE COMMITTEE'S LAST HYDRO HEARING

At the last hydropower hearing before this Committee two years ago, a member of the Committee posed this question to our industry: What has changed since ECPA that should cause Congress to act? Allow me, in summation, to answer that question.

- First, a non-partisan government statistical agency has projected a decline in hydropower generation due to regulatory actions.
- Second, as I have shown with the written documentation I am providing today, we have many new cases displaying how the process fails both industry and the environment.
- Third, over 575 organizations across the country have told Congress its time for action to improve the process.
- Fourth, and perhaps most important, the hydropower industry has modified its approach to resolving this problem and has embraced the moderate framework of the Towns bill in an effort to see relicensing reform before the bulk of our nation's non-federal hydro projects comes up for relicensing.

WHAT HASN'T CHANGED SINCE THE COMMITTEE'S LAST HYDRO HEARING

Before I close, let me remind you of some things that haven't changed:

- Hydropower is a clean, emissions-free, renewable and reliable energy source which has long played a vital role in the U.S. energy portfolio.
- Hydropower accounts for 81 percent of the nation's total renewable electricity generation and ranges between 10 and 12 percent of U.S. electrical generation.
- Of the 75,000 plus existing dams in the U.S., less than 3 percent are used for hydroelectric generation.
- Hydropower's operational flexibility—its unique ability to change output quickly, its voltage control, load-following and peaking capabilities—help maintain the stability and reliability of the electric grid ensuring economic growth and a high quality of life.

CLOSING

In closing, let me state that the hydropower industry takes very seriously its role in promoting the environmental stewardship of the rivers and lands we are so privileged to use. One of the reasons I enjoy working in the industry and why I am so involved in NHA is because I truly believe that supporting hydropower—an emissions free, domestic, reliable, renewable and clean source of energy—is the right thing to do.

By responsibly reforming the hydro relicensing process, we have an excellent opportunity to preserve the nation's leading renewable resource and protect the environment.

But we need your help to do it. And without your action on reform legislation, it is safe to say, we could be facing a hydropower crisis in the not too distant future.

Thank you again for allowing me the time to appear before you today. I'd be happy to answer any questions you may have.

NHA
National Hydropower Association

# Issue Brief

One Massachusetts Ave., NW • Suite 850 • Washington, DC 20001
202-682-1700 • Fax 202-682-9478 • www.hydro.org

**Hydropower: Indisputably Renewable**

Hydropower is, by definition, a renewable energy resource. It is our nation's oldest and most significant renewable energy source accounting for 81 percent of U.S. renewable energy generation. Like wind, solar, geothermal and biomass, hydropower's fuel—water—is essentially infinite and is not depleted in the production of energy. The cycle of evaporation and condensation, known as the hydrologic cycle, re-charges rivers, providing an endless supply of water to run through electricity generating turbines.

Some national policy leaders would leave hydro out of renewable policies to favor "emerging" renewable technologies—those that are not fully commercially viable. By erroneously limiting the definition of "renewable" to emerging technologies, these policymakers send the wrong signal to newly developing green power markets, thereby potentially eroding hydro's ability to compete. At a time when the utility industry is going through monumental changes in a newly competitive electricity marketplace, these policies set a dangerous precedent.

This is particularly disturbing as hydropower emits no greenhouse gases and deserves recognition for its role in offsetting hundreds of millions of tons of carbon dioxide each year. It is uniquely a clean, reliable and renewable source of power that should enjoy a substantial role in the competitive marketplace.

What is overlooked while encouraging some renewable sources of energy, but not hydropower, is that hydro faces significant market disadvantages of its own—losing, on average, up to 8 percent of generation as projects go through relicensing. While not the same as those encountered by the wind and solar industries, these disadvantages hold equal merit—and demand similar counter-measures in policies designed to encourage environmentally benign sources of power.

Also, while hydropower is an "existing" technology rather than an "emerging" one, it is a mistake, as some policymakers do, to consider the industry as "mature," or having no ability to gain new market share. This characterization fails to recognize the nearly 30,000 MW of hydropower potential identified by the Department of Energy that are absent environmental and legal obstacles. Under present circumstances, none of this clean, renewable power will likely be developed primarily due to the faulty relicensing process.

National Hydropower Association

(over)

NHA
National Hydropower Association

# Issue Brief

One Massachusetts Ave., NW • Suite 850 • Washington, DC 20001
202-682-1700 • Fax 202-682-9478 • www.hydro.org

## HYDROPOWER: A CLEAN ENERGY SOURCE FOR OUR FUTURE

Though they may disagree on the means, national leaders from both sides of the aisle agree that the U.S. should do more to reduce its emissions of greenhouse gases. In 1998, total U.S. greenhouse gas emissions from electricity generation was 550 million metric tons carbon, or 37 percent of total U.S. emissions.

One strategy to reduce U.S. emissions is to develop low carbon or non-carbon fuel alternatives. A well known, large-scale source of renewable, emissions-free electricity with extensive development potential is hydropower. Unfortunately, this clean, renewable and reliable energy source is often overlooked, and sometimes devalued as a solution to the problem of greenhouse gases. It may be that the magnitude of its contribution to avoiding emissions is too little understood.

NHA estimates that without hydropower, an additional 75.8 million metric tons of carbon would have been emitted into the atmosphere from the generation of electricity in 1998. That is equivalent to burning an additional 126 million tons of coal, plus 25 million barrels of oil, and 452 billion cubic feet of natural gas combined.

Put another way, the carbon emissions avoided by the nation's hydroelectric industry are the equivalent of an additional 61 million passenger cars on the road—nearly 50 percent more than there are currently.

Other pollutants avoided by the generation of hydropower in 1997 included 1.7 million tons of sulfur dioxide ($SO_2$) and 1 million tons of nitrogen oxides, both key ingredients in acid rain.

**The Obstacles for Hydropower:** Hydropower's environmental benefits are crystal clear, yet, due to a complex web of federal regulation, its future is cloudy. An increasing array of statutes, regulations, agency policies and court decisions have made the hydroelectric licensing process costly, arbitrary and time-consuming. A typical hydropower project takes 8 to 10 years to find its way through the licensing process. By comparison, a natural gas fired plant which emits significant carbon dioxide ($CO_2$) gases, can typically be sited and licensed in 18 months.

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# Issue Brief

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## FACTS YOU SHOULD KNOW ABOUT HYDROPOWER

Hydropower is a clean, renewable and reliable energy source which serves the nation's environmental and energy policy objectives. Hydropower converts kinetic energy from falling water into electricity without consuming more water than is produced by nature.

Since 1880, when 16 brush-arc lamps were powered using a water turbine at the Wolverine Chair Factory in Grand Rapids, MI, hydropower has played a vital role in the U.S. energy mix. Here are some facts about hydropower:

### HYDROPOWER — A MAJOR SOURCE OF ENERGY

- The United States is one of the largest producers of hydropower in the world, second only to Canada.
- Currently, hydropower ranges between 10 and 12 percent of U.S. electrical generation or enough electricity to supply the 37.8 million homes in California, Texas, New York, Pennsylvania, Ohio, and North Carolina.
- In the Pacific Northwest, up to 70 percent of electricity is generated from hydropower.
- Of the 75,187 existing dams in the U.S., less than 3 percent are used for hydroelectric generation.
- Non-federal, licensed conventional hydroelectric capacity equals 40.0 Gigawatts (GW) at 2,162 sites in the U.S. The federal government owns another 38.2 GW at 165 sites. Total U.S. hydroelectric capacity is 103.8 GW when you add pumped storage.
- Throughout the world, about one-fifth of electricity is generated from hydropower.

### HYDROPOWER — CLEAN AND RENEWABLE

- In 1997, hydropower avoided the release of an additional 83 million metric tons of carbon equivalent into the atmosphere. Without hydropower, the U.S. would have to burn an additional 143 million tons of coal, plus 20 million barrels of oil, and 471 billion cubic feet of natural gas combined.
- The carbon avoided by hydropower is equivalent to an additional 67 million passenger cars on the road – 50 percent more than there are currently.
- Like wind, solar, geothermal and biomass, hydropower is a renewable source of electricity. Water, its "fuel", is essentially infinite, replenished by the hydrologic cycle which is powered by the sun.

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# Issue Brief

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202-682-1700 · Fax 202-682-9478 · www.hydro.org

## HYDROPOWER AND ELECTRICITY RESTRUCTURING LEGISLATION

Hydropower – an important source of domestic power generation – provides emissions-free, renewable and reliable electric power, as well as a variety of other public benefits such as water supply, recreation, and flood control. Yet, in the Congressional debate over electric industry restructuring, the impact of competition on the nation's hydropower resources is often overlooked.

Presently, Congress is debating legislation in the House and Senate that would encourage retail electricity competition nationwide. However, most of these proposals ignore the fact that rising regulatory costs and changing market conditions now confront many hydropower projects with an increasingly marginal economic situation. This misguided omission threatens to place our country's most successful renewable energy resource in serious peril as competition comes to the electricity industry.

Furthermore, the Department of Energy released last year its own proposal to offer consumers their choice of energy provider and to spur competition in the electric utility market. Their plan sought to reduce power plant emissions by creating incentives for electricity generated from renewable energy sources. Unfortunately, the administration excluded hydropower from its renewable portfolio standard (RPS) - completely ignoring the air quality benefits of hydro, and failing to recognize hydropower as a renewable resource.

Besides being emissions-free and renewable, hydropower possesses electric benefits that maintain the reliability and security of the electric system. Hydro's ability to peak, load follow and provide frequency control protects against potential system failures that could lead to the damage of mechanical equipment and even brown or black-outs.

Hydro's technical advantages mean that it can provide enhanced value to the electric system in the form of efficiency, security, and most importantly, reliability. The electric benefits offered by the nation's hydroelectric resources are of vital importance to the successful culmination of our national experiment to open the electric industry to full and fair competition.

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NHA
National Hydropower Association

# Issue Brief

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202-682-1700 • Fax 202-682-9478 • www.hydro.org

## RESEARCH AND DEVELOPMENT: THE ADVANCED HYDRO TURBINE SYSTEMS PROGRAM

Hydropower is an efficient producer of emissions-free, renewable and domestic energy. However, like any energy generation technology, hydropower technology can have an impact on the environment requiring mitigation. The hydro industry has taken extensive steps and spent hundreds of millions of dollars to minimize the impact its technology has on aquatic life and habitat. While sometimes effective, these efforts are time consuming and costly to the industry both in terms of regulatory burdens and the resources expended on mitigation equipment.

Industry research demonstrates the mitigation of environmental and biological impacts can be achieved by applying state of the art technology. Progress in new technological improvements is the best approach to addressing the environmental issues associated with dams and hydropower projects, including fish passage, cavitation and entrained gases.

Over the last decade, the Department of Energy (DOE) has unfortunately invested little in hydro research and development, accounting for less than 1 percent of DOE's total renewable energy R&D budget during that time. While attention to the environmental impact of hydro has grown, federal funding for technological solutions to these challenges has been nearly nonexistent.

**The Advanced Hydro Turbine Systems Program:** Industry has joined with the DOE in an accelerated research and development program for a new generation of hydro turbine. This cost share program is essential to the development and testing of a new and improved turbine designed to protect fish and aquatic habitat, while operating efficiently over a wide range of flow levels. Essentially, the program addresses the main challenge to hydropower today – balancing environmental needs with those of energy, while maximizing the multiple uses and public benefits of the nation's waterways.

Development of advanced hydro turbine systems will place hydropower at the forefront of America's energy future. The successful completion of this program will ensure the continued production of this clean and low cost, renewable energy - while preventing much of the environmental impact that would otherwise require mitigation efforts.

The Advanced Hydro Turbine System program will:

- minimize environmental impact to aquatic life;

 *(over)*

Mr. SHADEGG. Thank you, Mr. Murphy. Mr. Lynch?

**STATEMENT OF KEVIN A. LYNCH**

Mr. LYNCH. Thank you, Mr. Chairman and members of the subcommittee. My name is Kevin Lynch. I'm Director of Government Affairs for PacifiCorp. My company serves 1.5 million retail electric customers in six Western States. The company holds 20 FERC licenses for hydro projects totaling about 1,100 megawatts in capacity.

PacifiCorp supports H.R. 2335, and I'll briefly explain why. Virtually every one of our hydro projects is in some stage of relicensing right now. To date, we've only succeeded in obtaining new licenses for two relatively small projects. Both of them are located in the State of Utah.

The company is also pending at the FERC a settlement agreement for its Condit hydroelectric project in Washington State. The Condit settlement includes removal of the project in 7 years. As the Condit settlement indicates, our record on hydro relicensing is not great, but it's not for want of trying. And it's not for want of being flexible in trying to achieve a resolution that balances economics and environmental imperatives.

In southern Oregon, on the other hand, PacifiCorp has already spent $20 million to $30 million on studies and activities to obtain a new license for our 186 megawatt capacity North Umpqua project. Last November, PacifiCorp exited a collaborative process for its multi-facility North Umpqua project after the U.S. Forest Service insisted on removal of a key part of the North Umpqua facility, one of the eight dams that make up the entire project, as a precondition to reaching settlement on relicensing. Further, the agency asserted if the company did not agree to removal of this facility as a precondition to settlement, it would mandate removal through the exercise of its claimed conditioning authority under Section 4(e) of the Federal Power Act. This assertion came more than 18 months into the collaborative effort, with little or no scientific justification, and virtually no analysis of any of the alternatives available—alternatives to removal of that facility.

We're hopeful the action by the Forest Service will be reconsidered, and we're under some impression that the Forest Service is in fact giving some more thought to trying to restart the negotiation process. We're eager to do that. But the episodes demonstrated to us a fundamental problem with the Federal Power Act. Federal agencies have the power to mandate conditions in relicensing with little justification, without examining alternatives, and with no need to balance other considerations.

H.R. 2335 would add some much-needed accountability over agency conditioning authority. Accountability to us is an essential element to making a collaborative process work. So PacifiCorp urges you to support this bill as a reasonable response to a real problem. Thank you.

[The prepared statement of Kevin A. Lynch follows:]

PREPARED STATEMENT OF KEVIN A. LYNCH, DIRECTOR OF GOVERNMENT AFFAIRS, PACIFICORP

Mr. Chairman and members of the Subcommittee, my name is Kevin A. Lynch. I am Director of Government Affairs for PacifiCorp. PacifiCorp is an electric utility headquartered in Portland, Oregon. We serve nearly 1.5 million retail electric customers in six western states.

PacifiCorp holds 20 hydroelectric licenses issued by the Federal Energy Regulatory Commission for 53 hydro plants totaling 1100 megawatts of electric generating capacity across seven states. These facilities provide about 10 percent of our customers' electric supply. Our hydro plants are crucial elements of our generation portfolio, providing energy, peaking capacity, voltage support, and other benefits.

Nearly all our hydro projects are in some stage of relicensing under the Federal Power Act. Since enactment of the 1986 amendments, however, PacifiCorp has been successful in licensing only two projects, both located in Utah (30 Mw and 1 Mw). We have also agreed to remove a significant facility as part of a relicensing settlement agreement—the 14 megawatt Condit project on the White Salmon River in Washington state. The Condit settlement should indicate to you that PacifiCorp is willing to be flexible in achieving results that balance economic and environmental objectives.

These achievements, however, are few in comparison to the difficulties we face in relicensing most of our other projects. We are concerned for the future of much of our entire hydro portfolio as a direct result of the current hydroelectric relicensing process.

This tenuous situation is due to the fact that the process now affords state and federal agencies "trump" cards via their mandatory conditioning authorities. Agencies may impose license conditions on existing facilities without regard to economics or other public values. Further, the process lacks any requirement for agencies to quantify expected environmental benefits of a mandated license condition.

H.R. 2335 would reduce the arbitrary nature by which mandatory conditions are imposed. It would impose a level of accountability on agencies to the decision making process that is currently lacking. This lack of accountability has, in some of our experiences, created a frustrating, dysfunctional process. H.R. 2335 is needed to restore balance to the process.

To illustrate our concerns, PacifiCorp has participated in a number of collaborative relicensing processes around our system. Our experience with these processes has been mixed.

The Condit process resulted in a mutually-agreeable outcome among a diverse group of stakeholders. Participants included the company, three federal agencies (excluding the FERC), two state government agencies, four Native American tribes, and several environmental groups. Dam removal was not a result we sought at Condit; but the collaborative process brought together a rationalization of steps and conditions that made dam removal acceptable to us.

We also are probably one of the first utilities to leave a collaborative process over the issue of dam removal. Our experience with relicensing the North Umpqua hydro project in western Oregon illustrate the problem with lack of agency accountability for mandatory prescriptions in the relicensing process.

At North Umpqua, PacifiCorp felt it had done "all the right things" for a successful relicensing:

- First-ever watershed analysis of a project on federal forest lands,
- Created a Citizens Advisory Committee,
- Initiated collaborative settlement proceeding even before FERC had developed its Alternative Licensing Process.

In short, we worked collaboratively in a settlement proceeding using the best science available over a four year period to try to arrive at a consensus-based solution involving all stakeholders.

That all ended when PacifiCorp exited the settlement negotiations last November. We were driven to this action by the Forest Service's insistence that we remove the downstream dam (known as Soda Springs) as a *starting point* to reaching any accord. The agency based its directive on ambiguous language in its Northwest Forest Plan, stating removal was the only way to achieve those objectives.

The agency further indicated that if PacifiCorp would not agree to removal of Soda Springs voluntarily as part of settlement, the agency would simply mandate it using its 4(e) conditioning authorities under the Federal Power Act.

In a September, 1999 memorandum from the Forest Service to PacifiCorp, the agency stated, "Dam removal will be a condition of settlement for the Resource Team as well as the Forest Service—Forest Service will submit preliminary 4(e) terms and conditions for dam removal and other mitigation."

As a company that has agreed to remove a dam, we believe we have a good understanding of when it is right—and when it is wrong. It is clearly wrong in the case of the North Umpqua project where a number of other ways exist to meet the objectives of the NW Forest Plan: installation of fish passage facilities and off-site habitat restoration among them. The Forest Service discounted these alternatives, however, in insisting on agreement to remove of the Soda Springs facility *before* negotiating any other mitigation measures.

The Forest Service's actions at North Umpqua illustrate how difficult it is to achieve true collaboration if agencies bring their mandatory conditioning authorities into the process.

At North Umpqua there may yet be a happy ending: the Forest Service has now indicated it does not have an official policy of using 4(e) to compel dam removal and that it did not intend to create such a policy via the North Umpqua settlement talks.

In fact, the agency recently indicated it is willing to return to the settlement table to see whether a mutually-acceptable resolution for relicensing this project can be achieved. It also is saying that dam removal will not be a precondition to a return to the table.

We would like to return to the talks because we still believe that settlement and collaboration is a good approach to resolving the tough issues that will arise in any relicensing.

*However, this is not to say the licensing process doesn't need fixing—it does.*

In fact, PacifiCorp believes that settlement processes would work much better if there is more accountability built into the process throughout.

Major flaws with the process as it currently exists include:

*Lack of a mechanism to ensure a final licensing decision will be in the overall public interest.* Under Sections 18 and 4 (e) of the FPA, agencies tend to focus narrowly on the resources under their jurisdiction and to the exclusion of other important factors.

Additionally, agency conditions are often written at a technical level within the agencies with little or no policy-level review or consideration of federal energy policy or other public interests, including the need for flexible, reliable low cost power that does not emit greenhouse gases.

*A single Section 18 or 4(e) condition imposed by a single agency can render a beneficial project uneconomic yet FERC must include the conditions in a final license.*

FERC cannot balance different kinds of public interests and benefits against one another and there is no opportunity for administrative or judicial review until after FERC issues its final order. Even then, conditions can only be challenged in court on narrow legal grounds.

H.R. 2335 addresses these key problems in several ways that we strongly support:

- It requires agencies to take into consideration project benefits, including economics and power values, system reliability, air quality and flood control, and requires the agencies to document consideration of these factors.
- It allows for administrative review of contested conditions before the issuance of a final order. This review could both improve the license and shorten the licensing process by eliminating much potential post-license litigation.
- It requires a scientific basis for all conditions and peer review. While peer review may not be needed for all conditions, it is certainly desirable where the scientific merit of a condition is contested.

In conclusion, PacifiCorp believes that settlement processes would have a higher chance of success with this legislation in place because ALL of the parties (not just the license applicant) would need to consider the full range of relevant factors—both the impacts and benefits of hydroelectric projects—in the licensing process.

H.R. 2335 merits support because it does not take away the agencies conditioning authorities—it simply requires them to be used under the right conditions in an appropriate way, taking into account all the values associated with hydropower.

Mr. SHADEGG. Thank you, Mr. Lynch. Mr. Fahlund? Is that how you pronounce it?

Mr. FAHLUND. Yeah. Fahlund.

Mr. SHADEGG. Fahlund.

## STATEMENT OF ANDREW FAHLUND

Mr. FAHLUND. Mr. Chairman and members of the subcommittee, thank you for allowing me to testify before you today. I represent American Rivers as Policy Director for Hydropower Programs and

serve as the Chair of the Hydropower Reform Coalition, a consortium of 62 conservation organizations from around the country with a combined membership of more than 800,000.

The licensing provides significant benefits to rivers. Changes in law in the 1980's and 1990's provided an opportunity to restore rivers and fisheries degraded by decades of unmitigated harm caused by hydropower operations. These changes, coupled with administrative improvements at FERC, resources agencies, have established an appropriate balance between power and nonpower values and ensured a more efficient process. H.R. 2335 would turn back the clock on this progress.

The licensing takes a 19th century technology—hydropower—and brings it up to 21st century standards without significant losses in power generation or profitability. Rivers are complex systems, and their management impacts the interests of millions of Americans. Relicensing reflects this complexity.

Congress made FERC responsible for issuing licenses that protect the public interest in power and nonpower values of rivers. However, they established three basic provisions: water quality, fish passage, and Federal lands management as a foundation of minimum protection assigned—and assigned expert resource agencies to carry out these mandates. These are commonly referred to as mandatory conditions.

H.R. 2335, described as a process bill, would have the effect of fundamentally changing this balance. How? H.R. 2335 makes a complex process more so and burdens resource agencies with limited resources so that they are unable to act. It creates three new processes and a host of new standards of review, several of which duplicate those already undertaken by FERC. This redundancy, inefficiency—this creates redundancy, inefficiency and forces State and Federal resource agencies outside of their expertise and sets them up to fail.

Because it is so vague and open-ended, the provisions of this bill create countless openings for new litigation that will leave us in court for years to come. It is also unworkable. One provision of the bill would require agencies to submit conditions for review before a dam owner even files an application for a new license. Agencies cannot submit conditions on a project without an application and the associated study results.

Agencies are not solely to blame for delays. In fact, delays in the relicensing process only prolong ongoing environmental harm. That is because once a license term expires, dam owners receive an annual license that grants them status quo conditions until a new license is issued. Delaying the expensive studies and the facility upgrades gives project owner a significant incentive to draw out the process.

Finally, H.R. 2335 forces agencies to consider the profitability of a hydropower project in determining basic environmental standards for protection of public trust resources. This fundamentally changes the mandate of these agencies and threatens public rivers.

Federal agencies cannot and should not guarantee the profitability of private industry, especially at the expense of resource protection. Industry does not even make information available to do the kind of analysis they are asking for.

FERC's previously testified in the class of 1993 that it resulted in an average loss of generation of 1 percent, which has been stated here several times and attributed to me. Let's remember that this is measured against projects—that loss is measured against projects that operated for 50 to 100 years with virtually no environmental protection. That's a small price to pay for the significant benefits to our rivers, wildlife, and recreation.

Hydropower will do just fine in this new era of competition, and there is only sporadic anecdotal evidence to suggest otherwise. After receiving a 30- to 50-year term, these projects should be fully amortized. Projects both facing relicensing and having just been relicensed are selling for very competitive rates. Stories of successful settlements far outnumber the horror stories of lengthy process or expensive requirements. There are several ongoing administrative improvements that are working and should be made to work to protect everyone's interest.

Congress should ensure agencies have sufficient staff, resources and training to effectively participate in relicensing.

Second, everyone should promote ongoing collaboration and cooperation using FERC's alternative process.

Third, Federal agencies should implement comprehensive policies and guidance already under development that will address coordination of and public input for mandatory conditioning.

Fourth, FERC should ensure that applicants complete all necessary environmental studies in a timely manner, and should place interim conditions on annual licenses to give applicants an incentive to act quickly.

If the committee has any questions about this or any of the other bills before us today which I have not referred to, I'd be happy to answer them. American Rivers is ready to work with Congress, agencies, and industry to make reasoned improvements to the process and substance of hydropower relicensing. Thank you for your attention.

[The prepared statement of Andrew Fahlund follows:]

PREPARED STATEMENT OF ANDREW FAHLUND, POLICY DIRECTOR FOR HYDROPOWER PROGRAMS, AMERICAN RIVERS

INTRODUCTION

Mr. Chairman and members of the Subcommittee, thank you for allowing me to testify before you today regarding federal regulation of hydropower dams. I am Policy Director of Hydropower Programs for American Rivers, a national river conservation organization with more than 30,000 members nationwide. In addition, I am the Chair of the Hydropower Reform Coalition, a consortium of more than 60 conservation and recreation organizations from around the country (see attachment). The Coalition was formed in 1992 with the purpose of improving river health and recreational opportunities through the licensing, relicensing, and regulatory enforcement of hydropower dams under the jurisdiction of the Federal Energy Regulatory Commission (FERC). Coalition members are national, regional and local conservation organizations, and together have a combined membership totaling more than 800,000. Coalition members are active in more than 75 percent of the relicensing cases currently pending before FERC and have constructively contributed to numerous policy discussions concerning FERC regulated hydropower.

There are four basic messages in my testimony, geared primarily toward HR 2335 "The Hydropower Licensing Process Improvement Act":

1. Hydropower relicensing results in significant improvements to environmental quality;
2. On average, relicensing results in relatively modest costs to industry in exchange for the privilege of utilizing a public resource;

3. The FERC process has never worked better to protect the public interest. Continued use of the collaborative process, coupled with adequate resources for participating agencies, and minor administrative reforms will further this progress;
4. Single project or state exemptions to the Federal Power Act, as a matter of policy, are inappropriate and unnecessary.

While the bulk of my testimony focuses on hydropower regulation generally and my organization's opposition to HR 2335 specifically, American Rivers and the members of the Hydropower Reform Coalition have strong reservations about single project or state exemptions to existing rule or law and therefore cannot support any of the other bills docketed for this hearing with the exception of S. 1937 for which we take no position at this time.

I would like to stress that we believe that hydropower relicensing is a natural resource issue—a rivers issue—not simply an energy issue. That is because the improvements and changes that we are making at these projects will have enormous implications for hundreds of species, thousands of river miles, and millions of dollars in recreational opportunities for decades to come. In contrast, these decisions have a relatively small impact on energy generation, electric rates, or industry viability.

I would also like to make clear that American Rivers and members of the Hydropower Reform Coalition are NOT anti-hydropower. We simply wish to ensure that these dams are operated to protect and restore river resources using best available technologies and best management practices. While decommissioning is a popular topic these days, we believe that dam removal will be the exception and not the rule.

ALL DAMS ARE NOT CREATED (OR OPERATED) EQUAL

*It is important to remember that rivers are owned by the public.* Licenses to operate non-federal hydropower dams last 30 to 50 years. It has always been Congress' intent that at the end of a license term, the Federal government reviews its commitment of the public's resource based on the knowledge and values of the time.

As early as 1908, President Teddy Roosevelt understood the need to safeguard our nation's rivers and helped to devise a system of periodic review to protect these national treasures.

> "The public must retain control of the great waterways. It is essential that any permit to obstruct them for reasons and on conditions that seem good at the moment should be subject to revision when changed conditions demand."

More than 75 years later, the 9th Circuit Court of Appeals in *Yakima Indian Nation v. FERC* found that:

> "Relicensing is more akin to an irreversible and irretrievable commitment of a public resource than a mere continuation of the status quo. Simply because the same resource had been committed in the past does not make relicensing a phase in a continuous activity. Relicensing involves a new commitment of the resource . . ."

While hydropower has provided significant benefits to society over the past 100 years, this has not come without a cost to our nation's rivers. Dams harm the physical, chemical, and biological function of rivers by disrupting flows, degrading water quality, and blocking passage of fish and other species. Although hydropower's energy source—water—is relatively renewable, the river ecosystems that dams affect are not. The profound impacts of hydropower dams on river systems have been widely documented in scientific literature. For example, dams cut off free-flowing rivers, blocking not only fish and wildlife migration, but also the flow of nutrients and sediments. By diverting water out of the river for power production, hydropower projects often remove water from entire river channels leaving them completely dewatered.

By withholding and then releasing water to generate power for peak demand periods, dams cause downstream stretches to alternate between no water and powerful surges. These drought to torrent episodes dramatically erode soil and vegetation and alternately flood or strand wildlife. Such peaking operations also lead to massive fluctuations in reservoir levels harming flatwater recreation and shoreline habitat. Dam operations can also cause water quality problems in rivers and reservoirs that can result in fish kills and permanent elimination of naturally occurring fish and wildlife species.

The cumulative impacts that multiple dams have on rivers can spell disaster for fish and wildlife. For example, 16 million salmon once traveled up the Columbia River and its tributaries from the Pacific Ocean each spring to spawn. Now fewer than 2% make the trip largely because dozens of hydropower dams bar their way. Both coasts have seen dramatic declines in river spawning species that were once mighty commercial industries from the Carolinas to Maine and all along the Pacific

Coast. These declines are in large part attributed to alteration and fragmentation of river habitat.

ECOLOGICAL AND ECONOMIC BENEFITS OF RELICENSING

Because these licenses are issued for 30 to 50 year terms, hydropower relicensing is a once-in-a-lifetime opportunity to bring a 19th century technology up to 21st century environmental standards. By requiring dam owners to build passage for fish, protect critical riparian habitat, adjust river flows to conform to a more natural pattern, and provide recreational access and opportunity we can protect valuable fisheries, native species diversity, recreational amenities, and natural ecosystem functions, while enhancing economic opportunities such as recreation, tourism, and ecological services. Because original licenses were issued prior to the enactment of modern environmental statutes and prior to our understanding of the impacts of dams on river ecosystems, virtually none of these environmental conditions were required.

There are hundreds of examples where these improvements to river environments have been made while maintaining the viability of the other benefits of the project. On the Manistee, Muskegeon, and AuSable Rivers in Michigan, Consumers Power, the State, the US Forest Service and Fish and Wildlife Service, and NGOs, reached a settlement that resulted in significant improvements to anadromous fish runs, sport fishing, and water quality and has restored these rivers to a more healthy condition. Studies are showing dramatic improvements in natural fish reproduction simply from changing the flow regime out of one dam to a more natural condition.

Many changes obtained through relicensing of hydropower dams can also bring economic benefits to communities. For example, in rural areas such as Western Massachusetts, hydropower dams provide very few jobs as they are highly automated. But improved river conditions from relicensing created significant numbers of jobs and increased revenue for this rural community. Improved flows on the Deerfield River have created a multi-million dollar rafting and fishing industry in this once economically depressed region while still maintaining profitable energy production.

HEALTHY RIVERS AND CLEAN AIR

Simply because hydropower is emissions free, does not automatically mean that it is without significant impacts on the environment. The overwhelming evidence of the impacts of dams on rivers runs contrary to the assertion that hydropower is "green". This argument is often used to get around critical river protection measures, without any showing of actual impacts. Ironically, some of the same companies that tout the climate change benefits of hydropower vehemently deny that climate change is a problem when talking about their fossil generation.

The benefits derived from relicensing provide significant protection to rivers with a low cost to air emissions. According to the Chair of the Federal Energy Regulatory Commission, the relicensing of more than 140 hydropower projects resulted in an average reduction in generation of only 1%! Based on this track record, we can reasonably expect a 1% average generation loss from projects due to be relicensed over the next ten years (these represent 2.5% of the annual generation of the US). This would result in a 0.025% reduction in the nation's overall annual generation, which would need to be offset by an alternative—most likely natural gas. That assumes no gains through energy efficiency or other demand side improvements and fails to consider emerging technologies such as wind and fuel cells.

In any case, the amount of "lost" generation is significantly less than the 5% average fluctuation of energy demand caused by factors such as weather, fuel prices, and advances in technology.[1] These losses in generation are derived from comparing a baseline of operation that had NO environmental conditions to one with modern environmental standards. One would reasonably expect at least some loss with meeting environmental laws. A 1% loss in generation is a small price to pay for the benefits received. We need not trade healthy rivers for clean air. We can have both.

In response to the clean air benefits that hydropower dams do provide and to create an incentive for operating hydropower dams to protect river resources, American Rivers and Green Mountain Energy have consulted with numerous power companies, resource managers and others in the hydropower community to establish a market incentive for environmental improvements at hydropower dams. The Low Impact Hydropower Institute was created as an independent body that rates the operation of hydropower dams using objective and measurable criteria for factors such

[1] The mean net generation of electric utilities and non-utility power producers for 1990 to 1996 is 3,203,998 million kilowatt-hours, with a standard deviation of +/-159084.6 million kwh or +/-4.96%.

as water quality, fish passage, and land protection. Those projects that meet these standards of environmental protection are given a certification that will allow their owners to sell the power from the project at a premium.

RELICENSING—AN IMPORTANT BALANCING ACT

Because rivers are *public* resources with many competing interests and significant environmental impacts, the licensing process for hydropower dams involves multiple stakeholders. Unlike most electricity generating technologies, hydropower does not have "end of pipe" standards to ensure that the dam's operations do not unduly damage the environment. This is because every dam and every river is different, and generic standards cannot be applied to each project. Most hydropower dam licensing conditions—including conditions to protect natural resources—are determined by FERC after giving equal consideration to power (electricity generation) and non-power (fish and wildlife protection, recreation, etc.) benefits of the river. The economics of the hydropower facility are taken into account in this balancing process.

Congress, however, determined that some basic environmental protections must be afforded at every dam, and should not be balanced away to promote cheap hydropower. Expert federal and state resource managers establish conditions based on substantial evidence to protect public trust resources. These basic protections form a floor above which FERC can do it's balancing of license conditions in the public interest.

Sometimes referred to as mandatory conditions, these requirements assure that:

1. Fish can be passed upstream and downstream of a dam (FPA Section 18);
2. If the private dam is located on federally-owned land, the uses of the federal land are protected (FPA Section 4(e)); and
3. The dam does not result in a violation of state-developed water quality standards (CWA Section 401).

Both fish passage and federal lands protection have been part of the relicensing process since enactment of the Federal Power Act in 1920. The current construction of the Act, which sets fishways apart as a special consideration, is in keeping with the law and practice that came to us from Europe at the time of settlement. Requiring millers (dam owners) to provide fishways at their own expense dates back many hundreds of years due to the fact that fish are equally important to interstate commerce. The changes proposed in HR 2335 to balance the financial needs of a privately held hydropower project with the protection of lands and fish resources held in trust by the government for the people reflects a tension that has existed for generations. The proposed changes to the Federal Power Act in HR 2335 would upset hundreds of years of precedent and tip the balance that has existed.

The provision under Section 4(e) of the Federal Power Act that grants authority to land management agencies to ensure that projects on their lands meet current management goals and objectives is simple, common sense. Projects that are located on federal or tribal lands are already getting the benefit of cheap rent. In order to adequately manage the lands entrusted to them, federal land management agencies must have control of how these projects are operated.

Even today, mandatory conditioning by federal agencies in the relicensing process is rare. According to a University of Michigan study, fish passage conditions were required outside of settlement at fewer than 10% of projects between 1980 and 1996. This hardly seems like a crisis given the dire need of salmon and other fisheries in both the Atlantic and Pacific coasts. The instances where agencies are exercising this authority are critical cases where improvements must be made.

HR 2335—A BAD SOLUTION TO THE WRONG PROBLEMS

The legislation before the Committee, HR 2335, is complex and rife with detail about a process that is foreign to most. Rather than walk through the bill step by step, the comments here simply refer to several of its most obvious problems. For a complete critique of the bill, see attachment to this testimony.

No regulatory process is perfect and this one is no exception. Many in the environmental community believe that there should be stricter environmental conditions at hydropower projects, while many in the industry believe that there should be fewer. Perhaps that is a signal that things are working. Whichever position one believes, HR 2335 will only make the relicensing process more complex and litigious and will threaten public trust resources in the name of private gain.

*HR 2335 will make a complex process more so*

Efficiency in the hydropower relicensing process is a constant challenge because of the complexity of the issues and the number of stakeholders involved. There are

a wide variety of requirements, checks, and balances. But HR 2335 only makes a complex process more so. It adds three new administrative processes at a time when agency budgets are limited and when the same bill seeks to avoid duplication. It further requires federal resource agencies to consider eight new factors in developing their environmental conditions, and then places on them a series of deadlines, procedural hoops, and resource constraints, most of which are completely out of their control.

Many of the new procedures and considerations placed on resource agencies are redundant with FERC's role in relicensing. HR 2335 requires agencies to consider several factors beyond the scope of their resource protection responsibilities and well beyond their expertise. Evaluation of these factors currently falls to FERC. The bill would require both federal and state resource agencies to undertake this analysis as well. It is unclear what is gained from having agencies duplicate this kind of evaluation.

One of the most egregious elements of the bill requires federal agencies to submit their mandatory conditions to a new administrative review process *before the applicant has even filed its application for a new license!* How can agencies write license conditions for a project that has no application? At that stage, FERC does not even recognize that there is a formal proceeding. Further, there is no guarantee that the applicant has concluded the studies that agencies must use when drafting their license conditions. Even if the agencies chose to rely on their own studies and environmental review, the bill prohibits them from doing so and forces them to rely on FERC's review. Without an application on file, FERC will not have begun to scope their environmental analysis, therefore it is unreasonable to require agencies to submit conditions at this stage in the process.

*Delays in relicensing are often within the applicant's control*

Relicensing typically is a five to seven year process involving multiple stakeholders, dozens of studies, and numerous meetings. However, dam owners receive a license that entitles them to utilize a public resource for 30 to 50 years. Delays in the process are not uncommon but everyone shares some of the blame and the impacts of delay are most often borne by the environment.

License applicants have caused significant delay of the relicensing process by failing to provide complete license applications. Of the 157 relicensing applications filed by industry in 1993, only *nine* provided sufficient scientific information about project impacts, forcing FERC to issue hundreds of additional information requests in the other 148 cases.[2] The subsequent need to conduct these studies to complete their applications was a significant reason that there were major delays in these relicensings. In written testimony for the Senate Energy and Natural Resources Committee, FERC identified only 7 instances since 1992 where mandatory conditions were filed after the regulatory deadline without support from all parties to the proceeding.

Who is really harmed by delay? Most often it is the interests of the environment. That is because when a license expires the dam owner receives an "annual license" that maintains *status quo* conditions at the project until a final license is issued. That means that the longer the process takes, the longer the applicant can stave off the cost of having to comply with modern environmental conditions.

When one takes a closer look at "horror stories" of never ending relicensings one can see that these dams operated for up to 30 years beyond their original license term under requirements based upon 1940s and 50s environmental laws and science. That provides a huge incentive for dam owners not to cooperate! The environment and the public are the parties most harmed by delay in the relicensing process. However, just as most resource agencies are not guilty of purposeful delay, neither are most power companies. But if we want to reduce the time required to relicense projects, we should reevaluate the way in which FERC issues these annual licenses to allow for interim amendments or abolish the practice altogether.

*We should not guarantee profitability of hydropower*

Being a good environmental steward is a legitimate cost of doing business. Acquiring a new license necessitates an upgrade of facilities and operations to meet modern environmental standards. This is appropriate and fair.

Should the federal government guarantee profitability of hydropower? If a project is already unprofitable because of market forces or because it is run poorly, should it be exempted from any environmental conditions? The answer to these questions is clearly no. According to the courts, "There can be no guarantee of profitability of water power projects under the Federal Power Act; profitability is at risk from

[2] Barnes, *FERC's "Class of '93": A Status Report,* Hydro Review (Oct., 1995).

a number of variable factors, and values other than profitability require appropriate consideration."[3]

Applicants are not even required to provide economic information about their projects. According to FERC's own general counsel, "Licensees are not required to file information with the Commission from which it (the Commission) could determine whether they (licensees) earn a profit on hydropower projects." How are agencies supposed to measure the impacts of their conditions on project economics when industry does not share this information and the information itself is speculative?

Federal agencies in fact do consider least cost alternatives provided that those conditions meet the necessary level of environmental protection to fulfill statutory obligations. Agencies are not insensitive to the needs of industry any less than the industry is insensitive to protection and restoration of the public's rivers.

Forcing agencies responsible for protection of public trust resources to consider economics in the development of environmental conditions changes the fundamental nature of their mandate and forces them beyond their expertise. This shift runs counter to the principles upon which Congress created these laws.

While couched in process, the bill effectively eliminates mandadory conditioning for most cases. The result of this bill clearly sets agencies up to fail. All of this additional process, review, and requirements appear to be set up to provide avenues for new litigation. Why are we moving in a direction of litigation, mistrust, and acrimony at a time when trust, cooperation, and settlement are flourishing?

FACTS DON'T SUPPORT THE CLAIMS OF A CRISIS

To date, federal resource agencies have not caused any hydropower owner to abandon its project because of environmental conditions. The courts place an appropriate check on this discretion and require a substantial record of evidence to support these conditions. The Energy Information Administration has forecasted only a 1% decline in total hydropower output over the next twenty years. This does not represent significant economic hardship after having operated under licenses with little or no environmental protections for the past 30 to 50 years. The original capital costs of these projects should be fully amortized.

In reality, dams are not being surrendered or abandoned due to environmental regulation. Since 1996, only three operating licenses have been surrendered—each because they fell into disrepair or were damaged by flooding. According to FERC, since1993 "no licensee has refused to accept or surrender their license citing project economics."[4]

In its entire history, FERC has ordered only one dam removed against the owner's wishes and that was later settled. The hydropower projects likely to come off line in the next several years will be those that are too old and too costly to upgrade and maintain and therefore won't be competitive in the new market. While meeting modern environmental standards in a few cases may lead to project decommissioning, upgrades for safety, operating efficiency, and the competition from natural gas are the greatest threats to hydropower.

In fact, hydropower is doing well in a deregulated market, even while maintaining modern environmental standards. Sales of recently relicensed hydropower facilities have been quite competitive and have brought in purchase prices well beyond industry expectations. New England Power Company was sold in 1998 to US Gen for $1.8 billion, well above its assessed value. And 30 dams previously owned by Central Maine Power Company—all with modern FERC licenses—were recently sold to Florida Power and Light for reportedly three times their assessed value. Recent divestiture proceedings in California have independent power producers salivating over Pacific Gas and Electric's (PG&E) hydropower complex, most of which is just coming up for relicensing.

If members of the hydropower industry are concerned with either environmental conditions imposed by recent relicensing or by the threat of pending conditions in upcoming relicensing, why are they so willing to pay a premium for hydropower projects?

ADMINISTRATIVE IMPROVEMENTS TO THE RELICENSING PROCESS CAN WORK

There are appropriate ways to make incremental improvements to the way that we license hydropower dams that do not place all blame on one sector and that meet at least some of the interests of all stakeholders.

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[3] *Wisconsin Public Service Corp. v. FERC,* 32 F.3d 1165, 1168 (7th Cir. 1994)

[4] Written supplemental testimony of Doug Smith, FERC General Counsel, before the Senate Energy and Natural Resources Committee, 10/27/99

*Provide Adequate Resources for Agency Participation*—To ensure that the relicensing process is efficiently implemented, state and federal natural resource agencies must have sufficient staff, resources and training to enable productive involvement in individual relicensings. At present, many of the relevant state and federal agencies do not have sufficient staff dedicated to relicensing. As a result, a range of individuals (few of whom are trained in the relicensing process) may participate in different parts of a relicensing proceeding as time allows, or the appropriate staff is overburdened and cannot spend the time to conduct an adequate review of the environmental needs at the site or participate constructively in the relicensing. Because of the complex nature of the proceedings, and because of the new, more productive trend toward collaborative relicensing efforts, a consistent presence of qualified staff with an appropriate workload would make agency efforts more efficient and productive.

In the state of Alabama, licenses for 12 dams on three major rivers will expire by 2007. Relicensing these projects will involve regular meetings, extensive studies, and detailed negotiation. Currently, the US Fish and Wildlife Service, which has significant statutory responsibilities for participating in this process, has only one staff person to cover this area. His situation is not unique. Without additional resources, there is a risk of inefficient or incomplete participation on the part of USFWS and potential disruption or delay in the process. This can be avoided with additional resources.

One potential solution is Section 1701(a) of the Energy Policy Act of 1992, which provides authority for FERC to reimburse resource agencies for their costs associated with licensing FERC projects. The provision calls for FERC to pass these costs on to licensees through annual fees. Since 1992, FERC has been collecting fees from licensees for some of the federal resource agency relicensing expenses but this money has not found its way back to these agencies. Instead, it has gone to the Treasury where these reimbursements to federal and state resource agencies have not been made available through annual appropriations from Congress. This system is not working. To provide adequate resources to these agencies that can facilitate more efficient relicensings, this provision of law should be implemented such that state and federal natural resource agencies are reimbursed off-budget.

*Collaboration Not Confrontation*—Since the codification of FERC's rules on the alternative relicensing or collaborative process, an increasing number of projects have reached successful settlement leading to positive project economics and greater environmental protection. In an independent evaluation of the costs of hydropower relicensing, the Electric Power Research Institute (EPRI) found that on average, savings of *20 to 50 percent* can be realized by using a collaborative approach. EPRI also found that the settlement process, on average, leads to reduced mitigation costs of *5 to 20 percent*.[5]

In a recently signed settlement agreement in Montana and Idaho between Avista Corporation and tribes, conservation groups, and federal and state agencies, each party came out with what they viewed as a significant win. Even with a commitment of environmental protection valued at $250 million, Avista can move forward with a profitable license that ensures profitability and contains certainty in their future operating conditions and environmental stakeholders can have assurance that environmental needs will be met over the next forty years.

This kind of cooperation must be fostered. Piecemeal legislation that targets only one stakeholder group—resource agencies—threatens the present and future progress and good will developed through this sort of collaboration.

*Increase Cooperation and Coordination among FERC and Resource Agencies*—Cooperation among FERC and state and federal resource agencies will greatly improve the efficiency of the relicensing process. Resource agencies and FERC have begun meeting to discuss ways to better meld their respective authorities. A better working relationship among FERC and resource agencies will make the relicensing process more efficient, and will likely result in better licensing decisions.

Under a charter signed in October 1998, the four principle federal agencies involved in relicensing—FERC, Interior, Agriculture, and Commerce—formed an Interagency Task Force to Improve Hydroelectric Licensing Processes (ITF). This committee was established to coordinate federal and state mandates.

In July of 1999, the ITF established a Federal Advisory Committee to provide a forum for non-federal entities to review and provide feedback on the activities of the ITF. The Hydropower Reform Coalition is represented by three members and is urging each of the members of the ITF to effect meaningful change through this process

[5] EPRI, *Hydro Relicensing and Mitigation Cost Data,* Excerpted from EPRI Report TR-104858, *Water Resource Management and Hydropower: Guidebook for Collaboration and Public Involvement* (Dec., 1995).

by advocating changes in guidance, policy, and regulations. The Coalition hopes to work with members of industry and others on this committee to advance common goals and interests.

At our last meeting in March 2000, the Department of the Interior announced the intention of Interior and Commerce to explore the possibility of developing a process that would allow public input into the development of draft conditions for fish passage and federal lands protection under FPA Sections 18 and 4(e) respectively. Such a process would be welcomed by American Rivers and others in the Hydropower Reform Coalition. We also encourage these same agencies to come out with a uniform policy on the development of FPA Section 18 fishway prescriptions and similarly urge the US Forest Service to finalize its handbook for field staff on the development of FPA Section 4(e) land management conditions. These policies and guidance will provide necessary consistency and uniformity across agencies and regions.

Another promising forum where coordination and cooperation are leading to positive reforms is a multi-stakeholder National Review Group (NRG) sponsored by the Electric Power Research Institute (EPRI). Since January of 1999, members of industry, agencies, and NGOs have been working together to develop a guidance document of best practices in the relicensing process to assist stakeholders in relicensing dealing with difficult issues and typical roadblocks. Development of this document has enabled experienced practitioners from differing camps to reach consensus about practical ways to make the process work better. Over the next several months, this document will be published and a training and outreach program put forward to train stakeholders and implement its ideas.

Proposed amendments to the Federal Power Act address the wrong issues and fail to offer comprehensive improvements to the process or substance of hydropower regulation. Real reforms can protect the environment and meet the needs of industry and other stakeholders. These administrative processes are making progress toward systematic improvements in the relicensing process. They should be given an opportunity to work.

SPECIAL EXEMPTIONS TO THE FEDERAL POWER ACT ARE INAPPROPRIATE

In addition to HR 2335, several other bills are being given consideration during this oversight hearing but rather than address the merits of each, I would like to reserve my comments for a more general overview of single state or single project exemption. These bills are often justified because the projects that they exempt are "small" in terms of generation capacity or they are proposed for states that have "unique" circumstances. While we acknowledge that there can be unique circumstances on a case-by-case basis, it is generally bad public policy to create unique loopholes for only some projects.

In particular, American Rivers and our conservation partners have particular objection to S 439, which passed the Senate by unanimous consent in June 1998, and would among other things, amend the Federal Power Act (FPA) to allow the State of Alaska assume jurisdiction over hydropower projects of 5 megawatts or smaller. We urge the House to reject any attempts to introduce or pass this bill, now or in the future.

Small hydropower does not necessarily mean small impacts. Even dams generating less than 5 megawatts can have profound negative impacts on valuable migratory and resident fisheries, water quality, riparian habitats, and river recreation and should therefore not receive less environmental review. If a project is non-controversial, it will move through FERC's existing process quickly, making exemption or duplication unnecessary. FERC already has in place a procedure to exempt "small" projects. Under Section 30 of the FPA, projects are subject to a shorter and less regulatory licensing process in exchange for accepting the terms and conditions of appropriate state and federal resource agencies.

Exemption for one state sets a dangerous precedent for further unnecessary individual exemptions to the Federal Power Act. Granting individual state jurisdiction of hydropower projects would lead to a piecemeal regulatory system with gross inefficiencies in environmental review and enforcement. While we support the general intent of S. 334, which would provide an exemption preventing projects in Hawaii from seeking a voluntary license, we believe that the State of Hawaii can adequately protect its unique water resources from hydropower development through state standards under the Clean Water Act. Again, a single state exemption, even if done for the right reasons, is inappropriate and in this case, unnecessary.

The Federal Power Act has established a process to ensure environmental and economic values are considered and duplication is unnecessary. FERC also issued a Rule in October 1998 that advances a more cooperative and collaborative alter-

native to the current relicensing process, which is being used widely in cases throughout Alaska.

American Rivers and our partner organizations in Michigan also oppose HR 1262, which would exempt hydropower facilities on the Pentwater River and owned by the City of Hart, Michigan from regulation under the Federal Power Act. The Pentwater River is a tributary to Lake Michigan and a small but important steelhead fishery that currently suffers from inadequate flows from the Hart Project. These flows, which drop down to almost zero at night, cause wild fluctuations that harm migrating fish and cause significant problems with water temperature, all for a small amount of power. There is no reason that this project should be exempted from the same environmental standards that others must meet.

As a general matter, American Rivers and the members of the Hydropower Reform Coalition oppose Congressional extensions for commencement to construct new hydropower projects. The Federal Power Act currently provides for a two-year period in which to commence construction of a dam with an option to extend that period for an additional two years. Extending commencement of construction to 10 years as proposed in S. 439 could render environmental and economic evaluations conducted during the licensing process useless as conditions in the project area may change. Such extensions also limit alternative economic activity at the site, including alternative power development. Projects should not be licensed unless they are fully prepared to carry out their obligations and responsibilities. Congress should simply not accept so many extension bills.

CONCLUSION

Our nation's rivers and fisheries are facing a crisis of slow but steady extinction. Resource agencies with expertise in these areas are in the best position to address this threat. The relicensing process can always benefit from incremental administrative improvements, and perhaps one day we will come to a conclusion that it is time to look at an entirely new way of doing business, but until that point, HR 2335, and bills like it, will only turn back the clock to an era of litigation, hostility, and continued environmental decline. We can endeavor to find better ways to generate hydropower and new sources of energy but we cannot bring back species once they have gone extinct.

Mr. SHADEGG. Thank you. And I'd like to compliment each of the witnesses so far for staying quite close to the timeline. Mr. Grimm?

## STATEMENT OF ROBERT S. GRIMM

Mr. GRIMM. Thank you, Mr. Chairman and members of the subcommittee. My name is Robert Grimm. I serve as president of Alaska Power & Telephone Company. AP&T is an investor-owned, employee-owned corporation which has been providing public utility services in Alaska since 1957.

We currently provide service to 25 different communities from above the Arctic Circle to the very southern portions of Alaska. Most of these communities are very small and due to lack of infrastructure, have isolated electric systems utilizing small diesel electric generating units that use fossil fuel.

In addition to representing my own company, I'm speaking today on behalf of Alaska's electric utility industry through our statewide association known as ARECA. We strongly support S. 422 for the reasons I would like to outline, using my utility experience as an example, but emphasizing that many other companies in Alaska have similar experiences.

One of the solutions to fossil fuel generation in these remote areas is the development of small hydro to provide a renewable and nonpolluting source of energy. We at AP&T began the program to identify and develop cost-effective projects in 1984. In 1987 we applied for a preliminary permit from FERC, which we received in June, for 36 months. In November 1993, FERC issued the license authorizing the project with a capacity of 4.5 megawatts. The

project was completed and began commercial operation in 1995. The permitting and licensing process took 7 years and cost $1.2 million. The actual construction took 1 year and cost $10 million. It's interesting to note that the licensing cost and permitting cost exceed the installed cost of equivalent diesel electric generating units.

This is not just a bad example or an anecdotal thing. We also have another project in Skagway, Alaska with a capacity of 4 megawatts. It's at Goat Lake, which is near Skagway. Filed for the preliminary permit in 1991. In 1994 a license application. Got the license in 1996. Took over 5 years and cost over $1 million. The project was completed in the fall of 1998 at a cost of $10 million.

Additionally, we have a couple of other projects that are currently under license. We've been through a relicense in our Dewey Lake system. Hence, we have first-hand experience with FERC during the last decade. It appears to us that the lack of flexibility, large project, small project, large impact, small impact in the FERC rules, regulations and requirements for these small projects has been the major reason so few have been developed in Alaska. Thus, we're forced to use fossil fuel in these remote areas, with the significant impacts associated with fuel storage, fuel spills, air emission, more than offset any of the adverse effects that have been identified in any of the projects that we've already completed or have currently under license.

These projects are very similar to small community water systems which are being developed in Alaska under State law. Small hydropower is a resource that has prove itself, yet the regulatory maze continues to hinder its development. Those of us on the front line trying to implement renewable energy policies are bewildered. With all the benefit associated with the development of small hydropower when compared to the continued use of fossil fuel, why is everybody making it so hard and difficult to develop?

My last point is tidal power. In Alaska, a lot of the communities are either on coastal sites, because there's no roads—very few roads in Alaska—or along rivers. And we've looked at several different free-flowing turbines which are essentially an adapted windmill type of a thing that is actually put into the water. Uses the—captures the free-flowing energy of the river that many of these villages sit by.

Unfortunately, these units are very small—in the neighborhood of 100 KW. Well, because these rivers are navigable, that would make a FERC permit required. So we would be looking at $1 million or more to permit a project of 100 KW in these villages where we're now using—it just makes some of the alternative energy a non-option.

To reiterate, S. 442 will not diminish public interest, environmental or conservation considerations and protection as under FERC. The bill will simply transfer regulatory jurisdiction from a very distant Washington, DC to our State government in Juneau.

My understanding is that because of our special situation in Alaska, FERC does not object to the Alaska-only program contained in S. 422, and the State of Alaska supports it. Thank you.

[The prepared statement of Robert S. Grimm follows:]

PREPARED STATEMENT OF ROBERT S. GRIMM, PRESIDENT, ALASKA POWER & TELEPHONE COMPANY

My name is Robert S. Grimm. I serve as President of Alaska Power & Telephone Company (AP&T). AP&T is an investor-owned and employee-owned corporation which has been providing public utility services in Alaska since 1957. We currently provide services to 25 different communities from above the Arctic Circle to very southern portions of Alaska. Most of these communities are very small and, due to the lack of infrastructure, have isolated electric systems utilizing small diesel electric generating units that use fossil fuel.

In addition to representing my own company, I'm speaking today on behalf of Alaska's electric utility industry, through our statewide association known as ARECA. We strongly support S.422 for reasons I would like to outline, using my utility's experience as an example, but emphasizing that many other of our rural utilities have similar experiences.

One of the solutions to fossil fuel generation in these remote areas is the development of small hydroelectric projects to provide a renewable andnon-polluting source of energy. We at AP&T began a program to identify and develop cost-effective projects in 1984.

In July 1987 we applied to the Federal Energy Regulatory Commission (FERC) for a preliminary permit for the Black Bear Lake Project on Prince of Wales Island in Southeast Alaska. In June 1988, FERC issued a preliminary permit for a term of 36 months. During this period, as evidenced by progress reports filed with the agency, AP&T spent a considerable amount of time and effort consulting with the agencies. In May 1991, we filed our license application. In November 1993, FERC issued the license authorizing the project with a capacity of 4.5 MW. The project was completed and began commercial operation on August 28, 1995. The permitting and licensing phase took seven years and cost nearly $1.2 million. The actual construction took one year and cost $10 million. It is interesting to note that the permitting costs alone almost exceed the installed cost of equivalent diesel electric generating units. I would like to point out that this project was funded entirely from private funds.

Another of our projects is located near Skagway, Alaska and has a capacity of 4 MW. The project is called the Goat Lake Hydropower. We filed for a FERC preliminary permit in January 1991 and the FERC issued that permit in June 1991. In May 1994, we filed our license application and FERC issued the license in July 1996. The permitting and licensing process took over five years and cost us $1,043,100. The project was completed in the fall of 1998 at a cost of about $10 million. Again, this project was funded entirely with private funds.

Another small hydroelectric project, Wolf Lake, is also located on Prince of Wales Island, and has a capacity of about 2 MW. The preliminary permit was issued by the FERC in April 1995. We fulfilled our obligations under the permit and filed our license application March 27, 1998. We are still awaiting a FERC license. This project would have been already permitted and under construction if the proposed legislation before you had been in place five years ago.

Additionally, as part of the Upper Lynn Canal Regional Energy Plan, we are waiting for FERC licensing for a 3 MW project located on Kasidaya Creek north of Juneau near Skagway and Haines in Southeast Alaska. We filed for our preliminary permit in July 1996 and FERC issued the permit in November 1996. We then followed an Applicant Prepared Environmental Assessment Process. That process took three years, and we applied for the license last October.

In addition, we have had the opportunity to re-license and amend our 1 MW project for Dewey Lakes FERC Project No. 1051 at Skagway, Alaska.

Hence, we have had extensive first hand experience with FERC during the last decade. It appears to us that the lack of flexibility (i.e. large impact vs. small impact) in the FERC rules, regulations, and requirements for these small projects has been the major reason that so few have been developed in Alaska.

The continued use of fossil fuel generation in these remote areas and the significant impacts associated with fuel storage and air emissions more than offset the minor impacts of these hydroelectric projects. These projects do not have large dams that constrict free-flowing rivers. These projects are very similar to the small-community water systems being developed in Alaska under state law.

As you are aware, the environmental costs associated with the continued use of fossil fuels are significant. One authority has attempted to estimate the "bottom line" cost of fossil fuels. Included in this assessment were health costs, damage to water resources, treatment costs necessary to counteract the adverse effect of fossil fuel use on food supplies, water resources, climate, and health. These costs, when tabulated, equal 3.35 cents per kilowatt-hour of fossil fuel energy. Even this assess-

ment does not include the environmental costs of cleaning up contaminated fossil fuel storage sites, which in rural Alaska alone is a $300 million dollar problem waiting to be addressed. These facts are understood and widely accepted.

Small hydropower in Alaska is a resource that has proven itself, yet the regulatory maze continues to hinder its development. Those of us on the front line trying to implement renewable energy policies are bewildered. With all of the benefits associated with the development of small hydropower when compared to the continued use of fossil fuels, why is it that small hydro is so difficult to develop?

The proposed legislation will provide us significant regulatory relief from the hardship we are now encountering when trying to displace fossil fuel generation with a proven renewable and non-polluting resource. That relief translates into dollars and time savings.

You may hear how FERC regulations contain shortcuts to be used by smaller projects and how the Applicant Prepared Environmental Assessment can deliver a FERC license in a shorter time period. We have had direct experience with these shortcuts and have found them to be largely ineffective. While we appreciate the intent and efforts of individual FERC staff, the Applicant Prepared Environmental Assessment process simply has not saved us time or money.

A major underlying problem is the diffusion of hydropower oversight that once was exclusively FERC's. Over the years FERC's overall authority under the Federal Power Act has been eroded by court decisions and legislative initiatives giving multiple state and federal agencies authority over various aspects of the licensing process. The process has become very inefficient and confrontational and results in very long licensing time periods and additional costs. Many small hydropower projects simply cannot afford these costs.

My last point is tidal power. Currently we believe that small tidal or free flowing hydropower plants placed upon navigable waters will be subject to the jurisdiction of FERC. In Alaska this technology may have promise for many small coastal or riverside villages. However, the cost and time required for a FERC license make this technology a non-option for small-scale development.

S.422 recognizes the special circumstances that exist in rural Alaska: very small communities, remote sites, no interstate (or for the most part intrastate) power grid, stand-alone generation that is largely diesel, limited local financial resources and much undeveloped small hydroelectric potential. Hence, S.422 would greatly facilitate the development of Alaska's small hydro potential by removing regulatory overlay while still requiring applicants to receive approvals from all other local, state and federal agencies.

To reiterate, S.422 will not diminish public interest, environmental or conservation considerations and protections as under FERC. The bill will simply transfer regulatory jurisdiction from a very distant Washington, D.C. to our state government in Juneau. This jurisdictional transfer would only occur upon submission by the Alaska governor of a state regulatory program and the approval of that program by FERC after consultation with the secretaries of the Interior, Agriculture and Commerce. My understanding is that, because of our special situation, FERC does not object to the Alaska-only program contained in S.422, and the State of Alaska supports it.

We ask for your support and passage of S.422. I will gladly respond to any questions.

Thank you for this opportunity.

Mr. SHADEGG. Mr. Grimm, thank you very much for your testimony. Mr. David Piper.

## STATEMENT OF DAVID E. PIPER

Mr. PIPER. Thank you, Mr. Chairman, members of the subcommittee. My name is Dave Piper. I'm President and Chief Executive Officer of PNGC Power, which is also known as the Pacific Northwest Generating Cooperative.

We're located in Portland, Oregon. We're a cooperatively based energy service provider for our 11 owners who are mostly small, rural electric systems throughout the Pacific Northwest.

I want to thank you and the staff particularly for convening this hearing and the courtesies that have been extended to us in this process over the last period of weeks and months. I'd like to submit

my complete written testimony for the record, but I can quickly summarize our support of the Joint Operating Entity legislation with the following three points:

No. 1, time is of the essence. BPA has some limited authorities but no clear guidance on selling preference power to aggregators such as Joint Operating Entities. Because of the September 31 deadline for completing the present Bonneville contract negotiations and the lead time that's necessary for analysis and contract negotiation, we would like to see this enacted as soon as possible. We need it, in fact.

No. 2, as it's currently drafted, Senate bill 1937 does not expand nor contract the amount of preference power sold by BPA. It does not impact BPA's revenue. It does not create any incentive for the formation of new public power entities, nor does it create a loophole for diverting preference power sales outside of the Pacific Northwest. What S. 1937 does do is allow BPA to sell to aggregators acting on behalf of existing preference customers so that administrative and operational efficiencies can be achieved by both Bonneville and their customers. For instance, we estimate that for our PNGC members, the total combined power scheduling operational billing costs would be at least 60 percent higher without this piece of legislation.

And finally, Mr. Chairman, over the past 2 years that this legislation has been circulated in the region, we have achieved as much of a consensus as any Northwest energy matter in my recent memory. S. 1937 has passed the Senate with the support of the entire bipartisan delegation. Congressmen Hastings and Walden introduced companion legislation late last session, which also enjoys bipartisan support. The Northwest Power Planning Council with members appointed by each Governor from the region have reviewed this legislation and have submitted positive statements to the Congress.

On a substantive basis, we believe regional and Federal energy policy goals are enhanced with the passage of this legislation. On a procedural basis, there are organizations which believe Senate 1937 should wait for comprehensive reform of BPA and argue that Congress should not pass piecemeal legislation. I personally have been an advocate for comprehensive reform and review, and I have been involved in regional discussions on this matter. In this instance, however, relative to this piece of legislation, there is no effect on any other Bonneville customer group. It creates important benefits to members of my organization, but it does so in a way that does not disadvantage anyone else.

I firmly believe the Senate recognized this when they passed S. 1937 last year. I would hope that this subcommittee and the House would do the same. I appreciate the time and am available for questions.

[The prepared statement of David E. Piper follows:]

PREPARED STATEMENT OF DAVID E. PIPER, PRESIDENT AND CEO, PNGC POWER

Mr. Chairman and Members of the Subcommittee, my name is Dave Piper, and I am the President and Chief Executive Officer of PNGC Power. PNGC Power, also known as the Pacific Northwest Generating Cooperative, is a Portland, Oregon-based energy-services cooperative that is owned by 11 mostly rural electric distribution utilities located throughout the Northwest.

First and foremost, I would like to thank the Chairman and the Subcommittee for holding this hearing. PNGC appreciates the courtesy with which we have been treated by the Committee and its staff in our quest to see adoption of S.1937. We also we appreciate the sense of urgency with which the Subcommittee has chosen to act. As I will explain later in my testimony, we are particularly concerned that this bill be enacted into law in time for our members to be able to use its provisions.

*PNGC Power Overview*

In the parlance of the industry, PNGC Power is a wholesale aggregator. Our mission is very simple—to minimize the wholesale power costs of our members. Because we lack any substantial "owned" resources, we are principally in the business of purchasing wholesale power and/or managing wholesale power contracts. The overwhelming bulk of that power comes from the Federal government, through the Bonneville Power Administration (BPA). PNGC also makes market purchases to meet the needs of its members, for which we acquired the nation's first FERC power-marketing license granted to a cooperative entity.

*The ability of our members to efficiently manage power supply rests on their ability to work together through PNGC Power.* Put simply, our members formed PNGC to bring some economies of scale to their power-supply efforts. We provide technical expertise, participate in ratecases, negotiate power contracts, manage transmission arrangements, and, in the case of non-federal power, purchase and resell power. As a wholly owned and not-for-profit entity, we look out for our members' best interests in all that we do. By centralizing the wholesale power-supply management, we spread costs, increase economies, and create administrative and operational efficiencies for systems that are not big enough to justify power management staffs on their own.

Allowing our members to consolidate their federal power-supply contracts through PNGC is a natural extension of the role we already play on their behalf. S.1937 would allow BPA to sell preference power to an aggregation entity called a Joint Operating Entity, or JOE, so long as the amounts of power sold to the JOE, and the terms and conditions of those sales, are the same as would otherwise apply if the power were sold directly to the individual customer. Pursuant to the text of S.1937, a JOE would have to have been formed as a public body or cooperative under relevant state law as of the date of enactment and consist of two or more public bodies or cooperatives that were BPA customers as of January 1, 1999. This is included in the bill to specifically address concerns about this legislation leading to new public power formation. A JOE would be eligible to purchase preference power for resale exclusively to its members for the purpose of meeting those systems' net requirements.

Effectively, what all of this means is that consumer-owned utilities in the Northwest would have the option of consolidating their Bonneville contracts through a central entity—effectively purchasing their BPA power through a jointly owned entity in order to achieve operational and administrative efficiencies.

As I explained earlier, S.1937 would not expand the pool of preference-eligible customers or alter the amount of preference power that customers are eligible to receive from Bonneville. Its provisions would also not alter the status quo with regard to the ability to resell either requirements or surplus power purchased from the agency.

*Why we want it*

The provisions of S.1937 do not grant any opportunities to PNGC Power that are not currently available to its member systems. However, as a result of working together, our members do anticipate meaningful operational and administrative savings.

For instance, under future power-supply scenarios that involve PNGC providing load-following capability for its members, the JOE provisions would allow PNGC to file a single schedule rather than individual schedules for each member as it arranges power deliveries with control area operators on both a preschedule and real-time basis. Because filing multiple schedules with BPA and other parties involves exponentially more complicated scheduling requirements, both PNGC and the control-area operator (primarily BPA) can expect lower staffing requirements and significantly reduced paper and electronic transaction costs as a result of joint operations.

We have estimated that, for PNGC, the total combined scheduling and operations costs would be as much as 60% higher without the ability to operate on a joint basis. Spread over 400-500 average megawatts of load, those costs are significant as our members attempt to minimize the retail rates of their customers.

The second major opportunity presented to our members through enactment of S.1937 is the ability to save money through more efficient management of billing processes.

Currently, Bonneville bills PNGC members separately on the basis of hourly demands at metered points of delivery, all read at the hour of the BPA system peak. Consolidating systems' contracts through a JOE will not change the basis on which points of delivery are metered and read, but will result in one single bill rather than multiple bills.

Accordingly, the administrative burden of rendering separate statements and monitoring individual accounts and payments will give way to a more streamlined process involving one single account and one monthly statement received and managed centrally. As is the case with joint scheduling, this would reduce administrative burden and cost. The savings could be substantial for both BPA and PNGC members, since Bonneville's billings are very complex and are frequently problematic for the agency to prepare correctly and for the customer to understand and respond properly. We also believe that this simplification in billing process will save time and money for the agency.

Also, it should be pointed out, *no other customers of BPA would experience any increased costs as a result of the JOE legislation, nor are BPA's total revenues affected.*

The provisions of S.1937 do not provide an ability to match up divergent load profiles in a way that allows a JOE to purchase less power from BPA than its members would individually. Accordingly, there is no impact on the revenues collected by BPA as a result of S.1937. As mentioned above, each BPA customer is separately metered and is billed based on its load during the hour of the BPA system peak. As a consequence, S.1937 does not provide an ability to capture additional "diversity" benefits because the power usage and consequent charges do not change as a result of operating under a single contract.

Conversely, enactment of S.1937 will also not allow for a JOE to purchase more BPA power than its members could individually. These purchases are effectively limited by the inability to resell cost-based "preference" power beyond what is used to meet the requirements of its member systems. Section 5(a) of the Northwest Power Planning and Conservation Act (Regional Act) and Section 5(a) of the Bonneville Project Act, as interpreted by BPA, prohibit the agency's customers from reselling requirements power. Accordingly, any contract between BPA and an eligible JOE would include a provision expressly restricting its resale other than to meet the net requirements of its members.

*The politics and timing of the JOE bill*

The provisions of S.1937 have achieved as much consensus as any Northwest energy matter in recent memory. No member of the Northwest delegation opposes its provisions. Congressmen Hastings and Walden introduced companion legislation late in the session last year, H.R.3447, which still enjoys bipartisan support. Virtually every member of the delegation with committee jurisdiction involving energy policy has actively supported enactment of the bill. And, the region's Northwest Power Planning Council also has fully vetted the JOE legislation and submitted supportive comments to the Congress.

The Bonneville Power Administration and the Department of Energy do not oppose its provisions. It has substantial support from those entities seeking its adoption—primarily small to medium sized consumer-owned utilities. It is not, to my knowledge, opposed by any entity, regional or national, on the substance of its merits.

With all of that said, there may be those who do not support enacting S.1937 into law. As I understand them, the basis of their arguments revolve around a desire not to amend the Regional Act in a piecemeal fashion. Frankly, for me, this is a difficult argument to swallow. The idea behind more "comprehensive" amendments to the Regional Act can only be forwarded by those with changes of their own in mind. Some of those changes may have merit, some may not. However, I would say to them that if they too can come up with legislation that creates benefits without disadvantaging any other parties—I will be the first to support its timely adoption.

Unless they pass that test—as I believe S.1937 does—I believe that any efforts to delay passage of this bill on that basis would represent an attempt to hold the JOE bill hostage to other, more controversial agendas. I would entreat the Committee not to be party to efforts of this kind. Instead, S.1937 should be seen for what it is—a non-controversial measure that creates benefits at no one's expense. Its enactment, I believe, would constitute a clear case of forwarding good public policy.

As mentioned above, the timing of the enactment of S.1937 is of particular concern to PNGC Power and its members. PNGC is participating in the BPA Power

Business Line's rate case on behalf of its members. That rate case is scheduled to conclude at the end of April 2000. Pursuant to the agency's Power Subscription Strategy, the deadline for signing power purchase contracts with the agency on the terms and at the rates set in the rate case is September 31, 2000.

In order to make informed decisions by BPA's deadline, PNGC and its members must undertake a myriad of analyses and decisions, as well as to negotiate appropriate contract forms and plan to meet substantial operational and staffing requirements. Without timely consideration of S.1937, we will not be able to adequately plan for our energy future and we will not be able to utilize the bill's provisions for the purposes of signing those contracts. This would effectively foreclose our ability to achieve the savings mentioned above.

*Summary*

While our business and this amendment may appear complex upon initial review, we believe that our case for S.1937 is straightforward. It achieves savings for small to medium-sized utilities by allowing them to administer their BPA power contracts jointly. We also believe it achieves modest savings for the agency as well. Those benefits ultimately accrue to ratepayers. It achieves those outcomes at no expense to any other interest.

I would again like to thank the Subcommittee for its expeditious review of this bill. As is obvious by my comments above, PNGC Power and its member utilities strongly support its adoption. Further, we believe that without timely consideration, we will lose the opportunity to achieve the benefits that its provisions entail.

I would be happy to answer any questions that the Subcommittee may have.

Mr. SHADEGG. Thank you, Mr. Piper. Mr. Steve Waddington.

**STATEMENT OF STEVE WADDINGTON**

Mr. WADDINGTON. Thank you, Mr. Chairman, members of the subcommittee. My name is Steve Waddington. I'm the Northwest Power Manager for Reynolds Metals Company. Reynolds operates two aluminum reduction plants in the Northwest, and for nearly 60 years has relied upon Bonneville for direct power service.

I'm here today also to testify on the JOE bill, S. 1937, on behalf of Reynolds and six other aluminum companies, all with operations in the Pacific Northwest.

S. 1937 is a bill to amend the Northwest Power Act. It would create a new obligation for Bonneville to sell power to a new customer class. This new class would be Joint Operating Entities or JOEs, composed exclusively of existing public agencies that purchase their power from BPA today. For the small public utilities that would qualify to purchase from Bonneville as a Joint Operating Entity, this bill provides some administrative efficiency.

The aluminum companies may ultimately have no opposition to Bonneville's selling to JOEs. However, we believe this idea should not be viewed in isolation but rather as one element in a comprehensive reexamination of the Northwest Power Act. The aluminum companies believe strongly that Congress should not amend the Northwest Power Act in a piecemeal fashion. The act is now 20 years old and was never designed for application in a deregulated electric industry. All of the act's basic assumptions are out of date because of industry restructuring and the movement by the States to allow retail access.

S. 1937 would contribute to amending this act little by little with no contemplation of this larger picture, and we believe this is inappropriate, given the ongoing changes in the electric industry.

Many interests affected by the Northwest Power Act, including the aluminum companies, would like to amend certain sections. We believe that all parties should work together in a comprehensive revision of the entire act. However, should Congress decide to open

the Northwest Act at this time and move S. 1937, we would like to work with you to repeal the New Large Single Load Provision in this act.

This New Large Single Load or NLSL clause blocks certain loads from being served by a local utility and thereby receiving the benefit of Bonneville Power. This provision is preventing the aluminum companies from turning to their local utilities for needed electric supply. Historically, the aluminum companies in the Northwest received electric service directly from Bonneville rather than from our local utility. The times are changing. Bonneville once supplied all of the aluminum load. They are now planning to serve only half. As a result of this new BPA policy, in combination with this outmoded provision in the act, companies are caught in a Catch-22. BPA is reducing direct service, and this New Large Single Load clause prevents low-cost service from our local utilities.

This NLSL clause is just one example of the many elements in the act that no longer make sense. Again, we believe the NLSL provision would be best considered in the context of reexamining the entire Northwest Power Act. But if the subcommittee wants to open the act now, we would like to eliminate the unfairness of this provision.

In addition, if the subcommittee decides to approve S. 1937, the bill should be amended to limit Bonneville's obligation to sell to Joint Operating Entities to a term of 5 years. In the light of the need for reexamining the Northwest Power Act, longer term contracts between Bonneville and Joint Operating Entities may limit the ability for Congress to make more comprehensive change.

The aluminum companies look forward to working with you and with the Northwest delegation on a review of the Northwest Act, and thank you for this opportunity to testify.

[The prepared statement of Steve Waddington follows:]

PREPARED STATEMENT OF STEVE WADDINGTON, NORTHWEST POWER MANAGER, REYNOLDS METALS COMPANY

My name is Steve Waddington. I am the power manager for the Reynolds Metals Company in the Pacific Northwest. Reynolds operates two aluminum reduction plants in the Northwest and for nearly 60 years has relied upon direct power service from the Bonneville Power Administration ("BPA") to operate these electric-intensive facilities. Reynolds' future viability, and that of the other aluminum companies in the Northwest, depends on continued access to low-cost power.

I am here to testify regarding S. 1937 on behalf of the following companies: Reynolds, Alcoa Inc., Columbia Falls Aluminum Company, Goldendale Aluminum, Kaiser Aluminum and Chemical Corporation, Northwest Aluminum and Vanalco, Inc. ("the Companies"). Recently, in response to a request from Representative John D. Dingell, these Companies joined in a letter expressing our concerns regarding this proposed legislation. A copy of the letter is attached for your review.

As background, the Northwest aluminum industry employs almost 10,000 Northwest citizens directly and over 30,000 indirectly. The Companies' direct annual economic contribution to the region is estimated at over $3 billion. The aluminum plants in the Northwest produce 40 percent of the nation's aluminum, making the Northwest the top aluminum-producing region in the country. Close to $1 billion worth of aluminum is exported overseas from the Northwest each year, contributing substantially to the nation's balance of trade.

S. 1937 is a bill to amend the Northwest Power Planning and Conservation Act ("the Act"). It would create an obligation for the Bonneville Power Administration to sell power to a new customer class. This new class would be joint operating entities (or "JOEs") composed exclusively of existing public agencies that purchase power from BPA today. For the small public utilities that would qualify to purchase from BPA as a joint operating entity, this bill provides some administrative effi-

ciency. The Companies may ultimately have no opposition to Bonneville selling to joint operating entities; however, this idea should not be viewed in isolation, but rather as one element in a comprehensive reexamination of the Northwest Power Act.

The Companies strongly believe that Congress should not amend the Northwest Power Act in a piecemeal fashion. The Act is now 20 years old and was never designed for application in a deregulated electric industry. All of the Act's basic assumptions are being called into question because of pending industry restructuring and the movement by state governments into the realm of open and competitive energy markets. S. 1937 would contribute to amending the Act, little by little, with no contemplation of this larger picture. We believe this is inappropriate, given dramatic changes in the electric industry.

Many interests affected by the Northwest Power Act, including the aluminum Companies, would like to amend certain sections of the Act. As stated above, the Companies' believe that all parties should work together in a *comprehensive* revision of the *entire* Northwest Power Act. On the other hand, should Congress decide to open up the Regional Act this year and move the JOE amendment, the Companies believe one of the most important issues for Congressional action would be to eliminate the New Large Single Load (NLSL) provision from the Act.

The New Large Single Load provision blocks any new load of 10 MW or more from being served by a local public utility and receiving the benefit of BPA's cost-based power. Thus, the aluminum Companies—whose loads are all much larger than 10 MW—cannot turn to their local public utility for needed economical power as Bonneville reduces their access to direct service.

This is an anomaly the Northwest Power Act did not, we believe, foresee. The aluminum Companies, unlike other industrial consumers in the region, have received electric service *directly* from BPA, rather than from their local utility. There were a number of historical reasons for this direct service relationship with BPA, but times are changing. Where in the past, BPA supplied 100 percent of the aluminum load, they are now planning to serve only 50 percent of the load. Although the Companies that signed BPA's Compromise Approach to supply partial power needs, support it, it has become apparent that BPA no longer intends to supply the full power needs of the Companies at cost-based rates. As a result of this new BPA policy, and in combination with an outmoded provision in the Act, the Companies are caught in a Catch-22. BPA is reducing direct access to cost-based power while the New Large Single Load provision precludes meaningful access through a local public utility. Ironically, had BPA not preferred to serve the aluminum plants directly in the past, these companies would have been served all this time by their local public utilities at BPA cost-based rates, just like other industrial loads, and thus would not be "new" loads blocked off by the NLSL provision.

The NLSL provision is just one example of the many provisions in the Act that no longer make sense as circumstances change. Again, we believe the NLSL provision would be best considered in the context of reexamining the entire Northwest Power Act. However, if the Subcommittee decides to open the Act to amendment, the NLSL needs to be corrected. It is a matter not just of administrative efficiency to the Companies (as is the JOE provision to its supporters), but of fundamental fairness and basic economic viability. To that end, if the Subcommittee decides to move S. 1937 we would like to work with you to include an amendment eliminating the NLSL provision.

In addition, if the Subcommittee decides to approve S. 1937, apart from consideration of the overall Act, the bill should limit Bonneville's obligation to sell to joint operating entities to a contract term of five years. In light of the need for comprehensive review of the Northwest Power Act, longer-term contracts with joint operating entities may prejudge or limit the ability for Congress to make more comprehensive changes to the Northwest Power Act.

In the meantime, as Bonneville intends to offer new contracts to its customers in the near future, the Companies would support language in these contracts to permit assignment of the purchase obligations to joint operating entities. Public agencies that are supporters of S. 1937 can individually sign contracts with BPA—as they always have done—and assign those contracts to a joint operating entity at the time when future legislation may authorize BPA to contract with a JOE. This assignment clause will ensure no need for a rush to judgement on this bill without adequate consideration of this amendment as part of an overall reexamination of the Regional Power Act.

Thank you for the opportunity to testify. The Companies look forward to working with you and the Northwest Delegation on a comprehensive review of the Northwest Power Act. Concurrent with national energy restructuring, it is time for a review

of all of the Act's assumptions in the content of an open access, market-based industry.

Mr. SHADEGG. Thank you for your testimony, Mr. Waddington. Ms. Lynne Kennedy.

**STATEMENT OF LYNNE KENNEDY**

Ms. KENNEDY. Mr. Chairman, members of the subcommittee and the full committee, my name is Lynn Kennedy and I'm a hydroelectric certification program coordinator for the Oregon Department of Environmental Quality. I appreciate the opportunity to speak today to you on behalf of Governor John Kitzhaber and the Western Governors' Association.

My testimony today only addresses House Resolution 2335. The Western Governors' Association has no position on the other bills, but some Governors may choose to submit independent written testimony on those bills.

The main point of what I want to tell you today is that the Western Governors' Association opposes House Resolution 2335. We think the goals of the bill are laudable, but we don't believe the bill will reach those goals. In fact, we think the bill will create less efficient, less equitable government and provide less resource protection.

Before I go into our specific concerns with the bill, I'd like to talk some about the reasons that we're interested in relicensing in the first place. Western Governors have long recognized the economic importance of hydroelectric production and supported its development. Utilities are valued and essential partners in our goal to have strong, healthy economies. At the same time, the projects that are coming up for relicensing were originally licensed 50 or more years ago when the scientific understandings of natural resource needs as well as societal values were significantly different than today. Relicensing is our one attempt to bring those facilities up to modern day environmental standards, and it's our one shot for the next 30 to 50 years to do that.

In the West, over 100 projects will be in relicensing in the next 10 years. Thirteen of those are in Oregon. Some of these projects have multiple developments and they affect entire watersheds.

Western States are interested particularly in developing and maintaining balanced, diverse economies while still protecting the natural resources on which those economies were traditionally based and those resources which provide the quality of life that we enjoy. We necessarily view hydropower in a context that includes other sectors and values. We believe that the Federal Power Act as amended under ECPA also recognizes that same need to accommodate diverse values. We see the Federal Power Act with ECPA as allowing FERC to balance among various interests by setting a floor of resource protection that holds some things safe from that balancing.

The agencies that are given the responsibility to set that resource protection floor are the same agencies that set that floor in other sectors of our economies, for example, agriculture, forestry and urban development. And this is a key point, is that we need to look beyond just the energy sector to all the sectors that affect

our economies. We want to have a level playing field where everyone provides the appropriate mitigation for their impacts.

Some of the authorities that create that resource protection floor are best at the State level. In Oregon the Federal and State agencies have collaborated well. We have appreciated the Federal expertise that they bring to the process in areas where we don't have expertise, and we've particularly appreciated their authority to backstop our 10(j) fish and wildlife recommendations.

Now I'd like to move on to briefly discuss the reasons that we oppose House Resolution 2335. First, we believe that the bill will create duplication and spinning of wheels in government. The bill requires agencies to evaluate a broad set of criteria, criteria for which these agencies don't have the expertise or jurisdiction to make such evaluations. For example, they're required to look at drinking water and air quality. These are areas of expertise that fall under my agency, the Department of Environmental Quality, and we don't think it would be helpful to have the fish and wildlife agencies making separate, independent assessments of those values.

Second, the bill requires submittal and justification of conditions prior to application—to the submittal of a license application. The conditions really should be based on what's in the license application, so this is kind of putting the cart before the horse and making agencies do a lot of justification up front that they'll probably have to change later when they know what's actually in the license application.

Another example is that the bill requires substantial scientific evidence—which I think we all agree we want scientific evidence to be substantial—and then it turns around and it prohibits those agencies from conducting their own environmental reviews, aside from what FERC might do. So I think it undermines their ability to meet the very standards that it specifies.

Our second significant issue with the bill is that it will result in less resource protection. It explicitly removes that balance—the floor—by causing the agencies to balance with economics and other factors. Remember, where there's no floor, there's not going to be equity across sectors. Other sectors may have to pick up the mitigation that hydro should justly have had to provide.

Having explained why we oppose the bill, we believe there are other collaborative efforts that we can support. We've talked about one of those, that's the Federal agencies task force. EPRI had brought together some national stakeholder meetings which have produced some very useful papers. And then the Western Governors, National Governors have worked with the NHA and EPRI to foster conferences to the same goals.

Finally, I'd like to say that Oregon has put together a process in which our agencies must collaborate and must come out with a unified position. So even though we sometimes have conflicting mandates, we have a way of working that through within the State of Oregon. We offer that as a model.

This concludes my remarks. Mr. Chairman, once again I thank you on behalf of Governor John Kitzhaber and the Western Governors' Association for this opportunity to share our views. I'd be happy to answer any questions.

[The prepared statement of Lynne Kennedy follows:]

PREPARED STATEMENT OF LYNNE KENNEDY, STATE OF OREGON, OFFICE OF THE GOVERNOR, ON BEHALF OF THE STATE OF OREGON AND THE WESTERN GOVERNOR'S ASSOCIATION

Mr. Chairman, members of the subcommittee, my name is Lynne Kennedy. I am the Hydroelectric Certification Program Coordinator for the Oregon Department of Environmental Quality. I appreciate the opportunity to appear here today before the subcommittee on behalf of Governor John Kitzhaber and the Western Governors' Association.

The Subcommittee is hearing testimony on a number of bills today related to hydroelectric power production. I will be testifying on only one of those bills, HR 2335. The Western Governors have taken no position on the other bills; Governor Kitzhaber's Office may submit separate written comments on S. 1937, which concerns the Northwest Power Act.

The main point that I want to communicate today is that the State of Oregon and the Western Governor's Association oppose HR 2335. We believe that while improving the hydroelectric relicensing process is a laudable goal, the bill will not meet this goal. In fact, we believe the bill will result in inefficiency, inequity, and undesirable loss of natural resource protection.

Before I address specifics of the bill, I'd like to highlight the reasons for our interest in it. Oregon has 13 hydroelectric projects that will be involved in the Federal Energy Regulatory Commission's (FERC) relicensing process within the next ten years. In the West as a whole, the licenses of over 100 hydropower projects will expire in the same timeframe. Many of these projects include multiple developments, some of which affect the movement of fish and wildlife populations, quality of habitat, and water quality across entire watersheds.

Western governors have long recognized the economic importance of hydropower and supported its development—subject to a strong state role. Utilities are valued and essential partners in the economic development and health of our states. At the same time, socioeconomic conditions, scientific knowledge, and society's values have all changed dramatically in the last fifty years, since those hydropower licenses were first issued.

We owe it to our citizens to ensure that hydroelectric projects address current knowledge and public policy concerns. Relicensing may provide the only opportunity during the next thirty to fifty years to address the effects a hydroelectric facility has on water quality, fisheries, and other natural resources. Many of these effects were not understood and were not addressed when the projects were first licensed.

Perhaps the most obvious illustration of the need to re-evaluate the impacts of hydropower projects is the status of salmon in the Northwest. Today we know that the cumulative impact of human activities, including hydropower production, has exceeded the ability of many populations to adapt. Oregon is now working to save our signature species from a human-caused slide toward extinction.

Western states are interested in developing and maintaining diverse economies, while protecting the natural resources that traditionally served as the base for both our economies and our quality of life. We necessarily view hydropower in a context that includes economic and social values beyond just those related to power production. We believe that the Federal Power Act (FPA), as modified by the Electric Consumers Protection Act (ECPA) also recognizes this need to accommodate diverse values.

The FPA gives FERC responsibility to balance power-related interests, but limits its ability to "balance away" certain resource protection requirements that are best evaluated in contexts broader than just power production. Under the FPA, resource agencies with mandatory conditioning authority set a "floor" of natural resource protection, above which FERC is free to make economic tradeoffs to ensure an efficient and plentiful power supply. The agencies who provide the floor for the energy sector are the same ones who provide the floor for other economic activities such as agriculture, forestry, and urban development. This promotes a level playing field across sectors. To encourage local involvement and decision-making, these authorities are vested in federal and state agencies according to their respective expertise and geographic scope.

In Oregon, State and Federal agencies have used their respective authorities in a collaborative and productive manner. While we haven't always agreed on every issue, better outcomes have resulted from our discussions. Oregon state agencies have relied on specific expertise that the federal agencies bring to the relicensing table, such as fish passage design and geomorphologic process evaluation, to assist us in making better recommendations for protection and mitigation measures at a

project. FPA Section 18 fishway authority has been a critical federal tool for helping meet state goals, and Section 4(e) authorities can serve to backstop state recommendations under FPA Sections 10(a) or 10(j).

I'd like to move on to discuss the reasons we oppose HR 2335. For each reason, I've tried to provide at least one example to illustrate the point.

Contrary to its stated goals, HR 2335 will increase duplication of effort—thereby increasing inefficiency in government. By way of example, Section 32 requires that agencies such as NMFS and USFWS consider diverse factors such as economic values, air quality, irrigation, and drinking water supply when writing license conditions. Unfortunately, these agencies have neither the expertise, nor the information required to evaluate such factors. There are other agencies who already have responsibility and expertise to evaluate and condition for those factors. For example, my own agency, the Department of Environmental Quality, has obtained federal delegation under both the Clean Air and Clean Water Acts to protect air and water quality. We do not believe that it is either practical or useful for other agencies to make their own independent determinations concerning these issues during relicensing.

My second major point concerning HR 2335 is that it promotes waste in government by establishing standards, and then creating roadblocks that impede compliance with those standards. For example, among the requirements in Section 32 is a statement that consulting agencies must take into account the mandatory conditions of other agencies. While this may seem reasonable, the bill later adds a process requirement that conditions be submitted to the applicant 90 days prior to the filing of a license application. At this point in the process agencies cannot know how the applicant proposes to operate the project under the new license, nor how it should best be conditioned. Agencies don't have enough information to determine their own conditions—much less to conform them to other agencies' mandatory conditions. The likely outcome is that conditions would have to be written and fully justified twice, creating extra work with little payoff.

Our third major objection to HR 2335 is perhaps the most important: the bill will result in inadequate protection of natural resources. By requiring federal resource agencies to meet untenable process standards and to base their conditions on a balance of factors outside their expertise and traditional jurisdiction, the bill will greatly diminish those agencies' ability to write defensible conditions. The bill even addresses the recommendations made by state fish and wildlife agencies under FPA 10(j), making it easier for FERC to simply balance away those recommendations.

In addition, the bill removes the natural resource protection floor I mentioned earlier by including economics as a primary consideration in every resource-protection decision affected by the bill. This reduces the ability of agencies such as my own to balance the burden of resource protection across sectors, leaving others to repair damage caused by the hydropower industry. Where this damage can't be repaired, it may deprive future generations of the opportunities and quality of life that is their proper heritage.

At this point, I'd like to note that there are ongoing efforts to improve the hydropower relicensing process within the existing legal framework. These are collaborative efforts that recognize the needs of all participants. There are at least three such ongoing efforts. (1) Federal agencies and states are participating in workgroups designed to improve coordination and communication during relicensing. These agencies are seeking input from a broader stakeholder group formed under FACA rules to ensure the usefulness of the workgroups' products. (2) Stakeholders nationwide are meeting to resolve issues under the facilitation of the Electric Power Research Institute (EPRI.) These discussions have resulted in a number of useful issue papers that include recommendations that can be adopted by relicensing participants. (3) The National and Western Governor's Associations have worked with EPRI and NHA to sponsor nationwide and regional conferences to discuss and resolve relicensing issues.

Finally, I'd like to mention that the State of Oregon has developed a very successful collaborative approach for participating in hydroelectric reviews that could be a model for others. The State has designed its water right review to coincide with and track the FERC relicensing process, with a goal of minimizing effort, and maximizing shared information. The process was the brainchild of a Task Force that included state agencies and a broad range of stakeholders. Oregon's process respects differing agency mandates, but ultimately resolves conflicts so that one unified state position results. We believe that collaboration—not legislation that favors one interest at the expense of others, is the best way to improve the relicensing process.

This concludes my remarks. Mr. Chairman, once again I thank you, on behalf of the State of Oregon and the Western Governor's Association, for this opportunity

to share our views with the subcommittee. I look forward to answering any questions the committee might have.

Mr. SHADEGG. Thank you, Ms. Kennedy. Mr. Paul Brouha.

**STATEMENT OF PAUL BROUHA**

Mr. BROUHA. Good afternoon, Mr. Chairman, Mr. Towns. The Department of Agriculture and the Forest Service have made the licensing of hydropower projects on national forest system lands a very high priority. Of the approximately 200 federally licensed projects due for relicensing in the next 10 years, more than half are partially or wholly within national forests, while the remainder lie in watersheds—most of the remainder lie in watersheds that contain national forests.

The Forest Service is responsible for conditions in hydropower licenses necessary for the adequate protection and utilization of the national forest, as stated in Section 4(e) of the Federal Power Act and the Wild and Scenic Rivers Act, Section 7.

We recognize that hydropower is a valid use of National Forest System lands. However, without appropriate protections, hydropower projects can have adverse impacts upon National Forest System resources; notably, water quality, fisheries, and wildlife.

Since hydropower licenses are for terms of 30 to 50 years, it's important that we exercise our conditioning authority as necessary at the time of licensing to ensure that adequate resource protection measures are included in the license. The Forest Service is very active in this licensing, working with the licensees, other Federal and State resource agencies, the FERC, and other users of National Forest System lands to reduce the negative environmental and recreational impacts of hydropower projects and create partnerships with others that will protect and enhance National Forest System resources.

In addition, we have created national and regional hydropower assistance teams led by my colleague, Ms. Janopaul, that facilitate the involvement of national forests with licensees, National Forest System stakeholders and other agencies.

The Forest Service is determined to effectively participate in both alternative and traditional licensing. To date, we have been able to provide sufficient staff and resources to accept all licensee invitations to participate in collaborative licensing processes.

Along with other Federal agencies, USDA and the Forest Service are taking an active role in a number of ongoing national processes mentioned by other people testifying here today. We are aimed at improving hydropower licensing and industry relationships and protecting our national resources.

During this year's review of our regional hydropower programs, the Forest Service invited licensees and other stakeholders to participate and comment on the Forest Service's performance in hydropower relicensing and licensing.

In the interest of good communication and improved hydropower licensing, the Forest Service ensures three opportunities to comment on its license terms and conditions before such conditions are finalized. The first opportunity is provided through the FERC licensing process when parties to the licensing process can comment

upon the Forest Service's preliminary conditions in response to the license application.

The second opportunity for comments to FERC is upon draft conditions in respond to FERC's NEPA process. The third opportunity for comment is offered to the general public and the established Forest Service NEPA process. To elaborate, this process supplement's FERC's NEPA document, provides the Forest Service information and analysis record used to develop and support the conditions, and provides the proposed final conditions themselves.

The Forest Service joins in the concerns raised by the Department of Interior and NOAA on the bills under consideration. We also offer the following additional comments. H.R. 2335 would create onerous, costly and time-consuming burdens on the Forest Service that would lead to additional complexity and possible conflicts in law and authority. Far from streamlining FERC licensing process, this bill would create delays, conflicts, confusion, and impossible requirements. The bill does not fully recognize the different responsibilities of each agency or the potential impacts of hydropower generation.

The most objectionable proposal was the potential loss of the mandatory 4(e) conditioning authority. Some of our other concerns are included in our written testimony, which I'll just include in the record with your permission, sir.

On Senate 422, the Forest Service has previously testified in opposition to this proposal to eliminate protections for National Forest System resources by removing small hydropower projects in Alaska from FERC jurisdiction. The bill would significantly impair the ability of the Forest Service to manage National Forest System lands and eliminate comprehensive fisheries management in Alaska. The bill creates a confusing configuration of State and Federal jurisdictions. The Federal Power Act already provides for special treatment of small hydropower while maintaining the ability of the Forest Service to protect National Forest System resources.

Senate 1236, H.R. 1262, and H.R. 3852 provide for special exemptions for particular hydropower projects, and the Forest Service objects to such measures, sir.

Thank you, and I'd be happy to answer questions.

[The prepared statement of Paul Brouha follows:]

PREPARED STATEMENT OF PAUL BROUHA, ASSOCIATE DEPUTY CHIEF, NATIONAL FOREST SYSTEM, FOREST SERVICE, U.S. DEPARTMENT OF AGRICULTURE

Good morning Mr. Chairman and members of the Subcommittee. I appreciate the opportunity to testify regarding hydropower legislation currently under your consideration. My name is Paul Brouha, Associate Deputy Chief for the National Forest System. With me is Mona Janopaul, National Hydropower Program Manager.

*Background*

The Department of Agriculture and the Forest Service have made the licensing of hydropower projects on National Forest System (NFS) lands a very high priority. Of the approximately 200 federally licensed projects due for relicensing in the next ten years, more than half are partially or wholly within national forests, while most of the remainder lie in watersheds that contain national forests. The Forest Service is responsible for conditions in hydropower licenses "necessary for the adequate protection and utilization of—the national forest (Section 4(e) Federal Power Act (FPA)), and Wild and Scenic rivers (Section 7, FPA).

We recognize that hydropower is a valid use of NFS lands, however, without appropriate protections hydropower projects can have adverse impacts upon NFS resources, including water quality, fisheries, and wildlife.

Since hydropower licenses are for terms of 30 to 50 years, it is important that we exercise our conditioning authority, as necessary, at the time of licensing to insure that adequate resource protection measures are included in the license. The Forest Service is very active in these licensings, working with the licensees, other federal and state resource agencies, the Federal Energy Regulatory Commission (FERC), and other users of NFS lands to reduce the negative environmental and recreational impacts of hydropower projects and create partnerships with others that will protect and enhance NFS resources.

In addition, we have created national and regional Hydropower Assistance Teams that facilitate the involvement of the national forests with licensees, national forest system stakeholders, and other agencies. The Forest Service is determined to effectively participate in both alternative and traditional licensings. To date, we have been able to provide sufficient staff and resources to accept all licensee invitations to participate in collaborative licensing processes.

Along with other federal agencies, USDA and the Forest Service are taking an active role in a number of ongoing national processes that are aimed at improving hydropower licensing, industry relationships, and protecting our natural resources. National processes include the Interagency Task Force and its Federal Advisory Committee, as well as the hydropower-industry sponsored Electric Power Research Institute's National Review Group. In addition, many of our staff have met with various members of the hydropower industry and attended industry conferences around the country. During this year's review for our regional hydropower programs, the Forest Service invited licensees and other stakeholders to participate and comment on the Forest Service's performance in hydropower licensing.

In the interest of good communication and improved hydropower licensing, the Forest Service ensures at least three opportunities to comment on its license terms and conditions before such conditions are finalized. The first opportunity is provided through the FERC licensing process when parties to the FERC licensing can comment upon the Forest Service preliminary conditions in response to the license application. The second opportunity for comments to FERC is upon draft conditions in response to FERC's NEPA process. The third opportunity for comment is offered to the general public in the established Forest Service NEPA process.

HYDROPOWER BILLS

The Forest Service joins in the concerns raised by Department of the Interior and NOAA on H.R. 2335, H.R. 1262, H.R.3852, S.422, and S.1236 and defer to their positions on these bills. We also offer the following additional comments on these bills.

**H.R. 2335**

H.R. 2335 would create onerous, costly, and time-consuming burdens on the Forest Service that would lead to additional complexity and possible conflicts in authority and law.

Far from streamlining or improving the FERC licensing process, this bill would create delays, conflicts, confusion and impossible requirements. The bill does not fully recognize the different responsibilities of each agency or the potential impacts of hydropower generation. Some of our specific objections include:

**Section 32(b)**

Section 32(b) would eliminate consideration of measures necessary for the protection of NFS resources, and instead direct the Forest Service to consider issues outside its realm of expertise and outside NFS lands, e.g., economic and power values, electricity generation, capacity and reliability, air quality, flood control, and compatibility with other agencies' terms and conditions. Forest Service analyses would also be duplicative of other resource agencies and FERC analyses. The bill would undermine Forest Service authority over NFS lands and introduce a possible conflict between the FPA and Federal Land Policy and Management Act that was resolved by Congress in the 1992 amendments to the FPA.

**Section 32(c):**

Section 32 (c) would require that each condition proposed by the Forest Service or other agencies be subject to "appropriately substantiated scientific review." This proposed standard is nebulous and untested. In contrast, the current standard for determining the adequacy of conditions and recommendations in licenses is whether they are supported by "substantial evidence," and is well-settled in law. The Forest Service makes science-based decisions, and we must retain the final decision-making authority and comport with individual Forest Plans when issuing mandatory terms and conditions designed to protect NFS resources.

**Section 32(e):**

Section 32 (e) would require that agencies issue their terms and conditions before the licensee has filed its application. An agency cannot adequately assess conditions appropriate for a license before the license application is filed. Based upon each license application, the Forest Service creates specific terms and conditions for that hydropower project. The responsibility to manage NFS lands cannot be delegated to any other entity by creating an additional reviewing authority over Forest Service conditions. As the Ninth Circuit Court of Appeals has observed, if the license applicant desires to construct or operate a hydropower project on NFS lands, the applicant should rightly answer to the Forest Service.

This Section would also delay licensing by adding a six-month appeal process (before an administrative law judge or other independent reviewing body) prior to the finalization of agency conditions and separate economic analysis by FERC of each term and condition. This Section would open the door to significant harm to NFS resources by reducing mandatory conditions regarding fish, wildlife, habitat, and other resources to mere recommendations if the independent reviewer takes more than 180 days to complete the review. Finally, this Section would duplicate the appeal process available to the general public under the Forest Service NEPA process.

**Section 6:**

This section is unnecessary. Under the FPA, when FERC is considering an exemption from licensing for a small hydropower project, the Forest Service is allowed to participate and condition the exemption so as to protect NFS resources. These existing FPA provisions regarding exemptions for small hydroelectric projects are sufficient and further study of a separate licensing process for such facilities is not warranted.

If a study were conducted and a new procedure for licensing small hydropower projects were enacted into law, the Forest Service would oppose any procedure that would diminish our role in the protection of NFS resources under such licensings

**S. 422:**

The Forest Service has previously testified in opposition to this proposal to eliminate protections for NFS resources by removing small hydropower projects in Alaska from FERC jurisdiction.

This bill would significantly impair the ability of the Forest Service to manage NFS lands, and eliminate comprehensive fisheries management in Alaska. The bill creates a confusing configuration of state and federal jurisdictions. As stated above, regarding Section 6 of H.R. 2335, the FPA already provides for special treatment of small hydropower while maintaining the ability of the Forest Service to protect NFS resources.

**S. 1236 and H.R. 1262, and H.R. 3852:**

These bills provide for special exemptions for particular hydropower projects, and the Forest Service objects to such measures. The Forest Service NEPA process provides for public participation and timely environmental analysis. By extending a construction period or eliminating licensing altogether, Congress would be impairing the public's opportunity to participate in the process and to receive electric power from a more efficient licensee. Such extensions take the matter beyond the scope of the original environmental review, and may lead to conflicts with ESA and other statutory obligations. Eliminating applicability of FPA to a non-federal hydropower project, as proposed in H.R. 3852, defeats the FPA's purpose of development of the waterway and protection of its resources.

Thank you. I would be happy to answer any questions.

Mr. SHADEGG. Thank you for your testimony. And before we move to questioning, I'd like to ask unanimous consent that statements submitted by stakeholders be made a part of the record. Without objection, so ordered. And questions submitted by our colleague, Mr. Dingell, to stakeholders on S. 1937 and the response to those questions also be made a part of the record. Without objection, so ordered.

Let's begin by turning to Mr. Towns for his questions.

Mr. TOWNS. Let me—first of all, let me begin by asking—we've heard a lot of talk about task forces. You've heard a lot of talk

about the task force this morning. How many of you feel comfortable just moving forward with the task force?

Mr. LYNCH. Mr. Towns, I'll try that one first. The task force may be a good process and it may come up with some good results, but in the meantime, we're licensing projects.

Mr. TOWNS. Right.

Mr. LYNCH. And we can't wait that long.

Mr. MURPHY. And just on behalf of all the members of the National Hydropower Association, we do support that task force and we want that to move forward. Do we think it will do all the things that this legislation will do? No, it won't. And do we know when it will get done or what we will exactly accomplish? We don't know that at that point. We think this legislation remains a very important facet as well as the task force, but neither one of them will work alone.

Mr. TOWNS. Thank you.

Mr. FAHLUND. As a member of the Federal advisory to that task force, I'd like to respond. I do think that the task force won't do all of the things that are in this bill, and that's precisely why I think it's a good avenue, because I think that what this bill does is effectively creates unnecessary and additional process, whereas it doesn't actually get at the heart of the matter in some instances.

There is a need, I think——

Mr. TOWNS. Could you be specific?

Mr. FAHLUND. Sure. I believe that there is a need to create some certainty of process within relicensing, and I think that there are ways that the Federal agencies can do that, and they are, I believe, moving in that direction through the task force.

I think that we're going to see some products coming out of that task force in the next several months that are going to result in some significant improvements in terms of creating certainty of process, in terms of how conditions are developed, and as well as giving the public an opportunity to at least have some input on how those conditions are developed. I don't believe that anything coming out of the task force is going to lead to any guarantee of profitability of projects. I don't believe that anything coming out of the task force is going to give industry the ultimate in assurance that every project is going to make it through without some problems.

This is a very complicated process, and we are inevitably going to run into projects where there are stumbling blocks. The individual unique characteristics of all of these river resources and all of the stakeholders involved necessitate complexity. It's almost an inevitability. And that's why we grant 50-year licenses for these projects; 30 to 50-year licenses for these projects. That's—these industries dominate——

Mr. TOWNS. But it takes 30 years to get it.

Mr. FAHLUND. In fact, actually, the 30 years to get it is as much upsetting—at least as upsetting to me as it is to anyone here. As a representative of the environmental community, we sit year after year with projects that are beyond expiration that receive annual licenses of status quo terms and conditions. That status quo condition basically prolongs harm to the environment, because we don't upgrade those projects. Now, that's not to say that industry is the

only one to blame in that instance. But it is an incentive not to move forward and not to meet environmental responsibilities.

Mr. TOWNS. You know, I hear all these horror stories, you know, and that's the reason why I keep asking about this task force, you know, because I keep getting this, you know. And I'm certain there's probably a lot of you sitting there probably have some horror stories that you could tell. I wish I had the time to tell you a horror story and you tell your horror story. I wish I could go down the line.

Mr. FAHLUND. We probably could all come up with horror stories I'm sure. But I think it's also important to remember that a lot of the horror stories that you hear are really relics of the past. Things like Cushman, for instance, the Cushman project, which is the 30-year relicensing. That started 30 years ago. It was a morass. Nobody benefited from that. It's in court today. It's not doing any—none of that did anybody any good. But we've learned a lot since then, and I think we're on a trajectory to make some real improvements. I think we're actually working well with industry for the first time in most folks' memory. And I think that a lot of this can jeopardize those efforts.

Mr. TOWNS. And I don't know. I mean, I could go on. Just recently a project in Wisconsin, where it was moving along. All of a sudden the State came into the picture in Section 401 of the Clean Water Act, and now that's a mess. I mean, so it's one thing after another. So, I mean, you know——

Mr. BROUHA. Mr. Towns, may I address your question, sir?

Mr. TOWNS. Sure. You can.

Mr. BROUHA. The Forest Service is committed to that process with the interagency task force. That said, however, we feel the FERC needs to be more forthright in addressing our concerns with respect to modification of the NEPA process so that we could get out of the NEPA business and they could effectively address our concerns in their process. And I'd be pleased to discuss that at greater length with you. And I believe Ms. Kennedy has a follow-up.

Ms. KENNEDY. You asked if people actually think the task force activities will result in the necessary changes. I think they have high potential to do that. My experience is that actually the folks in our—that work in hydropower in Oregon have similar goals to ours. They really do want to protect the resource. And yet, commonly, you know, we come up against roadblocks, and it's more of the timing, the scheduling of things, and just the opportunity to have discussions that is lacking. And I think these Federal task forces are going to address those types of issues so that we can in fact get on the ground and resolve them.

I sit on the State Mandates Task Force, which is one of the subgroups of the Federal task force. And we recently came out with a document which is just our first, which is looking at how can States write conditions in a way that will be actually implementable and enforceable by FERC. And we just produced a document. The FACA looked at that and thought that it was really helpful. So I think that's an example of ways that this task force actually is furthering the process and will make it far more efficient.

Mr. MURPHY. Mr. Towns, Mr. Chairman, may I just respond again?

Mr. TOWNS. Yes.

Mr. MURPHY. A couple things that have come up here that I'd like to clarify. One is whether these horror stories are old horror stories. You heard Mr. Lynch speak today about the North Umpqua project. That is not a 30-year-old story. That is a story that has occurred within the past few months. And if you go through my testimony, when you look at the stories that we've talked about, these are not old stories. These are stories that have been occurring within the past year. Do I think we're making progress on some fronts? Sure. But do I have enough trust that we don't need some other things? No, I don't. We do need these other things.

The other thing I do want to point out is when people talk about delays, appreciating that the delays are for various causes, there is absolutely no truth to the fact that a licensee has an incentive to delay the issuance of a license. With deregulation happening, licensees are trying to sell projects. New owners are coming in who are becoming generators rather than your typical old-style utility. And for a generator to delay the issuance of that license only does one thing to that project—it lowers the price and the value of that project, because no one wants to buy a project that has the questionable issues in front of it that a project in the middle of relicensing does.

Also as a project continues to sit on the books, and we continue to look at more things, more millions of dollars are spent looking at more and more issues until the licensee finally gets to a point where it knows what it's going to do. So these licensees are very interested in getting those licenses issued.

Mr. TOWNS. Thank you very much, Mr. Chairman.

Mr. SHADEGG. Okay. We can have a second round of questioning if you want. And let me ask a series of questions. First of all, Ms. Kennedy, I want to—you testified on behalf of the Western Governors' Association. Did they—how did they reach their decisions? Is this a unanimous position of all of the Western Governors?

Ms. KENNEDY. My comments here reflect a position that was developed I believe at the end of the 1980's and then renewed more recently. And it was a fairly——

Mr. SHADEGG. Wait, wait, wait, wait. It's a position that was developed at the end of the 1980's?

Ms. KENNEDY. Right. And then——

Mr. SHADEGG. On Mr. Towns' bill, which was introduced——

Mr. TOWNS. Just recently.

Mr. SHADEGG. I'm having a little trouble here.

Ms. KENNEDY. I was speaking more generally. There was a general position on hydropower and resource protection done in the late 1980's. And then more recently, there was a Western Governors' position on—I believe on the Craig bill, which is very similar to this one.

Mr. SHADEGG. But not on Mr. Towns' bill?

Ms. KENNEDY. I believe it's the same bill.

Mr. TOWNS. What? I'm sorry? No.

Mr. SHADEGG. Is that S. 422?

Ms. KENNEDY. I don't know the number of that.

Mr. SHADEGG. So you're not sure if it was on Mr. Towns' bill or not? You think maybe it was, but you're not sure?

Ms. KENNEDY. My understanding was that it was the same bill. It is the same bill. I'm getting feedback that it's the identical bill.

Mr. SHADEGG. Can I—now can I get to my question? Is this a unanimous position of the Western Governors' Association, or is this a staff position that they've reviewed? Is it a unanimous decision of the Western Governors? To oppose Mr. Towns' bill?

Ms. KENNEDY. I don't know how that decision was arrived at.

Mr. SHADEGG. Okay.

Ms. KENNEDY. I can get back to you on that.

Mr. TOWNS. Is anyone on the task force, any of those Governors on the task force?

Ms. KENNEDY. On the Federal task force?

Mr. TOWNS. Yeah.

Ms. KENNEDY. There are State representatives on there who report to their Governors, but no Governor is actually on that task force. It's more a staff level task force.

Mr. SHADEGG. Thank you very much. Let me turn to Mr. Fahlund and Mr. Murphy. And Mr. Fahlund, I wanted to ask you a question. As I can tell the testimony, as I understand the testimony, there is a dispute over the degree of reduction in hydropower as a result of the relicensing process. Mr. Murphy has indicated he believes it's 8 percent or at least that amount. And you've indicated in your testimony that it's 1 percent. But it's a dispute over the reduction in the electrical—in the generating capacities or process of the relicensing. Is that right?

Mr. FAHLUND. Yeah. I guess there is a dispute in what number is most appropriate.

Mr. SHADEGG. Okay. I want to ask you. I would certainly agree with the concept that in the relicensing process, it could be that you would look at environmental impacts of a particular project in a particular location and decide, you know, there are more negatives here than positives, so we're going to shut that one down in order to mitigate the environmental impact. That's a plausible circumstance. My question of you is, a series of questions. No. 1, it's my understanding that there are literally hundreds if not thousands of hydro—of dams across America where there is no turbine, and yet there could be. The dam's already there, but no one ever built a turbine.

Second, there is a category of dams where there is a turbine or turbines, but not as many turbines as could be present. And third, there is a category of dams where you have an older, inefficient turbine which could be replaced with a newer, more efficient turbine.

If Congress accepts the premise that some dams, upon examination, are causing—and some hydropower producing plants—are causing more environmental damage than the benefit they're producing, would—and so therefore should be shut down—would American Rivers and the others that you represent support the addition of hydroelectric generating capacity either at existing dams where there is no generating capacity or where there's less generating capacity than there could be, or where we could put in more efficient generating capacity?

Mr. FAHLUND. I guess I'd like to respond first by stressing something, and that is that we by no means seek removal or decommissioning of all hydropower. In fact, it's a rare instance where we actually seek decommissioning of hydropower. But that said, I think your point is a good one actually. I think given that there is actually—there are many sites across the country where there is either no capacity or there's underutilized capacity or perhaps just inefficient capacity, I'll address the second two first of all.

Where there's older, inefficient turbines, relicensing—oftentimes licensees will put in new turbines at that time, or they'll rewind old turbines and they will do upgrades and things of that nature that basically improve the efficiency of those projects. And provided that the environmental considerations of—the impacts of those changes are considered in doing that, I have no objection to it.

I think that with respect to the thousands of dams without hydropower across the country, I think it's necessary to take a look on a case-by-case basis. There is one company out there that I'm aware of that has applied for preliminary permits on 160, 170 Army Corps-owned lock and dams, particularly in throughout the Midwest, and while we don't have a good understanding of that technology just yet, I have no objection per se in building capacity where it's the environmentally responsible thing to do.

Mr. SHADEGG. In your answer to those, you said "I have no objection." I assume you were testifying on behalf of American Rivers?

Mr. FAHLUND. I am. I am speaking for American Rivers.

Mr. SHADEGG. Let me ask you another question. Has American Rivers ever supported an expansion or increase in hydropower capacity under any of those three circumstances in the past?

Mr. FAHLUND. Not to my—I have no idea, and I can get back to you with an answer to that question to the best of my ability, but our records are a little fuzzy when it gets back into the 1970's.

Mr. SHADEGG. I would like to know that. As you well know, I have some legislation trying to encourage the development of hydro in the future because it is clean, and my goal is not to damage the environment, my goal is to look at, particularly where we have existing dams. I mean, you get pretty radical if you say, well, we'll build a dam today. But when we have existing dams where we're not producing power——

Mr. FAHLUND. Sure.

Mr. SHADEGG. Let me——

Mr. FAHLUND. And might I add that I don't necessarily have objection to supporting further development as long as the environment is adequately protected.

Mr. SHADEGG. I guess that's where the rub comes.

Mr. FAHLUND. Pardon me?

Mr. SHADEGG. I guess that may be where the rub comes.

Mr. FAHLUND. Perhaps.

Mr. SHADEGG. We can't go at great length, but I do want to ask another point that—I believe Mr. Grimm raised a very interesting point, and that is, he talked about two things, really. One, the question of having the law distinguish between the relicensing process that applies to very large hydro plants and the relicensing process that applies to a very small process, or a small plant. And it seems to me that that makes a great deal of sense.

And then the second point that he raised—and I guess, Mr. Grimm, I'll give you a chance to expand on this—but I'd like to hear Mr. Fahlund's testimony on it. The second point he raised is the concept of in-stream generation, where you put a very small generator into a stream. You don't even build a dam. You just capture Mr. Newton's concept, as Mr. Markey talked about earlier, and yet—and yet, because of the cost of licensing such a facility, you make that impossible. And I guess I'd be interested in getting first of all your position on those two issues and then allow Mr. Grimm to comment.

Mr. FAHLUND. Well, let me say that FERC currently has a process to address small projects; projects in fact of five megawatts or less, and that's FERC's exemption.

Mr. SHADEGG. Does that take the Forest Service out of the process or——

Mr. FAHLUND. No it does not. What it does is it in fact—agencies are given the—well, a licensee is required to accept the terms and conditions of State and Federal agencies, as I understand how exemptions work. They're required to accept those terms and conditions on their face, and they can then operate in perpetuity. There's not a relicensing or reexemption process. And as long as they accept those reasonable terms and conditions, then that's effectively how it works, as I understand it.

Now, in an instance where we had described to us a propeller at the base of a river, for instance, no dam involved, my suspicion is that the agencies would have virtually nothing to say about those sorts of projects. I can't imagine that there would be a whole lot to be said in that instance.

However, let me also say that just because a project is small does not mean that its impacts are small—are equally small. There can be relatively large impacts for relatively small projects. And I think what's important here is that we recognize that size doesn't really factor into this. I almost said something that I really didn't want to say, but——

Mr. SHADEGG. Mr. Grimm, I have my own response, but why don't I let you respond.

Mr. GRIMM. Well, we—the numbers I testified to of over $1 million on projects under five megawatts was using the accelerated. Lord only knows what it would have been on the regular basis. It's the process. The process drags out several years. There's plenty of time for input and output. A lot of the agencies are late. We had an excellent working relationship with the Forest Service on our projects on Forest Service land. They weren't the problem. It was the multitude. We did essentially three or four different public scoping meetings because the Forest Service had different NEPA requirements than FERC had. It's the process that's broken.

Mr. SHADEGG. Does Mr. Towns' bill address this issue?

Mr. GRIMM. I can testify in support of S. 422. Mr. Towns' bill is very interesting to us. But we're out of our league here. We want to build new, small hydro to replace fossil fuel. We do not want to play——

Mr. SHADEGG. I like that idea myself, as you know.

Mr. GRIMM. We can't afford, on behalf of our customers, to play at this level. That's why we're proposing some alternative process

that it would allow more local representation by moving—not forsaking—if it was on Forest Service property, we would still need a special use permit issued by the Forest Service. So the Federal guidelines would be there. But we would have it locally where we can control the costs and make the licensing and permitting costs proportionate to the benefit and the size and the impact of the project. So we're kind of taking a different tact.

Mr. SHADEGG. I think Mr. Murphy is dying to make a comment, as is Mr. Brouha, and we have a vote on, and the chairman's returned. So, Mr. Chairman, I guess I'll leave it at your will. Mr. Murphy.

Mr. MURPHY. As you point out, there are almost 80,000 dams in this country. There are 2,400 with hydroelectric added. That's a sizable difference between those two groups of dams. There's a sizable opportunity there. If the current system was encouraging small projects to be built, you would be seeing it happen, but it's not happening. And it's not happening because of what was just talked about, because the process does not distinguish. Mr. Towns' bill does ask that it be studied and that a proposal be put forward for smaller projects. But at this point, we're not seeing development of new hydro, whether it's large or small. And when there's 80—77,000 dams in this country that do not have hydroelectricity added, we certainly wouldn't expect that we're going to take a sizable portion of that. But are there some there that are going to be benign to the environmental—negative environmental impacts? We would have to believe so.

Mr. SHADEGG. Mr. Brouha?

Mr. BROUHA. I'd like to follow up a little bit about the NEPA process requirements that we have that are different from FERC's and the reason behind that.

We do a separate NEPA process on our 4(e) conditions because the NEPA process for the Forest Service is open to the public and all users of the national forests. It's a final agency action. It's subject to appeal. And we feel that this process is necessary in order to provide the legally defensible documentation of the scientific and management basis for these terms and conditions, these mandatory conditions.

The FERC NEPA document only presents the conditions without the supporting rationale. And a lot of times we—well, we do all the time provide that supporting rationale. At FERC, they just don't choose to include it. Hence, the commissioners don't have any basis for their subsequent decision because they can't see the rationale. If there's subsequent court proceedings, that's also obscured from their view.

Mr. SHADEGG. I take——

Mr. BARTON. We're going to have to adjourn this hearing in the next two to 3 minutes.

Mr. SHADEGG. I take it that you do not approve of the preconditioning that Mr. Lynch referred to and do not think that was an appropriate—if it occurred—that that was an appropriate exercise of Forest Service authority?

Mr. BROUHA. Well, we don't know the conditions on the ground of what's proposed, sir. And as a result——

Mr. SHADEGG. Well, I think Mr. Lynch's position is that at 6 months—how many months into the process? Eighteen months into the process, the Forest Service walked in and said, we're only going forward if you shut down a dam.

Mr. BROUHA. Let me point out, sir, that that was part of a confidential settlement discussion which was largely informal.

Mr. BARTON. We'll keep it a secret, I promise you.

Mr. BROUHA. What I mean, they walked off the table. And instead of advancing through that process to this level, the Washington level, they chose to go public.

Mr. SHADEGG [presiding]. Mr. Lynch, did you want to respond? And then I guess we have to adjourn.

Mr. LYNCH. I'm not sure it was—well, we did walk from the table, but we felt, to add to the metaphors, we felt like we had a gun to our head. We didn't have much of a choice. And I guess I'd just leave it at that.

Mr. BROUHA. We're hopeful we can fix this problem.

Mr. LYNCH. And we are, too.

Mr. SHADEGG. I'd like to——

Ms. KENNEDY. If I could just add one thing. I actually sat on that negotiating settlement team. And there was a working document, a working model for how the relicensing would proceed that included a lot of conditions for 2 years, and that working model included removal of the dam in question. It was only after that 2-year period and a change in staff with PacifiCorp that the company made it apparent that that working model wasn't acceptable. So I think it would have been incumbent upon the applicant to have had an alternative model that was acceptable also being developed. I just wanted to say that there are two sides to this issue.

Mr. BARTON. We rarely get issues that have two sides to them.

Mr. SHADEGG. At the risk of making you miss a vote——

Mr. BARTON. Well, you're not. I'm going to take back over the gavel.

Mr. SHADEGG. Thank you, Mr. Chairman.

Mr. BARTON. I'm going to thank everybody. We're going to have some written questions. I have several that I wanted to ask, but Hydro Man was doing such a good job.

And he's to be commended for being here when apparently no other member was here.

We are going to work with the minority to see if we can develop some consensus positions to go to mark-up in the next 6 weeks on some of these bills. So I would encourage you to look at the bills that are pending, get with your congressman or congresswoman or somebody that you consider friendly to your position on the committee if you don't have a direct congressman from your area and offer constructive suggestions on how to improve them so that you could support them.

Mr. SHADEGG. I would like to thank all the witnesses. And I do think we can continue this dialog and work together.

Mr. BARTON. You've got to bang the gavel. The hearing is adjourned.

[Whereupon, at 1:27 p.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:]

STATE OF ALASKA
OFFICE OF THE GOVERNOR
*March 29, 2000*

The Honorable JOE BARTON
*Energy and Power Subcommittee*
*United States House of Representatives*
*2125 Rayburn House Office Building*
*Washington, DC 20515-6115*

DEAR REPRESENTATIVE BARTON: The State of Alaska supports S. 422 which would offer the state the opportunity to assume jurisdiction over licensing hydroelectric projects of five megawatts or less. Development of small hydroelectric projects is critical to the economic development of our state. Of the 29 hydropower projects supplying power to public utilities in Alaska, 17 are five megawatts or less in size.

Small hydro is especially important in rural Alaska where the cost of other energy sources is high and the resulting availability of power can be limited. The only practical alternative in many rural villages is small-scale diesel generation, which can also create undesirable environmental impacts. Where hydropower generation is feasible, it offers reliability unmatched by other currently available alternatives. Unfortunately, the financial feasibility of many small hydroelectric projects is impeded by the relatively high cost and lengthy process it takes to license these plants under the existing Federal Energy Regulatory Commission (FERC) regulatory regime.

Alaska's rural electrical production is unique. Over 150 villages in Alaska are isolated from any larger electrical grid, and each village is supplied with power almost exclusively from its own diesel generators. The cost of power in these communities is very high. Median residential rates are between 40 and 45 cents per kilowatt-hour, which is four to five times the average elsewhere in the United States.

Small hydro projects can help reduce these rates if the projects can be built economically. For example, at King Cove, Alaska, which is a remote community of 900 people in the Aleutian Islands, an 800-kilowatt hydro project completed in 1995 not only reduced costs but provides cost stability over the long-term by displacing most of the utility's diesel generation. Similar long-term benefits are expected from the new 825-kilowatt Tazimina hydro project, which serves a remote population of 450 people who live about 200 miles from Anchorage.

My Administration requires that development be done right. We apply this standard equally to hydroelectric development. For example, every hydroelectric project must also protect fish and wildlife. In the past, we have worked closely—and successfully—with the FERC to ensure minimal environmental impacts and to consider the cumulative impacts of development. It is critical this cooperation continues under S. 422 as well.

The State of Alaska is not presently able to assume exclusive authority to authorize small hydroelectric projects, because state law does not provide a regulatory regime for project review, monitoring, or licensing of these projects. We feel such a framework must be in place at the state level before the State of Alaska could apply to the Secretary of Energy to take jurisdiction. The regulatory framework needs to include regulations to ensure proper project design and construction, and to protect fish and wildlife populations at least as well as under existing federal law. Present FERC authority is broader than that held by the state, in that FERC may assert jurisdiction over watersheds, while the regulatory authority of the Alaska Department of Fish and Game is confined to the area between stream banks.

In addition to the lack of a state regulatory regime, the state has established no appropriate funding mechanism to support small hydro licensing and monitoring. Such a funding mechanism could be either a direct appropriation or based on a user fee system.

Again, the state appreciates the opportunity to express its support of S. 422. Although we desire the benefits this legislation offers, it is important to state clearly we are not currently in a position to implement the option that this legislation would present to Alaska.

Sincerely,

TONY KNOWLES
*Governor*

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
*March 29, 2000*

The Honorable JOE BARTON
*Chairman*
*House Commerce Subcommittee on Energy and Power*
*2125 Rayburn House Office Building*
*Washington, D.C. 20515*

DEAR MR. CHAIRMAN: I would like to thank you for the opportunity to submit a statement today on behalf of my legislation, H.R. 1262. I believe this bill is a common-sense solution to a costly, bureaucratic and controversial regulatory process required for the re-licensing of a small hydroelectric dam in my district.

The regulatory process and scrutiny hydroelectric dams undergo to be re-licensed by the Federal Energy Regulatory Commission (FERC) was brought to my attention by the small community of Hart, Michigan. In a meeting with members of the Hart City Council and the city manager, I was dismayed to learn of the extravagant costs, environmental scrutiny and time this rural city faces as part of the FERC re-licensing process. This process will cost the community an estimated $400,000-$600,000 and take three to five years for completion. For that reason, I introduced H.R. 1262, to provide that existing facilities located on the Pentwater River in Michigan are not required to be licensed by the Federal Energy Regulatory Commission under part I of the Federal Power Act. I feel this legislation represents a reasonable attempt to alleviate the unnecessary environmental scrutiny and costs associated with the FERC re-licensing process.

The Hart Dam which serves a predominately rural community, generates about 2 percent of the city's electrical power and has contributed to the creation of the Hart Lake. The lake has created millions of dollars in surrounding development and lakefront property for the community. The generation of hydropower provides inexpensive, efficient and environmentally safe energy for 1,300 residents of Hart.

The prospect of breaching the Hart Dam or requiring costly environmental structures looms heavily over the city as environmental groups weigh in and scrutinize all operations of the dam. The city is subject to finance all studies related to the ecological and recreational impacts from environmental groups that are adamant about tearing down hydropower dams. Dismantling the Hart Dam would be catastrophic to the developments and property values surrounding the Hart Lake, not to mention the cost passed onto consumers for the loss of energy generation from the hydropower plant.

I am frustrated by the prospect of complications in the re-licensing process for city of Hart, despite the fact the dam was rebuilt just more than 10 years ago with no objections or environmental concerns by the Michigan Department of Natural Resources, Michigan Department of Environmental Quality or FERC. Is the city of Hart to believe these agencies now have environmental concerns they didn't have 10 years ago?

As the amount of hydropower projects facing re-licensing will drastically increase over the next years, small communities across the country like Hart will continue to bear the burden of this costly system. I am particularly concerned with the costs passed on to communities as the result of environmental groups pressure to perform costly and unnecessary studies. The economic impacts associated with this process must be considered before conditions of re-licensing are mandated from a state or federal agency. At this point these considerations are not being made and I feel it is unnecessary to subject the city of Hart to this process.

Sincerely,

PETE HOEKSTRA
*Member of Congress*

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CITY OF HART
HART, MICHIGAN
*March 29, 2000*

Chairman Barton
*Subcommittee of Energy and Power:*

The City of Hart, located in west central Michigan, is currently in the midst of FERC relicensing for our small hydro electric facility having filed a notice of intent in September 1997. If all goes well, we anticipate issuance by 2002. Five years and an estimated $650,000 later! For one of the smallest municipal electric utilities in the state and perhaps the nation, this is unacceptable. The time and financial bur-

dens of relicensing for a system of 1300 customers and four employees on top of day to day operations, growth management, and pending deregulation will certainly tax our capabilities.

We understand and fully accept the licensing requirements. We welcome with open arms the participation of all interested parties. However, the scales of balance have tipped from participation to elimination. Non-pollutant sources of energy should be encouraged, not economically regulated out of business.

The costs of relicensing will consume an excess of 16% of our annual operating revenues over the next two years causing us to dip into capital improvement reserves. The City must delay expansion to a substation to keep pace with industrial growth and forestall improvements to the diesel generation plant to provide the reliable back up power our customers demand in an increasingly unreliable market in order to obtain a piece of paper.

The relicensing process for the City has been positive to date as the participation has been very cooperative. We entered the process as a child visiting the dentist for the first time. We have heard, first hand, the horror stories. Now that we are in the chair, it has not been all that bad. Will Hart continue to be "Lucky" or is the dentist reaching for a drill without administering novocaine?

The Hart Dam was built in the 1920's and rebuilt in 1986 under the watchful eyes of FERC, the Michigan Department of Environmental Quality, and the Michigan Department of Natural Resources. It is our belief that such a newer facility should be held to less stringent relicensing requirements, if not exempt.

Even under the best scenario, dam relicensing is too lengthy and too costly. The City of Hart urges this committee to support procedural changes to make relicensing practical for all parties.

Respectfully yours,

SCOTT K. HUEBLER
*Hart City Manager*

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PREPARED STATEMENT OF THE AMERICAN PUBLIC POWER ASSOCIATION

By the year 2015, over half of all federally regulated hydroelectric capacity—284 projects in 39 states—will be up before FERC for license renewals. This group, which includes many large and complex projects, has a combined capacity of approximately 29,000 MW, or 20 percent of the nation's installed hydroelectric capacity. By the year 2010, 16,000 MW of publicly owned hydro capacity will be up for license renewal. This represents nearly 50% of all hydro capacity subject to the relicense renewal process.

The experience of projects that completed relicensing in the early 1990's demonstrated that the process was costly, time-consuming and resulted in capacity losses. Studies are showing that there may be an average of 8% loss of hydropower generation per project resulting from new conditions imposed on existing projects up for relicensing in the next 20 years. At this rate, nearly 2400 MW of total hydro capacity may be lost. In the 2000 edition of its annual Energy Outlook report, the Energy Information Administration—the Department of Energy's statistical agency for the first time predicts that hydropower generation will decline through 2020, "as regulatory actions limit capacity at existing sites."

The costs of the licensing process has brought into focus a system that is broken and in conflict with the pressures to meet the demands of electricity competition. As states open their regions and electric utilities to competition, utilities are under increasing pressure to lower prices or risk losing customers. The ability of hydro licensees to pass to their customers ever increasing costs of environmental compliance will be limited by the market. These increasing costs threaten to significantly reduce hydropower's economic viability.

The regulatory process and resulting problems are also at odds with current concerns over rising gasoline prices and the impact these costs will have on the nation's energy security. As one of the cleanest and most efficient sources of energy, hydropower should play a greater role in the nation's energy mix. Along with its ability to provide clean, efficient and renewable electric power, this energy source offers operational flexibility for maintenance of system reliability as well as drinking water, flood control, fish and wildlife habitat improvement, irrigation support, transportation recreational and environmental enhancement funding. Despite these numerous and important benefits, policymakers have chosen to discount hydropower's energy resource potential.

One of the disturbing outcomes of the existing licensing process, as evidenced by a hydropower owner in the Northwest, is the inability to improve environmental conditions around the project. Without a license in hand, this particular hydropower

owner cannot install recommended fish improvements. Thus, it is in the interest of all project stakeholders—power and nonpower interests—to bring reasonableness and fairness to the process. No one wins under current law.

H.R. 2335 and its counterpart in the Senate, S. 740, represent a reasonable and well-meaning approach to the licensing process. The legislation limits reform to allow project owners and operators timely knowledge of the impact of mandatory conditions on project economics and other values. When agencies develop their statute-authorized mandatory conditioning authority, they will be required to consider key factors and document their consideration of those factors. These factors are to include the benefits gained or lost to the project's economics and to the environment.

As entities of the public domain, public power electric utilities are not interested, capable or supportive of any measure that would weaken the public input process. We regularly work with citizen and environmental groups through public processes and meetings. Through these activities we learn and are guided by what our citizens demand—a regulatory process that preserves and protects the environment. For that reason, we remain strong supporters of a hydropower licensing process that provides significant and meaningful environmental protections granted by law to the federal resource agencies involved in the licensing process. In our view, the legislation achieves this important objective.

Hydropower stakeholders, which includes electricity providers, consumers, recreational interests, labor, agriculture and farming groups, are supportive of reform. Working with these groups, APPA is convinced that common agendas can be met to construct a process that is more predictable, less time-consuming and results in adequate resources being committed to protection of the environment.

The legislation before the committee is a reasonable solution to the problems that face this industry and the country. We strongly encourage Congress to take steps, such as those represented in H.R. 2335, to improve the hydropower licensing process. As with the important and needed reforms that were made to accommodate environmental concerns in the 1980's, the pendulum has swung in the opposite direction requiring a hard look at what is happening to the hydropower energy resource in this country. The future of this emissions-free, reliable and domestic-based energy resource rests in your hands.

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PREPARED STATEMENT OF JAMES R. GOODHEART, EXECUTIVE DIRECTOR, MICHIGAN UNITED CONSERVATION CLUBS

On behalf of the 100,000 members and 510 affiliated clubs of the Michigan United Conservation Clubs (MUCC), I would like to express our opposition to HR 2335 and HR 1262 which have been recently referred to the House Committee on Commerce, Subcommittee on Energy and Power, regarding hydroelectric licensing under the Federal Power Act.

Generally speaking, the MUCC views the issue of hydroelectric licensing as imperative in protecting and wisely using our public river resources. MUCC supports the re-licensing, renovation, and reconstruction of dams for hydroelectric power where it can be proven to be both economically feasible and environmentally sound.

MUCC recognizes that if not properly managed, the trade-off of generating power from rivers is the river ecosystem. Hydro facilities can negatively impact liver ecosystems, fish habitat, and fish reproduction through river flow or temperature alterations, blocking fish movement or impeding the natural cycling of nutrients throughout the river. As an organization of hunters, anglers, boaters, and other outdoors enthusiasts, MUCC has participated as part of the Michigan Hydro Relicensing Coalition in its efforts to monitor the progress of the Federal Energy Regulatory Commission's re-licensing of the 113 hydroelectric dams in Michigan.

Licensing hydroelectric projects is a commitment of our natural river resources as they are only re-licensed every 30 to 50 years. For this reason, MUCC stresses the importance of incorporating the protection, enhancement, and long-term sustainability of the natural resources into the licensing process.

*H.R. 2335—The Hydropower Licensing Improvement Act*

MUCC's membership clearly supports the existing Federal. Energy Regulatory Commission (FERC) licensing program as the only opportunity to address natural resources concerns, particularly in regards to protecting fish populations and natural reproduction. The MUCC strongly believes that the existing rules and laws of the current hydroelectric licensing process have demonstrated clear and successful results in providing hydro power that is not detrimental to the river ecosystems.

The benefit of the current FERC licensing process is widely distributed across many of Michigan's 36,350 miles of rivers and streams, and applauded by the an-

glers, boaters, and other recreational users who benefit from the vast improvements to these river systems—physically, chemically, and biologically—as a result of the current process.

The membership of the MUCC already benefits from the recent improvements through re-licensing on highly utilized river systems such as the Muskegon, Manistee, and Au Sable Rivers. The importance of these river enhancements can be defined by angler usage alone, as anglers travel from throughout the state and country to take part in the popular trout and salmon fishing of these rivers. This is demonstrated through sportfishing hours spent on these systems in 1999. The Muskegon River accounted for about 374,895 hours of angler effort 96,329 angler trips, while on the Manistee River, anglers spent approximately 528,766 hours fishing during 111,863 trips. The Au Sable River accounted for nearly 280,000 hours of angling effort and almost 80,000 fishing trips. MUCC's conservation approach of protecting a usable resource stands to benefit not only the river and fishery, but also those who enjoy the fishery through recreation and the community, which benefits economically through tourism.

The re-licensing process for hydroelectric projects may not be perfect. However, the current process incorporates industry, state and federal agencies, as well as private citizens into the re-licensing process, significantly increasing the benefits to our natural resources while minimizing economic impacts on the hydroelectric facilities. Current attempts to reform this process appear to the benefit of hydroelectric projects, as changes would create an easier and less restrictive licensing process to work through and an corresponding short-term economic gain for the hydroelectric facility. MUCC does not support the proposed changes in H.R. 2335 as they are at the potential cost of the sustaining the long-term biological integrity of these river ecosystems.

*H.R. 1262—Exempting existing facilities located on the Pentwater River in Michigan from the FERC licensing under the Federal Power Act*

MUCC firmly opposes Representative Hoekstra's bill, H.R. 1262, exempting the hydroelectric projects on the Pentwater River in Michigan from licensing under the Federal Power Act. The sportsmen and women of the MUCC point to the many hydro projects in Michigan that have already been re-licensed through the FERC process. These projects provide significant protection and enhancements to the public river and fishery resources while allowing the hydro facilities to continue generating power and private economic gain.

As a member of the Michigan Hydro Relicensing Coalition, the MUCC has long supported and advocated for a wise and conservative use of our natural resources including public rivers and river fishery resources. The currently existing federal licensing is a common sense approach to managing hydroelectric projects that need be applied to all projects, including those on the Pentwater River. Improvements to hydro licenses that provide for run-of-river flow management, temperature monitoring and controls, upstream and downstream fish passage, and other habitat improvements allow for a wise and conservative use of the natural resources our rivers provide. This ensures that all favorable benefits can be derived for all users from a river resource, from power generation to a healthy, sustainable fishery.

MUCC believes there is no reason to exempt projects on the Pentwater River in Michigan from a licensing process that has proven beneficial to the river, the fishery, anglers, and other public users of the river resources while maintaining operation of the hydroelectric facilities. In promoting conservation, MUCC contends that the re-licensing of hydro projects in Michigan demonstrates that hydro projects can utilize river resources while promoting long term sustain ability of fish and wildlife populations valued by the public in our state's rivers,

MUCC urges that this philosophy be maintained throughout the state of Michigan, if not across the nation. Considering the exemption of the Pentwater hydro projects in Michigan sets a dangerous precedent that the public of Michigan would be willing to sacrifice the long-term recreational and economic benefits of our rivers for short-term economic gain to the hydroelectric facilities on that river. This is a sacrifice that the sportsmen and women of the Michigan United Conservation Clubs are not willing to make.

MUCC opposes any legislation that would exempt hydro projects from the licensing process under the Federal Power Act. Furthermore, MUCC opposes proposed legislation to change this process. This license process allows hydroelectric projects to generate power from a renewable resource while providing for the proper consideration and minimization of the impacts of these projects on the river and fishery resources.

The Michigan United Conservation Clubs appreciates your consideration of our comments, and asks your support in opposing bills H.R. 2335 and H.R. 1262, regard-

ing the hydroelectric licensing process under the Federal Power Act and exemption of projects from this process.

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PREPARED STATEMENT OF OREGON UTILITY RESOURCE COORDINATION ASSOCIATION

The Oregon Utility Resource Coordination Association (OURCA) supports the intent of H.R. 3447 and urges timely enactment. Passage of this legislation will facilitate coordinated power supply planning among BPA's public preference customers, providing both them and BPA with added efficiencies. This legislation will enable municipal utilities, people's utility districts, and cooperatives in the Pacific Northwest to manage their resource planning similar to how customers of other federal power marketing agencies do today. We do not believe passage of this legislation would have an adverse impact on BPA or other BPA customers. To the contrary, we believe that this legislation will provide enhanced efficiencies that directly or indirectly serve the entire region.

*Background on OURCA*

OURCA is an intergovernmental agency, formed under the laws of Oregon. OURCA was formed in September 1999 by the action of three municipalities and four people's utility districts (PUDs) which operate electric utilities in Oregon. These utilities include the City of Ashland, McMinnville Light & Power, the Eugene Water & Electric Board, and the Clatskanie, Emerald, Northern Wasco County, and Tillamook PUDs. The first action of the OURCA Board of Directors was to expand the membership to include the City of Forest Grove.

OURCA qualifies under the legislative definition contained in H.R. 3447. In fact, OURCA was formed largely for the purpose of performing the coordinated operational functions as envisioned by H.R. 3447.

*Benefits of the Legislation*

OURCA envisions a number of potential operational and fiscal opportunities through coordinated utility purchasing, planning and administration. Many of these opportunities, such as joint purchasing of distribution poles or transformers, are available absent this legislation.

As drafted, this legislation provides opportunities for OURCA specifically and exclusively in terms of the joint purchasing and scheduling of power from the Bonneville Power Administration (BPA). Each of the current members of OURCA is a public preference customers of BPA.

Passage of H.R. 3447 enables OURCA to act as an agent to coordinate the power purchases of the OURCA members from BPA. OURCA has not yet decided what form that coordination will take. Options range from joint billing and coordinated management of multiple contracts to a single contract based on the combined net requirements of OURCA members.

*Impact of Legislation on Other Customer Groups*

OURCA does not believe enactment of H.R. 3447 adversely impacts any other Northwest customer group—in terms of either power supply or costs.

Under the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), BPA has a legal obligation to provide a power exchange with participating regional investor-owned utilities (IOUs) for service to such IOUs' residential and small farm consumers. In addition, any regional utility can seek to have BPA provide power to serve its net requirements. Nothing in H.R. 3447 alters or limits these provisions. BPA is not statutorily required to provide service to the Direct Service Industries (DSIs) post-2001.

More importantly, OURCA does not believe that enactment of H.R. 3447 will reduce the power available to serve other customers in the region. The intent of the legislation is to limit the purchase of power by the JOE to the sum of its members' net requirements. In other words, if a JOE's members could individually purchase a total of 100 MW of requirements power from BPA, then the JOE could purchase no more than 100 MW of requirements power from BPA under this legislation.

Nor will enactment of H.R. 3447 increase costs to other regional customers. To the contrary, enactment of H.R. 3447 could provide BPA with some administrative efficiencies, the benefit of which will inure to all regional customers.

*Impact of Legislation on Resale of Power*

Some parties have expressed concern that enactment of this legislation could promote resale of preference power.

Other than sales to its retail customers or to its members or participants, OURCA has no intention of reselling requirements power purchased from BPA. In fact, such resale could violate current legal and contractual prohibitions.

The intent of the legislation is to restrict the JOE's purchase of requirements power from BPA to the sum of the net requirements of its members, and OURCA supports that intent. However, OURCA would note that the language could potentially create a problem for a JOE whose members have generation resources of their own and are not full requirements customers of BPA.

The current language of H.R. 3447 authorizes BPA to sell power to a JOE "solely for the purpose of meeting the regional firm power customer loads" of its regional public preference customer members. This language does not fully mirror the language of Section 5(b) of the Northwest Power Act, which provides that BPA shall offer to sell power to meet a customer's firm load, to the extent that the firm load exceeds the customer's own resources. OURCA is concerned that this might potentially create confusion and lead to the unintended circumstance where BPA would be required to sell to the JOE an amount of power that is more than the actual requirements of the JOE membership due to the existence of other utility power supply resources of the JOE's members. Similarly, the language might unintentionally preclude BPA from selling other non-requirements products to a JOE that other public preference customers (or even non-preference customers) could purchase.

Notwithstanding this potential statutory construction, the legislation is not intended—and should not—alter any existing resale restrictions that are contained in present law or contract.

Finally, we would note that the legislation does not preclude a JOE from purchasing "surplus power" from BPA which does not have resale restrictions associated with it (Note: Under the Northwest Power Act any entity may purchase "surplus power" from BPA, and such purchases do not have a resale restriction.)

*Eligibility*

OURCA sees no compelling reason for either the January 1, 1999 member eligibility restriction or the restriction that JOEs must form by the date of enactment.

The legislation is designed to provide public preference customers of BPA with opportunities to capture administrative and operational efficiencies. OURCA sees no legitimate public policy reason why certain current (those who fail to form a JOE before enactment of this legislation) or future public preference customers should be denied the opportunity to capture these benefits.

For instance, the City of Hermiston, Oregon is in the process of forming a municipal utility. Because Hermiston was not a customer of BPA on or before January 1, 1999, Hermiston would not be an eligible member of a JOE. Ironically, based on a strict interpretation of H.R. 3447, Hermiston could not participate in a JOE in any form—even to simply receive newsletters' without negating the eligibility of a JOE. State laws provide for formation of municipal, PUD and cooperative utilities, and federal law provides these public preference customers with priority purchase rights to BPA power. OURCA fails to see a public policy rationale for arbitrarily precluding lawfully constituted public preference customers from managing their lawfully purchased BPA resources under this legislation.

*Timing of Legislation*

OURCA believes that the legislation needs to be enacted as soon as possible, preferably before the end of April, in order to realize the intended benefits as soon as possible.

BPA is in the process of finalizing its rates and developing and executing contracts for post-2001 sales. Under the current schedule, rates for power will be finalized by April 21, 2000 and contracts must be signed by September 30, 2000. However, OURCA would note that enactment needs to occur as soon as possible in order to provide JOE participants: (a) the opportunity to select their form of coordinated power purchases, (b) draft the necessary operating agreements and protocols, (c) negotiate contracts with BPA, (d) undertake any needed billing or metering purchases and installations, and (e) consider and arrange for any alternate power supplies. Given the required steps needed to make a JOE fully functional, OURCA believes the legislation needs to be enacted by the end of April.

Enactment of H.R. 3447 *after* September 30, 2000 would preclude Pacific Northwest public preference customers from utilizing a JOE for requirements power purchases until the next contract period in 2006 (or 2011 for BPA customers choosing 10 year contracts). While BPA power contracts are assignable (with the concurrence of BPA), such post-subscription assignment would not enable JOE participants to truly realize the benefits of the legislation: the JOE members would not be able to

have the potential existence of the JOE influence their post-2001 power supply decisions.

*Conclusion*

OURCA strongly supports timely enactment of H.R. 3447 to facilitate coordinated power supply planning among BPA's public preference customers. As noted above, OURCA would prefer minimal refinements to the legislation to: (1) clarify that the intent of the law is for BPA to serve the cumulative net requirements of the JOE members and no more, and (2) to remove the eligibility restrictions. In sum, we believe that the legislation should grant JOEs the same rights, responsibilities and restrictions as those that apply to its public preference customer members: no more, and no less. If the Committee determines that such refinements are appropriate, OURCA would be happy to assist in the necessary drafting changes.

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PREPARED STATEMENT OF IDAHO ENERGY AUTHORITY

The Idaho Energy Authority (IDEA) strongly supports enactment of H.R. 3447 and deeply appreciates the Committee's efforts to promote prompt consideration of this common sense legislation.

Throughout the country, consumer-owned utilities (municipals, PUDs and co-ops) have formed entities to provide coordinated power supply and other services. These entities are generally formed on the basis of geography, organizational form and historic relationships. Given these factors, the cities of Burley, Idaho Falls, Soda Springs, and United Electric Cooperative chose to form the Idaho Energy Authority (IDEA) under the provisions of existing Idaho law enabling establishment of non-profit membership corporations consisting of intergovernmental and cooperative members. The cities of Heyburn and Rupert and East End Mutual Electric, Farmers Electric, Idaho County, Lower Valley Energy, Salmon River Electric, South Side Electric Lines, and Fall River Rural Electric Cooperatives have also joined, and other consumer-owned utilities in Idaho are considering membership in IDEA. We expect the membership to continue to expand.

Although IDEA anticipates providing a number of services for its members, the timing of IDEA's formation was greatly influenced by our desire to meet the eligibility standards of the pending legislation and to jointly manage our requirements purchases from the Bonneville Power Administration (BPA).

*Purpose of H.R. 3447*

The bill enables existing BPA preference customers (e.g., public body and cooperative utilities) to designate a joint operating entity (JOE) as their agent for contracting with BPA for the purchase and delivery of power to meet the members net power requirements. Such coordination can provide the members of IDEA with administrative savings by providing for centralized interaction with BPA personnel. In addition, IDEA members can capture operational savings by having centralized billing, metering and scheduling and potentially achieving diversity benefits that reflect the different load characteristics of IDEA's members. The extent to which these benefits are realized will depend, in part, on (1) the purchasing form IDEA chooses (e.g., single administration of multiple contracts or a single contract reflecting the pooled requirements of IDEA's members), (2) the type(s) of product(s) that IDEA chooses to purchase from BPA and how those products are managed with other resources either owned by IDEA members or contracted for with other parties and (3) the design of BPA's rates.

BPA's existing statutes provide a first right of purchase—or "preference"—to cooperative and public body utilities (*See* Section 5(b) of the Pacific Northwest Electric Power Planning and Conservation Act). The statutes further direct BPA to make such sales in compliance with BPA's standards of service (*See* Section 5(b)(1) of the Pacific Northwest Electric Power Planning and Conservation Act). Those standards of service provide that the applicable preference customer must own distribution facilities necessary to deliver the BPA power to end-use consumers.

While IDEA (or another JOE) is itself a public body, it neither directly serves end-use consumers nor directly owns distribution facilities. The responsibilities and facilities needed to provide retail service are owned by IDEA's members. While IDEA's members meet the statutory test and the requirements of the BPA standards of service, BPA has determined that IDEA's members cannot assign their BPA purchases to IDEA nor authorize IDEA to act as their agent in purchasing requirements power from BPA. H.R. 3447 provides the clear authority for BPA to make sales to Joint Operating Entities.

In addition to the coordination of BPA purchases authorized by the legislation, IDEA may provide the following additional services to its members: diversification

power supply acquisition and management, transmission planning and contracting (including with BPA), materials purchase, public purpose services, safety programs, etc. Enactment of H.R. 3447 is not necessary for IDEA to engage in these other functions.

*Eligibility Restrictions are Inappropriate*

Existing Idaho law allows for the formation of new cooperative and municipal utilities and creation of joint powers agencies and cooperative associations. IDEA sees no reason why future consumer-owned utilities or future JOE's should be prevented from receiving the benefits of this legislation.

IDEA would support removing the eligibility restrictions from the legislation.

Alternately, IDEA would support granting the Secretary of Energy authority to add other JOEs by rule as well as authorizing the Secretary to permit future BPA preference customers the right to purchase and or manage requirements power through an existing or future JOE.

*Legislation Does Not Harm Other Customers*

While benefiting public preference customers in the Northwest, H.R. 3447 does not harm the interests of other regional customers in either the cost or availability of power.

IDEA does not believe that enactment of this legislation would result in a reduction of power available to serve other customers in the region. The legislation establishes a maximum purchase authority for any JOE equal to the combined load of its members. The legislation intends that a JOE would not be able to purchase firm requirements power in excess of what the members could purchase through individual contracts. Thus, enactment of this legislation should not reduce the power available for other regional customers.

Similarly, IDEA does not believe that enactment of H.R. 3447 will result in increased costs to other regional customers. To the contrary, enactment of this legislation is likely to result in some administrative savings for BPA which will benefit all regional customers.

IDEA is aware that some have expressed potential concern that a JOE might be able to realize diversity savings—reduced purchases during peak periods as a result of differences in the coincident peak of a JOE's member loads. While it is true that, depending on the details of future BPA power contracts, such diversity savings may be realized and may result in reduced purchases from BPA, this would result in either (a) additional peak power available for sale to other regional entities, or (b) surplus peak power that could be sold by BPA with the revenue credited to regional customers. Under either circumstance, it would appear that regional parties would benefit—not face increased costs.

*Legislation Does Not Promote Merchant Marketing of Preference Power*

H.R. 3447 does not provide preference customers any authority to purchase power surplus to the needs of the JOE participants. Current law and BPA contracts restrict the resale of requirements power. H.R. 3447 does not alter these current statutory or contractual restrictions.

Nor does IDEA intend to resell requirements power. Such action would be in violation of existing statutory and contractual restrictions, and IDEA and its members intend to comply fully with all applicable laws and restrictions.

*Legislation Should be Enacted Promptly*

Based on a variety of contractual, operational and system requirements, IDEA believes that the legislation should be enacted before the end of April.

In order for this legislation to be of value to IDEA during the 2001-2006 BPA contract term, it needs to be enacted prior to the September 2000 conclusion of the BPA subscription contract window. However, considerable time will be needed prior to this date for the legislation to realize its intended benefits. As noted above, IDEA has been in existence for a short period of time. IDEA and its members will need to review the existing BPA power products, assess alternative power supply opportunities , and determine which purchases (or mix of purchases) are most desirable. Once this decision is made, IDEA will need to prepare and execute the relevant contracts (with BPA, any other selected power suppliers, and between the IDEA members). In addition, we may need to purchase and install computer hardware and/or software to provide for real-time scheduling and joint billing. Given these potential requirements and the established closing date for BPA contracts, we believe the legislation should be enacted before the end of April to provide the time needed to properly and diligently fulfill our power supply responsibilities to our consumer-owners.

Some have questioned whether, if the legislation is not enacted in time, if IDEA members could assign their contracts to IDEA if the legislation were passed in a subsequent Congress. First, it should be recognized that assignment of BPA contracts is dependent on BPA concurrence. More importantly, such action would be largely ministerial and would not enable JOE members to realize the full benefit of the legislation during the pending subscription period. Specifically, IDEA members may make different power supply decisions—both from BPA and alternative power suppliers—if they can act jointly rather than individually. In the absence of timely enactment of the legislation, IDEA members will purchase power products from BPA or elsewhere without realizing the benefits of joint purchasing decisions envisioned by this legislation.

*Conclusion*

IDEA supports H.R. 3447 in its current form. As noted above, IDEA would support relaxation or elimination of the eligibility restrictions contained in the legislation. However, we would still support the legislation without any such changes if needed to ensure swift enactment.

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CENTER FOR ENERGY EFFICIENCY AND
RENEWABLE TECHNOLOGIES, ENVIRONMENTAL DEFENSE,
NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB

*March 30, 2000*

The Honorable JOE BARTON
*Chairman, Subcommittee on Energy and Power*
*The House Committee on Commerce*
*2125 Rayburn House Office Building*
*Washington, DC 20515*

**Re: H.R. 2335/S. 740—Hydropower Licensing Process Improvement Act—OPPOSE**

DEAR CHAIRMAN BARTON: Legislation has recently been introduced that would dramatically change the hydropower licensing process and jeopardize a critical restoration opportunity for rivers that have suffered for decades. Pitched as a process reform bill, the legislation actually adds nine new requirements for federal agencies and three new administrative processes to an already complex process. The result? A significantly diminished ability of resource agencies to protect public trust resources such as fish, wildlife, water quality, as well as economically beneficial recreational resources.

While the hydropower relicensing process is not perfect, the industry is not what is in jeopardy here. They warn that the relicensing process will render their dams uneconomic. In fact, no license issued in the last seven years has been rejected by its owner. Industry also threatens that reduced generation capacity will result in increased greenhouse gas emissions. In fact, in the last decade, relicensing has yielded dramatic improvements in rivers around the country while reducing average generation by only 1%! That is just 0.05% of the nation's overall electrical capacity. Surely we can afford such a small price for such enormous benefits.

It is important to remember that licenses are issued for 30 to 50 year terms. Relicensing is a once-in-a-lifetime opportunity to ensure that private use of the nation's public river resources is balanced and fair. Judicious changes to a dam's operations can provide dramatic benefits to fish, wildlife, and recreation opportunities. H.R. 2335 is a transparent attempt by the hydropower industry to circumvent its accountability to the public.

In recent years, industry, state and federal resource agencies, and private citizens have worked together to resolve many inefficiencies with the relicensing process, significantly reducing the need for litigation. Parties are working toward administrative solutions for remaining issues. Legislative fixes, particularly this legislation, will only set back the substantial progress and trust that stakeholders have built and dramatically tilt the balance away from protecting public trust resources.

Please join us in opposing H.R. 2335.

Sincerely,

V. JOHN WHITE, *Executive Director,*
*Center for Energy Efficiency and Renewable Technologies*

JOHANNA THOMAS, *Hydropower Project Director,*
*Environmental Defense*

SHERYL CARTER, *Senior Policy Analyst,*
*Natural Resources Defense Council*

DAN BECKER, *Director,*
*Global Warming and Energy Program, Sierra Club*

cc: Subcommittee on Energy and Power

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INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES
*March 28, 2000*

Hon. JOSEPH BARTON, *Chairman*
*Subcommittee on Energy and Power*
*Commerce Committee*
*U.S. House of Representatives*
*2125 Rayburn House Office Building*
*Washington, DC 20515*

DEAR CHAIRMAN BARTON: This is in reference to H.R. 2335, the "Hydroelectric Licensing Process Improvement Act of 1999," scheduled for hearing March 30, 2000 before your subcommittee. The Association strongly opposes H.R. 2335 because it would significantly constrain the US Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) from fulfilling their responsibility under law to submit permit conditions that could ensure that hydroelectric projects are consistent with the conservation of the public trust resources of fish and wildlife. We also believe H.R. 2335 would impede the significant progress now being made under the Interagency Task Force to Improve Hydroelectric Licensing Processes. For those reasons, the Association is strongly opposed to H.R. 2335.

The International Association of Fish and Wildlife Agencies was founded in 1902 as a quasi-governmental organization of public agencies charged with the protection and management of North America's fish and wildlife resources. The Association's governmental members include the fish and wildlife agencies of the states, provinces, and federal governments of the U.S., Canada, and Mexico. All 50 states are members. The Association has been a key organization in promoting sound resource management and strengthening federal, state, and private cooperation in protecting and managing fish and wildlife and their habitats in the public interest.

While the goal of enhanced permit efficiency is laudable, our analysis is that, as currently drafted, H.R. 2335 would actually create more problems than it would solve. We believe the bill would 1) impose new, difficult, and burdensome process requirements and increase government cost, and 2) inappropriately change the process from the wise use and conservation of public trust resources of a whole river, to one that makes each individual project economically viable, no matter what the impact on public's resources. The impact of this bill as drafted would especially compromise the resource stewardship role of the US Fish and Wildlife Service and the National Marine Fishery Service in maintaining the Nation's fish and wildlife resources. Since the Federal Power Act preempted traditional State's rights to protect fish and wildlife in hydropower licensing, the role reserved under Section 18 (16 USC 811) for the Secretaries of Interior and Commerce to prescribe fishways is of critical concern to our State fish and wildlife agency membership.

The IAFWA recognizes the significant role of hydropower in the Nation's mix of energy sources; however, inadequately mitigated hydroelectric facilities have the potential for exacting a substantial toll on the surrounding environment. Hydroelectric plants can obstruct fish movements and migration, alter water temperature and depth, injure or kill fish entrained through turbines, deter normal river sediment flows and even desiccate rivers entirely, devastating ecosystems and endangering fish populations. Often with only a few modifications, these facilities can operate while mitigating most adverse impacts on fish and wildlife resources. It is important that the law continue to provide the U.S. Fish and Wildlife Service and the National Marine Fisheries Services adequate time and authority to examine the operations of hydroelectric plants and submit reasonable conditions for licensing.

The following concerns are submitted for your consideration:

- Consulting agencies are required to consider the various economic impacts of their conditions under § 32, subsection (b)(1)(A) of the bill. However, these agencies

do not have the legal authority and staff resources to compel submission of relevant economic data from license applicants and to interpret and challenge such submissions.

- The requirements under § 32, subsection (c) would limit the ability of consulting agencies to submit supporting evidence for the conditions they impose. Though the provision requires the use of current data, the use of historical data in conjunction with current data is necessary to demonstrate the long-term impact of these facilities on environmental quality and aquatic populations. Furthermore, the provision which mandates "peer review" may obviate timely submission of environmental data. Field studies are currently reviewed by supervising biologists for competency and accuracy. Additional "peer review" would be time-consuming, costly and unnecessary.
- Administrative review under § 32, subsection (e) would allow a hydroelectric facility operator, prior to filing a license application, to obtain an expedited review of conditions imposed by a consulting agency. However, the Federal Energy Regulatory Commission (FERC) requires environmental studies to be conducted *after* the submission of the application and any Additional Information Requests, when the case is deemed "ready for environmental review". The bill's new provision would require the consulting agency to defend its conditions before an administrative law judge without access to relevant information contained in the license application.
- Also under § 32, subsection (e), an administrative law judge in a court of competent jurisdiction would be instructed to consider the effect of the conditions on "energy and economic values of the project". The judge would not be required to consider the reasonableness of the conditions given the potential environmental impacts of a project. An impartial determination would require consideration of both environmental impacts as well as economic impacts.
- Section 32, subsection (f) would set a maximum limit of one year as the deadline for submission of conditions from consulting agencies, but would not legislate a minimum time frame, which could permit FERC to set unreasonably short deadlines.

We believe there is a cooperative process already well underway which could achieve improvements to the hydropower licensing and relicensing processes without the negative impacts on both process and natural resources of H.R. 2335. That effort is being conducted by the Interagency Task Force To Improve Hydroelectric Licensing Processes. Its steering committee is comprised of senior representatives from the Federal Energy Regulatory Commission, the Department of the Interior, the Department of Commerce, the Department of Agriculture, the Environmental Protection Agency, and the Council on Environmental Quality. We understand that its working groups are making great progress cooperatively, and urge you to consider their recommendations. Until such time as those recommendations become available, we urge that no further legislative action be taken on H.R. 2335.

Thank you for this opportunity to express the Association's concerns about H.R. 2335. I have attached a more detailed analysis of the bill for your consideration and use.

Sincerely,

GARY J. TAYLOR
*Legislative Director*

cc: Hon. Thomas Bliley, Chairman, Commerce Committee
Hon. John Dingell, Ranking Minority Member, Commerce Committee
Hon. Ralph Hall, Ranking Minority Member, Energy and Power Subcommittee
State Fish and Wildlife Directors

**Comments on HR 2335, the "Hydroelectric Licensing Process Improvement Act of 1999"**
**International Association of Fish and Wildlife Agencies**
**March 28, 2000**

HR 2335 would cause serious problems by impeding or blocking the protection and restoration of fish passage by the responsible federal agencies. The bill will:

1. Impose new, difficult, and burdensome process requirements and increase government cost.

2. Shift the burden from conserving public trust resources on a whole river, to making each individual project economically viable, no matter what the impact on the public's resources.

Here are our specific suggestions and comments on this bill:

"SEC. 2. FINDINGS

(1) and (3) Comment: Hydroelectric developments, especially older facilities, have also caused great environmental problems that still need to be addressed. Many miles of rivers in many states are very nearly dried up or are subjected to large pulses and fluctuations in river flows that severely impact aquatic resources. Dams form impoundments that can dramatically impact the river system by precluding movement of fish, changing water temperatures, trapping and altering sediment transport. Penstocks or power canals on many projects divert water out of the natural channel, bypassing miles of river that receive very little water. Turbines, especially older designs found at plants up for relicensing, kill some of the fish passing through them. Facilities now up for relicensing were often built when little consideration was given to environmental protection measures, and in others we've found that technology that looked promising 50 years ago just didn't work. That is why State and Federal fish and wildlife resource agencies, carrying out their stewardship mission, must call for mitigative measures at hydropower developments.

(5)(A) Comment: There are inefficiencies in the process, many of which could be corrected by FERC rules or actions. We do not believe that untimely submittals by USFWS or NMFS are a significant cause of delay.

Part of the reason why the process is slow is that delays favor the hydropower operators. These developers continue to operate their projects under Annual Licenses, continuing the current operational regime without any new mitigative measures. Thus, any delays favor the developer by postponing changes, and maximizing revenue.

SECTION 3(1). PURPOSE
Comment: This is not the charge or mission of the USFWS or NMFS, nor should it be. Their charge is to provide the prescription for fishways that will keep migratory fish-life perpetuated in the river, as a minimum condition that hydropower developers must meet in using public waters for power production. FERC's mission is to do the broad balancing in determining whether a power license should be issued under conditions that meet the minimum requirements of State and Federal environmental laws.

"SEC. 4. PROCESS FOR CONSIDERATION BY FEDERAL AGENCIES OF CONDITIONS TO LICENSES.
New section (to FPA) 32
"(b) FACTORS TO BE CONSIDERED.--

"(1)(A) Comment: Consulting agencies do not have the power to comply with this condition unless they are given legal authority and staff resources to compel submission of such information to them, and to interpret, challenge, and adjudicate disputes in submittals. In those states with a deregulated electric market, a generator's offering price for a megawatt is a proprietary secret, submitted to the Independent System Operator hourly via sealed electronic bids.

"(1)(B) Comment: Conditions on fish passage and protection are the minimum necessary to maintain the propagation and survival of migratory fish-life in the river. These conditions by their nature are one independent factor which may or may not be compatible with other conditions. FERC's role is to develop a license that meets this and other environmental minima and produces power. The fish passage facilities have a cost, but hydropower production and fish passage can be compatible.

"(2) DOCUMENTATION.--

Comment: We do not perceive that there is a problem with USFWS or NMFS not considering submittals. A simple statement of the factors considered in arriving at their conclusion would probably provide the key information being sought, without the burdensome documentation exercise. The reduced paperwork will save time and money, and keep the focus on the real issue.

"(c) SCIENTIFIC REVIEW.--

"(2) DATA--
"(A) Comment: The limitation to "current empirical data or field-tested data" is unrealistically and inappropriately limiting. It precludes use of historical data of what was there before project construction, and thus precludes any restoration. The charge to scientists is to interpret all available data, evaluate the limitations inherent to virtually any data set, and draw reasonable conclusions. Unless there is an intent to fund USFWS and

NMFS to do instantaneous, high-quality studies (that will cost time and money), staff will be faced with making reasonable decisions on less-than-perfect, mixed-age data.

"(B) Comment: (We interpret "peer review" as used in this bill to be the process a scientific article goes through before being published in a scientific journal. Please recognize that prescriptions are usually issued at the field-office level, which means that the work of a line biologist has already been reviewed by a supervising biologist, an existing, *de facto* peer review.)

The requirement for "peer review" is an inequitable and unrealistic requirement. It is inequitable because no other submission in the entire FERC process is subjected to peer review--not economic, not engineering, nothing! It is unrealistic because there is no mechanism for peer review, and a new, fair, and unbiased consulting industry will need to be created to carry it out. Once created, peer review would only slow the current process while the additional review occurred. This process slow-down would appear contrary to the stated legislative objective to improve efficiency.

"(e) ADMINISTRATIVE REVIEW.--

"(1) OPPORTUNITY FOR REVIEW. Comment: The timing of the opportunity seems untenable, as it is occurring before the license application is filed. This would mean it is before FERC-required studies are completed, or the FERC Additional Information Requests (which follow license submission and precede the "ready for environmental review" determination) results are available. This seems like a strange time for an agency to have its preliminary determination subjected to adjudication, that is, before the record is even complete!

"(A) Comment: The proposed wording **(emphasis added)**:

> "(A) the reasonableness of the condition in light of the effect that implementation of the condition will have on the energy and economic values of **a project**"

wrongly and harmfully makes the economics of any individual project (no matter how ill-conceived or shaky) superior to any consideration of the public interest and public-trust resources. This is unsupportable for the following reasons:

- *It violates public trust responsibilities.* Fish and wildlife are public resources which are held in public trust for the Nation's citizens by the State and Federal government. In passing the Federal Power Act and amendments (FPA), Congress preempted states' rights to public waters and public fisheries, but Congress did not impose "water power at any price." Rather, FPA Section 10 sets the standard for selecting projects "best adapted to a comprehensive plan..." that includes a number of public considerations,

including "...for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat),... ." Further, FPA Section 18 requires construction of fishways; in recognition of the harm that unmitigated dams and turbines have on interstate and intrastate public trust fisheries resources. The proposed wording makes all these public purposes subservient to private profit in the granting of a Federal license to develop public waters.

- *It is imprudently narrow.* It does not consider the impacts on a whole river system, nor the need (or lack of need) for the power, nor the needs of fish propagation and survival, nor the monies governments and private industries have spent in pollution control to restore rivers and fisheries. The only "frame of reference" is the economics of the individual project. Lack of an adequate fishway can nullify all the good accomplished at considerable expense by decades of comprehensive programs. Yet a project could kill any fishway prescription by simply claiming that the prescription cost too much.

- *It will extirpate species and make some stocks extinct.* An adequate fish passage route is a physical necessity for migratory species to complete their life cycle and survive in that river. In contrast, electricity can be generated many ways; including adequately-mitigated hydroelectric. Hydroelectric without adequate fish passage does not have to be the only alternative, as would be forced by this proposed law change.

- *Costs of adequate protection are not necessarily high.* As we understand it, energy losses have not been substantial at the "Class of 1993" projects relicensed in several states. Generally the total cost of mitigation has been less than 5% in the projects we are aware of, including land transfers, base flows in rivers, restoring minimum flows in bypassed reaches, reduced impoundment fluctuations, new intake structures, downstream fish passage structures, passage flows, etc.

"(2) COMPLETION OF REVIEW.--Comment: This adds a process and deadlines to execute the review of preliminary conditions. We disagree with the provisions changing the prescription to a "recommendation" if the deadline is not met, especially where hearing processes, remand, and other actions are required all within 180 days. The nature of these prescriptions are too critical to be watered down to a recommendation.

"(3) REMAND.--Comment: We have already commented that the criteria being proposed under SEC. 32(e)(1)(A) are wrong and harmful for the reasons listed there, so it follows that the application of those criteria here are also objectionable. Remanding a proposed prescription back to a consulting agency for re-consideration is not going to change the primary conflict involved. That is, it will still cost money to do an adequate job of

protecting public trust resources, and if inadequate fish passage is provided, migratory public trust fish resources will be impaired, extirpated, or even made extinct. Unless Congress proposes to budget USFWS or NMFS to build fishways at public expense to save profits for private projects using public waters, remand will change nothing.

"(f) DEADLINE FOR SUBMISSION OF CONDITIONS.--Comment: There is a disconnect between subsection (1) and (2). Subsection (2) sets a reasonable outside limit for the deadline of up to 1 year after the project is found "ready for environmental review." However, Subsection (1) sets no reasonable minimum time frame for consulting agency action, nor does it tie the minimum time to the "ready for environmental review" milepost. This is a problem. Under the proposed wording, FERC could set a deadline of unreasonably short length. FERC could also set a deadline before the "ready for environmental review" milepost, that is, before all the answers to FERC "additional information requests" have been satisfied.

"(g)(1) ECONOMIC ANALYSIS BY THE COMMISSION.-- Comment: FERC already does an economic analysis of all the costs of the project in deciding whether or not the project is economical. We see no reason to add a specific requirement for consulting agency conditions, since it changes nothing. The Section 18 fishway prescriptions, like other environmental minimum conditions, are the "floor" that a developer must minimally meet before being granted a federal license to use public resources to generate power. That is, the Section 18 prescription is no different from other statutorily-required minimum requirements like dam safety provisions, or the minimum requirements to meet water quality standards. They are the minima necessary to protect public health, welfare, and public trust resources.

"(h) COMMISSION DETERMINATION ON EFFECTS OF CONDITIONS.--Comment: This provision is unnecessary as FERC does not have the authority to overturn prescriptions: nor does it change the physical facts that failure to provide adequate passage for migratory public trust fish resources will result in their impairment, extirpation, or even stock extinction. Unless Congress proposes to budget FERC to build fishways at public expense to save profits for private projects using public waters, the Commission determination will change nothing.

"SEC. 6. STUDY OF SMALL HYDROELECTRIC PROJECTS.

Comment: This section proposes a study and report for a separate license procedure for projects with a minimum capacity of 5 megawatts or less. This seems unnecessary and redundant as several such FERC licensing procedures have been in place for years. (See 18 CFR Subchapter B Part 4, Subpart G--"Application for Licenses for Minor Water Power Projects and Major Water Power Projects 5 Megawatts or Less.") In addition, there are license exemption procedure for qualifying projects 5 MW or less. Further, there is a Conduit Exemption does not have a limitation on size for qualifying projects. Lastly, projects 1.5 MW or less qualify as Minor water power projects (18 CFR 4.3[b][17]).

ONE HUNDRED SIXTH CONGRESS

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JAMES E. DERDERIAN, CHIEF OF STAFF

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

January 19, 2000

The Honorable Bill Richardson
Secretary
U.S. Department of Energy
Forrestal Building
Washington, D.C. 20001

Dear Mr. Secretary:

I am writing in regard to H.R. 3447, legislation that would amend the Pacific Northwest Electric Power Planning and Conservation Act to allow the Bonneville Power Administration (BPA) to sell electricity to joint operating entities (JOEs).

Supporters of H.R. 3447 are anxious to move this bill quickly through the legislative process. While I certainly appreciate their desire to see swift enactment of their legislation, neither the House Commerce Committee nor the House Resources Committee, which have jurisdiction over this matter, have held any hearings on this proposal. The lack of a legislative record on H.R. 3447 leaves many unanswered questions which, for the sake of the American taxpayer, must be addressed before Congress acts on this proposal. Unfortunately, neither Committee has scheduled a hearing on H.R. 3447 at this time.

However, in an effort to expedite Congress' consideration of this matter, I have enclosed a copy of the legislation and some questions regarding its impact. I respectfully request that you respond to these questions as quickly as possible, and in any case, by no later than February 11, 2000.

Thank you in advance for your prompt attention to my request.

Sincerely,

JOHN D. DINGELL
RANKING MEMBER

Attachment

**Questions for the Department of Energy Regarding H.R. 3447**

1. As defined in the legislation, a JOE is an entity that is "lawfully organized under state law as public body or cooperative...and is formed by, and whose members or participants are, two or more public bodies or cooperatives, each of which was a customer of the Bonneville Power Administration" prior to January 1, 1999.

   (a) Which states have entities that meet the legislation's definition of a JOE?

   (b) Under each applicable state law, what is the form of a JOE? Is it a corporation? Is the JOE a nonprofit or not-for-profit entity?

   (c) For what purpose do JOEs exist under each state's laws?

   (d) What is the Department's understanding of the difference between a member and a participant of a JOE?

   (e) Please provide a list of all entities that the Department can identify as qualifying as a JOE under this legislation and for each, please provide a listing of all members and all participants in the JOE.

2. H.R. 3447 limits eligibility for formation of joint operating entities to those cooperative or public body utilities that purchased power from BPA on or before January 1, 1999.

   (a) Does this requirement preclude any current customers of BPA from forming a JOE?

   (b) Does this requirement preclude any current customers of BPA from participating in a JOE?

   (c) Does the Department support precluding future cooperative or public body utilities from forming or participating in JOEs under this legislation? If not, should the Secretary be permitted to add other JOEs by rule?

3. Supporters of H.R. 3447 maintain that other federal power marketing administrations allow requirements customers to jointly purchase and pool resources, and that this legislation is necessary to allow certain current BPA customers to do the same.

   (a) Do other federal power marketing agencies allow requirements customers to jointly purchase and pool resources?

   (b) Are other federal power marketing agencies required to sell electric power at wholesale to JOEs or substantially similar organizations? If so, please cite examples in law.

   (c) In order to afford BPA customers an opportunity to jointly purchase power and pool resources, is it necessary that BPA be required to sell power to JOEs, as the legislation currently mandates, or is it enough to allow BPA to sell to such entities?

(d) Do any statutory barriers exist that prohibit BPA from allowing its public preference customers to engage in these activities? Please provide a specific cite. If no statutory barrier exists is there are rule or court decision that prohibits BPA from allowing its public preference customers to engage in these activities?

(e) Are there instances in which BPA has allowed public preference customers to jointly purchase, aggregate and pool purchases? If so, what distinguishes those purchases from activities that would occur under this legislation?

4. What operational or fiscal opportunities for BPA customers would this legislation provide that are not otherwise currently available?

5. Could enactment of this legislation result in reducing the power available to serve other customers in the region, such as residential and small farm customers of private utilities or the Direct Service Industries (DSIs).

6. Could enactment result in increased costs to other customers in the region such as private utility customers or DSIs?

7. Could enactment of this legislation reduce BPAs revenues by any measure? If so, how would BPA recoup any lost revenues?

8. The Administration has forwarded to Congress electricity restructuring legislation that would impose a surcharge on BPA customers to finance the costs of environmental remediation measures.

(a) Could a JOE as constituted under this legislation pay less in surcharges than the total of the surcharges that would be assessed upon its individual members?

(b) Could a JOE pay less in transmission fees than its individual members would otherwise pay?

9. The legislation precludes resale of BPA power by public bodies or cooperatives to which the JOE sells power, except to retail customers of the entity's participants or other participants within the entity, or *except as otherwise permitted by law.*

(a) The legislation requires the sale of power to a JOE, but the prohibition on resale of preference power is placed not on the JOE, but rather on the public bodies or cooperatives that purchase from the JOE. Under the legislation, would a JOE be precluded from reselling electricity?

(b) Could the legislation enable preference customers to purchase power that is surplus to their needs, with the surplus then sold on the open market (e.g., arbitraging preference power)?

(c) Please identify all avenues for JOE customers to resell preference power that would "otherwise be permitted by law."

10. BPA is currently in the process of setting rates for 2001 power sales and will soon begin contract negotiations for purchases during that period.

(a) In order for this legislation to influence BPA customer resource plans during that time frame, when does this legislation need to be enacted? Please explain the reason for your answer.

(b) Could a JOE enjoy special benefits in a rate negotiation that would not be enjoyed by other public utility customers?

11. Under the legislation, what actions could the Secretary or the Administrator take against a JOE that has violated the limitations of the legislation? For example, could the Secretary revoke recognition of a JOE whose customers violated the prohibition on power resales?

12. How would the Department implement H.R. 3447 if enacted? Would the Department issue any new rules or regulations?

13. Does the Administration have any concerns about enactment of this legislation other than those expressed in response to the questions posed above?

14. Does the Administration support or oppose H.R. 3447 in its current form?

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U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

March 27, 2000

The Honorable Bill Richardson
Secretary
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Dear Secretary Richardson:

On January 19, 2000, I wrote you a letter seeking the Department of Energy's (DOE) comments on H.R. 3447, legislation that would amend the Pacific Northwest Electric Power Planning and Conservation Act to allow the Bonneville Power Administration (BPA) to sell electricity to joint operating entities (JOEs). On February 11, 2000, Assistant Secretary John Angell wrote me that a response would be sent to me presently. Nearly two months have passed since the Department's last correspondence and I have yet to receive a response to my questions.

As I informed you in my original letter, I was writing in an effort to help supporters of H.R. 3447 to expedite Congress' consideration of the legislation. I sent similar letters to five other stakeholders at about the same time I corresponded with you; those stakeholders responded in full at least one month ago. This disparity is very perplexing since the information I requested from the Department is of a basic nature, on a proposal that had been considered previously by the Senate, and therefore I find it difficult to believe that my request was overly burdensome or extraordinary.

Since the time I wrote you, the Commerce Committee has scheduled a hearing on H.R. 3447 for March 30, 2000, at 10:00 a.m. Your Department has stated its intention to send a witness to the hearing. If the Department has been unable to respond to my questions thus far, it is very difficult for me to understand how your witness will be able to answer such questions three days from now. I would also point out that it is primarily due to the Department's inability or unwillingness to respond in a timely fashion, that the Energy and Power Subcommittee must convene to hear testimony on this legislation.

The Honorable Bill Richardson
Page 2

As it is the Committee's responsibility to conduct due and diligent oversight into these matters, and it is DOE's duty to keep the Committee fully informed, I am enclosing a copy of my original questions and I am again requesting a detailed response to each prior to the hearing.

Sincerely,

JOHN D. DINGELL
RANKING MEMBER

cc: The Honorable Doc Hastings
The Honorable Greg Walden
The Honorable Peter DeFazio
The Honorable Ron Wyden
The Honorable Tom Bliley
The Honorable Joe Barton
The Honorable Rick Boucher

**Department of Energy**

Bonneville Power Administration
P.O. Box 3621
Portland, Oregon 97208-3621

EXECUTIVE OFFICE

March 29, 2000

In reply refer to: L-7

The Honorable John D. Dingell
Ranking Member
Committee on Commerce
U.S. House of Representatives
Washington, DC 20515-6115

Dear Representative Dingell:

This is in response to your letter of January 19, 2000, to Secretary Richardson regarding proposed legislation H.R. 3447 that would amend the Pacific Northwest Electric Power Planning and Conservation Act to allow Bonneville Power Administration (BPA) to sell electricity to joint operating entities (JOE's).

Sincerely,

J. A. Johansen

Judith A. Johansen
Administrator and Chief Executive Officer

Enclosure

cc:
The Honorable Thomas J. Bliley
Chairman
Commerce Committee
United States House of Representatives
Washington, DC 20515-6020

**Question & Answers for the House Commerce Committee**
**On H.R. 3447—Joint Operating Entities (JOE's)**

1. **As defined in the legislation, a JOE is an entity that is "lawfully organized under state law as public body or cooperative . . . and is formed by, and whose members or participants are, two or more public bodies or cooperatives, each of which was a customer of the Bonneville Power Administration" prior to January 1, 1999.**

   (a) **Which states have entities that meet the legislation's definition of a JOE?**

   To our knowledge, all four of the Northwest states--Oregon, Washington, Idaho, and Montana--have entities that may meet the definition of a JOE in the legislation.

   (b) **Under each applicable state law, what is the form of a JOE? Is it a corporation? Is the JOE a nonprofit or not-for-profit entity?**

   The answer to these questions depends on the individual state laws of each state under which a JOE may form. This question would be better answered by the specific organizations that seek to qualify as a JOE.

   (c) **For what purpose do JOE's exist under each state's laws?**

   This question would be better answered by the organizations that seek to qualify as JOE's. It is our understanding, however, that the general purpose of these organizations is to provide services to public body and cooperative members, which would provide cost savings that might not otherwise be available to a single member.

   (d) **What is the Department's understanding of the difference between a member and a participant of a JOE?**

   The legal rights, duties, and obligations may differ for a member compared to a participant. Our general understanding, subject to correction by the organizations that seek to qualify as JOE's, is that a member of a JOE would have full rights, including participation on the governing board or body of the organization. A participant might not have the responsibility or privilege of a member, but be able to receive services from the organization.

   (e) **Please provide a list of all entities that the Department can identify as qualifying as a JOE under this legislation and for each, please provide a listing of all members and all participants of the JOE.**

   The following is a list of entities of which the Department believes may qualify as JOE's. There may be others.

   Possible JOE organizations:

   Pacific Northwest Generating Cooperative (PNGC): Blachly-Lane Electric Co-op (Eugene, OR); Central Electric Cooperative (Redmond, OR); Consumers Power, Inc., (Philomath, OR); Coos-Curry Electric Co-op (Port Orford, OR); Douglas Electric

Co-op (Roseburg, OR); Lane Electric Co-op (Eugene, OR); Lost River Electric Co-op (Mackay, ID); Northern Lights Inc. (Sandpoint, ID); Oregon Trail Electric Co-op (Baker City, OR); Raft River Rural Electric Co-op (Malta, ID); and Umatilla Electric Co-op), (Hermiston, OR).

Oregon Utility Resource Coordination Association (OURCA): City of Ashland, City of McMinnville, Eugene Water and Electric Board, Clatskanie People's Utility District, Emerald People's Utility District, Northern Wasco County People's Utility District, and Tillamook People's Utility District.

The Idaho Energy Authority (IdEA): Cities of Burley, Idaho Falls, Soda Springs, Rupert, Heyburn, United Electric and Lower Valley Energy. A pending member is Idaho County Light and Power.

Western Montana Electric Generating and Transmission Cooperative: Missoula Electric, Mission Valley Power, Lincoln Electric, Flathead Electric, Glacier Electric, Ravalli County Electric, and Vigilante Electric.

2. **H.R. 3447 limits eligibility for formation of joint operating entities to those cooperative or public body utilities that purchased power from BPA on or before January 1, 1999.**

   (a) **Does this requirement preclude any current customers of BPA from forming a JOE?**

   The requirement that JOE's be formed by BPA's public body and cooperative customers that purchased power from BPA on or before January 1, 1999, precludes BPA's investor-owned utility and direct service industrial customers from forming JOE's. Since no new public body or cooperative customers have formed since January 1, 1999, this date requirement does not preclude any of BPA's current public customers from forming JOE's.

   (b) **Does this requirement preclude any current customers of BPA from participating in a JOE?**

   Again, the requirement that only BPA's public body and cooperative customers, who were purchasing power from BPA on or before January 1, 1999, may participate precludes BPA's investor-owned utility and direct service industrial customers from participating in a JOE. Since no new public customers of BPA have formed since January 1, 1999, no current public customers are precluded from participating in a JOE.

   (c) **Does the Department support precluding future cooperative or public body utilities from forming or participating in JOE's under this legislation? If not, should the Secretary be permitted to add other JOE's by rule?**

   The Department does not support or oppose this legislation. We do not, however, believe that eligibility to form or participate in a JOE should be limited to only those public customers that purchased power from BPA on or before January 1, 1999. The Department believes that future public agency and cooperative customers of BPA should be eligible to form a JOE or participate in a JOE.

3. **Supporters of H.R. 3477 maintain that other federal power marketing administrations allow requirements customers to jointly purchase and pool resources and that this legislation is necessary to allow certain current BPA customers to do the same.**

   (a) **Do other federal power marketing agencies allow requirements customers to jointly purchase and pool resources?**

   The other Federal Power Marketing Administrations' (PMA) power marketing plans have allowed the accumulation of power allocations for more than one distribution entity by a Generation and Transmission Cooperative (G&T) or a Municipal Joint Action Agency (MJAA), either of which could be considered a JOE. The other PMA's are primarily concerned with the preference status of the members of a JOE. They market federal power to G&T's, MJAA's, distribution cooperatives, and municipalities. They are not required to serve the requirements load of the preference entities and are not required to buy or acquire generating capability to serve the load growth of those preference entities. Distribution entities that are customers of these PMA's have generally combined together for the purpose of obtaining cost-efficient power supplies for those portions of their loads not served by federal power or of obtaining transmission services rather than for the purpose of aggregating federal power.

   (b) **Are other federal power marketing agencies required to sell electric power at wholesale to JOE's or substantially similar organizations? If so, please cite examples in the law.**

   The other PMA's are not compelled to sell to statutorily denominated classes of customers such as utilities and direct service industries. They must first sell power to preference entities that have met the criteria of a marketing plan and are thus entitled to receive an allocation of federal power. The organizational structures of those entities vary.

   (c) **In order to afford BPA customers an opportunity to jointly purchase power and pool resources, is it necessary that BPA be required to sell power to JOE's, as the legislation currently mandates, or is it enough to allow BPA to sell to such entities?**

   Language that authorized rather than required BPA to make sales to a JOE under section 5(b)(1) for purposes of meeting the firm load requirements of its members or participants would be sufficient to allow BPA to sell federal requirements power to a JOE. If BPA were not directed by Congress to sell power to JOE's, the Administrator could exercise discretion as to whether or not to make such a sale. The Administrator would make a determination based on a variety of factors, including whether such a sale was beneficial to BPA's other customers or the members of a JOE, and whether the pooling of the federal power would not disadvantage the government.

   (d) **Do any statutory barriers exist that prohibit BPA from allowing its public preference customers to engage in these activities? Please provide a specific cite. If no statutory barrier exists, is there a rule or court decision that prohibits BPA from allowing its public preference customers to engage in these activities?**

Yes. Several provisions of BPA's statutory authority to market power for purposes of meeting the net firm requirements loads of its utility customers currently limit BPA's ability to sell power to entities like JOE's. Under section 5(b)(1) of the Northwest Electric Power Planning and Conservation Act of 1980, P. L. 96-501, 94 Statute 2697 (Northwest Power Act), BPA is to sell to each individual utility an amount of firm electric power for its firm consumer loads in the region net of the firm resources a customer must apply or has determined will apply to such loads. 16 U.S.C. 839c(b)(1). BPA's obligation is to provide power based on each utility's individual loads and resources, independent of the loads and resources of others. These sales are not discretionary; BPA is obligated to meet each utility's request.

The Bonneville Project Act of 1937, P. L. 75-329, contains provisions in section 2(a) and (b), and sections 4(c) and (d), which limit BPA's authorization to sell blocks of firm requirements power to an entity representing large groups of public bodies or cooperatives. Under section 2(a), the Administrator is to "make all arrangements for the sale and disposition of electric energy generated at the BPA project . . . [not otherwise required for the project]." Section 2(b) expresses the general purpose of encouraging the widest possible use of all electric energy marketed and preventing monopolization of such energy by limited groups.

For the past 60 years, BPA has interpreted these purposes as precluding sales of firm power for regional loads to an entity that does not itself directly serve retail consumers, but that simply reallocates the power to retail utilities. This interpretation also has underpinnings in section 4(c) and (d), which express the intent and requirement that public bodies and cooperatives are to be both sellers and distributors of federal power--i.e., retail utilities with distribution systems--in order to qualify for serving the general public. This interpretation was recently reaffirmed in BPA's Record of Decision on its standards for service policy, issued by the Department in December 1999.

The statutory authorization in the JOE legislation would create a limited exception to these purposes and provisions by acknowledging that a combined sale of power to a JOE for its public members' and participants' net firm requirements loads would be required or permitted. Under this legislation, a JOE acts like a purchasing agent for its members' net firm requirement purchases. Other than its members' right to buy net firm requirements power, it has no independent right to purchase such power unless it is directly serving retail consumer load itself. BPA does see the need to have an express authorization for such sales included in its statutes.

(e) **Are there instances in which BPA has allowed public preference customers to jointly purchase, aggregate and pool purchases? If so, what distinguishes those purchases from activities that would occur under this legislation?**

Yes. BPA sells surplus power to entities purchasing on behalf of its public preference customers. This situation can be distinguished from the activities that would occur under this legislation by the type of power being sold. Under this legislation, a statutory exception is being created that would allow a JOE to purchase firm requirements power under section 5(b)(1) of the Northwest Power Act for its members or participants. Firm requirements power is power BPA sells to meet the firm retail loads of Northwest public and private utilities. Each utility customer is

entitled to request the purchase of such power from BPA in an amount equal to its "net firm load requirements." A utility's "net firm load requirements" is the amount of its retail consumer load that exceeds the amount of its firm resources.

This legislation would allow a JOE to purchase the same amount of net firm requirements power that its members or participants are entitled to purchase from BPA. BPA has not sold net firm requirements power to any entity purchasing power on behalf of a group of BPA's public utility or cooperative customers.

The power that BPA has sold to entities which pool purchases on behalf of groups of its public and cooperative customers is surplus power. BPA's authority to sell surplus power differs significantly from its authority to sell firm net requirements power. Sales of surplus power are made under section 5(f) of the Northwest Power Act, or section 2(a) of the Act of August 31st, 1964, P. L. 88-552, 78 Statute 756, 16 U.S.C. 837a, or section 508 of the Energy and Water Development Act of 1996, P.L. 104-46, 109 Statute 402, 16 U.S.C. 832m, which are different statutory authorities than section 5(b)(1) of the Northwest Power Act.

Unlike federal power sold for the net firm load requirements of regional public customers under section 5(b)(1) of the Northwest Power Act, BPA's surplus power sales are discretionary – not statutorily required – and are not limited to customers' net firm requirements. BPA does not have the statutory obligation to purchase power to make such sales; surplus power sales are made when the energy is available. Much of the surplus power BPA sells is generated in the spring and summer when runoff and flows are high. Surplus power does not have to be used solely to serve retail consumer loads of utilities. Although it may be used to serve load, surplus power may also be resold on the wholesale market consistent with BPA statutory limitations.

4. **What operational or fiscal opportunities for BPA customers would this legislation provide that are not otherwise currently available?**

Generally, customers might realize such benefits as reduction in administrative staff, reduction in legal fees, combinations of operations and maintenance work, or optimized use of the interconnected transmission and distribution system. Pooling would also provide the utilities with greater opportunity to better manage the use of, addition to, or sales from non-BPA resources than they could individually. Since partial service customers are billed on their system peak, aggregation under a JOE could help them manage their diverse peaking situations.

5. **Could enactment of this legislation result in reducing the power available to serve other customers in the region, such as residential and small farm customers of private utilities or the Direct Service Industries (DSIs)?**

We do not believe that the legislation will have this effect. First, the provisions of this bill do not permit a JOE to purchase more firm load requirements power for its members than each member would otherwise be entitled to receive annually from BPA under the terms of section 5(b)(1) of the Northwest Power Act. (Under this legislation, a JOE could also purchase surplus power for its members and participants, as discussed in the answer to question 9(b), below.) Second, BPA may sell power to IOU's under section 5(b)(1) as well, which would benefit the IOUs' residential and small farm consumers. In that case,

BPA is obligated to meet those loads, if necessary by acquiring resources or purchasing power. Thus, assuming no other changes in BPA's authorities to acquire resources or purchase power, the amount of power BPA makes available to the IOU's should not be affected by this legislation.

BPA has set the amount of power that the DSI's will be able to purchase for the next contracting period--fiscal years 2002 through 2006. Assuming those contracts are executed, BPA has a planned amount of firm power available for serving the DSI's and has the ability to acquire or purchase power if necessary to meet those obligations. BPA has included planned purchases of power in its rate case. BPA does not anticipate having to make more purchases than are currently reflected in BPA's rate case.

6. **Could enactment result in increased costs to other customers in the region such as private utility customers or DSIs?**

Enactment of the legislation would probably not result in increased costs to other BPA customers. Because it would aggregate the loads of BPA customers with considerable diversity in their peak loads, a JOE would probably be able to realize lower peak demand charges than the customers' disaggregated demands would yield. Thus, BPA would probably collect lower demand revenues from a JOE than it would have collected from individual customers for power delivered at peak load hours. However, BPA would then have additional peak to sell to other customers, so the reduction is not likely to impact other BPA customers' rates.

7. **Could enactment of this legislation reduce BPA's revenues by any measure? If so, how would BPA recoup any lost revenues?**

Yes. BPA may see a reduction in demand revenues, as noted above, which BPA would likely be able to manage given the diversity of its system loads. Also, the resultant increase in available capacity would then be available for sale, which would offset BPA's revenue loss.

8. **The Administration has forwarded to Congress electricity restructuring legislation that would impose a surcharge on BPA customers to finance the costs of environmental remediation measures.**

   a) **Could a JOE as constituted under this legislation pay less in surcharges than the total of the surcharges that would be assessed upon its individual members?**

   It's possible a JOE would pay less in transmission surcharges, though the actual design of a surcharge mechanism as outlined in the Administration's bill has not been decided. At this point, however, there is no reason to believe that the formation of a JOE advantages or disadvantages its members or participants with respect to the proposed surcharge.

   Subtitle B of Title VIII of the Administration's Comprehensive Electricity Competition Act (CECA) largely supersedes BPA's existing transmission ratemaking and service authorities and imposes Federal Power Act and other requirements. Section 813 of CECA would amend section 205 of the Federal Power Act to include a new subsection (f) that narrowly limits, but provides clarification and certainty as to, the Administrator's authority to surcharge transmission rates for the purpose of

recovering costs otherwise properly recovered through power rates, but unable to be timely recovered through them. This helps avoid shifting risk to the United States Treasury. The surcharge authority is dollar and time limited, and any amounts collected pursuant to the authority must be treated as a loan to the power function.

Section 813 of CECA provides that the surcharge shall be designed to recover costs from transmission users in a manner that (i) minimizes any effect on transmission users' choices among competing suppliers or products, (ii) does not apply to use of the BPA transmission system for power sales outside the Pacific Northwest, and (iii) minimizes bypass of the BPA transmission system by transmission users seeking to avoid the surcharge. Hence, the surcharge does not target any group or groups of transmission users to pay the surcharge, though it is limited to exclude out-of-region power sales.

The Federal Energy Regulatory Commission (FERC) will determine the appropriate design of the surcharge. FERC might very well determine that no one group should be assessed the surcharge because the costs being recovered--likely fish and wildlife costs--represent societal costs in amounts that could not have been reasonably anticipated. On the other hand, FERC might determine that the surcharge should be limited or targeted to limited groups of customers. Regardless of how the surcharge is targeted, FERC would then determine how to recover the costs, whether on the basis of contract demand, past usage, or other factors. How the surcharge is designed will be the subject of considerable debate to FERC.

b) **Could a JOE pay less in transmission fees than its individual members would otherwise pay?**

Yes, it is possible a JOE could pay less in transmission fees, depending upon the type of transmission service purchased by a JOE for its members or participants. JOE's are currently able to function as designated agents for their members for purchasing transmission and do so to combine their transmission arrangements into a single contract. BPA operates under an open access tariff. Its products are standardized and offered to all customers. The rate charged to all customers for the applicable service is the same--whether the customer is a JOE or not.

However, BPA offers different services, and the billing determinants for the services differ. The billing determinant for long-term point-to-point service and for Network Contract Demand service is annual contract demand. There may be considerable diversity in the annual peak loads among a group of customers. Combining customer demand under one contract could result in a lower contract demand to cover the combined system peak demand than would be the case with disaggregated demands. If this happened, the total transmission revenues collected from a JOE would be less. On the other hand, in the case of Network service, the way the billing determinants operate is indifferent to whether or not demand is aggregated under a single contract, and the transmission revenues collected from a JOE would not be affected.

9. **The legislation precludes resale of BPA power by public bodies or cooperatives to which the JOE sells power, except to retail customers of the entity's participants or other participants within the entity, or *except as otherwise permitted by law.***

(a) **The legislation requires the sale of power to a JOE, but the prohibition on resale of preference power is placed not on the JOE, but rather on the public bodies or cooperatives that purchase from the JOE. Under the legislation, would a JOE be precluded from reselling electricity?**

Under this legislation a JOE would be precluded from reselling the firm requirements power it purchases on behalf of its members or participants to other than its members and participants. As stated above, BPA's sales of firm requirements power under section 5(b)(1) of the Northwest Power Act are for the purposes of meeting the net firm load requirements of its utility customers. BPA's utility customers can only use that power to meet the load of its retail customers. A JOE purchasing such power on behalf of its members and participants would also be precluded from reselling that power other than to its members and participants to meet their retail consumer loads.

However, a JOE would not be precluded from reselling BPA surplus power it purchased for its members or participants consistent with statutory limitations, such as, offering it first to Pacific Northwest purchasers. As stated above, BPA currently sells surplus power to entities buying on behalf of its public customers. Currently, these "pooling entities" do not have preference and priority in purchases of surplus power from BPA, even though they may purchase and resell to their members who are BPA public preference customers. This legislation, by giving a JOE the same preference status of its members and participants for purchases of firm requirements power from BPA, will also permit a JOE the same preference status to purchase surplus power from BPA on behalf of those customers. In this case, a JOE would be able to use the priority and preference of its members to purchase surplus power from BPA. A JOE could then use the power to meet its members' or participants' regional firm loads, or, like any other utility purchaser of BPA's surplus power, a JOE could resell that power on the wholesale market, first offering it to customers in the Northwest and then outside the region.

(b) **Could the legislation enable preference customers to purchase power that is surplus to their needs, with the surplus then sold on the open market (e.g., arbitraging preference power)?**

Only to the extent that existing public preference customers have a right to purchase surplus power from BPA. This legislation does not increase or decrease an existing preference customer's right, through a JOE, to purchase and use federal power. Under current statutes, public bodies and cooperative utilities in the region receive preference and priority in all sales of Federal power. These customers can purchase BPA firm power for service to their regional consumer firm loads under section 5(b)(1) of the Northwest Power Act. They can only use that power to meet the load of their retail customers.

Preference customers can also purchase Federal power that is surplus to BPA's firm contract obligations to its regional customers. BPA's authority to sell surplus power is found in section 5(f) of the Northwest Power Act, and other statutes stated in answer 3(c) above.

A Northwest utility may use surplus power in several ways. They may use the power to serve their load, or to displace their higher-cost operating resources. They may also resell their displaced power to other parties on the wholesale market, or they

may resell BPA surplus power by first offering it to customers in the Northwest, and then outside the region. In general, these rules also apply to all purchasers of BPA's secondary or surplus firm power. BPA sells such power to its regional utilities and direct service industrial customers, as well as to other purchasers like power marketers and entities purchasing power on behalf of groups of BPA customers. An exception to this general rule is that BPA's direct service industrial customers can only use surplus power purchases for plant load. Private purchasers, such as power marketers, are prohibited from reselling surplus power purchased from BPA to a private utility or its agent or affiliate, unless the power is purchased as excess power under section 508 of P. L. 104-46.

(c) **Please identify all avenues for JOE customers to resell preference power that would "otherwise be permitted by law."**

As stated above in the answer to question 9(b), a JOE's customers – public entity and cooperative customers of BPA – have preference and priority on purchases of all types of federal power. Firm requirements power can only be resold to their regional retail consumers. Any surplus power purchased from BPA can be used to serve load, displace higher cost non-Federal resources with the displaced power sold on the market, or the surplus power can be resold on the market by first offering it to customers in the Northwest and then outside the region.

10. **BPA is currently in the process of setting rates for 2001 power sales and will soon begin contract negotiations for purchases during that period.**

(a) **In order for this legislation to influence BPA customer resource plans during that time frame, when does legislation need to be enacted? Please explain the reason for your answer.**

Under our current schedule, the legislation would have to be enacted well in advance of September 30, 2000. This date represents the close of BPA's subscription period. In order for BPA customers to utilize the provisions of the JOE legislation for the purpose of jointly contracting with BPA for power, such provisions would need to be enacted with sufficient time prior to the end of the subscription window to allow BPA to both negotiate contracts and to establish JOE eligibility.

(b) **Could a JOE enjoy special benefits in a rate negotiation that would not be enjoyed by other public utility customers?**

No. BPA's price for the firm load requirements products is set in BPA's section 7(i) rate proceeding and is under a published tariff, the Priority Firm Power rate schedule. Where a JOE is purchasing basic power products from BPA for meeting its members' loads in the region under a Northwest Power Act Section 5(b)(1) contract, the BPA price for a JOE's basic service would be the same as that for a member buying directly from BPA.

BPA cannot speculate about whether the price for power resold by a JOE to its members would be the same as if they had purchased from BPA directly because BPA does not know what service charges may be imposed.

11. **Under the legislation, what actions could the Secretary or the Administrator take against a JOE that has violated the limitations of the legislation? For example, could the Secretary revoke recognition of a JOE whose customers violated the prohibition on power resales?**

The remedies available to the Administrator would be actions for breach of the contract, termination of the contract, and claims for damages. If the customer requested service, the next contract offered may contain different terms and conditions and service may be provided at a different rate than the initial rate under a subscription contract. The Administrator may include in BPA contracts terms and conditions that are appropriate, desirable, or necessary to carry out its laws.

12. **How would the Department implement H.R. 3447 if enacted? Would the Department issue any new rules or regulations?**

The Administrator will review the law and make a determination of which entities requesting service from BPA under section 5(b)(1) of the Northwest Power Act may qualify as a JOE, and for which public customers they are requesting service for their net firm consumer loads. BPA would determine that entity's qualification for taking federal power consistent with the terms of its statutes. For the public agency and cooperative customers on whose behalf a JOE requests service, BPA would then negotiate the appropriate power sale contract terms and conditions relevant to a sale to a JOE. Among other actions, BPA would determine the amount of net firm consumer load BPA would serve for each member (individual customer load minus that customer's firm resources).

Having reviewed the qualifications, product requests, and individual member net load calculations, appropriate terms and conditions necessary to a contract with a JOE, and the application of current policies to the service to be provided, BPA would offer a power sale contract to a JOE. BPA does not anticipate at this time the need for any new rule or regulation to implement the legislation, though BPA may consider the issuance of a public policy if needed.

13. **Does the Administration have any concerns about enactment of this legislation other than those expressed in response to the questions posed above?**

The views expressed in these responses are those of the Department and BPA. Neither the Department nor BPA have concerns other than those expressed in the response above.

14. **Does the Administration support or oppose H.R. 3447 in its current form?**

The Administration does not oppose this legislation. It neither supports nor opposes the legislation.

ONE HUNDRED SIXTH CONGRESS

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JAMES E. DERDERIAN, CHIEF OF STAFF

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

February 8, 2000

Mr. Greg Booth
Oregon Utility Resource Coordination Association
c/o Clatskanie PUD
P.O. Box 216
Clatskanie, Oregon 97016

Dear Mr. Booth:

I am writing in regard to H.R. 3447, legislation that would amend the Pacific Northwest Electric Power Planning and Conservation Act to allow the Bonneville Power Administration (BPA) to sell electricity to joint operating entities (JOEs).

As you may know, neither the House Commerce Committee nor the House Resources Committee, which have jurisdiction over this matter, have held any hearings on this proposal. The lack of a legislative record on H.R. 3447 leaves many unanswered questions which, for the sake of the American taxpayer, must be addressed before Congress acts on this proposal. Unfortunately, neither Committee has scheduled a hearing on H.R. 3447 at this time.

In an effort to expedite Congress' consideration of this matter, I have enclosed a copy of the legislation and some questions regarding its impact. I respectfully request that you respond to these questions as quickly as possible, and in any case, by no later than February 22, 2000.

Thank you in advance for your prompt attention to my request.

Sincerely,

JOHN D. DINGELL
RANKING MEMBER

Attachment

(a) Is OURCA aware of any existing statutory barriers that prohibit BPA from allowing its public preference customers to engage in these activities? Please provide a specific cite. If no statutory barrier exists is there a rule or court decision that prohibits BPA from allowing its public preference customers to engage in these activities?

(b) Is OURCA aware of instances in which BPA has allowed public preference customers to jointly purchase, aggregate and pool purchases? If so, what distinguishes those purchases from activities that would occur under this legislation?

10. Do you have any other comments about this legislation other than those expressed in response to the questions posed above? If so, please elaborate.

11. Do you support or oppose H.R. 3447 in its current form? Please explain your answer.

CLATSKANIE
PEOPLE'S UTILITY DISTRICT

Board of Directors
Ray Cowan
Kenneth Erickson
Merle Gillespie
Warren Nakkela
Keith Sutfin

General Manager
Gregory A. Booth

February 18, 2000

The Honorable John D. Dingell
Ranking Member
Committee on Commerce
U.S. House of Representatives
Washington, DC 20515

Dear Representative Dingell:

I am writing in response to your February 8 letter requesting the comments of the Oregon Utility Resource Coordination Association (OURCA), on H.R. 3447, legislation to authorize joint operating entities, such as OURCA, to purchase power from the Bonneville Power Administration (BPA) to meet the firm power requirements of its members.

As detailed in our attached responses, OURCA supports the intent of H.R. 3447 and urges timely enactment. Passage of this legislation will facilitate coordinated power supply planning among BPA's preference customers, providing both them and BPA with added efficiencies. This legislation will enable municipal utilities, people's utility districts, and cooperatives in the Pacific Northwest to manage their resource planning similar to how customers of other federal power marketing agencies do today. We do not believe passage of this legislation would have an adverse impact on BPA or other BPA customers. To the contrary, we believe that this legislation will provide enhanced efficiencies that directly or indirectly serve the entire region.

On behalf of OURCA, I wish to thank you for your efforts to expedite consideration of this legislation.

Sincerely,

Greg Booth

Gregory A Booth, General Manager
OURCA President

469 N. Nehalem St., P.O. Box 216, Clatskanie, Oregon 97016
(503) 728-2163 • Fax (503) 728-2812 • E-Mail clatspud@clatskanie.com

# Responses of the Oregon Utility Resource Coordination Association (OURCA) To The February 8, 2000 Questions of Representative John Dingell On H.R. 3447

**1: As defined in H.R. 3447, a JOE is an entity that is "lawfully organized under state law as a public body or cooperative...and is formed by, and whose members or participants are, two or more public bodies or cooperatives, each of which was a customer of the Bonneville Power Administration" prior to January 1, 1999.**

**a. Please explain your current relationship with PNGC Power.**

OURCA has no formal relationship with PNGC Power. PNGC Power is a generation and transmission (G&T) cooperative comprised of cooperative utility members in Oregon and Idaho. In addition, PNGC Power has contractual participants that are not full members.

In contrast, OURCA is an intergovernmental agency, formed under the laws of Oregon. OURCA was formed in September 1999 by the action of three municipalities and four people's utility districts (PUDs) which operate electric utilities in Oregon. These utilities include the City of Ashland, McMinnville Light & Power, the Eugene Water & Electric Board, and the Clatskanie, Emerald, Northern Wasco County, and Tillamook PUDs. The first action of the OURCA Board of Directors was to expand the membership to include the City of Forest Grove.

As a new entity, OURCA does not have an independent staff or directly own any utility resources. Rather, OURCA draws on the resources of its members to provide coordinated planning, utility operations and administration on behalf of its members.

**b. If PNGC were to become a JOE under H.R. 3447, would the Oregon Utility Resource Coordination Association (OURCA) be a member or participant in the JOE.**

OURCA itself qualifies under the legislative definition contained in H.R. 3447. In fact, OURCA was formed largely for the purpose of performing the coordinated operational functions as envisioned by H.R. 3447. OURCA's members intend to realize these benefits through OURCA and have no need to become members of or participants in PNGC.

**2. Please provide a list and explanation of each of the operational and fiscal opportunities this legislation would provide OURCA that are not otherwise currently available.**

OURCA envisions a number of potential operational and fiscal opportunities through coordinated utility purchasing, planning and administration. Many of these opportunities, such as joint purchasing of distribution poles or transformers, are available absent this legislation.

As drafted, this legislation provides opportunities for OURCA specifically in terms of the joint purchasing and scheduling of power from the Bonneville Power Administration (BPA). Each of the current members of OURCA are public preference customers of BPA.

Passage of H.R. 3447 enables OURCA to act as an agent to coordinate the power purchases of the OURCA members from BPA. OURCA has not yet decided what form that coordination will take. Options range from joint billing and coordinated management of multiple contracts to a single contract based on the combined net requirements of OURCA members.

3. **H.R. 3447 limits eligibility for formation of joint operating entities to those cooperative or public body utilities that purchased power from BPA on or before January 1, 1999.**

   **(a) Do you support precluding cooperative or public body utilities from forming or participating in JOEs under this legislation in the future? If so, why?**

No. OURCA sees no compelling reason for either the January 1, 1999 member eligibility restriction or the restriction that JOEs must form by the date of enactment.

The legislation is designed to provide public preference customers of BPA with opportunities to capture administrative and operational efficiencies. OURCA sees no legitimate public policy reason why certain current (those who fail to form a JOE before enactment of this legislation) or future public preference customers should be denied the opportunity to capture these benefits.

For instance, the City of Hermiston, Oregon is in the process of forming a municipal utility. Because Hermiston was not a customer of BPA on or before January 1, 1999, Hermiston would not be an eligible member of a JOE. Ironically, based on a strict interpretation of H.R. 3447, Hermiston could not participate in a JOE in *any* form – even to simply receive newsletters– without negating the eligibility of a JOE. State laws provide for formation of municipal, PUD and cooperative utilities, and federal law provides these public preference customers with priority purchase rights to BPA power. OURCA fails to see a public policy rationale for arbitrarily precluding lawfully constituted public preference customers from managing their lawfully purchased BPA resources under this legislation.

   **(b) Should the Secretary of Energy be permitted to add other JOEs by rule?**

Secretarial rulemaking would be one means of resolving this unnecessary restriction, although rulemaking is a potentially lengthy and expensive process. As stated above, OURCA sees no reason for the restriction. In addition, any administrative remedy should provide for both addition of new JOEs *and* the addition of new members or participants in either a new or existing JOE.

4. **Could enactment of this legislation result in reducing the power available to serve other customers in the region such as residential and small farm customers of private utilities or the Direct Service Industries (DSIs)?**

Under the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), BPA has a legal obligation to provide a power exchange with participating regional investor-owned utilities (IOUs) for service to such IOUs' residential and small farm consumers. In addition, any regional utility can seek to have BPA provide power to serve its net requirements. Nothing in H.R. 3447 alters or limits these provisions. BPA is not statutorily required to provide service to the Direct Service Industries (DSIs) post-2001.

More importantly, OURCA does not believe that enactment of H.R. 3447 will reduce the power available to serve other customers in the region. The intent of the legislation is to limit the purchase of power by the JOE to the sum of its members' net requirements. In other words, if a JOE's members could individually purchase a total of 100 MW of requirements power from BPA, then the JOE could purchase no more than 100 MW of requirements power from BPA under this legislation.

In fact, a JOE could conceivably purchase *less* requirements power from BPA than its members would do so individually if the JOE is able to capture "diversity benefits" reflecting differences in the peak demand of its members. Any reduction in aggregated purchases would mean more power available for other regional customers.

5. **Could enactment result in increased costs to other customers in the region such as private utility customers or DSIs?**

OURCA does not believe that enactment of H.R. 3447 will cause increased costs to other regional customers. First, enactment of H.R. 3447 could provide BPA with some administrative efficiencies, the benefit of which will inure to all regional customers. Finally, if a JOE were to purchase less power as a result of "diversity benefits," then the power that would be "freed up" – which occurs during valuable peak periods – could be sold to other regional or extra-regional parties with the resulting revenues benefiting all BPA regional customers.

6. **Could enactment of this legislation reduce BPA's revenue by any measure? If so, how would you recommend that BPA recoup any lost revenues?**

As noted in response to Question 5, we do not believe that enactment of this legislation will reduce BPA's revenue by any significant measure. If the JOE purchases less power

from BPA than the members would purchase individually, BPA will be able to recover the lost revenue by remarketing the "freed" power to other regional or extra-regional parties.

7. **H.R. 3447 contains language that precludes resale of BPA power by public bodies or cooperatives to which the JOE sells power, except to retail customers of the entity's participants or other participants within the entity, or except as otherwise permitted by law.**

   (a) **Could the legislation enable preference customers to purchase power that is surplus to their needs, with the surplus then sold on the open market (e.g., arbitraging preference power)?**

The intent of the legislation is to restrict the JOE's purchase of requirements power from BPA to the sum of the net requirements of its members, and OURCA supports that intent. However, the language could create a problem for JOEs, such as OURCA, whose members have generation resources of their own and are not full requirements customers of BPA.

The current language of H.R. 3447 authorizes BPA to sell power to a JOE "solely for the purpose of meeting the regional firm power customer loads" of its regional public preference customer members. This language does not fully mirror the language of Section 5(b) of the Northwest Power Act, which provides that BPA shall offer to sell power to meet a customer's firm load, to the extent that the firm load exceeds the customer's own resources. OURCA is concerned that this might potentially create confusion and lead to the unintended circumstance where BPA would be required to sell to the JOE an amount of power that is more than the actual requirements of the JOE membership due to the existence of other utility power supply resources of the JOE's members. Similarly, the language might unintentionally preclude BPA from selling other non-requirements products to a JOE that other public preference customers (or even non-preference customers) could purchase.

Notwithstanding this potential statutory construction, the legislation is not intended – and should not – alter any existing resale restrictions that are contained in present law or contract.

Finally, we would note that the legislation does not preclude a JOE from purchasing "surplus power" from BPA which does not have resale restrictions associated with it (Note: Under the Northwest Power Act any entity may purchase "surplus power" from BPA, and such purchases do not have a resale restriction.)

   (b) **If the legislation is enacted, does OURCA or PNGC intend to resell preference power? If yes, please explain why.**

Other than sales to its retail customers or to its members or participants, OURCA has no intention of reselling requirements power purchased from BPA. In fact, as noted above,

such resale would violate legal and contractual prohibitions. OURCA assumes that PNGC would similarly comply with the current legal and contractual resale prohibitions.

**8. In OURCA's opinion, when does this legislation need to be enacted? Please explain the reason for your answer.**

OURCA believes that the legislation needs to be enacted as soon as possible, preferably before April, in order to realize the intended benefits as soon as possible.

BPA is in the process of finalizing its rates and developing and executing contracts for post-2001 sales. Under the current schedule, rates for power will be finalized by April 21, 2000 and contracts must be signed by September 30, 2000. Enactment of H.R. 3447 after September 30, 2000 would preclude Pacific Northwest public preference customers from utilizing a JOE for requirements power purchases until the next contract period in 2006. However, OURCA would like the enactment to occur as soon as possible in order to provide JOE participants: (a) the opportunity to select their form of coordinated power purchases, (b) draft the necessary operating agreements and protocols, (c) negotiate contracts with BPA, (d) undertake any needed billing or metering purchases and installations, and (e) consider and arrange for any alternate power supplies. Given the required steps needed to make a JOE fully functional, OURCA believes the legislation needs to be enacted by the end of March.

**9. Supporters of H.R. 3447 maintain that other federal power marketing administrations allow requirements customers to jointly purchase and pool resources, and that this legislation is necessary to allow certain current BPA customers to do the same.**

**(a) Is OURCA aware of any existing statutory barriers that prohibit BPA from allowing its public preference customers to engage in these activities? Please provide a specific cite. If no statutory barrier exists is there a rule or court decision that prohibits BPA from allowing its public preference customers to engage in these activities?**

No. There is nothing in BPA's authorizing statutes that expressly enables BPA to treat a joint operating entity, comprised of public preference customers, as a public preference customer itself. Absent such express authorization, BPA has determined that it is unable to treat a JOE as a public preference customer.

**(b) Is OURCA aware of instances in which BPA has allowed public preference customers to jointly purchase, aggregate and pool purchases? If so, what distinguishes those purchases from activities that would occur under this legislation?**

BPA does not currently allow public preference customers to jointly purchase, aggregate and pool purchases of ***requirements power.***

Other BPA power products, such as surplus power products, do not have restrictions on purchase, aggregation or resale. Consequently, public preference customers — as well as any other type of BPA customer—can currently jointly purchase, aggregate and pool purchases of surplus power and other non-requirements power products. Enactment of this legislation should in no way restrict, enhance or alter that ability.

**10. Do you have any other comments about this legislation other than those expressed in response to the questions posed above.**

OURCA's position is adequately outlined in response to the questions above.

**11. Do you support or oppose H.R. 3447 in its current form? Please explain your answer.**

OURCA strongly supports timely legislative action to facilitate coordinated power supply planning among BPA's public preference customers. As noted in response to Questions 3 and 7(a), OURCA would support minimal refinements to the legislation to: (1) clarify that the intent of the law is for BPA to serve the cumulative net requirements of the JOE members and no more, and (2) to remove the eligibility restrictions. In sum, we believe that the legislation should grant JOEs the same rights, responsibilities and restrictions as those that apply to its public preference customer members: no more, and no less. If the Committee determines that such refinements are appropriate, OURCA would be happy to assist in the necessary drafting changes.

ONE HUNDRED SIXTH CONGRESS

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JAMES E. DERDERIAN, CHIEF OF STAFF

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

January 20, 2000

Mr. Frank L. Cassidy
Chairman
Pacific Northwest Electric Power and
Conservation Planning Council
851 Southwest Sixth Avenue, Suite 1100
Portland, Oregon 97204-1348

Dear Chairman Cassidy:

I am writing in regard to H.R. 3447, legislation that would amend the Pacific Northwest Electric Power Planning and Conservation Act to allow the Bonneville Power Administration (BPA) to sell electricity to joint operating entities (JOEs).

Supporters of H.R. 3447 are anxious to move this bill quickly through the legislative process. While I certainly appreciate their desire to see swift enactment of their legislation, neither the House Commerce Committee nor the House Resources Committee, which have jurisdiction over this matter, have held any hearings on this proposal. The lack of a legislative record on H.R. 3447 leaves many unanswered questions which, for the sake of the American taxpayer, must be addressed before Congress acts on this proposal. Unfortunately, neither Committee has scheduled a hearing on H.R. 3447 at this time.

However, in an effort to expedite Congress' consideration of this matter, I have enclosed a copy of the legislation and some questions regarding its impact. I respectfully request that you respond to these questions as quickly as possible, and in any case, by no later than February 11, 2000.

Thank you in advance for your prompt attention to my request.

Sincerely,

JOHN D. DINGELL
RANKING MEMBER

Attachment

**Questions for the**
**Pacific Northwest Electric Power and Conservation Planning Council**
**Regarding H.R. 3447**

1. As defined in the legislation, a JOE is an entity that is "lawfully organized under state law as public body or cooperative...and is formed by, and whose members or participants are, two or more public bodies or cooperatives, each of which was a customer of the Bonneville Power Administration" prior to January 1, 1999.

   (a) Which states have entities that meet the legislation's definition of a JOE?

   (b) Under each applicable state law, what is the form of a JOE? Is it a corporation? Is the JOE a nonprofit or not-for-profit entity?

   (c) For what purpose do JOEs exist under each state's laws?

   (d) What is the Council's understanding of the difference between a member and a participant of a JOE?

   (e) Please provide a list of all entities that the Council can identify as qualifying as a JOE under this legislation and for each, please provide a listing of all members and all participants in the JOE.

2. H.R. 3447 limits eligibility for formation of joint operating entities to those cooperative or public body utilities that purchased power from BPA on or before January 1, 1999.

   (a) Do the provisions of H.R. 3447 preclude any current customers of BPA from forming a JOE?

   (b) Do the provisions of H.R. 3447 preclude any current customers of BPA from participating in a JOE?

   (c) Does the Council support precluding cooperative or public body utilities from forming or participating in JOEs under this legislation in the future? If not, should the Secretary be permitted to add other JOEs by rule?

3. Is the Council aware of any operational or fiscal opportunities for BPA customers this legislation would provide that are not otherwise currently available? If so, please explain.

4. Could enactment of this legislation result in reducing the power available to serve other customers in the region, such as residential and small farm customers of private utilities or the Direct Service Industries (DSIs)?

5. Could enactment result in increased costs to other customers in the region such as private utility customers or DSIs?

6. Could enactment of this legislation reduce BPAs revenues by any measure? If so, how should BPA recoup any lost revenues?

7. Under the Pacific Northwest Electric Power Planning and Conservation Act (PNEPPCA), the Council is required to perform a number of power planning, conservation, and environmental protection functions.

   (a) Would enactment of this legislation affect the Council's power planning efforts in any way? If so, how?

   (b) Would enactment of this legislation affect the attainment of the conservation goals of PNEPPCA in any way? If so, how?

   (c) Could enactment of this legislation result in any activities that would conflict with the Council's plans to "protect, mitigate, and enhance fish and wildlife?" If so, how?

8. The legislation precludes resale of BPA power by public bodies or cooperatives to which the JOE sells power, except to retail customers of the entity's participants or other participants within the entity, or except as otherwise permitted by law.

   Does the Council support a prohibition on the ability of this new entity or its members and participants to purchase power that is surplus to their needs, with the surplus then sold on the open market (e.g., arbitraging preference power)? If not, why not?

9. Does the Council have any concerns about enactment of this legislation other than those expressed in response to the questions posed above? If so, please elaborate.

10. Does the Council support or oppose H.R. 3447 in its current form? Please explain your answer.

FRANK L. CASSIDY JR.
"Larry"
CHAIRMAN
Washington

Tom Karier
Washington

Todd Maddock
Idaho

Mike Field
Idaho

NORTHWEST POWER PLANNING COUNCIL
851 S.W. SIXTH AVENUE, SUITE 1100
PORTLAND, OREGON 97204-1348

Fax: 503-820-2370
Phone: 503-222-5161
1-800-452-5161
Internet: www.nwppc.org

ERIC J. BLOCH
VICE CHAIRMAN
Oregon

John Brogoitti
Oregon

John Etchart
Montana

Stan Grace
Montana

February 11, 2000

The Honorable John Dingell
Ranking Minority Member
Committee on Commerce
~~2125 Rayburn House Office~~ Building
U.S. House of Representatives
Washington, DC 20515-6115

Dear Congressman Dingell:

Thank you very much for the opportunity to comment on H.R. 3447, legislation amending the Pacific Northwest Electric Power Planning and Conservation Act to require the Bonneville Power Administration to sell electricity to joint operating entities (JOEs). Responses to the specific questions you posed are presented in the attachment. In general, the Council believes that joint operating entities can lead to greater administrative efficiencies for both the participants and for Bonneville.

The Council does not expect JOEs to result in increased costs to other Bonneville customers or reduced revenues for Bonneville, although some have expressed such concerns to us. In our detailed responses to your questions, we propose report language to make clear that it is not the intent to create benefits for JOEs at the expense of other customers.

We do not expect the formation of JOEs to have any adverse effect on the Council's responsibilities for power planning, conservation or fish and wildlife.

The Council does not normally take positions on legislation not central to the Council's responsibilities. The Council is not opposed to this legislation.

Again, thank you for the opportunity to comment. I hope our responses are helpful.

Sincerely,

Frank L. Cassidy
Chair

Attachment

FRANK L. CASSIDY JR.
"Larry"
CHAIRMAN
Washington

Tom Karier
Washington

Todd Maddock
Idaho

Mike Field
Idaho

NORTHWEST POWER PLANNING COUNCIL
851 S.W. SIXTH AVENUE, SUITE 1100
PORTLAND, OREGON 97204-1348

Fax: 503-820-2370
Phone: 503-222-5161
1-800-452-5161
Internet: www.nwppc.org

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February 11, 2000

**Responses of the Northwest Power Planning Council to Questions Regarding HR 3447**

The Northwest Power Planning Council is pleased to have this opportunity to offer comment as the Commerce Committee considers H.R. 3447, an amendment to the Northwest Power Act that would require the Bonneville Power Administration to sell electricity at wholesale to joint operating entities. As an interstate compact agency, the Council does not operate pursuant to the laws of its member states. Therefore we do not represent that our opinions on the application of state laws to joint operating entities are definitive.

1. (a) It is our understanding that each of the Northwest states has or could have at least one entity that could qualify as a joint operating entity as defined by H.R. 3447.

(b) H.R. 3447 requires that JOEs be organized under state law as a public body or cooperative. The Bonneville Project Act defines "public bodies" as States, public power districts, counties, and municipalities, including agencies or subdivisions of any of them. "Cooperatives" are any form of "nonprofit-making" organizations of citizens supplying goods and services to their members "as nearly as possible at cost." (16 USC § 832b).

(c) Public bodies and cooperatives created pursuant to the Bonneville Project Act are creatures of the law of the states in which they are formed. Each state within Bonneville's service territory has determined what kinds of activities public bodies and cooperatives can undertake and the legal authority of each. State law limits the actions that may be taken jointly and determines the vehicles available fore joint action. Typically, JOEs have been created to permit their members to carry out activities or provide services that the individual members or participants could not carry out or could not carry out as efficiently.

(d) We believe that "member" and "participant" are essentially equivalent under the different state laws.

(e) We are aware of a number of organizations in the Northwest that would qualify as JOEs. They include the Pacific Northwest Generating Cooperative (PNGC); the Oregon Utility Resource Coordination Association (OURCA); the Idaho Energy Authority (IDEA); the Montana Generating and Transmission Cooperative; the Snake River Power Association; Washington Public Power Supply System; and the Conservation and Renewable Energy System (CARES).

2. (a) and (b) The requirement in H.R. 3447 that a JOE must be formed prior to the effective date of the act could limit the ability of some public and cooperative customers to form a JOE. However, as noted in the response to question 1, there are already a number of organizations that would qualify as

JOEs. We are not sufficiently knowledgeable about the laws governing these organizations to know whether their membership or participation could be expanded. Other customers, such as Direct Service Industries and Investor Owned Utilities would not be eligible to form a JOE. However, it is less likely that participating in a JOE would yield significant efficiencies for such customers.

(c) The Council does not support precluding future JOEs. It is unclear whether existing JOEs can accommodate all those wishing to participate in a JOE. The Council is also concerned that new public entities that may form in the future would be precluded from participating in JOEs. The proponents of the bill did not propose these limitations. They could result in regional inequities. Allowing the formation of new JOEs by rule established by the Secretary could remedy these concerns.

3. The Council believes that the benefits of a JOE would largely be administrative efficiencies resulting from power purchases from Bonneville being managed by one entity as opposed to several. To the extent that contracts are consolidated, this should yield efficiencies for Bonneville, which will benefit other customers.

4, 5 and 6. The Council believes it is unlikely that the enactment of this legislation will reduce the power available to serve other BPA customers, increase costs to other customers or reduce Bonneville's revenues. The JOE would be limited to purchasing for the net firm requirements of its members or participants, to which they are already entitled.

There are, however, two concerns that have surfaced in our discussions of the legislation. One is the "diversity benefits" that a JOE might enjoy. The potential for diversity benefits arise because the peak demand obtained by summing the loads of the participants in a JOE will be less than the sum of the peak demands of the individual participants. For partial requirements customers, the peak demand and the demand at the time of Bonneville's overall system peak affect how much would be charged for demand. If the demand charges for a JOE were determined by simply aggregating the loads of the participants, the JOE could enjoy lower demand charges, with the potential for cost shifts to other Bonneville customers. We understand that is not how Bonneville would determine demand charges for a JOE. Moreover, the proponents of this legislation have stated that it is not the intent to shift costs among Bonneville customers as a result of "diversity benefits." Therefore it may be worthwhile to include language in the bill report that makes it clear that it is not the intent of the legislation to allow JOEs to capture diversity benefits at the expense of other customers.

Another concern that has been expressed is that if JOEs prove to yield the anticipated benefits, preference customers are more likely to subscribe for their maximum entitlement, and for longer terms, than without the JOEs. If that were the case, there could be less power available for customers with lower preference rights and that BPA would have to augment its resources for other customers with more purchases, thereby increasing costs. On balance, however, it seems likely that there are many other factors, e.g., price and contract terms, that will be much more important in determining the amount of load preference customers place on Bonneville and the period for which they contract. It would not be reasonable to preclude the efficiencies a JOE can yield on the basis of this possibility.

7. The Council does not think the enactment of this legislation would have any effect on the Council's power planning, the attainment of the conservation goals of the Power Act, or in any way conflict with the council's plans to protect, mitigate and enhance fish and wildlife.

8. The Council supports the prohibition on resale of federal power except as otherwise permitted by law. This is essentially current law.

9. The Council has no additional concerns about the enactment of this legislation.

10. The Council does not typically take a position on legislation that is not central to its mission and statutory responsibilities. The Council does not oppose the legislation.

ONE HUNDRED SIXTH CONGRESS

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JAMES E. DERDERIAN, CHIEF OF STAFF

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

February 8, 2000

Mr. Mark Gendron
Idaho Energy Authority, Inc.
c/o City of Idaho Falls
P.O. Box 220
Idaho Falls, Idaho 83402

Dear Mr. Gendron:

I am writing in regard to H.R. 3447, legislation that would amend the Pacific Northwest Electric Power Planning and Conservation Act to allow the Bonneville Power Administration (BPA) to sell electricity to joint operating entities (JOEs).

As you may know, neither the House Commerce Committee nor the House Resources Committee, which have jurisdiction over this matter, have held any hearings on this proposal. The lack of a legislative record on H.R. 3447 leaves many unanswered questions which, for the sake of the American taxpayer, must be addressed before Congress acts on this proposal. Unfortunately, neither Committee has scheduled a hearing on H.R. 3447 at this time.

In an effort to expedite Congress' consideration of this matter, I have enclosed a copy of the legislation and some questions regarding its impact. I respectfully request that you respond to these questions as quickly as possible, and in any case, by no later than February 22, 2000.

Thank you in advance for your prompt attention to my request.

Sincerely,

JOHN D. DINGELL
RANKING MEMBER

Attachment

**Questions for Mark Gendron**
**Idaho Energy Authority**
**Regarding H.R. 3447**

1. As defined in H.R. 3447, a JOE is an entity that is "lawfully organized under state law as a public body or cooperative...and is formed by, and whose members or participants are, two or more public bodies or cooperatives, each of which was a customer of the Bonneville Power Administration" prior to January 1, 1999.

   (a) Please explain in detail your current relationship with PNGC Power.

   (b) If PNGC were to become a JOE under H.R. 3447, would Idaho Energy Authority (IEA) be a member or participant in the JOE?

2. Please provide a list and explanation of each of the operational and fiscal opportunities this legislation would provide IEA that are not otherwise currently available.

3. H.R. 3447 limits eligibility for formation of joint operating entities to those cooperative or public body utilities that purchased power from BPA on or before January 1, 1999.

   (a) Do you support precluding cooperative or public body utilities from forming or participating in JOEs under this legislation in the future? If so, why?

   (b) Should the Secretary of Energy be permitted to add other JOEs by rule?

4. Could enactment of this legislation result in reducing the power available to serve other customers in the region such as residential and small farm customers of private utilities or the Direct Service Industries (DSIs)?

5. Could enactment result in increased costs to other customers in the region such as private utility customers or DSIs?

6. Could enactment of this legislation reduce BPA's revenues by any measure? If so, how would you recommend that BPA recoup any lost revenues?

7. H.R. 3447 contains language that precludes resale of BPA power by public bodies or cooperatives to which the JOE sells power, except to retail customers of the entity's participants or other participants within the entity, or except as otherwise permitted by law.

   (a) Could the legislation enable preference customers to purchase power that is surplus to their needs, with the surplus then sold on the open market (e.g., arbitraging preference power)?

   (b) If this legislation is enacted, does IEA or PNGC intend to resell preference power? If yes, please explain why.

8. In IEA's opinion, when does this legislation need to be enacted? Please explain the reason for your answer.

9. Supporters of H.R. 3447 maintain that other federal power marketing administrations allow requirements customers to jointly purchase and pool resources, and that this legislation is necessary to allow certain current BPA customers to do the same.

(a) Is IEA aware of any existing statutory barriers that prohibit BPA from allowing its public preference customers to engage in these activities? Please provide a specific cite. If no statutory barrier exists, is there a rule or court decision that prohibits BPA from allowing its public preference customers to engage in these activities?

(b) Is IEA aware of instances in which BPA has allowed public preference customers to jointly purchase, aggregate and pool purchases? If so, what distinguishes those purchases from activities that would occur under this legislation?

10. Do you have any other comments about this legislation other than those expressed in response to the questions posed above? If so, please elaborate.

11. Do you support or oppose H.R. 3447 in its current form? Please explain your answer.

**CITY OF IDAHO FALLS**
P.O. BOX 50220
IDAHO FALLS, IDAHO 83405-0220

ELECTRIC DIVISION

PHONE (208) 529-1430

February 22, 2000

The Honorable John D. Dingell
Ranking Member
Committee on Commerce
U.S. House of Representatives
2322 Rayburn Building
Washington, DC 20515

Dear Representative Dingell:

I am writing to respond to your February 8 letter concerning legislation to amend the Northwest Regional Act to authorize joint purchases from the Bonneville Power Administration. The Idaho Energy Authority (IdEA) strongly supports enactment of H.R. 3447 and deeply appreciates your efforts to promote prompt consideration of this common sense legislation.

Please accept the enclosed document as IdEA's complete response to the questions raised in your letter. I and the other members of IdEA would, of course, be happy to furnish you or your staff with any additional information to assist you in advancing this legislation.

Sincerely,

Mark Gendron
Director, IDEA

# Idaho Energy Authority (IDEA) Response to the February 8, 2000 Questions of Representative John Dingell On H.R. 3447

**Question 1(a)**

IDEA is not a member or participant of PNGC Power. Individual members of IDEA may also be members of PNGC Power.

Throughout the country, consumer-owned utilities (municipals, PUDs and co-ops) have formed entities to provide coordinated power supply and other services. These entities are generally formed on the basis of geography, organizational form and historic relationships. Given these factors, the cities of Burley, Idaho Falls, Soda Springs, and United Electric Cooperative chose to form the Idaho Energy Authority (IDEA) under the provisions of existing Idaho law enabling incorporation of not-for-profit associations consisting of intergovernmental and cooperative members. The cities of Heyburn and Rupert and Lower Valley Power and Light Cooperative have also joined, and other consumer-owned utilities in Idaho are considering membership in IDEA. We expect the membership to continue to expand.

Although IDEA anticipates providing a number of services for its members, the timing of IDEA's formation was greatly influenced by our desire to meet the eligibility standards of the pending legislation and be able to jointly manage our requirements purchases from the Bonneville Power Administration (BPA).

**Question 1(b)**

As noted above, the timing of IDEA's formation was largely influenced by our intention of acting as a Joint Operating Entity (JOE) as provided for in H.R. 3447. Therefore, we do not envision becoming a member or participant in PNGC's JOE. Moreover, the members of PNGC Power have particular power supply plans that may not match appropriately with those of the IDEA members. IDEA would be its own JOE.

**Question 2**

The bill enables existing BPA preference customers (e.g., public body and cooperative utilities) to form a joint entity and designate that entity as their agent for contracting with BPA for the purchase and delivery of power to meet the members net power requirements. Such coordination can provide the members of IDEA with administrative savings by providing for centralized interaction with BPA personnel. In addition, IDEA members can capture operational savings by having centralized billing, metering and scheduling and potentially achieving diversity benefits that reflect the different load characteristics of IDEA's members. The extent to which these benefits are realized will

depend, in part, on (1) the purchasing form IDEA chooses (e.g., single administration of multiple contracts or a single contract reflecting the pooled requirements of IDEA's members) and (2) the type(s) of product(s) that IDEA chooses to purchase from BPA and how those products are managed with other resources either owned by IDEA members or contracted for with other parties.

In addition to the coordination of BPA purchases authorized by the legislation, IDEA may provide the following additional services to its members: diversification power supply acquisition and management, transmission planning and contracting (including with BPA), materials purchase, public purpose services, safety programs, etc..

**Question 3(a)**

IDEA does not support precluding cooperative or public body utilities from forming or participating in JOEs under this legislation in the future. Existing Idaho law allows for the formation of new cooperative and municipal utilities and creation of joint powers agencies and cooperative associations. IDEA sees no reason why future consumer-owned utilities should be precluding from joining a JOE, or why existing or future consumer-owned utilities should be prevented from forming a new JOE in the future.

**Question 3(b)**

IDEA would support granting the Secretary of Energy authority to add other JOEs by rule as well as authorizing the Secretary to permit future BPA preference customers the right to join an existing or future JOE. Alternately, IDEA would support removing the eligibility restrictions from the legislation.

**Question 4**

IDEA does not believe that enactment of this legislation would result in a reduction of power available to serve other customers in the region.

The legislation establishes a maximum purchase authority for any JOE equal to the combined load of its members. The legislation intends that a JOE would not be able to purchase firm requirements power in excess of what the members could purchase through individual contracts. Thus, enactment of this legislation should not reduce the power available for other regional customers.

**Question 5**

IDEA does not believe that enactment of H.R. 3447 will result in increased costs to other regional customers. To the contrary, enactment of this legislation is likely to result in some administrative savings for BPA which will benefit all regional customers. In addition, in a period of high BPA costs, increased purchases by a JOE (resulting from pooled savings as described above) should result in savings that benefit all customers.

IDEA is aware that some have expressed potential concern that a JOE might be able to realize diversity savings – reduced purchases during peak periods as a result of differences in the coincident peak of a JOE's member loads. While it is true that such diversity savings may be realized and may result in reduced purchases from BPA, this would result in either (a) additional peak power available for sale to other regional entities, or (b) surplus peak power that could be sold by BPA with the revenue credited to regional customers. Under either circumstance, it would appear that regional parties would benefit – not face increased costs.

**Question 6**

As mentioned above, IDEA does not believe that enactment of this legislation will reduce BPA's revenues. If IDEA (or another JOE) were to purchase less power from BPA than the JOE members would purchase individually, then BPA will be able to recover the lost revenue through sales of this power to other parties.

**Question 7(a)**

IDEA does not believe H.R. 3447 provides preference customers any authority to purchase power surplus to the needs of the JOE participants. Current law and BPA contracts restrict the resale of requirements power. H.R. 3447 does not alter these current statutory or contractual restrictions.

**Question 7(b)**

IDEA does not intend to resell requirements power. Such action would be in violation of existing statutory and contractual restrictions, and IDEA and its members intend to comply fully with all applicable laws and restrictions.

**Question 8**

Based on a variety of contractual, operational and system requirements, IDEA believes that the legislation should be enacted before April.

In order for this legislation to be of value to IDEA during the 2001-2006 BPA contract term, it needs to be enacted prior to the September 2000 conclusion of the BPA subscription contract window. However, considerable time will be needed prior to this date for the legislation to realize its intended benefits. As noted above, IDEA has been in existence for a short period of time. IDEA and its members will need to review the existing BPA power products, assess alternative power supply contracts, and determine which purchases (or mix of purchases) are most desirable. Once this decision is made, IDEA will need to prepare and execute the relevant contracts (with BPA, any other selected power suppliers, and between the IDEA members). In addition, we may need to purchase and install computer hardware and/or software to provide for real-time scheduling and joint billing. Given these potential requirements and the established closing date for BPA contracts, we believe the legislation should be enacted before April

to provide the time needed to properly and diligently fulfill our power supply responsibilities to our consumer-owners.

**Question 9(a)**

BPA's existing statutes provide a first right of purchase – or "preference" – to cooperative and public body utilities (See Section 5(b) of the Pacific Northwest Electric Power Planning and Conservation Act). The statutes further direct BPA to make such sales in compliance with BPA's standards of service (See Section 5(b)(1) of the Pacific Northwest Electric Power Planning and Conservation Act). Those standards of service provide that the applicable preference customer must own distribution facilities necessary to deliver the BPA power to end-use consumers.

While IDEA (or another JOE) is itself a public body, it neither directly serves end-use consumers nor directly owns distribution facilities. The responsibilities and facilities needed to provide retail service are owned by IDEA's members. While IDEA's members meet the statutory test and the requirements of the BPA standards of service, BPA has determined that IDEA's members cannot assign their BPA purchases to IDEA nor authorize IDEA to act as their agent in purchasing requirements power from BPA.

**Question 9(b)**

As noted above, due to existing statutory directives and the existing standards of service, BPA preference customers cannot jointly purchase, aggregate or pool requirements power purchased from BPA.

BPA sells other power products, such as surplus power, for which there is no statutory "preference" granted to cooperative or public body utilities. Any entity purchasing this power – cooperative, public body, private utility, DSI or power marketer – could conceivably jointly purchase, aggregate and pool such purchases.

It is our understanding that joint contracting and purchasing of BPA transmission services is permitted ,that joint operating entities presently practice this, and that the legislation does not alter this practice or authority in any way.

**Question 10**

No additional comments.

**Question 11**

IDEA supports H.R. 3447 in its current form. As noted above, IDEA would support relaxation or elimination of the eligibility restrictions contained in the legislation. However, we would still support the legislation without any such changes if needed to ensure swift enactment.

ONE HUNDRED SIXTH CONGRESS

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JAMES E. DERDERIAN, CHIEF OF STAFF

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

February 23, 2000

Mr. Robert G. Hayes
Ball Janik, LLP
1455 F Street, N.W., Suite 225
Washington, D.C. 20005

Dear Mr. Hayes:

I am writing in regard to H.R. 3447, legislation that would amend the Pacific Northwest Electric Power Planning and Conservation Act to allow the Bonneville Power Administration (BPA) to sell electricity to joint operating entities (JOEs). I am seeking the views of a number of pacific northwest aluminum companies that are BPA customers regarding this legislation, and these companies have requested I address my correspondence to you.

Supporters of H.R. 3447 are anxious to move this bill quickly through the legislative process. While I certainly appreciate their desire to see swift enactment of their legislation, neither the House Commerce Committee nor the House Resources Committee, which have jurisdiction over this matter, have held any hearings on this proposal. The lack of a legislative record on H.R. 3447 leaves many unanswered questions which, for the sake of the American taxpayer, must be addressed before Congress acts on this proposal.

In an effort to expedite Congress' consideration of this matter, I have enclosed a copy of the legislation and some questions regarding its impact. I respectfully request that you respond to these questions as quickly as possible, and in any case, by no later than Friday, March 3, 2000.

Thank you in advance for your prompt attention to my request.

Sincerely,

JOHN D. DINGELL
RANKING MEMBER

Enclosures

**Questions for Robert G. Hayes**
**Ball Janik, LLP**
**Regarding H.R. 3447**

(1) Please provide the name of each aluminum company you are representing in your response to this letter.

(2) What is the current nature of your clients' relationship with the Bonneville Power Administration?

(3) Do your clients support or oppose H.R. 3447 in its current form? Please explain your answer.

(4) Do your clients have any other comments about this legislation other than those expressed in response to the question posed above? If so, please elaborate.

BALL JANIK LLP

ATTORNEYS

ROBERT G. HAYES

1455 F STREET, NW, SUITE 225
WASHINGTON, D.C. 20005

TELEPHONE 202-638-3307
FACSIMILE 202-783-6947

RHAYES@BJLLP.COM

March 8, 2000

The Honorable John D. Dingell
U.S. House of Representatives
2125 Rayburn Building
Washington, DC 20515

Re: H.R. 3447

Dear Congressman Dingell:

Thank for your letter of February 23, 2000, requesting the views of members of the Pacific Northwest aluminum industry regarding H.R. 3447, a bill to amend the Pacific Northwest Power Planning and Conservation Act ("the Act") to allow the Bonneville Power Administration ("BPA") to sell to joint operating entities ("JOEs"). Below we address your questions regarding H.R. 3447.

(1) **Please provide the name of each aluminum company you are representing in your response to this letter.**

This response is submitted on behalf of the following Northwest aluminum companies:

Alcoa Inc., with smelters in Wenatchee and Ferndale, Washington;
Columbia Falls Aluminum Company, Columbia Falls, Montana;
Goldendale Aluminum, Goldendale, Washington;
Northwest Aluminum, The Dalles, Oregon;
Kaiser Aluminum and Chemical Corporation, with smelters in Spokane and Tacoma, Washington;
Reynolds Metals, with smelters in Longview, Washington, and Troutdale, Oregon; and
Vanalco, Inc., Vancouver, Washington.

**(2) What is the current nature of your clients' relationship with the Bonneville Power Administration?**

The relationship between Bonneville and the Northwest aluminum companies is changing. As you know from your experience drafting the Northwest Power Act, some of the aluminum smelters are Bonneville's oldest customers. Indeed, the industry was induced to locate in the Northwest by the federal government in part to provide Bonneville a revenue stream at a time when there were no other power customers. It was a symbiotic relationship. Bonneville was able to sell a large amount of power and reap the corresponding financial benefit, and the companies had access to a ready supply of low-cost power. The aluminum manufactured in the region was then used to supply the areospace manufacturing needs of the WWII effort, and the entire process – water to power to aluminum to airplanes – helped develop the fledgling Northwest economy.

Even when Congress passed the Act in 1980, the aluminum industry still played a major role in BPA's customer base. As direct service industry ("DSI") customers of BPA, the companies continued to receive the vast majority, if not all, of their power supply from BPA at cost-based rates. While some supply diversification took place in the early 1990s by a number of direct service companies *and* public utilities, the aluminum companies continued to look to the federal hydro system as an attractive power supply.

The aluminum companies continue to be direct service customers of Bonneville, but Bonneville is severely limiting the amount of power it sells to the companies. Where Bonneville used to be the total supplier of Northwest aluminum load, it is now offering only 40-50 percent of the industry's needs. This causes the companies serious concern. Moreover, BPA's projections for the next rate period, 2006 and beyond, suggest that they will make *no* cost-based power available to the companies, instead focusing primarily on residential loads. We believe that to be a BPA administrative interpretation that is contrary to the Northwest Power Act and the Regional Preference Act. That is a discussion for another day, but it provides you a flavor of how the industry's relationship with BPA is changing and provides insight as to why we take the position we do on H.R. 3447.

**(3) Do your clients support or oppose H.R. 3447 in its current form? Please explain your answer.**

The companies strongly believe that Congress should not amend the Northwest Power Act in a piecemeal fashion. The Act is now 20 years old and was never designed for application in a deregulated electric industry. All of the Act's basic assumptions are being called into question because of pending industry restructuring and the movement of state governments into the realm of open and competitive energy markets. Amending the Act, little by little, with no contemplation of the larger picture would be shortsighted in this changing environment.

The companies may ultimately have no substantive opposition to BPA selling electricity to joint operating entities as outlined in H.R. 3447, but the issue needs to be analyzed

BALL JANIK LLP



as one element in a comprehensive reexamination of the Northwest Power Act. Many interests affected by the Act, including the aluminum companies, would like to amend certain sections of the Act. Some of these amendments may be non-controversial, others may engender a more prolonged debate. But, addressing only the easy issues without consideration of the whole simply ensures that the tough issues will not be addressed in the near term. We want to work with you, the supporters of H.R. 3447 and the Northwest delegation to address the *entire* Northwest Power Act.

(4) **Do your clients have any other comments about this legislation other than those expressed in response to the question posed above? If so, please elaborate.**

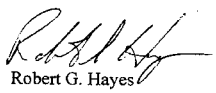
The supporters of H.R. 3447 argue that if this legislation is not enacted before the contracts are signed, they will be foreclosed from achieving their operating efficiencies for a *significant* period of time. This is not necessarily true. Supporters of H.R. 3447 can individually sign contracts with BPA – as they always have done – and assign those contracts to a Joint Operating Entity at the time when future legislation authorizes BPA to contract with a JOE. There is no need for a rush to judgement on this legislation without adequate consideration of this amendment as part of the overall Act.

Since H.R. 3447 has raised the relevance of the Act's application in a restructured electric industry environment, we want to work together with the Northwest Delegation, and you, on a comprehensive review of the Northwest Power Act. Concurrent with national restructuring, it is time for a review of *all* of the Act's assumptions in the context of a restructured, market-based industry.

In light of the need for comprehensive review of the Northwest Power Act, we also ask your assistance in limiting Bonneville to a contract period of five years. A five-year transition period would provide adequate time to review the Power Act and enact new legislation addressing Bonneville's role. Longer-term contracts may prejudge this outcome or limit the ability for Congress to make changes. Bonneville should be precluded from offering some of its customers new contracts of ten to 20 year duration as it presently is planning to do.

Thank you for the opportunity to comment. We look forward to working with you in the future.

Sincerely,



Robert G. Hayes

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JAMES E. DERDERIAN, CHIEF OF STAFF

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

February 8, 2000

Mr. Tom Kuhn
CEO
Edison Electric Institute
701 Pennsylvania Avenue, NW.
Washington, D.C. 20004-2696

Dear Mr. Kuhn:

I am writing in regard to H.R. 3447, legislation that would amend the Pacific Northwest Electric Power Planning and Conservation Act to allow the Bonneville Power Administration (BPA) to sell electricity to joint operating entities (JOEs).

Supporters of H.R. 3447 are anxious to move this bill quickly through the legislative process. While I certainly appreciate their desire to see swift enactment of their legislation, neither the House Commerce Committee nor the House Resources Committee, which have jurisdiction over this matter, have held any hearings on this proposal. The lack of a legislative record on H.R. 3447 leaves many unanswered questions which, for the sake of the American taxpayer, must be addressed before Congress acts on this proposal. I am particularly interested to know what, if any impact this legislation could have on investor owned utilities and their customers in the Pacific Northwest.

In an effort to expedite Congress' consideration of this matter, I have enclosed a copy of the legislation and some questions regarding its impact. I respectfully request that you respond to these questions as quickly as possible, and in any case, by no later than February 22, 2000.

Thank you in advance for your prompt attention to my request.

Sincerely,

JOHN D. DINGELL
RANKING MEMBER

Attachment

**Questions for Tom Kuhn**
**Edison Electric Institute**
**Regarding H.R. 3447**

1. H.R. 3447 limits eligibility for formation of joint operating entities to those cooperative or public body utilities that purchased power from BPA on or before January 1, 1999.

   (a) Does EEI support precluding cooperative or public body utilities from forming or participating in JOEs under this legislation in the future? If so, why?

   (b) Should the Secretary of Energy be permitted to add other JOEs by rule?

2. In your opinion, could enactment of this legislation result in reducing the power available to serve other customers in the region, such as residential and small farm customers of private utilities?

3. In your opinion, could enactment result in increased costs to private utility customers?

4. Should enactment of this legislation reduce BPAs revenues by any measure, how would you recommend that BPA recoup any lost revenues?

5. H.R. 3447 contains language that precludes resale of BPA power by public bodies or cooperatives to which the JOE sells power, except to retail customers of the entity's participants or other participants within the entity, or except as otherwise permitted by law.

   (a) Should a JOE, its members, or its participants be allowed to resell preference power under any circumstances? Please elaborate.

   (b) Is EEI satisfied that the bill, as currently drafted, provides no new avenues for either a JOE, its members, or its participants to resell preference power?

6. As currently drafted, H.R. 3447 provides no new enforcement authority for the Secretary to use against a JOE that has violated the limitations of the legislation, relying instead on remedies contained in current law.

   Is EEI satisfied that current law provides the Secretary with adequate authority to take action against a JOE, its members, or its participants for a violation of the provisions of H.R. 3447 or current law?

7. Do you have any other comments about this legislation other than those expressed in response to the questions posed above? If so, please elaborate.

8. Do you support or oppose H.R. 3447 in its current form? Please explain your answer.

701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2696
Telephone 202-508-5555

**EDISON ELECTRIC INSTITUTE**

THOMAS R. KUHN
President

February 18, 2000

Representative John D. Dingell
U.S. House of Representatives
Washington, DC 20515-2216

Dear Mr. Dingell:

Thank you for inquiring as to the Edison Electric Institute's (EEI's) views on H.R. 3447, legislation which would amend the 1980 Pacific Northwest Electric Power Planning and Conservation Act to authorize the Bonneville Power Administration (BPA) to sell Federal power at wholesale to certain "joint operating entities."

EEI does not have a position on H.R. 3447 itself and does not have sufficient information to respond to several of your specific questions.

The need for additional information is one reason the "J.O.E." proposal should be considered by the Committee as part of broader legislation to determine the future role of BPA and the allocation of the benefits of BPA's low-cost Federal hydropower.

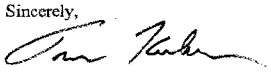
As of now, BPA is proposing (for FY2002-06) to allocate only 23% of the benefits of its cheap Federal hydropower to the 6 million-plus citizens in the Northwest that are served by investor-owned electric utilities though they comprise 50% of the region's residential electric customers. That is not fair and does not comport with the Pacific Northwest Electric Power Planning and Conservation Act that has as a central purpose the equitable distribution of BPA power benefits to all residential and small farm customers in the Northwest.

The obvious inequity of BPA's proposed allocation of the power benefits could be exacerbated by proposals (including Sec. 623 of H.R. 2944) that would permit BPA to charge its power customers less than market price for Federal power and still charge its captive transmission customers to recover a share of the cost of that cheap power. So, for example, if H.R. 3447 allowed joint operating entity customers to reduce what they pay for BPA power the difference could be shifted to BPA transmission customers. Since Northwest investor-owned utilities often are very dependent upon BPA's transmission this would unfairly shift power costs to them and their customers who will be getting such a disproportionately small share of BPA's power. (None of the IOUs' business customers get BPA power).

Besides addressing the allocation of BPA's Federal hydropower, Congress needs to give the Federal Energy Regulatory Commission full Federal Power Act jurisdiction over the interstate transmission activities of BPA. Additionally, EEI believes Congress should act to ensure that BPA cannot use its special government status and subsidies to expand its role or compete in competitive markets (e.g. by aggressively competing as it is in the provision of dark optic fiber).

I hope this information is helpful. We look forward to working with you as legislation is considered.

Sincerely,



Thomas R. Kuhn

TRK:dlm

ENERGY:Electricity (H.R. 3447) JDD:RK:des

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JAMES E. DERDERIAN, CHIEF OF STAFF

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

February 8, 2000

Mr. David Piper
CEO
Pacific Northwest Generating Cooperatives
711 Halsey Street
Suite 200
Portland, Oregon 97204-1348

Dear Mr. Piper:

I am writing in regard to H.R. 3447, legislation that would amend the Pacific Northwest Electric Power Planning and Conservation Act to allow the Bonneville Power Administration (BPA) to sell electricity to joint operating entities (JOEs).

As you may know, neither the House Commerce Committee nor the House Resources Committee, which have jurisdiction over this matter, have held any hearings on this proposal. The lack of a legislative record on H.R. 3447 leaves many unanswered questions which, for the sake of the American taxpayer, must be addressed before Congress acts on this proposal. Unfortunately, neither Committee has scheduled a hearing on H.R. 3447 at this time.

In an effort to expedite Congress' consideration of this matter, I have enclosed a copy of the legislation and some questions regarding its impact. I respectfully request that you respond to these questions as quickly as possible, and in any case, by no later than February 22, 2000.

Thank you in advance for your prompt attention to my request.

Sincerely,

JOHN D. DINGELL
RANKING MEMBER

Attachment

**Questions for David Piper**
**Pacific Northwest Generating Cooperatives**
**Regarding H.R. 3447**

1. As defined in H.R. 3447, a JOE is an entity that is "lawfully organized under state law as a public body or cooperative...and is formed by, and whose members or participants are, two or more public bodies or cooperatives, each of which was a customer of the Bonneville Power Administration" prior to January 1, 1999.

   (a) I understand that PNGC would meet the legislation's definition of a JOE. Is this correct?

   (b) Under which state's law is PNGC organized and why?

   (c) What is your understanding of the difference between a member and a participant of a JOE?

   (d) Please provide a listing of all members and a listing of all participants in PNGC.

2. H.R. 3447 limits eligibility for formation of joint operating entities to those cooperative or public body utilities that purchased power from BPA on or before January 1, 1999.

   (a) Do you support precluding cooperative or public body utilities from forming or participating in JOEs under this legislation in the future? If so, why?

   (b) Should the Secretary of Energy be permitted to add other JOEs by rule?

3. Please provide a list and explanation of each of the operational and fiscal opportunities this legislation would provide PNGC that are not otherwise currently available.

4. Could enactment of this legislation result in reducing the power available to serve other customers in the region such as residential and small farm customers of private utilities or the Direct Service Industries (DSIs)?

5. Could enactment result in increased costs to other customers in the region such as private utility customers or DSIs?

6. Could enactment of this legislation reduce BPA's revenues by any measure? If so, how would you recommend that BPA recoup any lost revenues?

7. H.R. 3447 contains language that precludes resale of BPA power by public bodies or cooperatives to which the JOE sells power, except to retail customers of the entity's participants or other participants within the entity, or except as otherwise permitted by law.

   (a) Could the legislation enable preference customers to purchase power that is surplus to their needs, with the surplus then sold on the open market (e.g., arbitraging preference power)?

   (b) If this legislation is enacted, does PNGC or any of its members or participants intend to resell preference power? If yes, please explain why.

8. In PNGC's opinion, when does this legislation need to be enacted? Please explain the reason for your answer.

9. Supporters of H.R. 3447 maintain that other federal power marketing administrations allow requirements customers to jointly purchase and pool resources, and that this legislation is necessary to allow certain current BPA customers to do the same.

   (a) Is PNGC aware of any existing statutory barriers that prohibit BPA from allowing its public preference customers to engage in these activities? Please provide a specific cite. If no statutory barrier exists, is there a rule or court decision that prohibits BPA from allowing its public preference customers to engage in these activities?

   (b) Is PNGC aware of instances in which BPA has allowed public preference customers to jointly purchase, aggregate and pool purchases? If so, what distinguishes those purchases from activities that would occur under this legislation?

10. Do you have any other comments about this legislation other than those expressed in response to the questions posed above? If so, please elaborate.

11. Do you support or oppose H.R. 3447 in its current form? Please explain your answer.

February 22, 2000

The Honorable John D. Dingell
U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, D.C. 20515
Attn: Minority Counsel

**Delivered by FAX (202/225-5288) and by Hand**

Dear Congressman Dingell:

Thank you for this opportunity to respond to questions concerning H.R. 3447, legislation to amend the Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. 96-501 (Regional Act), to allow the Bonneville Power Administration (BPA) to sell power to joint operating entities (JOEs).

PNGC Power is an energy services cooperative located in Portland, Oregon. It is owned by 11 electric distribution utilities located in the Northwest and principally engaged in managing wholesale power supply for those members system. Licensed by the Federal Regulatory Energy Commission as a power marketer, PNGC Power is a not-for-profit entity whose mission is to minimize the retail electric rates of its members' customers.

As you know, PNGC Power has been actively supportive of the "JOE bill" and feels strongly that its provisions allow for a common-sense way to ease the administrative burden that small systems incur as they work together to manage their power supply. These benefits do not come at the expense of any other party, and actually create cost savings for BPA as well.

As we have communicated in the past, we are particularly concerned that this bill be enacted into law in time for our members to use its provisions as they assess their contractual options for the next BPA rate period. We know that you and your staff understand the pressing time constraints we are under in this regard and very much appreciate your willingness to conduct this review of the JOE bill on an expedited basis.

Below are our answers to the questions you posed in your letter of February 8th, 2000:

1. (a), (b) PNGC Power, also known as the Pacific Northwest Generating Cooperative (PNGC), was organized under Oregon law as a cooperative

**Pacific Northwest Generating Cooperative**
711 NE Halsey, Suite 200 • Portland, OR 97232-1268
(503) 288-1234 • Fax (503) 288-2334 • www.pngc.com

corporation in October 1995. It began operations January 1, 1996. It was organized to provide a means by which its members could act jointly to manage their power supply, provide various types of technical and administrative support, and realize economies of scale for its members. Each member of PNGC is a well-established electric distribution cooperative serving retail customers within the service territory of BPA in the Northwest.

(c) The terms "member" and "participant" are essentially generic and synonymous. Cooperatives normally have "members." There are a variety of ways in which public bodies could organize or affiliate, and these vehicles are defined under the law of the state in which the public body is located. Some available vehicles have "participants."

(d) PNGC's current membership [1] includes the following:

Blachly-Lane Electric Cooperative
Central Electric Cooperative, Inc.
Consumers Power, Inc.
Coos-Curry Electric Cooperative, Inc.
Douglas Electric Cooperative
Lane Electric Cooperative
Lost River Electric Cooperative
Northern Lights, Inc.
Oregon Trail Electric Consumers Cooperative
Raft River Rural Electric Cooperative
Umatilla Electric Cooperative

2. (a) The provisions in the bill limit sale of power by BPA under Section 5(b) of the Regional Act[2] to JOEs formed as of the date of enactment. Therefore, while a JOE could be formed after that date, it would not be eligible for Section 5(b) power purchases under the provisions of H.R. 3447. The bill's provisions do not limit public bodies and cooperatives from participating in a JOE as long as they were customers of the Administrator on or before January 1, 1999.

PNGC Power believes that cost savings from use of the JOE provisions would accrue both to eligible JOEs and to BPA. No other party is disadvantaged by the use of the JOE provisions. While PNGC qualifies

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[1] PNGC also has power supply option agreements with the following systems, which may choose to become PNGC members in the future: Clearwater Power Company, Fall River Rural Electric Cooperative, Lower Valley Energy, Okanogan County Electric Cooperative, Salmon River Electric Cooperative, and West Oregon Electric Cooperative.

[2] Under Section 5(b), the BPA Administrator is required to offer contracts for the sale of power to meet the net requirements of both (1) public body and cooperative utilities that are entitled to preference pursuant to Section 4(a) of the Bonneville Project Act, Pub. L. 75-329 (Project Act), and Section 5(a) of the Regional Act, and (2) investor-owned utilities serving loads within Bonneville's service territory.

under the current JOE definition and would not be adversely affected by the date limitations included in the bill, we do not see a compelling reason for limiting those benefits to a limited number of existing JOEs. We do, however, recognize that these provisions were inserted to meet the concerns of authorizing committee staff.

(b) PNGC does not oppose the concept of giving the Secretary of Energy authority to add additional JOEs by rule (consistent with the principles of H.R. 3447), provided that the Secretary is not given authority to refuse sales of Section 5(b) power to entities eligible as JOEs under the provisions of H.R. 3447.

3. H.R. 3447 does not grant any opportunities to PNGC Power that are not currently available to its member systems. However, as a result of working together, our members do anticipate the following operational and fiscal opportunities as a result of enactment of H.R. 3447:

***First,*** under future power-supply scenarios that involve PNGC providing load-following capability for its members, the JOE provisions would allow PNGC to file a single schedule rather than individual schedules for each member as it arranges power deliveries with control area operators on both a preschedule and real-time basis. Because filing multiple schedules with BPA and other parties involves exponentially more complicated scheduling requirements, both PNGC and the control-area operator (primarily BPA) can expect lower staffing requirements and significantly reduced paper and electronic transaction costs as a result of joint operation.

***Second,*** Bonneville currently bills PNGC members separately on the basis of hourly demands at metered points of delivery, all read at the hour of the BPA system peak. Consolidating systems contracts through a JOE will not change the basis on which points of delivery are metered and read, but will result in one single bill rather than multiple bills. Accordingly, the administrative burden of rendering separate statements and monitoring individual accounts and payments will give way to a more streamlined process involving one single account and one monthly statement reviewed centrally. As is the case with joint scheduling, this would reduce administrative burden and cost. The savings could be substantial for both BPA and PNGC members, since Bonneville's billings are very complex and are frequently problematic for Bonneville to prepare correctly and for the customer to understand and respond to properly.

***Third,*** Consolidating the contracts of multiple systems within a JOE would resolve the periodic misperception by Bonneville and other parties over how power is managed for PNGC's members. Because the present contracts rest with the systems themselves, PNGC member systems are continually redirecting agency personnel and outside parties to PNGC Power on matters involving power supply. While legislation is not required to highlight this relationship,

consolidating contracts through PNGC through use of the JOE provisions will remove all doubt and help PNGC's member cooperatives to accomplish a long-sought economy of scale, eliminating a fairly constant source of misunderstanding and inefficiency.

4. As mentioned above, under BPA's current billing practices each delivery point for each PNGC member is separately metered and is billed based on its load during the hour of the BPA system peak. Accordingly, H.R. 3447 does not provide the ability to capture additional "diversity" benefits in terms of combining individual system loads for the purpose of purchasing less power from the agency. The power usage and consequent charges do not change as a result of operating under a single contract. Accordingly, H.R. 3447 would not result in either reducing or increasing the amount of BPA power available to serve other customers.

5. PNGC Power believes that use of the JOE provisions will result in contract administration, billing, and scheduling efficiencies for the agency as well as its customers. Consequently, we would expect agency costs – and resulting costs to other existing and potential BPA customers – to marginally decrease rather than increase with the enactment of H.R. 3447.

6. As mentioned in detail in our answers to Questions 3 and 4, we do not expect BPA's actual power sales – and resulting revenues – to either increase or decrease as a result of the enactment of H.R. 3447.

7. (a), (b) As is explicit in subsection (C) of H.R. 3447, the bill does not alter the status quo with regard to resale of federal power. "Surplus" power is currently sold by the agency without resale restriction under Section 5(f) of the Regional Act. Accordingly, a current preference customer, any existing or potential customer, or PNGC can currently purchase surplus power for resale. PNGC, acting on behalf of its members, has periodically contracted directly with the agency for the purchase of surplus power.

We assume that the term "preference power" in the context of the question refers to power sold under Section 5(b) of the Regional Act to serve the net requirements of preference customers' firm power loads. This is generally thought of as "preference" power because eligibility to purchase it is strictly limited.[3] Section 5(a) of the Regional Act and Section 5(a) of the Bonneville Project Act, as interpreted by BPA, currently prohibit the agency's customers from reselling requirements power. Accordingly, any contract between BPA and an eligible JOE would include a provision expressly restricting its resale.

H.R. 3447 goes further to ensure the status quo with regard to resale prohibitions by including express provisions ensuring that the JOE's

[3] However, the Committee may notice that Section 5(b) of the Regional Act also requires BPA to offer to sell firm power to serve the net requirements of Pacific Northwest investor-owned utilities.

members also cannot resell requirements power. This carries forward the existing statutory resale prohibitions to cover the additional transaction needed between a JOE and its members – ensuring that the benefits of that power are realized by the retail customers of the preference-eligible utility.

Neither PNGC Power nor its members intend to resell firm requirements power because (1) it is and will continue to be illegal; and (2) our purpose in purchasing firm requirements power is to meet the needs of our members' retail customers.

8. PNGC Power believes that H.R. 3447 needs to be enacted as soon as possible.

We are currently participating in the BPA Power Business Line's rate case on behalf of our members. That rate case, which covers the rate period commencing on October 1, 2001, is scheduled to conclude at the end of April 2000. Pursuant to the agency's Power Subscription Strategy, the deadline for signing power purchase contracts with the agency on the terms and at the rates set in the rate case is the end of September 2000.

In order to meet the September deadline for finalizing contracts with Bonneville, each of PNGC's members must review all available power-supply and contract options available to them to serve their customers reliably and at the lowest cost. Before the boards of each of those systems can make those decisions on an informed basis, substantial economic, legal, and operational analyses must be performed. PNGC is currently engaged in performing these analyses, while, at the same time, engaging in ongoing strategic planning with each individual member's staff and board of directors. This is an extensive, complicated and time-consuming undertaking that is made more difficult because of the uncertainty over whether our members can contract jointly with the agency.

There are other time constraints that make the timely passage and enactment of H.R. 3447 critical. For instance, the generic contract forms for different BPA power products have been under negotiation for some time. Any variations required to accommodate multiple systems under a single contract must be developed well in advance of actual contract execution in September.

In addition, PNGC Power must plan well in advance to meet the operational and staffing requirements to operate under different contract scenarios – a factor that will be substantially influenced by the ability to jointly contract with the agency. PNGC will be offering new contracts to its members that must be in place well in advance of the close of subscription. The structure of these agreements depends, in part, on whether PNGC Power can contract with BPA as a JOE.

Put simply, we are already past the point at which it would have been optimal to know our contractual options with Bonneville. However, use of the JOE provisions are still of sufficient value to warrant our continued strong interest in

seeing Congressional action on H.R. 3447. Our hope is that, with your assistance, this bill will be enacted into law this spring so that systems will have a reasonable basis on which to make their power-supply decisions this summer.

9. (a) PNGC believes that no statutory barriers exist that prohibit BPA from allowing its public preference customers to pool their purchases of BPA products. However, for nearly 20 years, BPA has not allowed PNGC members to pool their purchases of requirements firm power. In 1985, a request was submitted to the agency for a contract to pool purchases by members of PNGC. BPA declined the request and articulated numerous reasons in a Draft Record of Decision (ROD), which by agreement with the agency was not finalized or published.

In that draft ROD, Bonneville argued that a pooling entity must itself have an electrical distribution system, regardless of whether or not each of the entity's members had all the necessary facilities. Bonneville asserted that a cooperative composed exclusively of electric distribution cooperatives was ineligible for a contract, despite the fact that each member cooperative was an "organization of citizens" and an eligible "cooperative" customer under the Project Act. Bonneville claimed that a cooperative owned and controlled exclusively by member cooperatives serving all within their service areas at cost-based rates, on a not-for-profit basis, and without discrimination lacked a sufficient "public utility responsibility."

Somewhat more persuasively, the agency cited a 50 year practice and course of conduct of refusing to serve would-be customers that did not *themselves* have a distribution system or a physical ability to "take and use" BPA power and were not "public utilities" having a responsibility to serve their customers' loads.[4]

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[4] Examples cited by Bonneville in the Draft ROD included the following:

- City of Seattle (1948) (takeover of Puget Power facilities; Seattle did not yet own a distribution system)
- Washington State Power Commission (1954) (attempt by a state utility regulatory agency to purchase "all available hydroelectric generation for resale to State utilities and industry")
- Oregon State Agency Proposals (1957 and 1979) (Oregon's "Domestic and Rural Power Authority" and a predecessor were attempts comparable to Washington's 1954 effort)
- Washington Public Power Supply System (WPPSS) (1979) (power sales contract sought by WPPSS to enlarge allocation to its members, who were exclusively Washington municipalities and Public Utility Districts)
- City of Portland (1979) (contract sought by city as purchasing agent for resale to citizens served by investor-owned utilities, with these utilities remaining as distributors)
- 1981 BPA Power Sale Contract Principles (blanket policy against pooling)

Notwithstanding the agency's rationale, PNGC believes that there is no statutory, regulatory or judicial determination that would prevent Bonneville from offering PNGC a contract under Section 5(b) of the Regional Act. However, there is no statute expressly authorizing or directing Bonneville to do so. While Section 9(i) of the Regional Act requires the agency to offer contracts for transmission service to groups of preference customers, the Act does not contain a parallel, express obligation to offer requirements power contracts to groups of preference customers.

Although we believe that BPA has legal authority to offer a contract to PNGC under Section 5(b) of the Regional Act, and it is possible that, with the vast changes in wholesale and retail markets since 1985, the agency might now agree, we continue to believe that this legislation is essential to allow small public body and cooperative utilities in the Pacific Northwest serve their customers reliably and efficiently.

(b) PNGC is directly aware of two instances in which BPA has allowed joint contracting: (1) PNGC currently has contracted with the agency's Transmission Business Line for the purpose of securing *transmission* and *delivery* services for each of its members. PNGC holds and manages one contract with the agency for this purpose; and (2) as mentioned in the answer to Question 7, PNGC and other entities are not restricted from purchasing surplus power products from Bonneville through a combined contract. However, those purchases are clearly distinguishable from the types of purchases envisioned by the JOE provisions. They do not deal with 5(b)(1) requirements firm purchases by preference customers. Those purchases are strictly limited to preference-eligible entities under the Regional Act. H.R. 3447 merely allows a JOE to act on behalf of a group of such entities that form the JOE and comprise its membership to make and administer firm requirements purchases for them in a manner that achieves administrative efficiencies.

10. We would note that the reason that H.R. 3447 and its Senate counterpart have achieved a high level of industry and bipartisan political support is that the substantive effect of its provisions is to permit common-sense economies without disadvantaging any other party. For that reason, the JOE bill has come as far as any Northwest energy matter has in achieving consensus. While many parties, including PNGC and its members, would suggest numerous other changes to the Regional Act, none have been, or are likely to be, as non-controversial in their

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- Emerald People's Utility District (EPUD) (1982) (as in the earlier case of Seattle, BPA refused to execute a power sales contract until EPUD acquired a distribution system and assumed a public utility responsibility)

- Columbia River People's Utility District (1981-83) (same treatment as EPUD).

substance as H.R. 3447.

As mentioned in the answer to Question 8, we are under enormous time pressure to assure the use of the JOE provisions for upcoming contracts. Failure to act quickly, or a decision to discuss this issue it the context of other more contentious issues, will have the practical impact of depriving PNGC's members and other eligible systems of an important opportunity to achieve reasonable cost economies that would be available if H.R. 3447 is passed and JOEs can be employed for the period of their new contracts with Bonneville. And Bonneville itself would be impeded in its on-going efforts to reduce its costs of operation. In this sense, it would be a case of justice delayed, justice denied.

11. For the reasons stated in our answers above, PNGC Power and its members strongly support H.R. 3447 in its current form. The current provisions are the result of substantial discussion and negotiation between interest groups and with committee and member staffs. While not all of the provisions included in the current draft may be necessary from our standpoint – for instance the date restrictions – we have recognized the need to be flexible in our deliberations over the bill's language. In addition, we would note that any changes to the bill would entail additional time delays given that the Senate has already approved it in its current form.

Thank you for this opportunity to provide our input as you deliberate on H.R. 3447. We appreciate the courtesy and the sense of urgency with which you have proceeded on this matter. Please feel free to contact me or Patrick Reiten (503/288-1234) should you require any additional information.

Sincerely,

David E. Piper

David E. Piper
President and CEO

EDWARD J. MARKEY
7TH DISTRICT, MASSACHUSETTS
COMMERCE COMMITTEE
RANKING MEMBER
SUBCOMMITTEE ON
TELECOMMUNICATIONS, TRADE
AND CONSUMER PROTECTION
BUDGET COMMITTEE
RESOURCES COMMITTEE
RETIRED

# Congress of the United States
## House of Representatives
## Washington, DC 20515–2107

2108 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515-2107
(202) 225-2836
DISTRICT OFFICES
[illegible]
[illegible]
FRAMINGHAM, MA 01701
(508) [illegible]

April 10, 2000

The Honorable Joe Barton
Chairman
Subcommittee on Energy and Power
The House Committee on Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Barton:

I am writing in regard to March 30, 2000, legislative hearing before the Subcommittee on Energy and Power. This hearing dealt with legislation to modify the hydropower licensing process. In particular, the following bills were discussed: H.R. 2335, H.R. 1262, H.R. 3852, S. 422, S. 334, S. 1236, and S. 1937.

I respectfully request that the enclosed joint letter from the Center for Energy Efficiency and Renewable Technologies, Environmental Defense, Natural Resources Defense Council, and Sierra Club be submitted as part of the hearing record. If you or your staff has any questions, please contact Mr. Gregory Jaczko in my office at x5-2836.

Thank you for your consideration of my request.

Sincerely,

Ed Markey

Edward J. Markey

Attachments as stated.

PRINTED ON RECYCLED PAPER

**Center for Energy Efficiency and Renewable Technologies**
**Environmental Defense**
**Natural Resources Defense Council**
**Sierra Club**

March 30, 2000

The Honorable Joe Barton
Chairman, Subcommittee on Energy and Power
The House Committee on Commerce
2125 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Barton:

**Re: H.R. 2335 / S. 740- Hydropower Licensing Process Improvement Act - OPPOSE**

Legislation has recently been introduced that would dramatically change the hydropower licensing process and jeopardize a critical restoration opportunity for rivers that have suffered for decades. Pitched as a process reform bill, the legislation actually adds nine new requirements for federal agencies and three new administrative processes to an already complex process. The result? A significantly diminished ability of resource agencies to protect public trust resources such as fish, wildlife, water quality, as well as economically beneficial recreational resources.

While the hydropower relicensing process is not perfect, the industry is not what is in jeopardy here. They warn that the relicensing process will render their dams uneconomic. In fact, no license issued in the last seven years has been rejected by its owner. Industry also threatens that reduced generation capacity will result in increased greenhouse gas emissions. In fact, in the last decade, relicensing has yielded dramatic improvements in rivers around the country while reducing average generation by only 1%! That is just 0.05% of the nation's overall electrical capacity. Surely we can afford such a small price for such enormous benefits.

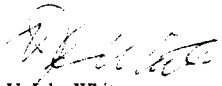
It is important to remember that licenses are issued for 30 to 50 year terms. Relicensing is a once-in-a-lifetime opportunity to ensure that private use of the nation's public river resources is balanced and fair. Judicious changes to a dam's operations can provide dramatic benefits to fish, wildlife, and recreation opportunities. HR 2335 is a transparent attempt by the hydropower industry to circumvent its accountability to the public.

In recent years, industry, state and federal resource agencies, and private citizens have worked together to resolve many inefficiencies with the relicensing process, significantly

reducing the need for litigation. Parties are working toward administrative solutions for remaining issues. Legislative fixes, particularly this legislation, will only set back the substantial progress and trust that stakeholders have built and dramatically tilt the balance away from protecting public trust resources.

Please join us in opposing HR 2335.

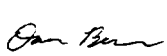
Sincerely,



V. John White
Executive Director
Center for Energy Efficiency and Renewable Technologies

Johanna Thomas
Hydropower Project Director
Environmental Defense

Sheryl Carter
Senior Policy Analyst
Natural Resources Defense Council



Dan Becker
Director, Global Warming and Energy Program
Sierra Club

cc: Subcommittee on Energy and Power

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426

OFFICE OF THE CHAIRMAN

May 8, 2000

The Honorable Joe L. Barton
Chairman
Subcommittee on Energy and Power
Committee on Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Barton:

Thank you for your letter of April 17, 2000, enclosing questions for the record, following on my March 30, 2000 testimony before the Energy and Power Subcommittee of the House Committee on Commerce. My responses are enclosed.

I hope these responses will be helpful in your consideration of the various hydropower bills that are before the Committee. If I can be of further assistance to you in this or any other Commission matter, please do not hesitate to contact me.

Sincerely,

James J. Hoecker
Chairman

Enclosure

cc: The Honorable Heather Wilson
The Honorable Tom Bliley, Chairman, Committee on Commerce
The Honorable John D. Dingell, Ranking Member, Committee on Commerce
The Honorable Rick Boucher, Ranking Member, Subcommittee on Energy and Power

**Answers to April 17, 2000 Questions in Connection with March 30, 2000 Hearing on Various Hydropower Bills Before the Subcommittee on Energy and Power Committee on Commerce United States House of Representatives**

**Questions from Chairman Barton**

**Question 1: In the past, have Federal resource agencies submitted mandatory conditions that FERC believed were not in the public interest?**

Answer: On occasion, the resource agencies have submitted mandatory conditions that the Commission or its staff did not believe best met the public interest, for a variety of reasons, such as not being supported by substantial evidence, not being necessary or properly designed to meet resource needs, and not providing sufficient environmental benefits to balance their negative impacts on developmental resources, particularly power costs. The Commission is generally required as a matter of law to include in licenses mandatory conditions, including those submitted under Sections 4(e) and 18 of the FPA. Thus, the Commission has only two options with regard to such conditions: it can issue a license that includes the conditions, or, if it determines that the conditions cause the license as a whole to be contrary to the public interest, it can deny the license.

Given these constraints, the Commission has only on rare occasion opined in its orders on the merits of mandatory conditions, or made separate public interest findings regarding them. See, e.g., American Rivers v. FERC, 187 F.3d 1007 (9th Cir. 1999) (Court overturned Commission holding that resource agency conditions including construction schedule for non-fishway facilities, setting mortality rates for fish screens, and limiting flows through project power canals were not fishways under FPA § 18 and were otherwise not in the public interest); American Rivers v. FERC, 129 F.3d 99 (2nd Cir. 1997) (Court overturned Commission holding that state resource agency conditions including requiring state approval of project construction and maintenance activities and reserving state authority to unilaterally revise its conditions at any time were beyond the scope of Section 401 of the Clean Water Act and were otherwise not in the public interest).

**Question 2: According to your testimony, FERC has two options if Federal resource agencies propose mandatory conditions that are not in the public interest: (1) approve a license with conditions that are not in the public interest, or (2) deny the license. In practice, which option does FERC choose if agencies submit such conditions?**

Answer: Section 10(a)(1) of the Federal Power Act mandates that the Commission license only those projects that in its judgment will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for beneficial public purposes. The Commission is thus charged with ensuring that the licensed project will be in the public interest. See Udall v. Federal Power Commission, 387 U.S. 428, 450 (1967). Even where the Commission may find one or more mandatory conditions imposed by other federal agencies not to be in the public interest, it may yet conclude that the public interest is served by licensing the project, in view of the totality of the project and all the conditions thereon. To date, the Commission has not denied a license application on the basis that the mandatory conditions would render the project as a whole not in the public interest.

**Question 3: Can Federal resource agencies exercise their authority under section 18 of the Federal Power Act to attach mandatory conditions that are not fishway prescriptions to a FERC license? If so, have the resource agencies exercised their authority in this manner?**

Answer: The U.S. Court of Appeals for the Ninth Circuit, in American Rivers v. FERC, 187 F.3d 1007 (9th Cir. 1999), held that the Commission cannot revise or reject any prescriptions filed under color of Section 18 of the Federal Power Act. If the Commission issues a license containing such prescriptions, review of the prescriptions can only occur in the context of an appeal of the license order to a U.S. Circuit Court of Appeals pursuant to Section 313 of the Federal Power Act. The resource agencies have, on occasion, submitted Section 18 prescriptions that the Commission or Commission staff stated, in orders or environmental documents, were not fishways. See, e.g., the Leaburg-Walterville Project, which was the subject of the American Rivers case (construction schedule for non-fishway facilities; mortality rate standards for the fish screens; limits on flows through project power canals).

**Question 4: Does FERC have authority under current law to impose deadlines for the submission of mandatory conditions and recommendations by Federal resource agencies?**

Answer: Timely receipt by the Commission of mandatory conditions and recommendations is important to the efficiency of the licensing process and to full public participation in that process (if conditions are received too late, participants may not have an optimal opportunity to review and comment on them). In recognition of these considerations, the Commission, in 1991, promulgated a rule establishing deadlines for the submission of mandatory licensing conditions and recommendations. The Commission cited as authority for that rule Section 309 of the Federal Power Act, which empowers the Commission to prescribe such rules and regulations as it may find necessary or appropriate to carry out the provisions of the Act. However, because the Commission's authority to establish such deadlines has been questioned, I support specific statutory clarification of the Commission's authority in this area.

**Question 5: At the Subcommittee hearing in September 1998, Federal agency witnesses expressed optimism the interagency process would produce administrative reforms to the hydropower relicensing process. What specific administrative reforms have come out of the interagency working group over the past two years?**

Answer: The Interagency Task Force to Improve Hydroelectric Licensing Processes (ITF) is comprised of representatives of the Commission, Department of Agriculture, Department of Commerce, Department of Energy, Department of the Interior, and the Environmental Protection Agency. ITF working groups, which also include representatives from the Advisory Committee on Historic Preservation and State agencies, have been reviewing the process by which the Commission, with the input of the listed federal agencies and other participants, issues hydropower licenses. When we pushed for creation of the ITF, it was to obtain some fundamental changes in the relicensing process. It is my intention that the participants in the ITF agree on appropriate means to substantiate mandatory conditions through public notice and comment, and submit to this agency the record of those proceedings.

To date, the ITF has accomplished the following:

*Noticing procedures.* Prepared a report on the manner in which the Commission alerts the public and other agencies of proposed hydropower licensing actions, and proposed changes in Commission and resource agency procedures to expedite

issuance and receipt of notices and improve overall communication among federal agencies. The Commission has implemented these changes.

***NEPA process.*** Prepared a report on the manner in which the environmental impacts of hydropower licensing actions are studied. The Commission is examining the changes recommended in the report, with a view towards implementing those that will improve coordination among federal agencies and enable all interested parties to understand and more efficiently work within the NEPA process.

***Studies.*** Prepared draft guidelines on how to identify resource issues, identify and conduct necessary studies during the pre-filing stage, resolve disputes over studies, and address issues related to post-filing studies. These guidelines can help make the licensing process more efficient and eliminate or help resolve disputes early on in the process.

***Endangered Species Act consultation.*** Is developing an integrated and streamlined process by which the Commission and the resource agencies will coordinate Section 7 consultation under the Endangered Species Act with the Commission's traditional licensing process. This will facilitate timely licensing actions.

***Enforceable license conditions.*** Prepared draft guidance to state and federal agencies on how to draft clear and enforceable license conditions.

***The collaborative process.*** Prepared draft guidelines for use by anyone involved in FERC's alternative licensing procedures (ALP), to supplement FERC's regulations and, among other things, assist stakeholders in identifying resource managements goals early in the process, establish clear ground rules for participating in an ALP, and help resolve disputes as they arise.

***Off-the-record communications.*** The ITF provided useful input to the process whereby the Commission revised its regulations governing off-the-record (i.e., *ex parte*) communications. The new regulations – which were issued in final form on September 15, 1999 – facilitate enhanced communications among the participants in hydropower licensing proceedings.

***Economics.*** The ITF completed a draft report on how the Commission and the other federal resource agencies use economic information in evaluating resource protection policy. This report examines the different types of economic analyses used by different federal agencies and outlines the types of economic data and methodologies that are available.

**Question 6: Your testimony highlights examples where settlements expedited relicensing. What are the limitations on settlement agreements in relicensing? Have settlements fallen apart because Federal resource agencies resorted to use of their mandatory conditioning authority?**

Answer: The greatest limitation on settlement agreements in relicensing is the willingness, or lack thereof, of parties to look beyond their sometimes limited interests to the entire spectrum of public interest considerations. There are often strong competing interests at stake in these proceedings, and the Federal resource agencies represent some part of those. It is only the Commission, however, that has a statutory mandate to balance all the relevant considerations. The use of mandatory conditioning authority can disrupt settlements to the extent that it precludes negotiation on the matters covered by the conditions.

**Question 7: Proponents of S. 334 argue that the bill is needed to honor the water law of Native Hawaiians. Do you believe that this is a good rationale for this legislation? If so, should there be exemptions in the Lower 48 to honor the water law of Native American tribes in the Lower 48?**

Answer: I am not familiar with the referenced arguments on Native Hawaiian water law, and so cannot comment on them in any detail. As a matter of policy, the Commission defers to the states with regard to determinations concerning water rights. Also, in making licensing decisions, the Commission takes into account the religious and cultural values of Native Americans. However, a suggestion that areas where local water law customs exist should be exempt from the Federal Power Act might well be inconsistent with Congress' intent that that Act create a complete scheme of national regulation to promote the comprehensive development of the water resources of the Nation.

QUESTIONS FROM CONGRESSWOMAN WILSON

**Question 1: As last October's oversight hearing on this issue in the Senate, FERC General Counsel Douglas Smith testified as to his frustration over "trying to administer a process that has so many influences, some of which we attempt to balance, some of which are outside of our control to even attempt to balance."**

**Do you share this frustration, and in your opinion would legislation such as H.R. 2335 help relieve this frustration?**

Answer: I do share that frustration. While I recognize the important resource protection mission of agencies with mandatory conditioning authority, it can nonetheless be difficult to achieve timely outcomes that fully meet the Commission's views of what the public interest requires when other entities have control over key aspects of the licensing process. As I stated in my testimony, certain parts of H.R. 2335, such as those requiring that agencies consider certain public interest factors, that they provide the Commission documentation of their conditions, and that they meet deadlines for the submission of conditions, could help make licensing more timely and efficient.

**Question 2: In the case of American Rivers v. FERC, the license for the Leaburg-Walterville Project, which is owned and operated by the Eugene Water & Electric Board (EWEB), was appealed. The court decision, regarding fishway prescription authority under the Federal Power Act Section 18, included a quote from the U.S. Supreme Court that stated, "Any conflict between the Commission and the Secretary with respect to whether the conditions are consistent with the statute must be resolved initially by the courts of appeals, not the Commission." Is the Federal judiciary the right place to resolve conflicts among state and federal agencies?**

Answer: I do not think that the judiciary is the best place to resolve most conflicts, especially if they have immediate economic and environmental impacts and are highly technical and detailed. It is, moreover, inefficient and time-consuming for judicial appeal to be a licensee's first opportunity to obtain any review of a mandatory condition. A more rational system would entail the Commission making the initial determination of whether a mandatory condition comports with the statute the Commission administers, subject to appellate review of the Commission's ruling. If the current statutory scheme, which divides authority over the terms of hydropower licenses among a number of federal and state agencies and gives no single agency final approval over license conditions, remains in place, parties may nevertheless have to resort to the courts in the first instance to resolve inter-agency conflicts.

**Question 3: Recognizing the competition over finite resources that is inherent to the relicensing process, can truly environmentally equitable licenses be achieved when mandatory conditions do not have to be justified and can not be "touched" by FERC and any attempt at balancing is done at the expense of state and other governing bodies? Shouldn't all conditions and recommendations be held to the same standards?**

Answer: To the extent that the Commission receives mandatory conditions that are unsupported and which the Commission cannot revise, it makes it more difficult for the Commission to craft licenses that reflect a balance of the public interest. I believe that all conditions should be held to the same standards, particularly those specified by the Administrative Procedure Act, which requires that agency decisions not be "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." See 5 U.S.C. § 706(2)(3).

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

May 8, 2000

OFFICE OF THE COMMISSIONER

The Honorable Joe Barton
Chairman
Subcommittee on Energy and Power
House Commerce Committee
U.S. House of Representatives
Washington, D.C. 20515-6115

Dear Chairman Barton:

I write in response to your letter to me dated April 17, 2000. In that letter, you compiled and attached questions from you and Congresswoman Wilson. Those questions address my testimony on various hydropower bills that were the subject of a hearing before the Subcommittee on Energy and Power on March 30, 2000.

For purposes of brevity, and to avoid duplication, I will refer to Chairman Hoecker's responses when appropriate.

**Questions from Chairman Barton**

**Question 1: In the past, have Federal resource agencies submitted mandatory conditions that FERC believed were not in the public interest?**

Answer: Yes, federal resource agencies have submitted mandatory conditions that the Commission as a collective body -- and myself as an individual Commissioner – have found to be not in the public interest. Because the Commission has little discretion in responding to the submission of mandatory conditions, typically it does not opine in its orders as to the reasonableness of individual conditions. The Commission does, however, look at the cumulative impact of all of the license conditions, whether submitted by other agencies or adopted in the first instance by the Commission, in its assessment of anticipated economic benefits of project power. In a number of Commission licensing orders, the Commission has found that the cumulative impact of mandatory and discretionary license conditions produces a **negative** net annual benefit. In other words, the conditions attached to a hydroelectric license may compel the license holder to operate the project at a cost that may be significantly higher than the cost of alternative (non-hydroelectric) sources of electricity.

For these reasons, I strongly support H.R. 2335 (the Towns Bill). I wish to emphasize that H.R. 2335 represents a pragmatic, balanced approach that does not strip the federal resource agencies of their existing ability to submit mandatory conditions for inclusion in a hydroelectric license. Rather, it takes the common sense approach that federal agencies must consider a wide range of public interest factors, document their consideration of these factors, and submit their license conditions in a timely manner. I find this approach to represent a sensible and balanced accommodation of interests and responsibilities

**Question 2: According to your testimony, FERC has two options if Federal resource agencies propose mandatory conditions that are not in the public interest: (1) approve a license with conditions that are not in the public interest; or (2) deny the license. In practice, which option does FERC choose if agencies submit such conditions?**

Answer: When confronted with mandatory conditions that are not in the public interest, the Commission must choose the best of two bad options. Given the choice between approving or denying a license application, my preference is for approval -- even if the license contains mandatory conditions that, in the aggregate, might make the license uneconomic to operate.

I have two reasons for this approach. First, I believe that the Commission should not make the decision for the licensee whether or not to operate the project as licensed. Despite the cost of mandatory (or discretionary) conditions, the licensee still might have reasons to go forward with hydroelectric generation of electricity – perhaps to enhance its share of peak load capability or its holdings of environmentally-benign generation that does not contribute to greenhouse gas emissions.

Second, when the Commission does deny a license, I emphatically disagree with the Commission's current policy that it also maintains the authority to order the decommissioning of an existing project. I explained my position in a dissent (which I have attached) to an order issued on September 16, 1998 in Edwards Manufacturing Company, Inc., et al., 84 FERC ¶ 61,228 at 62,101-03 (1998). In my dissent, I explained that the text and legislative history of Part I of the Federal Power Act evidences no authority to order dam decommissioning; rather, the appropriate procedure under the statute, at the time of license denial, is to grant a license to operate the project to another licensee, issue a non-power license, or direct a federal takeover.

**Question 3: Can Federal resource agencies exercise their authority under section 18 of the Federal Power Act to attach mandatory conditions that are not fishway prescriptions to a FERC license? If so, have the resource agencies exercised this authority in that manner?**

Answer: Unfortunately, federal resource agencies can exercise -- and have exercised – their authority to submit mandatory conditions that, in the Commission's judgment, are not legitimate fishway prescriptions within the meaning of section 18 of the FPA. This is the subject of a recent court case – the 1999 Ninth Circuit American Rivers case – that Chairman Hoecker refers to in his response to this question.

Frankly, this court decision is of real concern to me. I fear that federal resource agencies, armed with mandatory conditioning authority and a judicial precedent that disables the Commission from questioning the legitimacy of any license condition proferred under the cloak of section 18, will use this authority to achieve goals that they otherwise might be unable to attain. H.R. 2335 -- by compelling agencies to justify their submission of mandatory license conditions, including those submitted under section 18 -- would go a long way to alleviating this concern.

**Question 4: Does FERC have authority under current law to impose deadlines for the submission of mandatory conditions and recommendations by Federal resource agencies?**

Answer: Chairman Hoecker's response explains the Commission's existing practice and authority to establish deadlines.

I believe strongly that Congress should clarify the extent of the Commission's authority to establish reasonable deadlines. A recent Commission licensing order, issued on April 27, 2000, demonstrates the extent of the current problem. See Curtis/Palmer Hydroelectric Company, L.P.; International Paper Company, Project No. 2609-013 (relicensing of the Curtis/Palmer Falls Project in New York). As my concurring statement (which is attached) explains, the Department of Interior has yet to take a definitive position as to whether it intends to mandate fish passage conditions. (It reserved its authority to direct the construction and operation of unspecified fishways in a 2-year old letter to the Commission.) As a result, the Commission was unable to undertake a real balancing of costs and benefits; the Commission was compelled to estimate the annual cost of the project's operation and the annual value of the project's output without understanding whether Interior intends in the future to impose additional commitments on the licensee. Such delay and uncertainty, in my opinion, seriously undermines the type of balanced consideration of issues that is contemplated by the

Federal Power Act.

**Question 5: At the Subcommittee hearing in September 1998, Federal agency witnesses expressed optimism the interagency process would produce administrative reforms to the hydropower relicensing process. What specific administrative reforms have come out of the interagency working group over the past two years?**

Answer: Chairman Hoecker's response explains the reforms that have originated from the interagency process. I support efforts to reconcile the respective interests of stakeholders to the licensing process and to expedite and rationalize the process. I am hopeful that productive administrative reform will improve the licensing process and help eliminate the problems I have identified.

I nevertheless believe that administrative reform, given the current assignment of administrative responsibilities under existing law, is no substitute for badly-needed legislative reform. The only effective way to ensure that all agencies with an interest in hydroelectric licensing balance and document their consideration of various public interest factors is through legislative action – such as passage of H.R. 2335.

**Question 6: Your testimony highlights examples where settlements expedited relicensing. What are the limitations on settlement agreements in relicensing? Have settlements fallen apart because Federal resource agencies resorted to use of their mandatory conditioning authority?**

Answer: I also support ongoing Commission-led efforts to promote settlements and to streamline the licensing process. I much prefer for interested parties to resolve as many of their concerns as possible in a consensual manner prior to submission of a license application, rather than devote years (perhaps decades) to litigation of contested issues.

However, the Commission's collaborative, alternative licensing process is no substitute for legislative reform. As recent practice has demonstrated, such procedures can significantly expedite the processing of some licensing proceedings. Other proceedings have proven to be resistant to collaborative and settlement efforts. I suspect that the most significant hindrance to settlement of disputed issues is the presence of mandatory conditioning authority. Without the need to balance countervailing circumstances and the obligation to justify their choice of conditions, resource agencies with such mandatory authority may have little incentive to sit down and settle any differences. In short, the presence of mandatory licensing conditioning, in its current

form, confers upon parties to licensing proceedings greatly disproportionate negotiating strength.

I highlighted this problem in a concurring statement attached to a recent order issued by the Commission. See Public Utility District No. 1 of Okanogan County, Washington, 90 FERC ¶ 61,169 at 61,551-52 (2000) (rescinding license for Enloe Dam project in Washington). In my statement, which I have attached to these responses, I explained that a single federal resource agency (the National Marine Fisheries Service of the Department of Commerce), which alone was insistent on a mandatory condition requiring the construction and operation of upstream fish passage facilities, was able to scuttle extensive efforts by numerous other parties spanning a wide array of interests to advance a collaborative, regional solution to a protracted licensing dispute. I explained my concern as follows:

> But one party, carrying mandatory conditioning authority, and focusing myopically on its own particular interest, can upset the collaborative process if so inclined. To a party opposing licensing, stalemate may mean victory for one party and defeat to the rest of America.
>
> I view this process, where some participants, bearing veto power, have more negotiating authority than others, if indeed inclined to negotiate at all, as absurd. As a result, I am encouraged by pending legislative efforts to rationalize this process, by requiring a greater level of cooperation among federal and state resource agencies. Such reform would benefit consumers by forcing all parties to the table in an effort to resolve such disputes in a fashion that is best suited for the benefit of all Americans.

**Question 7: Proponents of S. 334 argue the bill is needed to honor the water law of Native Hawaiians. Do you believe that is a good rationale for this legislation? If so, should there be exemptions in the Lower 48 to honor the water law of Native American tribes in the Lower 48?**

Answer: I have no objection to S. 334. My understanding is that it would have no effect on the Commission's existing operations, as the Commission never has licensed a hydroelectric project in Hawaii. As to the Lower 48, as long as the Commission is able effectively to balance and consider all relevant issues, including water law and other rights of Native American tribes, as contemplated in the provisions of H.R. 2335, I do not see the need for additional legislation.

Questions from Congresswoman Wilson

**Question 1: At last October's oversight hearing on this issue in the Senate, FERC General Counsel Douglas Smith testified as to his frustration over "trying to administer a process that has so many influences, some of which we attempt to balance, some of which are outside of our control to even attempt to balance."**

**Do you share this frustration, and in your opinion would legislation such as H.R. 2335 help relieve this frustration?**

Answer: Yes, I share this frustration. And yes, I believe that legislation such as H.R. 2335 would significantly help to relieve this frustration.

As I explained in my responses to Chairman Barton's questions, at present the Commission is effectively unable to satisfy its obligation under the Federal Power Act to balance its consideration of developmental and non-developmental issues that arise in the hydroelectric licensing process. I believe that H.R. 2335 represents a fair accommodation of interests and responsibilities. I have no objection to federal resource agencies exercising the ability to submit mandatory license conditions – as long as the Commission can be assured that the agencies have considered various public interest considerations (including cost) and have submitted their conditions in a timely manner.

**Question 2: In the case of American Rivers vs FERC, the license for the Leaburg-Walterville hydroelectric project, which is owned and operated by the Eugene Water & Electric Board (EWEB), was appealed. The court decision, regarding fishway prescription authority under the Federal Power Act Section 18, included a quote from the U.S. Supreme Court that stated, "Any conflict between the Commission and the Secretary with respect to whether the conditions are consistent with the statute must be resolved initially by the courts of appeals, not the Commission." Is the Federal judiciary the right place to resolve conflicts among state and federal agencies?**

Answer: No, the federal courts are rarely, if ever, the appropriate place to resolve conflicts among state and federal agencies. I would much prefer a process -- such as that embedded in H.R. 2335 -- that obligates all agencies to engage in a balancing of public interest factors and to consider the cost implications of their decisions. Such a process would significantly enhance the ability of agencies with a role in the licensing process to resolve their disputes among themselves, rather than having to resort to time- and resource-extensive litigation.

I explain above, in response to Question 3 submitted by Chairman Barton, my strong objection to the American Rivers case you cite. My concern is that federal resource agencies, armed with mandatory conditioning authority and a judicial precedent that disables the Commission from questioning the legitimacy of any license condition proffered under the cloak of section 18, will use this authority to achieve goals that they otherwise might be unable to attain.

**Question 3: Recognizing the competition over finite resources that is inherent to the relicensing process, can truly environmentally equitable licenses be achieved when mandatory conditions do not have to be justified and can not be "touched" by FERC and any attempt at balancing is done at the expense of state and other governing bodies? Shouldn't all conditions and recommendations be held to the same standards?**

Answer: Yes, I believe that all conditions and recommendations submitted by federal and state resource agencies should be held to the same standard applicable to the Commission's licensing decisions – the obligation to consider and balance all relevant public interest factors. H.R. 2335 would significantly enhance the licensing process by adopting the same standard to all licensing conditions. The current process, recognized in this question – whereby resource agencies are under no obligation to justify their conditions or balance countervailing circumstances, and the Commission has no ability to "touch" those mandatory conditions – does significantly hinder the ability of the Commission to ensure the adoption of environmentally and economically equitable licenses.

I will be glad to answer any further questions you may have.

Sincerely,

Curt L. Hébert, Jr.
Commissioner

cc: The Honorable Heather Wilson
The Honorable Tom Bliley, Chairman, Committee on Commerce
The Honorable John D. Dingell, Ranking Member, Committee on Commerce
The Honorable Rick Boucher, Ranking Member, Subcommittee on Energy and Power

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Curtis/Palmer Hydroelectric Company LP
International Paper Company

Project No. 2609-013

(Issued April 27, 2000)

HÉBERT, Commissioner, *concurring*:

I support the issuance of a new license for the continued operation of the Curtis/Palmer Falls Project. I write separately to comment on two discrete issues presented by today's order.

The first concerns the Commission's assessment of the environmental benefits deriving from relicensing of this project. The order states simply (on page 13) that continuous operation of the Curtis/Palmer Falls Project will reduce annual carbon emissions in the Northeast. This is because the project displaces the need for other power plants – primarily those fueled by natural gas and oil – to operate. The order concludes that the continued project operation "avoid[s] some power plant emissions and creat[es] an environmental benefit."

I am, of course, gratified that the Commission recognizes some environmental benefit from the operation of hydroelectric facilities. My preference, however, would have been for the Commission to recognize in its order the extent of the environmental benefit from the continued operation of the Curtis/Palmer Falls Project. In particular, I would not have shied away from a quantification of the amount of greenhouse gas emissions that are avoided on account of continued operation of the project.

Based upon information supplied by the Commission's Staff, the atmospheric emissions benefits from a new license are truly substantial. I understand that in the Northeast Power Coordinating Council reliability region, where the Curtis/Palmer Falls Project is located, any increase or decrease in demand is likely to result in a corresponding increase or decrease in natural gas- or oil-fired generation. That type of fossil fuel-generated electricity implicates greenhouse gas emissions rates of about 197 kg/MWH of carbon. Without the Curtis/Palmer Falls Project, annual carbon emissions in

this region would increase by about 59 thousand metric tons per year.[1] Using a more visual and understandable reference, the emissions avoidance benefit of the Curtis/Palmer Falls Project is equivalent to emissions of more than 45,000 passenger cars.

That's a huge benefit – one that should be recognized explicitly and frankly by the Commission in its balancing of costs and benefits.

I believe that the Commission should include this type of quantification of environmental benefits in all of its hydroelectric orders in which such an analysis is available and reasonably uncontroverted. (Indeed, I believe that such an analysis, if available, should be included in the Commission's natural gas pipeline certification orders.) This type of analysis indicates that the benefits provided by hydroelectric development, which the Commission must balance against any environmental costs, do not stop with developmental and economic benefits. Rather, hydroelectric development also provides important environmental benefits that are entirely consistent with the Clinton/Gore Administration's promotion of renewable, atmospherically-friendly sources of energy. I wish the Commission had connected the dots and had publicly reached that same conclusion.

As to my second issue of concern, the Commission bears no responsibility. Rather, I now focus on the Department of Interior, and its failure to take a definitive stance as to whether it intends to mandate fishway prescriptions, as contemplated under section 18 of the Federal Power Act.

As today's order recognizes (on pages 8-11), Interior reserved its authority to direct the construction, maintenance and operation of fishways in a letter to the Commission, dated June 22, 1998. Now, almost two years later, as the Commission prepares to issue an order on the subject of a new license for the Curtis/Palmer Project, Interior still has not made up its mind as to whether it intends to compel the licensee to undertake additional, and possibly expensive, measures to promote fish passage near the

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[1]This analysis is based on a 1997 set of plants and demands. The data for regional power plants are from the database used by the Energy Information Administration for the Annual Energy Outlook 1999 (U.S. Department of Energy, Energy Information Administration 1999). Fuel costs and peak demands are based on various monthly fuel reports from the same agency. Demand profiles are based on hourly load data from Resources Data International. The data were analyzed using the Oak Ridge Competitive Electricity Dispatch model (Hadley and Hirst 1998).

project. Unfortunately, under recent court precedent, the Commission has no discretion to reject any fishway prescriptions offered now or in the future by Interior. Because the Commission reasonably has no intention of delaying license issuance and waiting for Interior to act, it does the only logical thing – include a license article (Article 408) that reserves to Interior the authority to require the licensee in the future to construct, operate and maintain any fishways that Interior prescribes at any time in the future.

This game of cat-and-mouse highlights the need for congressional action to impose reasonable deadlines for the submission of mandatory license conditions by federal (and indeed state) resource agencies. My understanding is that this type of delay, and the reservation of authority to act in the future, is not unusual. Indeed, armed with mandatory licensing authority and no deadline, Interior has no real incentive to move quickly. [2] It can always act to impose fishway prescriptions at any time in the future it wants – thus presumably requiring a later assessment of environmental and cost impacts by the Commission.

In the meantime, the Commission's current assessment of costs and benefits carries a big, albeit unstated, asterisk. By way of example, the Commission (at page 15) estimates the annual cost of the project's operation and the annual value of the project's output, and concludes that the project will produce annual net benefits over the new license term of about $10.8 million. However, neither the Commission nor the licensee can speculate with confidence as to the real value of continued operation with the possibility of future Interior action imposing additional commitments on the licensee.

Even with the Commission's estimates and calculations subject to later revision, I have little doubt in this particular case that the balance of benefits and costs justifies issuance of a new license. Among other reasons, I am particularly impressed by the fact that many of the license conditions are the product of settlement agreements signed by the licensee and interested parties. Other cases, however, might be much closer – and the

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[2]Interior has justified its delay by claiming that the license applicant must first provide additional information and conduct additional studies concerning fish movement and passage. As today's order explains (at 10-11), however, the Commission staff determined in October, 1997, that sufficient information already existed from studies already conducted at the project and at other sites for an adequate evaluation of the project's impacts on fish. Today's order reaffirms that earlier determination and encourages Interior – which has refused to participate in settlement discussions – to work cooperatively with other resource agencies and the applicant to develop whatever information it needs to support a section 18 fishway prescription.

failure of resource agencies to offer all of their license conditions in a timely manner will make the Commission's ultimate judgment all the more difficult.

Therefore, I respectfully concur.

Curt L. Hébert, Jr.
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Public Utility District No. 1 of
Okanogan County, Washington

Project Nos. 10536-005 and -006

(Issued February 23, 2000)

HÉBERT, Commissioner, *concurring*:

I write separately to explain my reluctant support for this order.

Given the unfortunate circumstances presented, I agree with my colleagues that the best approach is to rescind the license previously issued to the District. The alternative would be to issue a license that, because of the insistence of a single federal resource agency, would include a condition requiring construction of fish passage facilities. Even without the obligation to install and operate an upstream fish ladder, the project would cost about $700,000 more than the current cost of alternative resources. As today's order explains, slip op. at 15, "[t]he obligation to construct and operate a fish ladder would significantly increase the costs of a project that already appears to be uneconomical." [1]

Moreover, issuance of a license order with the recommended fish passage condition would be deeply offensive to a number of governmental and tribal authorities. In particular, Canadian authorities remain adamantly opposed to the installation of fish passage facilities at Enloe Dam that would introduce anadromous fish into Canadian waters. And the various bands of the Okanogan Tribal Nation oppose fish passage at Enloe Dam, based on concerns of negative impacts to fish stocks and on tribal legend.

The Commission was mindful of these concerns when it issued its earlier orders in this proceeding. To its credit, the Commission resisted the efforts of a single agency – the National Marine Fisheries Service of the U.S. Department of Commerce – to attach a mandatory condition to the license requiring the construction and operation of upstream facilities. At that time, the Commission believed that it had some discretion not to adopt

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[1]A more precise quantification of the costs to the licensee of satisfying a mandatory fish ladder condition would depend upon whether all of the costs of the condition would be incurred by the licensee and, of course, the specific design of the facility. My understanding is that the annual cost of the licensed project – even without the obligation to install and operate an expensive upstream ladder-type facility – would be more than double the annual benefits from the project.

the proposed condition. The Commission's preference was to encourage the District and all applicable agencies to reach a regional, cooperative solution to the identified upstream fish passage problem. Among other things, the Commission's hope was that the parties could reach agreement on allocating the costs of compliance with a fish passage condition if acceptable to the District.

Unfortunately, the Commission's hope that this protracted dispute could result in a mutually-acceptable agreement has been undermined by the recalcitrance of a single agency. NMFS now clarifies that it is advancing the fish passage condition pursuant to its authority under the Endangered Species Act to minimize the impact of the Enloe Dam project (an "incidental taking" under the parlance of the ESA) on protected steelhead trout. In today's order, the Commission states that it no longer has the discretion to continue to resist NMFS' overtures. I reluctantly must concur in the Commission's legal analysis.

I continue only to comment briefly on the role of NMFS in upsetting the efforts of all of the other parties to resolve this matter in a cooperative and non-mandatory manner. The fishway concerns articulated by NMFS are not new. Today's order, see slip op. at 2-3, spells out in considerable detail the historical efforts of numerous parties to minimize the role of Enloe Dam in blocking fish passage. Among other things, the District consulted with pertinent agencies and Indian tribes, conducted studies to support minimum flow and other mitigation requirements, and redesigned project features to address the fish passage problem. The Northwest Power Planning Council, authorized by Congress to protect, mitigate and enhance fish and wildlife resources affected by hydroelectric projects in the Columbia River Basin, was satisfied with the District's efforts to address fish passage issues. Moreover, the Northwest Council, the Bonneville Power Association, and the Bureau of Reclamation were no longer advocating or suggesting removal of Enloe Dam as a means of providing upstream passage.

Left for resolution was the issue of allocating financial responsibility for the construction and operation of any future upstream fish passage facilities at the project. The Commission previously expressed its expectation that resource agencies would refrain from imposing additional conditions until all of the parties could reach a collaborative, regional solution to the upstream fish passage problem.

NMFS, unfortunately, decided not to work to advance a collaborative, regional solution. Instead, armed with authority under the ESA that, for all essential purposes, requires the Commission to impose, and the licensee to accept, the fish passage remedy it favors, NMFS has insisted on a license article requiring the construction and operation of

a fish ladder. It need not concern itself with the interests of different entities with different perspectives on the licensing process.

This is, of course, a problem with the hydroelectric licensing process that is not specific to this case or these particular parties. As this case demonstrates, the Commission can urge parties, in the strongest possible language available, to resolve their disputes in a cooperative manner. And as another case on today's hydroelectric agenda demonstrates, the various participants to a hydroelectric proceeding can significantly speed up the process, and minimize the extent of the Commission's involvement, by reaching agreement on disputed issues. See Avista Corporation, 90 FERC ¶ ___ (2000) (relicensing of Clark Fork Project).

But one party, carrying mandatory conditioning authority, and focusing myopically on its own particular interest, can upset the collaborative process if so inclined. To a party opposing licensing, stalemate may mean victory for one party and defeat to the rest of America.

I view this process, where some participants, bearing veto power, have more negotiating authority than others, if indeed inclined to negotiate at all, as absurd. As a result, I am encouraged by pending legislative efforts to rationalize this process, by requiring a greater level of cooperation among federal and state resource agencies. Such reform would benefit consumers by forcing all parties to the table in an effort to resolve such disputes in a fashion that is best suited for the benefit of all Americans. The ESA should be used as a workman's tool, not a sniper's rifle.

Therefore, I respectfully concur.

Curt L. Hébert, Jr., Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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| Edwards Manufacturing Company, Inc.<br>City of Augusta, Maine | )<br>) | P-2389-034 |

(Issued September 16, 1998)

HÉBERT, Commissioner, dissenting:

The majority denies a motion to vacate from entities that are not parties to the Comprehensive Settlement, in a case where the original decommissioning Order of November 25, 1997 has become moot. The settlement we approve ensures voluntary decommissioning and removal of certain Edwards dam facilities. The applicable authority that requires vacation is clearly set forth in Atlanta Gas Light Co. v. FERC, 140 F. 3d 1392 (11th Cir. 1998).

The primary issue before the court in Atlanta Gas pertained to the Commission's assertion of jurisdictional authority under Section 5 of the NGA to require and mandate the construction of a bypass pipeline pursuant to alleged discrimination in the natural gas market. Parallel to Atlanta Gas, the paramount issue here is the assertion by the Commission of jurisdictional authority to decommission a project or dam facility by the owner, over the objections of the owner, and at the expense of the owner without just compensation. Yet the 11th Circuit in Atlanta Gas held we were required to vacate the order just as here the law requires us to vacate the decommissioning order. In both Atlanta Gas and in this matter before the Commission, each are cases of first impression embarking in uncharted legal grounds. Such assertion is an over-reaching interpretation of the Federal Power Act.

The majority, through their selective application of the law, ignore the plain truth that the voluntary nature of the Comprehensive Settlement renders the original decommissioning Order moot. Because of the voluntary nature of the Comprehensive Settlement, the issues presented in the original decommissioning Order are no longer alive for review. See Powell v. McCormick, 395 U.S. 486, 496 (1969). Vacating this Order is appropriate and should be granted as a matter of course pursuant to United States v. Munsingwear, 340 U.S. 36 (1950), Mechling Barge Lines v. United States, 368 U.S. 324 (1961), and American Family Life Assurance Co. of Columbus v. FCC, 129 F. 3d 625,630 (D.C. Cir. 1997).

In Munsingwear, the court "...clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved." Id. at 40. Further, the rule of law is applicable in regard to "unreviewed administrative orders." Mechling at 329. It is a comfort to know the D.C. Circuit relied on this principle as stated in American Family. "Since Mechling we have, as a matter of course, vacated agency orders in cases that have become moot by the time of judicial review." Id. at 630. Failure to vacate, as the majority in this case, forces the non-settling parties "...to acquiesce in the judgment", which is contrary to U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18,25 (1994). In elementary terms, the rights, duties and obligations of the Edwards license are incorporated as legal requirements of the voluntary Comprehensive Settlement, and the underlying assertion of authority to order the removal of a dam over the objection of the owner, at the expense of the owner without just compensation, is moot.

It is expressed in the original decommissioning Order of November 25,1997, the license application for a new license is denied. The only rights, duties and obligations of a license issued to Edwards are the same as the rights, duties and obligations of the license issued in 1964. Ordering the decommissioning of the project is clearly separate from the operational license. Requirements for a decommissioning plan, technical conference, consultation, and request for waiver are all components to the Comprehensive Settlement which further establish that the Order of November 25, 1997 to be moot. The majority simply views this denial of the motion to vacate as an opportunity to hold onto a ruling which is flawed and without basis in the law.

The dispute between some, but not all, of the parties has been resolved voluntarily through the Comprehensive Settlement. As Atlanta Gas contended that its loss of revenue constituted its damages and injuries, the movants or non-settling parties continue to have a loss although of a different nature. The simple proposition that an entity which is now informed that its property can be destroyed and dismantled over the objection of the business owner, and required to remove or destroy the facilities at the owners expense without just compensation, is one which is suffered throughout the hydro-electric industry. The mere threat of decommissioning based on environmental reasons causes each facility to record a loss contingency of varying degrees. The loss may be enormous and devastating for some and *de minimis* to others. However, the loss is significant and material, and causes a legitimate and real devaluation of the going concern. The assertion by certain comments filed by a few of the settling parties that no direct or preclusive injury or prejudice is suffered, is at best, being disingenuous with this

Commission, and this Commissioner takes issue with such intentional and obvious misrepresentation. It is this type of lack of intellectual honesty which brings us to this issue of decommissioning authority where none exists. This case has evolved into a political agenda wherein the majority does not allow the law to stand in their way. Political agendas are nothing new at FERC, but can be accomplished through the law. In this case, a nonpower license.

The express authority which the Commission so willingly expands, is clearly defined by the Federal Power Act. The authority includes the acceptance of a voluntary surrender of a license under Section 6 of the Federal Power Act, includes a recommendation for a federal takeover under Section 14, and includes the issuance of a nonpower license or power license under Section 15. The legislative history clearly supports the specific alternatives for the Commission at the expiration of a license. Without a clear expression of legislative intent to the contrary, the language is conclusive. See Consumer Project Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

The legislative history includes the original debate prior to passage, and also includes the revisions made in 1968 (P.L. No. 90-451, 82 Stat. 616, August 3, 1968) and 1986 (P.L. No. 99-495, 100 Stat. 1243, October 16, 1986). With the process of the revisions in mind, no expression of intent to grant authority for decommissioning of a hydro-electric facility is evident by a review of such history. However, the enactment of the Atomic Energy Act of 1954 clearly addresses the decommissioning issues required for the public health, welfare, and safety. Based on extensive discussion and explicit inclusion of the decommissioning statutory provisions in the Atomic Energy Act, the majority must assert a congressional mental lapse in the area of hydro-electric facilities, but not in the arena of atomic energy. It is amazing the majority in this matter are alone in their assertion that Congress fails to be keenly aware and conscientious of the environmental measures necessary in the public interest for hydro power. Concluding as the majority proves once again evasive of reasonable thought and interpretation.

Specifically, legislative history speaks to the protection of the investment with regard to water power development under the law. See Hearings before the House Committee on Public Lands, 63rd Congress, 2nd Session, 6 (1914), Hearings before the House Committee on Public Lands, 63rd Congress, 2nd Session 142-144 (1914), and 56 Congressional Record 2942 (1918). The legislative history also expresses the specific options at the end of the license period as well as the longevity and continuity of projects upon construction. See Hearings before the House Committee on Public Lands, 63rd Congress, 2nd Session, 20-23

(1914), Hearings before the House Water Power Committee, 65th Congress, 2d Session 30-32 (1918) and Hearings before the House Water Power Committee, 65th Congress, 2d Session 471, & 872-873 (1918).

A close review of the hearings before the House Committee on Public Lands, 63rd Congress, 2nd Session, 248-256 (1914) warrants special attention. Therein a statement was made which was so strong, it bears emphasis. "...[T]hese dams are being built on the navigable streams, or out in the public domain -- they will always be there; there is no power in the world that is going to drive them away; they are serving a useful purpose, and that is just why I think people misapprehend the situation..." Id. Further, the text also enlightens us that the right to recapture the project and any right to fix terms and conditions does not imply the right to terminate or cease the operation. Id.

The legislative history further provides and expressly authorizes a method for accomplishing the voluntary nature of the Comprehensive Settlement through the issuance of a nonpower license. Set forth in S.2445, Senate Report No. 1338, at 8, June 28, 1968, as well as P.L. 90-451, House Report, No. 1643, at 3093, the Assistant Secretary of the Interior stated, "...the provision of issuance of a temporary, exclusively nonpower, license, pending assumption of supervision by a governmental agency, should provide an appropriate vehicle for advancing water pollution control, recreation, conservation of fish and wildlife and preservation or restoration of aesthetic and historic values." Also stated in P.L. 90-451, House Report No. 1643, at 3094, an opinion of then Deputy Attorney General Warren Christopher, that the exclusive nonpower license would be the result of a Commission determination that a power license is no longer conforming with the comprehensive plan for beneficial public uses. It is expressly clear in the statute, as well as the legislative history, the appropriate alternative to accomplish a voluntary decommissioning and removal of a dam facility, as in the case of the Comprehensive Settlement, is statutorily provided. The majority in this case is clearly avoiding the express authorization set forth in the statute in order to assert a political agenda through an unauthorized means. It is clear to me this Commission is statutorily empowered, and must strictly conduct itself within the language drafted by Congress.

It is this lack of understanding of the law and legislative history as well as the failure to be intellectually forthright about the jurisdictional bounds of this Commission, which puts the non-settling parties in a position to seek vacation of the original decommissioning Order in P-2389. The expression by the majority that decommissioning is a rare and unusual circumstance, further supports the argument to vacate the original Order. The transformation to a voluntary Comprehensive Settlement eliminates

any public interest for the decommissioning Order, and establishes the matter to be moot and appropriate to be vacated in accordance with the above authority.

Therefore, I respectfully dissent.

Curt L. Hébert, Jr.
Commissioner

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D C 20426

May 8, 2000

OFFICE OF THE COMMISSIONER

The Honorable Joe Barton
Chairman, Subcommittee on Energy and Power
United States House of Representatives
Washington, DC 20515-6115

Dear Chairman Barton:

I have reviewed, and, with one clarification, concur with Chairman James J. Hoecker's answers to questions submitted by Members of the Subcommittee on April 17, 2000, in connection with the March 30, 2000, hearing on various hydropower bills before the Subcommittee on Energy and Power.

In response to Chairman Barton's second question, Chairman Hoecker appears to interpret the use of the term "mandatory condition" to apply only to Section 4(e) or Section 18 conditions. Thus interpreted, I agree with the last sentence of his answer. Interpreted more broadly to include any mandatory conditions, however, the Commission recently denied the license application of Public Utility District No. 1 of Okanogan County, Washington for the Enloe Dam Project No. 10536, because the Commission believed it had no choice legally but to include a license condition requiring the construction of an upstream, ladder type fish passage facility proposed by NMFS under the Endangered Species Act. The Commission concluded that on balance, due to this condition, issuing the license was not in the public interest.

With this clarification, I adopt Chairman Hoecker's answers as my own. If I can be of further assistance to the Subcommittee, please do not hesitate to call.

Sincerely,

William L. Massey
Commissioner

cc: Honorable Tom Bliley
Honorable John D. Dingell
Honorable Rick Boucher
Honorable Heather Wilson

# United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

MAY 30 2000

Honorable Joe Barton
Chairman, Subcommittee on Energy
and Power
Committee on Commerce
House of Representatives
Washington, DC 20515-6115

Dear Mr. Chairman:

Enclosed are responses to questions submitted following the March 30, 2000, hearing on various hydropower bills (H.R. 2335, S. 422, S. 334, H.R. 1262, H.R. 3862, S. 1236, and S. 1937).

Thank you for the opportunity to provide this material to the Subcommittee.

Sincerely,

Jane M. Lyder
Legislative Counsel
Office of Congressional and
Legislative Affairs

Enclosure

cc: Honorable Tom Bliley, Chairman, Committee on Commerce
Honorable John D. Dingell, Ranking Member, Committee on Commerce
Honorable Rick Boucher, Ranking Member, Subcommittee on Energy & Power

Questions from Chairman Barton:

1) I understand Deputy Secretary Hayes has stated there should be notice and comment on proposed mandatory conditions and such conditions should be considered final agency actions under the Administrative Procedures Act. Do you agree? If not, explain why Interior opposes public comments on proposed mandatory conditions and why these conditions should not be considered final agency actions, since FERC can't change the conditions.

**Response**: The Department of the Interior supports public review of proposed mandatory conditions. In fact, the Department, together with the Department of Commerce, is committed to explore establishing a public review process for its mandatory conditioning authorities. The Departments have convened a joint drafting committee and are exploring a variety of approaches. The Departments have just issued a Federal Register notice to get early input from the public as to how such a review process might work.

The question of whether our conditions under section 4(e) and prescriptions under section 18 of the Federal Power Act should be considered "final agency action" generally arises in the context of whether they are subject to immediate judicial review. The courts that have considered this question have concluded that section 4(e) and 18 conditions and prescriptions should be reviewed after a Federal Power Act license is issued, in accordance with the "petition for review" procedures set forth in the Act. California Save Our Streams Council, Inc., et al, v. Yeutter, et al, 887 F.2d 908 (9th Cir. 1989). See also Bangor Hydro-Electric Company v. FERC, 659 F.3d 78 (D.C. Cir. 1996). The courts reason that the final agency action at issue is the Commission's final licensing order and that, by its express language, the Federal Power Act provides exclusive jurisdiction to review licensing decisions to the court of appeals. (Any other result would lead to the awkwardness of having mandatory conditions reviewable in federal district courts while the license containing those conditions is simultaneously reviewable in the court of appeals – or delayed pending the district court determination.)

2) Under current law, do Federal resource agencies consider a broad range of public interest factors in their development of mandatory conditions, such as power production, energy conservation, protection of fish and wildlife, protection of recreational opportunities, and other factors? Should legislation require agencies to consider a broad range of factors?

**Response**: The Department's responsibility in this process, as defined by the Federal Power Act, is to develop license conditions under section 4(e) based on its special expertise as a federal land manager, and prescriptions under section 18 as one of the custodians, along with the Department of Commerce, of the Nation's fishery resources. In developing these conditions and prescriptions, the Department may consider the factors listed above, particularly where they intersect with the Department's obligations to protect and provide for federal lands and fish and wildlife resources. The primary responsibility for balancing this range of factors lies with the Commission, once the "floor" for resource

protection is established under sections 4(e) and 18.

This is an appropriate division of roles, since our expertise lies in resource conservation, and it would be unnecessarily duplicative to give us the Commission's balancing responsibility, or to give the Commission our resource conservation responsibility. This is not an unusual division of responsibility. Many other regulatory statutes involve one agency making a broad "public interest" determination considering all factors after another agency makes a narrower, binding determination of what is necessary to protect a particular resource. Indeed, in the case of hydropower licensing, state agencies are also given mandatory authorities to protect water quality under section 401 of the Clean Water Act and coastal zones under section 307(c)(1) of the Coastal Zone Management Act.

3) Under current law, do Federal resource agencies consider cost in their development of mandatory conditions? If not, should legislation require agencies to consider cost?

**Response**: The Department's primary responsibility is to identify relevant resource management goals and to draft reasonable conditions that meet those goals, making use of agency expertise and information provided by licensee and other stakeholders. The Department is sensitive to costs when developing conditions for protecting resources under our purview, and we strive to propose conditions that achieve the Department's resource goals at a reasonable cost. We are always on the lookout for less expensive means of achieving the necessary natural resource protection measures. This typically requires consultation and assistance from the licensees and others to help identify opportunities for cost efficiencies. Currently, the Department is working to ensure that this cost-conscious approach is consistently applied across all field offices involved in hydropower licensing, and we anticipate that the public review process described in the Response to Question 1 will also aid in this effort.

4) Does current law require that mandatory conditions developed by resource agencies be limited to mitigation of project impacts?

**Response**: Neither the language of the Federal Power Act nor judicial decisions directly address this question. The statutory provisions underlying the Department's mandatory authorities provide for the conditioning of a license issued on a federal reservation for the "adequate protection and utilization" of that reservation, and for the prescription of fishways. The Department's authority under section 4(e) is limited to projects actually occupying, as opposed to affecting, a reservation. The Supreme Court in Escondido Mutual Water Company v. La Jolla Band of Mission Indians, et al., 466 U.S. 765, 778 (1984), provided guidance as to this authority, holding that section 4(e) conditions must be sustained if they are reasonably related to the goal of protecting the reservation, otherwise consistent with the Federal Power Act, and supported by substantial evidence. The Escondido analysis has been applied in the context of section 18 as well. See American Rivers, et al., v. FERC, 201 F.3d 1186 (9th Cir. 2000); Bangor Hydro-Electric Company v. FERC, 78 F.3d 659 (D.C. Cir. 1996). Within these guidelines, the agencies strive to ensure that their mandatory conditions respond to project impacts, and provide

for effective mitigation of those impacts.

5) One reason Congress enacted the Electric Consumers Protection Act of 1986 was the perception that FERC was not a good environmental steward. Do you believe FERC has been a good environmental steward in recent years?

**Response**: The Commission's environmental record has been improving since 1986, due to its efforts to comply with ECPA as well as the increasing environmental consciousness of the Commissioners and staff. We particularly appreciate the good working relationship we have developed with Chairman Hoecker and General Counsel Smith. We have had significant success over the past two years in working with the Commission to streamline and better institutionalize, in both the Commission and the agencies with conditioning authority under sections 4(e) and 18, the environmental aspects of hydropower licensing. We will continue to work with the Commission to further streamline the process to review environmental issues, and also to address Indian treaty rights and tribal trust responsibilities.

6) The Energy Policy Act of 1992 required FERC to collect fees from licensees to recover the expenses Federal resource agencies incur in their development of mandatory conditions. These fees are deposited directly in the Treasury, and resource agencies are not reimbursed. Should legislation authorize the resource agencies to directly recover these costs, perhaps by authorizing Federal resource agencies to charge fees?

**Response**: Reimbursement to the agencies, either directly or through the Commission, could help to alleviate the chronic resource constraints that have limited agency participation in alternative licensing proceedings, 10(j) conferences, post-licensing adaptive management, and other resource-intensive consultative processes. It might also provide resources to allow the agencies to expedite reviews of license applications. Any reimbursement of funds should not, however, interfere with the Department's ability to maintain programmatic funding within agency budgets. An initiative to establish cost reimbursement should be structured to avoid billing requirements that are so detailed or fragmented among so many agencies that they cease being cost-effective to the Treasury.

7) Do the current exemptions to FERC licensing in the Federal Power Act and PURPA provide adequate protections for fish and wildlife? Federal resource agencies can attach mandatory conditions to these exemptions. If so, would legislation that expanded current exemptions to include small hydroelect-ic projects in Alaska also provide adequate protection?

**Response**: In a great may cases, currently outstanding exemptions to FERC licensing do not provide adequate protection for fish and wildlife resources, because many exemptions issued over the last few decades were issued before current environmental protection laws were in effect and therefore do not contain the necessary conditions for adequate resource protection. Exempted licenses must be reopened at times in order to provide necessary adjustments to resource conditions, yet they are not easily or readily opened when

resources are in need of protection.

FERC already has the discretion to exempt small projects in Alaska and elsewhere from general licensing requirements. PURPA states that such exemptions remain subject to the fish and wildlife protection requirements of the FPA. PURPA underscores Congressional intent that all exempted projects must meet FPA requirements to protect fish, wildlife, and other environmental concerns. This is very important because the size of a hydropower project is not necessarily related to the magnitudeof its impacts on fish and habitat. We will continue to work with FERC in the application of PURPA to assure that the requirements of fish, wildlife, and the environment are met.

As indicated in our testimony to the Subcommittee on March 30, we remain strongly opposed to legislation such as S. 422, which would expand exemptions for small projects in Alaska, for reasons set out in that testimony, and in the letter of May 16 to the Committee, attached to this transmittal. Among other reasons, the legislation to expand current exemptions would not provide adequate protection for fish and wildlife resources, nor would it assure the application of NEPA and important environmental laws, and it applies to a class of projects rather than being applicable on a case-by case-basis, as under current law. Since Alaska is where the most new hydropower projects are being developed, and the individual and cumulative impacts of that development are not fully known, a new exemption for the State would be particularly problematic. In addition, adding a state-specific exemption would fragment the national scheme for hydropower licensing.

Questions from Rep. Wilson:

1) If you do not consider the benefits of hydroelectric projects when issuing a mandatory condition, and FERC, which is charged with balancing the benefits against the environmental considerations, cannot reject your condition, does that not effectively prevent FERC from carrying out its mission to balance these considerations? If FERC cannot effectively consider economic benefits, who does?

**Response**: The Federal Power Act, as amended by the Electric Consumers Protection Act, requires the Commission to give "equal consideration" to environmental purposes as to the "power and development purposes" for which licenses are issued. Section 4(e), 16 U.S.C. 797(e). This amendment left intact the provisions of sections 4(e) and 18 that establish the mandatory nature of the resource agencies conditions and prescriptions. Thus, section 4(e) and 18 conditions and prescriptions, together with other mandatory environmental authorities, such as the States' water quality certifications under section 401 of the Clean Water Act, create a "floor" of environmental protection, above which the Commission must balance other environmental recommendations, such as section 10(a) and 10(j) recommendations, and environmental concerns, against the power and development purposes of the license. As noted in Response to Chairman Barton's question 2, this is not a unique or even unusual regulatory approach.

2) From what I understand, the mandatory conditions that resources agencies place on licensees can make a project uneconomic and are often unrelated to project impacts. Therefore, in some cases the licensee's only recourse may be to fight those conditions and bring a case to court, thereby resulting in delays both in the licensing process and in the enhanced conservation of the resource your agency is bound to protect. I'm going to be a little like King Solomon for a minute here. Bear with me. Because I want to know if you care more about the effective and timely protection of the resource or your agency's own power to impose mandatory conditions. If there was a faster, better way to achieve benefits to the resource by bypassing your right to impose a mandatory condition, would you take it?

**Response**: Yes, we are always interested in more timely ways to protect the resources for which we are responsible. This is why, for example, we support the Commission's alternative licensing process, and have participated in these cooperative ventures to the extent that our resources allow. There are some further constraints due to the ongoing nature of the hydropower regulation process, which sometimes delays resource protection or mitigation efforts until even after a license is issued. Within those constraints, we do not impose uneconomic or unrelated conditions, but we strive to develop mandatory conditions that address project impacts in a cost - conscious manner. However, we would welcome any suggestions for additional ways to consistently and reliably achieve resource protection goals more quickly and cheaply.

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

MAY 16 2000

Honorable Thomas J. Bliley, Jr.
Chairman, House Commerce Committee
House of Representatives
Washington D.C. 20015

Dear Mr. Chairman:

This letter responds to your request for the views of the Department of the Interior concerning H.R. 2335, a bill to revise Federal Energy Regulatory Commission (FERC) hydropower licensing process under the Federal Power Act, and S. 422, to provide for Alaska State jurisdiction over certain small hydropower projects. The letter reinforces my testimony before the Energy and Power Subcommittee on March 30.

The Department is strongly opposed to H.R. 2335 as introduced, and the Secretary would recommend that it be vetoed if it were presented to the President in its present form. The Department is also strongly opposed to S. 422.

The Department of the Interior has made the Federal Power Act licensing process a high priority over the last several years. The Department has an important role and responsibilities under the Federal Power Act to provide input to FERC the as it decides whether and how to license hydropower projects. Our mission is not to interfere with licensing, but to ensure that certain resources are protected when a public resource – a navigable waterway – is dedicated to private hydropower generation for thirty to fifty years under a Federal Power Act license.

The Department recognizes that the FERC licensing process can be complex, time-consuming and resource-intensive for all parties, but we also believe that the process can be improved to avoid inefficiencies and delays. In undertaking to improve the process, we have become convinced that the existing statutory framework is sound, and whatever inefficiencies or shortcomings may exist can and should be addressed administratively. Therefore, we would oppose each of the bills the Subcommittee is considering that would revise the licensing process or exempt particular hydropower projects from all or part of the Federal Power Act requirements.

Administrative Efforts on Hydropower Licensing

For the last two years, the Department has worked in several different forums to improve the

hydropower licensing process for all participants. I would like to point out several specific efforts in that regard.

First, the Department is actively engaged in the Interagency Task Force on Hydropower Licensing (ITF) – a cooperative effort initiated by Interior, Commerce, Agriculture, EPA, Energy, CEQ, and FERC to find administrative solutions for inefficiencies in the licensing process that can sometimes result from unclear procedures, poor communication, and the interaction of other federal statutes (e.g. NEPA, ESA) with the Federal Power Act process. The ITF has developed a variety of administrative solutions:

- facilitating and streamlining noticing procedures,
- standardizing the NEPA review process,
- implementing necessary studies of resource impacts from licensing,
- preparing trackable and enforceable license conditions pursuant to the Coastal Zone Management Act and Section 401 of the Clean Water Act.

The ITF also has produced a draft set of guidelines that should make the Commission's alternative licensing procedures (a.k.a., the "collaborative process") work better for all federal and non-federal stakeholders. Currently, the ITF is working on additional solution documents for Endangered Species Act consultation, various provisions of the Federal Power Act, and issues related to the post-licensing phase of hydropower operations.

Second, the Department has sought input from others affected by hydropower licensing (e.g., licensees, NGOs, tribes, states and counties) to better understand and address their concerns with the licensing process. As a member of the ITF, the Department was instrumental in establishing a federal advisory committee that enables these interests to advise the ITF. The advisory committee has met three times in the last seven months and will continue to make recommendations to the ITF through the end of this year, when the work of the ITF should be complete. As the advisory committee provides its input, the ITF sets about institutionalizing the agreed-upon reforms in each of our respective agencies.

One positive outcome of the ITF effort is that our relationship with many stakeholders in the licensing process has improved. For instance, the staffs of the Commission and the resource agencies have come to better understand each other's views and respective obligations under the Federal Power Act and other relevant statutes, which in turn has led to increased trust among our agencies and an enhanced ability to work together. In my view, this improved relationship will pay dividends in the field as we address the many projects scheduled for relicensing over the next ten years.

Our relationship with the licensees has also greatly benefitted from the Department's recent attention to hydropower licensing. The National Hydropower Association periodically visits with Department staff to discuss concerns they have about various aspects of our participation in the licensing process. Moreover, the Department is an active participant in

the industry-sponsored Electric Power Research Institute effort, which brings together the full range of affected interests to explore our common goal of improving the hydropower licensing process.

Finally, the Department has taken concrete internal steps to further improve the constructive role that its bureaus play in the licensing process. These internal changes will facilitate better communication and coordination among Interior bureaus. Improving our own internal processes will help us avoid unnecessary delays and ensure consistent application of Department policies throughout the bureaus' regional offices.

H.R. 2335

Far from contributing to these efforts to improve hydropower licensing, we believe that H.R. 2335 as written would interfere with the Department's responsibilities under the Federal Power Act, add multiple delays to the licensing process, and make the Department's involvement in Federal Power Act licensing proceedings completely unworkable.

The most troubling feature of H.R. 2335 is that it would undercut the purposes of much of the Department's participation in federal hydropower licensing. The Department provides input to the Commission under several different sections of the Federal Power Act; this bill is principally directed at the prescriptions for "fishways" issued by the Fish and Wildlife Service under section 18, and at the responsibility of several bureaus that manage reserved lands to mandate conditions under section 4(e) "necessary for the adequate protection and utilization of such reservations." The resource agencies' authority to protect the uses of reserved lands is an integral part of the Federal Power Act licensing scheme, going back 80 years to the original enactment of Act in 1920. While the Act allowed licensing of private hydro facilities on Federal lands, it also contemplated that the resource agencies would possess the necessary expertise to ensure that those facilities would not interfere with protection and use of the lands. That responsibility of Federal land managers to condition projects on the lands they manage remains in the statute to this day.

Section 4 of the bill (new section 32(b)(1) of the FPA) would change these mandates by requiring the Department to take into consideration a variety of factors, including air quality, drinking [sic], flood control, irrigation and navigation, in determining section 4(e) conditions and section 18 prescriptions. At the same time, the original purposes of sections 4(e) and 18 – to protect and utilize reserved lands and to ensure that fish can survive passage through hydro projects – are not mentioned in the list of proposed new factors. Thus, there would be no mandate that the Department take these purposes into consideration. In effect, by emphasizing other factors, H.R. 2335 would potentially force the Department to ignore fishery needs in prescribing fishways. It might oblige us to ignore the project impacts to Indian tribal lands and resources when determining conditions necessary to protect Indian

reservations, or the needs of parks, wildlife refuges and other conservation areas when setting conditions to protect those reserved lands.

Furthermore, as if to underscore this effort to ignore the original purposes of sections 4(e) and 18, H.R. 2335 would then require the Commission to make a separate determination based on the same factors. Under section 4 (new section 32(h)(1) of the FPA), if requested by the license applicant, the Commission would have to make a determination whether a 4(e) condition or section 18 prescription was in the public interest, based solely on this same list of other factors. Thus, the Commission could not take fisheries or land management needs into account in making this "public interest" determination.

H.R. 2335 would also undercut the purpose of recommendations made by state and federal fish and wildlife agencies for protection, mitigation and enhancement of fish and wildlife and their habitats under section 10(j) of the Federal Power Act. Section 4 (new section 32(g) of the FPA) would require the Commission to evaluate these section 10(j) recommendations as well against the list of factors set out above.

The combined effect of these various provisions of H.R. 2335 would be to subordinate resource needs and trust responsibilities to a wide range of other factors. The current structure of the Federal Power Act requires that a license be issued only with conditions that ensure protection of underlying resources. Once this floor is established to protect against unreasonable resource destruction, then the Commission balances various factors to determine whether and how to issue a license. This bill would turn that scheme on its head, allowing protection of underlying resources only if a laundry list of other needs were met.

In addition, rather than streamlining the licensing process under the Federal Power Act, the bill would add new and cumbersome procedures to the process, delaying license issuance still further. It would go beyond the current judicially required standard of "substantial evidence" for agency conditions and require separate scientific peer review (new section 32(c) of the FPA). It would mandate a six-month appeals process before "an administrative law judge or other independent reviewing body" before section 4(e) conditions and section 18 prescriptions could be made final (new section 32(e) of the FPA). It would require the Commission to conduct an economic analysis of each section 4(e) condition or section 18 prescription (new section 32(g) of the FPA), plus an additional review process if requested by the license applicant (new section 32(h) of the FPA).

Apart from these concerns about delay, the licensing procedure prescribed by H.R. 2335 is simply unworkable. Section 5 (new section 33(b) of the FPA) would prohibit the resource management agencies from doing any environmental analysis outside of the Commission's own NEPA analysis. This would make it impossible to formulate section 4(e) conditions and section 18 prescriptions. Our section 4(e) and 18 responsibilities can only be carried out

through our own analysis of impacts to lands, fisheries, and other resources – though this is not a separate NEPA process, it is environmental analysis. The Bangor Hydro court decision held that we must have "substantial evidence" to support our 4(e) conditions and section 18 prescriptions – again, that substantial evidence is developed through environmental analysis. Without such analysis, we cannot do our job at all.

The Department could not rely on the Commission's NEPA analysis to provide the evidence necessary to support our determinations under sections 4(e) and 18, because H.R. 2335 would require that the draft conditions and prescriptions be formulated before the license application is filed (new section 32(e) of the FPA). Not surprisingly, the Commission does its NEPA analysis after the license application is filed. Obviously, if there is no application available, and consequently no Commission NEPA analysis, many of the necessary conditions and prescriptions could not be developed at all. Moreover, finalization of the conditions depends upon information provided in the Commission's NEPA analysis. H.R. 2335 would require that final conditions and prescriptions be issued within one year after the Commission determines the application is ready for environmental analysis (new section 32(f) of the FPA). But a condition could hardly be finalized if the Commission has not completed at least a draft NEPA analysis, which is often delayed more than one year after the application is determined ready for environmental analysis.

The most impractical aspect of this process described by this bill bears repeating: H.R. 2335 would require that the agencies formulate license conditions and prescriptions before the license application is filed (new section 32(e) of the FPA). Although license applicants circulate draft applications before filing, these are often altered substantially before they are filed before the Commission. An agency simply can't write a mandatory condition for a license application it hasn't yet seen.

For these reasons, we strongly oppose H.R. 2335, and if it were presented to the President in its current form the Secretary of the Interior would recommend that he veto it.

S. 422

The Department has commented at some length in the past on S. 422 and similar legislation which would place small hydroelectric projects in the State of Alaska solely under State jurisdiction. The Department's previous letters on S. 422 are attached. In brief, we strongly oppose S. 422 because it would fragment hydropower regulation and impair the Federal government's ability to protect federally managed lands and resources affected by the projects. Although certain land areas are exempted from application of S. 422, the bill's provision addressing tribal lands is confusing, since most Native lands in Alaska are not "reservations." Furthermore, it does not address the applicability of NEPA, the Endangered Species Act, or rights of way under the Federal Land Policy and Management Act.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program and that enactment of H.R. 2335 would not be in accord with the program of the President.

Sincerely,

Solicitor

United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

APR - 5 1999

Honorable Tom Bliley
Chairman
Committee on Commerce
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter is to present the views of this Department with respect to a bill, S. 422, as passed by the Senate, and subject to the jurisdiction of your Committee. S. 422 would provide for Alaska State jurisdiction over small hydroelectric projects.

The Department strongly opposes S. 422, because the bill would erode the uniform system of the Federal Power Act for licensing hydroelectric power projects and would significantly impair the ability of the Federal government to protect federally managed lands and resources that would be affected by those projects.

The bill is the same as S. 439 as passed by the Senate in the 105th Congress with respect to provisions on the Alaska hydroelectric project exemption. The Department and the Administration strongly opposed that bill. We reported on S. 439 in a letter to you of October 7, 1998 and in a letter to the Senate Committee on Energy and Natural Resources of September 19, 1997. (Copies of those letters are attached.) Although we realize the bill was amended during Senate consideration in the last Congress, the deficiencies in the original bill were not sufficiently corrected, and we remain strongly opposed.

Allowing individual states to exercise separate jurisdiction would lead to a patchwork of regulatory programs and related environmental review and enforcement. Moreover, it is not clear that S. 422 would set up a more cost and time-efficient licensing process, which is what we understand is the intent of the bill.

The bill would provide a significantly lesser level of protection than under current law, and is inconsistent or unclear in its applicability. The bill provides a list of special land areas excepted from applicability, including "any Indian reservation," conservation system units and certain river segments designated for wild and scenic river study, but the new section 32(d) still clearly anticipates applicability to conservation system units and to "reservations," previously excepted.

The use of the term "reservation" in the bill is confusing. The exemption for "any Indian reservation" in (b)(5) does not adequately address or protect Indian lands in Alaska, where there is only one

reservation; it would not protect lands belonging to or selected by Alaska Natives pursuant to the Alaska Native Claims Settlement Act.

Furthermore, the bill fails to protect areas of critical environmental concern. It does not address the applicability of the National Environmental Policy Act, the Endangered Species Act (ESA), or rights-of-way under the Federal Lands Policy and Management Act. We have particular concerns about compliance with the ESA. For instance, under section 7 of the ESA, the Federal Energy Regulatory Commission (FERC) must consult with the Fish and Wildlife Service and/or the National Marine Fisheries Service when issuing a license that may affect a threatened or endangered species. Under S. 422, the State of Alaska would not be required to engage in this important consultation. The bill is also unclear about how enforcement of federal conditions would occur.

Moreover, if the Federal Energy Regulatory Commission (FERC) fails to determine within the stated time whether the State program meets the requirements of the bill for FERC to cede authority, the State program is deemed approved. Once the State program has been approved, the State can thereafter modify the program with no further Commission approval. In either event the protections written into the bill may totally fail to be implemented.

For all of the above reasons, we strongly oppose S. 422.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

David J. Hayes
Counselor to the Secretary

cc: Hon. John D. Dingell, Ranking Minority, Committee on Commerce
Hon. Don Young, Chairman, Committee on Resources
Hon. George Miller, Ranking Minority, Committee on Resources
Hon. Joe Barton, Chairman, Commerce Subcommittee on Energy and Power
Hon. Frank H. Murkowski, Chairman, Senate Energy and Natural Resources Committee
Hon. Jeff Bingaman, Ranking Minority, Senate Energy and Natural Resources Committee
Hon. Ralph Hall

# United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

October 7, 1998

Honorable Tom Bliley
Chairman
Committee on Commerce
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter is to present the views of this Department with respect to a bill, S. 439, to provide for Alaska State jurisdiction over small hydroelectric projects, and for other purposes, as passed by the Senate, now being considered by your Committee. At a recent hearing before the Subcommittee on Energy and Power on the hydroelectric licensing process, Subcommittee Chairman Schaefer inquired of the views of the Department on the bill. This responds to that request.

The Department strongly opposes S. 439. The bill would erode the Federal Power Act's uniform system for licensing hydroelectric projects in the United States and impair the Federal government's ability to protect federally managed resources. Allowing individual states to exercise separate jurisdiction would lead to a patchwork of regulatory programs and related environmental review and enforcement. It is also not clear that S. 439 would set up a more cost and time-efficient licensing process, which is what we understand the intent of the bill to be.

Although the bill as passed by the Senate represents an improvement over the bill as originally introduced, with respect to the section 1 provisions on Alaska State jurisdiction, it would nevertheless provide a lesser level of protection than the current law, and is inconsistent or unclear in its applicability. The bill would expand the list of special land areas excepted from applicability to include conservation system units and wilderness study areas, but the new section 32(d) still clearly anticipates applicability to conservation system units and to "reservations" previously excepted.

The use of the term "reservations" in the bill is confusing. The exemption for "Indian Reservations" in (b)(5) does not adequately address nor protect Indian lands in Alaska, where there is only one reservation; it would not protect lands belonging to or selected by Alaska Natives or federally recognized tribes pursuant to the Alaska Native Claims Settlement Act.

Furthermore, the bill fails to protect areas of critical environmental concern. It does not address the applicability of the National Environmental Policy Act, the Endangered Species Act, nor rights-of-way under the Federal Lands Policy and Management Act. We have particular concerns about compliance with the ESA. For instance, under section 7 of the ESA, the Federal Energy Regulatory Commission (FERC) must consult with the Fish and Wildlife Service and/or the National Marine Fisheries Service when issuing a license that may affect a threatened or endangered species.. Under

S 439, the State of Alaska would not be required to engage in this important consultation. The bill is also unclear about how enforcement of federal conditions would occur.

Moreover, if the Federal Energy Regulatory Commission (FERC) fails to determine within the stated time whether the State program meets the requirements of the bill for FERC to cede authority, the State program is deemed approved. Once the State program has been approved, the State can thereafter modify the program with no further Commission approval. In either event the protections written into the bill may totally fail to be implemented.

The bill also retains in section 3 the provision for an extension for the El Vado project, and the provision in section 4 for extension of construction deadlines to 10 years for FERC approved projects, both of which we have previously opposed and continue to oppose. The 10-year time period may render all the environmental, economic, and other quality reviews of projects useless.

We are attaching for inclusion in your record our earlier letter of September 19, 1997 submitted to the Senate on the bill as originally introduced. Only section 1 of the bill has been changed. The provisions and our views as to the other original sections have not changed. The bill was also amended to add a new section 5, on which we express no views.

For all of the above reasons, we continue to strongly oppose S. 439.

Sincerely,

David J. Hayes

Counselor to the Secretary

cc: Hon. John Dingell
Hon. Dan Schaefer
Hon. Ralph Hall

United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO

MAY 16 2000

Honorable Thomas J. Bliley, Jr.
Chairman, House Commerce Committee
House of Representatives
Washington D.C. 20015

Dear Mr. Chairman:

This letter responds to your request for the views of the Department of the Interior concerning H.R. 2335, a bill to revise Federal Energy Regulatory Commission (FERC) hydropower licensing process under the Federal Power Act, and S. 422, to provide for Alaska State jurisdiction over certain small hydropower projects. The letter reinforces my testimony before the Energy and Power Subcommittee on March 30.

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The Department recognizes that the FERC licensing process can be complex, time-consuming and resource-intensive for all parties, but we also believe that the process can be improved to avoid inefficiencies and delays. In undertaking to improve the process, we have become convinced that the existing statutory framework is sound, and whatever inefficiencies or shortcomings may exist can and should be addressed administratively. Therefore, we would oppose each of the bills the Subcommittee is considering that would revise the licensing process or exempt particular hydropower projects from all or part of the Federal Power Act requirements.

Administrative Efforts on Hydropower Licensing

For the last two years, the Department has worked in several different forums to improve the

hydropower licensing process for all participants. I would like to point out several specific efforts in that regard.

First, the Department is actively engaged in the Interagency Task Force on Hydropower Licensing (ITF) – a cooperative effort initiated by Interior, Commerce, Agriculture, EPA, Energy, CEQ, and FERC to find administrative solutions for inefficiencies in the licensing process that can sometimes result from unclear procedures, poor communication, and the interaction of other federal statutes (e.g. NEPA, ESA) with the Federal Power Act process. The ITF has developed a variety of administrative solutions:

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the industry-sponsored Electric Power Research Institute effort, which brings together the full range of affected interests to explore our common goal of improving the hydropower licensing process.

Finally, the Department has taken concrete internal steps to further improve the constructive role that its bureaus play in the licensing process. These internal changes will facilitate better communication and coordination among Interior bureaus. Improving our own internal processes will help us avoid unnecessary delays and ensure consistent application of Department policies throughout the bureaus' regional offices.

H.R. 2335

Far from contributing to these efforts to improve hydropower licensing, we believe that H.R. 2335 as written would interfere with the Department's responsibilities under the Federal Power Act, add multiple delays to the licensing process, and make the Department's involvement in Federal Power Act licensing proceedings completely unworkable.

The most troubling feature of H.R. 2335 is that it would undercut the purposes of much of the Department's participation in federal hydropower licensing. The Department provides input to the Commission under several different sections of the Federal Power Act; this bill is principally directed at the prescriptions for "fishways" issued by the Fish and Wildlife Service under section 18, and at the responsibility of several bureaus that manage reserved lands to mandate conditions under section 4(e) "necessary for the adequate protection and utilization of such reservations." The resource agencies' authority to protect the uses of reserved lands is an integral part of the Federal Power Act licensing scheme, going back 80 years to the original enactment of Act in 1920. While the Act allowed licensing of private hydro facilities on Federal lands, it also contemplated that the resource agencies would possess the necessary expertise to ensure that those facilities would not interfere with protection and use of the lands. That responsibility of Federal land managers to condition projects on the lands they manage remains in the statute to this day.

Section 4 of the bill (new section 32(b)(1) of the FPA) would change these mandates by requiring the Department to take into consideration a variety of factors, including air quality, drinking [sic], flood control, irrigation and navigation, in determining section 4(e) conditions and section 18 prescriptions. At the same time, the original purposes of sections 4(e) and 18 – to protect and utilize reserved lands and to ensure that fish can survive passage through hydro projects – are not mentioned in the list of proposed new factors. Thus, there would be no mandate that the Department take these purposes into consideration. In effect, by emphasizing other factors, H.R. 2335 would potentially force the Department to ignore fishery needs in prescribing fishways. It might oblige us to ignore the project impacts to Indian tribal lands and resources when determining conditions necessary to protect Indian

reservations, or the needs of parks, wildlife refuges and other conservation areas when setting conditions to protect those reserved lands.

Furthermore, as if to underscore this effort to ignore the original purposes of sections 4(e) and 18, H.R. 2335 would then require the Commission to make a separate determination based on the same factors. Under section 4 (new section 32(h)(1) of the FPA), if requested by the license applicant, the Commission would have to make a determination whether a 4(e) condition or section 18 prescription was in the public interest, based solely on this same list of other factors. Thus, the Commission could not take fisheries or land management needs into account in making this "public interest" determination.

H.R. 2335 would also undercut the purpose of recommendations made by state and federal fish and wildlife agencies for protection, mitigation and enhancement of fish and wildlife and their habitats under section 10(j) of the Federal Power Act. Section 4 (new section 32(g) of the FPA) would require the Commission to evaluate these section 10(j) recommendations as well against the list of factors set out above.

The combined effect of these various provisions of H.R. 2335 would be to subordinate resource needs and trust responsibilities to a wide range of other factors. The current structure of the Federal Power Act requires that a license be issued only with conditions that ensure protection of underlying resources. Once this floor is established to protect against unreasonable resource destruction, then the Commission balances various factors to determine whether and how to issue a license. This bill would turn that scheme on its head, allowing protection of underlying resources only if a laundry list of other needs were met.

In addition, rather than streamlining the licensing process under the Federal Power Act, the bill would add new and cumbersome procedures to the process, delaying license issuance still further. It would go beyond the current judicially required standard of "substantial evidence" for agency conditions and require separate scientific peer review (new section 32(c) of the FPA). It would mandate a six-month appeals process before "an administrative law judge or other independent reviewing body" before section 4(e) conditions and section 18 prescriptions could be made final (new section 32(e) of the FPA). It would require the Commission to conduct an economic analysis of each section 4(e) condition or section 18 prescription (new section 32(g) of the FPA), plus an additional review process if requested by the license applicant (new section 32(h) of the FPA).

Apart from these concerns about delay, the licensing procedure prescribed by H.R. 2335 is simply unworkable. Section 5 (new section 33(b) of the FPA) would prohibit the resource management agencies from doing any environmental analysis outside of the Commission's own NEPA analysis. This would make it impossible to formulate section 4(e) conditions and section 18 prescriptions. Our section 4(e) and 18 responsibilities can only be carried out

through our own analysis of impacts to lands, fisheries, and other resources – though this is not a separate NEPA process, it is environmental analysis. The Bangor Hydro court decision held that we must have "substantial evidence" to support our 4(e) conditions and section 18 prescriptions – again, that substantial evidence is developed through environmental analysis. Without such analysis, we cannot do our job at all.

The Department could not rely on the Commission's NEPA analysis to provide the evidence necessary to support our determinations under sections 4(e) and 18, because H.R. 2335 would require that the draft conditions and prescriptions be formulated before the license application is filed (new section 32(e) of the FPA). Not surprisingly, the Commission does its NEPA analysis after the license application is filed. Obviously, if there is no application available, and consequently no Commission NEPA analysis, many of the necessary conditions and prescriptions could not be developed at all. Moreover, finalization of the conditions depends upon information provided in the Commission's NEPA analysis. H.R. 2335 would require that final conditions and prescriptions be issued within one year after the Commission determines the application is ready for environmental analysis (new section 32(f) of the FPA). But a condition could hardly be finalized if the Commission has not completed at least a draft NEPA analysis, which is often delayed more than one year after the application is determined ready for environmental analysis.

The most impractical aspect of this process described by this bill bears repeating: H.R. 2335 would require that the agencies formulate license conditions and prescriptions before the license application is filed (new section 32(e) of the FPA). Although license applicants circulate draft applications before filing, these are often altered substantially before they are filed before the Commission. An agency simply can't write a mandatory condition for a license application it hasn't yet seen.

For these reasons, we strongly oppose H.R. 2335, and if it were presented to the President in its current form the Secretary of the Interior would recommend that he veto it.

S. 422

The Department has commented at some length in the past on S. 422 and similar legislation which would place small hydroelectric projects in the State of Alaska solely under State jurisdiction. The Department's previous letters on S. 422 are attached. In brief, we strongly oppose S. 422 because it would fragment hydropower regulation and impair the Federal government's ability to protect federally managed lands and resources affected by the projects. Although certain land areas are exempted from application of S. 422, the bill's provision addressing tribal lands is confusing, since most Native lands in Alaska are not "reservations." Furthermore, it does not address the applicability of NEPA, the Endangered Species Act, or rights of way under the Federal Land Policy and Management Act.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program and that enactment of H.R. 2335 would not be in accord with the program of the President.

Sincerely,

Solicitor

# United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

APR - 5 1999

Honorable Tom Bliley
Chairman
Committee on Commerce
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter is to present the views of this Department with respect to a bill, S. 422, as passed by the Senate, and subject to the jurisdiction of your Committee. S. 422 would provide for Alaska State jurisdiction over small hydroelectric projects.

The Department strongly opposes S. 422, because the bill would erode the uniform system of the Federal Power Act for licensing hydroelectric power projects and would significantly impair the ability of the Federal government to protect federally managed lands and resources that would be affected by those projects.

The bill is the same as S. 439 as passed by the Senate in the 105th Congress with respect to provisions on the Alaska hydroelectric project exemption. The Department and the Administration strongly opposed that bill. We reported on S. 439 in a letter to you of October 7, 1998 and in a letter to the Senate Committee on Energy and Natural Resources of September 19, 1997. (Copies of those letters are attached.) Although we realize the bill was amended during Senate consideration in the last Congress, the deficiencies in the original bill were not sufficiently corrected, and we remain strongly opposed.

Allowing individual states to exercise separate jurisdiction would lead to a patchwork of regulatory programs and related environmental review and enforcement. Moreover, it is not clear that S. 422 would set up a more cost and time-efficient licensing process, which is what we understand is the intent of the bill.

The bill would provide a significantly lesser level of protection than under current law, and is inconsistent or unclear in its applicability. The bill provides a list of special land areas excepted from applicability, including "any Indian reservation," conservation system units and certain river segments designated for wild and scenic river study, but the new section 32(d) still clearly anticipates applicability to conservation system units and to "reservations," previously excepted.

The use of the term "reservation" in the bill is confusing. The exemption for "any Indian reservation" in (b)(5) does not adequately address or protect Indian lands in Alaska, where there is only one

reservation; it would not protect lands belonging to or selected by Alaska Natives pursuant to the Alaska Native Claims Settlement Act.

Furthermore, the bill fails to protect areas of critical environmental concern. It does not address the applicability of the National Environmental Policy Act, the Endangered Species Act (ESA), or rights-of-way under the Federal Lands Policy and Management Act. We have particular concerns about compliance with the ESA. For instance, under section 7 of the ESA, the Federal Energy Regulatory Commission (FERC) must consult with the Fish and Wildlife Service and/or the National Marine Fisheries Service when issuing a license that may affect a threatened or endangered species. Under S. 422, the State of Alaska would not be required to engage in this important consultation. The bill is also unclear about how enforcement of federal conditions would occur.

Moreover, if the Federal Energy Regulatory Commission (FERC) fails to determine within the stated time whether the State program meets the requirements of the bill for FERC to cede authority, the State program is deemed approved. Once the State program has been approved, the State can thereafter modify the program with no further Commission approval. In either event the protections written into the bill may totally fail to be implemented.

For all of the above reasons, we strongly oppose S. 422.

The Office of Management and Budget advises that there is no objection to the presentation of this report from the standpoint of the Administration's program.

Sincerely,

David J. Hayes
Counselor to the Secretary

cc: Hon. John D. Dingell, Ranking Minority, Committee on Commerce
Hon. Don Young, Chairman, Committee on Resources
Hon. George Miller, Ranking Minority, Committee on Resources
Hon. Joe Barton, Chairman, Commerce Subcommittee on Energy and Power
Hon. Frank H. Murkowski, Chairman, Senate Energy and Natural Resources Committee
Hon. Jeff Bingaman, Ranking Minority, Senate Energy and Natural Resources Committee
Hon. Ralph Hall

# United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

October 7, 1998

Honorable Tom Bliley
Chairman
Committee on Commerce
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter is to present the views of this Department with respect to a bill, S. 439, to provide for Alaska State jurisdiction over small hydroelectric projects, and for other purposes, as passed by the Senate, now being considered by your Committee. At a recent hearing before the Subcommittee on Energy and Power on the hydroelectric licensing process, Subcommittee Chairman Schaefer inquired of the views of the Department on the bill. This responds to that request.

The Department strongly opposes S. 439. The bill would erode the Federal Power Act's uniform system for licensing hydroelectric projects in the United States and impair the Federal government's ability to protect federally managed resources. Allowing individual states to exercise separate jurisdiction would lead to a patchwork of regulatory programs and related environmental review and enforcement. It is also not clear that S. 439 would set up a more cost and time-efficient licensing process, which is what we understand the intent of the bill to be.

Although the bill as passed by the Senate represents an improvement over the bill as originally introduced, with respect to the section 1 provisions on Alaska State jurisdiction, it would nevertheless provide a lesser level of protection than the current law, and is inconsistent or unclear in its applicability. The bill would expand the list of special land areas excepted from applicability to include conservation system units and wilderness study areas, but the new section 32(d) still clearly anticipates applicability to conservation system units and to "reservations" previously excepted.

The use of the term "reservations" in the bill is confusing. The exemption for "Indian Reservations" in (b)(5) does not adequately address nor protect Indian lands in Alaska, where there is only one reservation; it would not protect lands belonging to or selected by Alaska Natives or federally recognized tribes pursuant to the Alaska Native Claims Settlement Act.

Furthermore, the bill fails to protect areas of critical environmental concern. It does not address the applicability of the National Environmental Policy Act, the Endangered Species Act, nor rights-of-way under the Federal Lands Policy and Management Act. We have particular concerns about compliance with the ESA. For instance, under section 7 of the ESA, the Federal Energy Regulatory Commission (FERC) must consult with the Fish and Wildlife Service and/or the National Marine Fisheries Service when issuing a license that may affect a threatened or endangered species.. Under

S 439, the State of Alaska would not be required to engage in this important consultation. The bill is also unclear about how enforcement of federal conditions would occur.

Moreover, if the Federal Energy Regulatory Commission (FERC) fails to determine within the stated time whether the State program meets the requirements of the bill for FERC to cede authority, the State program is deemed approved. Once the State program has been approved, the State can thereafter modify the program with no further Commission approval. In either event the protections written into the bill may totally fail to be implemented.

The bill also retains in section 3 the provision for an extension for the El Vado project, and the provision in section 4 for extension of construction deadlines to 10 years for FERC approved projects, both of which we have previously opposed and continue to oppose. The 10-year time period may render all the environmental, economic, and other quality reviews of projects useless.

We are attaching for inclusion in your record our earlier letter of September 19, 1997 submitted to the Senate on the bill as originally introduced. Only section 1 of the bill has been changed. The provisions and our views as to the other original sections have not changed. The bill was also amended to add a new section 5, on which we express no views.

For all of the above reasons, we continue to strongly oppose S. 439.

Sincerely,

David J. Hayes

Counselor to the Secretary

cc: Hon. John Dingell
Hon. Dan Schaefer
Hon. Ralph Hall

**Questions to Dr. Rosenberg from the March 30, 2000 Hearing on Hydropower Bills**

**Hon. Joe Barton**
**Chairman**
**Subcommittee on Energy and Power**

1. **You testify there is no reason to exempt small hydroelectric projects in Alaska because current law already provides an exemption for small projects. That is only partially true. Under current law, exemptions are limited to small projects at conduits, such as irrigation canals, and small projects at dams built before 1977. Should current exemptions be expanded to include small projects at new dams in Alaska?**

The limitations on exemptions you reference are indeed set forth in the Federal Power Act (FPA). However, the Public Utility Regulatory Policies Act of 1978 (PURPA), in 16 U.S.C. 2705, titled "Simplified and expeditious licensing procedures," broadens the exemptions from FERC licensing to small hydropower projects of 5,000 kilowatts or less. Specifically, section (d) "Exemptions from licensing requirements in certain cases" states that:

> "The Commission may in its discretion (by rule or by order) grant an exemption in whole or in part from the requirements (including the licensing requirements) of Part I of the Federal Power Act [16 U.S.C.A. 791a et seq.] to small hydroelectric power projects having a proposed installed capacity of 5,000 kilowatts or less, on a case-by-case basis or on the basis of classes or categories of projects,.." (emphasis added).

Thus, FERC already has the discretion to exempt small projects in Alaska from general licensing requirements. It is therefore unnecessary to expand current exemptions to include small projects at new dams in Alaska. PURPA also states that such exemptions remain subject to the fish and wildlife protection requirements of the FPA. The preceding quote continues, explaining that exempted projects remain:

> "...subject to the same limitations (to ensure protection for fish and wildlife as well as other environmental concerns) as those which are set forth in subsections (c) and (d) of section 30 of the Federal Power Act [16 U.S.C.A. 823a(c) and (d)]..." (emphasis added).

Thus, even while expanding FERC's purview for granting exemptions, PURPA underscores Congressional intent that all exempted projects must meet FPA requirements to protect fish, wildlife, and other environmental concerns. From the perspective of fisheries management, this is very important because the size of a hydropower project is not necessarily related to the magnitude of its impacts on fish and habitat.

2. **You testified the current exemptions in the Federal Power Act provide "adequate protections for fish and wildlife." Would legislation that expanded current**

**exemptions to include small hydroelectric projects in Alaska also provide adequate protection for fish and wildlife? Federal resource agencies would have the same ability to attach mandatory conditions.**

From DOC's perspective neither the size of a hydropower project nor the type of exemptions sought, determines the need to protect fish and habitat from project impacts. Instead, it is the project design and location that are most important in determining fish protection measures. As stated in the previous answer, PURPA [16 USC 2705(d)] already provides a mechanism for exempting small projects in Alaska while preserving DOC authority to protect fish by providing mandatory conditions: specifically, that small hydroelectric projects in Alaska constitute a "class or category of project." Since the existing exemption mechanism already provides for adequate protection of fish and wildlife, we do not see any reason for additional exclusions. Consequently, we recommend that Alaskan applicants exercise the existing regulatory options rather than seeking legislation that could duplicate and confuse regulatory programs and that could diminish the effectiveness of existing statutes for protecting fishery resources.

3. **Should Federal resource agencies provide public notice and opportunity for comment on proposed mandatory conditions? If not, explain why you oppose public comment.**

The opportunity for public comment on proposed mandatory conditions already exists within the Applicant Prepared Environmental Assessment, or "collaborative process," that FERC estimates is utilized by applicants on 80% of the licenses. DOC supports the shift to the collaborative process because we recognize that enhanced opportunity for public participation throughout the relicensing process reduces the likelihood of litigation. This shift represents a significant change from *status quo,* and obviates the need for statutory reforms. For those applicants who continue to utilize the traditional licensing process, the opportunity for public comment already exists *via* FERC's NEPA analysis that includes mandatory conditions. Furthermore, DOC is working with the Department of the Interior to develop review procedures for mandatory conditions.

4. **Under current law, do Federal resource agencies consider a broad range of public interest factors in their development of mandatory conditions, such as power production, energy conservation, protection of fish and wildlife, protection of recreational opportunities, and other factors? Should legislation require agencies to consider a broad range of factors?**

No, there are several reasons why DOC does not consider a broad range of factors. The licensing process already provides all interested parties an opportunity for input to FERC. FERC then makes licensing decisions in the public interest. This makes sense because the DOC's statutory authority is limited to fish protection. Yet we do not operate in a vacuum, as we do consider the cost effectiveness of different passage techniques. We also consider any other relevant information provided to us.

We believe that FERC's requirement to consider the broad range of public interest factors is appropriately assigned. The FPA makes clear Congressional intent that FERC is the appropriate entity to balance competing societal interests when making the decision whether or not to issue a license, not a resource agency responsible for only part of the multifaceted licensing process. Additionally, since these other factors fall outside the purview of the DOC, we are not equipped to address them. For example, we do not have access to proprietary economic information, nor do we have agency expertise or resources in some technical areas, *e.g.*, the generation of electricity. Requiring us to consider the effects of our conditions and recommendations on all of these other factors would not only lengthen the process, but more importantly would result in DOC duplicating the important balancing role of FERC. We oppose any legislation that would diminish or duplicate FERC's critical role in balancing by assigning new and duplicative responsibilities to the resource agencies.

**5. Under current law, do Federal resource agencies consider cost in their development of mandatory conditions? If not, should legislation require agencies to consider cost?**

DOC does consider costs. Whenever there are choices between proven, equally effective technologies, we choose the least costly option that will still achieve our resource management objectives. This is appropriate because our role in hydropower licensing is limited to providing FERC with measures for adequate fish protection. Given that hundreds of FERC projects have operated for up to 50 years without fish and wildlife protections, characterizing the implementation of conditions to ensure fish passage solely as a "cost" ignores the many benefits that fish passage confers on the constituent groups who utilize fishery resources. Again, as we stated in response to question 4, the FPA directs FERC, not DOC, to consider the costs and benefits of a project.

**6. One reason Congress enacted the Electric Consumers Protection Act of 1986 was the perception that FERC was not a good environmental steward. Do you believe FERC has been a good environmental steward in recent years?**

FERC has strengthened its efforts at environmental stewardship since ECPA. However, there remains room for improvement, and we are working with FERC and the other resource agencies on the "Interagency Task Force to Improve Hydroelectric Licensing Processes" to identify and implement improvements.

**7. The Energy Policy Act of 1992 required FERC to collect fees from licensees to recover the expenses Federal resource agencies incur in their development of mandatory conditions. These fees are deposited directly in the Treasury, and resource agencies are not reimbursed. Should legislation authorize the resource agencies to directly recover these costs, perhaps by authorizing Federal resource agencies to charge fees?**

This is a complicated issue and DOC has not yet taken a position on it. However, we have no objection to the current process, under which section 10(e) of the FPA requires FERC to recover the costs incurred by the Federal and state fish and wildlife agencies. At the request of FERC, agencies submit their costs each fiscal year. These costs are then consolidated and billed to the hydroelectric dam owners the following year. FERC's role is appropriate, given that it is both a regulatory agency and the agency which oversees the hydropower industry.

To have each resource agency bill its own costs to each dam owner, could add a tremendous burden for each agency and the industry. It would require the resource agencies to duplicate the collections by FERC, thereby increasing administrative costs to the government and industry. It could also fragment accountability for the dam owners, who would need to work separately with the state and Federal agencies rather than once with FERC.

**Hon. Heather Wilson**

8. **If you do not consider the benefits of hydroelectric projects when issuing a mandatory condition, and FERC, which is charged with balancing the benefits against the environmental considerations, cannot reject your condition, does that not effectively prevent FERC from carrying out its mission to balance these considerations? If FERC cannot effectively consider economic benefits, who does?**

The protective measures we develop are intended to ensure that the Nation will reap the benefits from both hydroelectricity and fish and wildlife resources. Mandatory conditions for fish passage, protection of Federal and tribal lands, and water quality are important enough that they must be included in every license. "Balancing" is then conducted on top of a foundation of certain environmental protections, and is a balancing of all other aspects of the project.

FERC is not precluded from balancing simply because Congress has designated some of the many factors FERC considers to be the purview of another agency. The mandatory conditions do not of themselves prevent FERC from making a licensing decision based on the range of factors considered in balancing. Furthermore, FERC has a number of alternatives for the project as a whole. This still allows FERC room to balance competing interests and to consider economics.

9. **From what I understand, the mandatory conditions that resource agencies place on licensees can make a project uneconomic and are often unrelated to project impacts. Therefore, in some cases the licensee's only recourse may be to fight those conditions and bring a case to court, thereby resulting in delays both in the licensing process and in the enhanced conservation of the resource your agency is bound to protect. I'm going to be a little like King Solomon for a minute here. Bear with me. Because I want to know if you care more about the effective and timely protection of the resource or your agency's own power to impose mandatory conditions. If there**

**was a faster, better way to achieve benefits to the resource by bypassing your right to impose a mandatory condition, would you take it?**

Before answering your question, it is important to address two of the underlying assumptions that are inaccurate. First, fishway prescriptions do not necessarily render a project uneconomic. Applicants are accepting licenses issued by FERC, indicating that they must consider the project, with mandatory conditions, to be economically viable. Second, fish passage conditions must, by their very nature, be related to project impacts since fish passage facilities are needed to pass fish around the blockage (up and down river) caused by the project at the project site.

Our primary concern is the health and sustainability of anadromous fish stocks and their habitats, which are in decline nationally. We are sensitive to the time factor, and agree that we need to move expeditiously to assure adequate protection for healthy stocks, and work to recover those that are threatened and endangered. Consequently, we are most concerned about the effective and timely protection of fish. However, we believe that effective fish passage and mandatory conditioning are related in that without the ability to impose mandatory conditions, we would be unable to adequately protect our trust resources.

We suggest that the faster and better way to achieve benefits for the resource is not to forego the resource protections crafted by existing legislation, but rather to achieve them more quickly by:
1. Supporting the shift to the collaborative process where appropriate; and,
2. Encouraging applicants to meet their responsibilities for providing information in a timely fashion and working with us in the development of fishway prescriptions.

**Follow up questions for Mr. Paul Brouha, relating to the March 30, 2000 hearing on Various Hydropower Bills.**

1) *Should Federal resource agencies provide public notice and opportunity for comment on proposed mandatory conditions? If not, explain why you oppose public comment.*

Yes. As per my submitted testimony, the Forest Service does provide public notice and opportunity for comment on its proposed mandatory conditions. The Forest Service ensures at least three opportunities to comment before conditions are finalized. The first opportunity is provided through the FERC licensing process when parties to the FERC licensing can comment upon the Forest Service "preliminary draft conditions" in response to the licensee's application. The second opportunity for comment to FERC is provided when the Forest Service issues "draft conditions" in response to FERC's commencement of Environmental Analysis. The third opportunity for comment and appeals is offered to the general public through the Forest Service's NEPA process, after the issuance of FERC's final Environmental Assessment or Environmental Impact Statement.

2) *Under current law, do Federal resource agencies consider a broad range of public interest factors in their development of mandatory conditions, such as power production, energy conservation, protection of fish and wildlife, protection of recreational opportunities, and other factors? Should legislation require agencies to consider a broad range of factors?*

Consistent with my submitted testimony, the Forest Service considers a broad range of public interest factors that are within its mandate and expertise, but does not address issues that are not related to resource protection of National Forest System lands. The Forest Service considers a number of public interest factors in our development of mandatory conditions, including: water quality, aquatic life and habitat, terrestrial life and habitat, watershed impacts, and recreational opportunities on National Forest System lands. The Forest Service does not consider factors outside its expertise or outside its mandates, e.g., power production or energy conservation. Parties have the opportunity to submit information on all issues, both in the FERC licensing and the Forest Service NEPA process.

3) *Under current law, do Federal resource agencies consider cost in their development of mandatory conditions? If not, should legislation require agencies to consider cost?*

The Forest Service does not conduct an economic analysis of its conditions either with regard to a dollar or power-production. The Forest Service will consider proposals by the licensee for alternative, lesser cost, methodologies that meet the goals of its conditions.

4) *Does current law require that mandatory conditions developed by resource agencies be limited to mitigation of project impacts?*

Section 4 (e) of the Federal Power Act provides that the Forest Service will prescribe license conditions for hydropower projects that lie partially or wholly within National Forest System lands, which are necessary for the adequate protection and utilization of the affected forest reservation.

5) *Do the current exemptions to FERC licensing in the Federal Power Act and PURPA provide adequate protections for fish and wildlife? Federal resource agencies can attach mandatory conditions to these exemptions. If so, would legislation that expanded current exemptions to include small hydroelectric projects in Alaska also provide adequate protection?*

If the Forest Service has the authority to issue a special use permit, pursuant to FLPMA, and if the terms of the FERC license are properly executed and enforced, then it is more likely that adequate resource protections can be provided. As to Alaska, I refer you to my testimony and previous Forest Service testimony (attached) on this matter.

6) *One reason Congress enacted the Electric Consumers Protection Act of 1986 was the perception that FERC was not a good environmental steward. Do you believe FERC has been a good environmental steward in recent years?*

We are working with FERC toward that end through the 1A process, on an individual agency-to-agency basis, and on a case-by-case basis. Communications with FERC are improving, as is resource agency performance in FERC proceedings. We believe that the Act of 1986 has enabled the resource agencies and FERC to better protect the environment impacted by hydropower projects.

7) *The Energy Policy Act of 1992 required FERC to collect fees from licensees to recover the expenses Federal resource agencies incur in their development of mandatory conditions. These fees are deposited directly in the Treasury, and resource agencies are not reimbursed. Should legislation authorize the resource agencies to directly recover these costs, perhaps by authorizing Federal resource agencies to charge fees?*

The Administration is not currently proposing such legislation. We would note that if a proposal to allow multiple agencies to charge fees were enacted, it could cause confusion to the licensee since FERC would issue the permit, but other agencies would charge or collect fees.

**Questions for the Department of Interior, National Marine Fisheries Service, and the United States Forest Service.**

Honorable Heather Wilson

1) *If you do not consider the benefits of hydroelectric projects when issuing a mandatory condition, and FERC, which is charged with balancing the benefits against the environmental considerations, cannot reject your condition, does that not effectively prevent FERC from carrying out its mission to balance these considerations? If FERC cannot effectively consider economic benefits, who does?*

The public's interest in protecting national forest lands and the natural resources therein is best served by the Forest Service developing license conditions that protect forest lands and resources from the impacts of hydropower generation. FERC is not an expert in forest plans or forest resources. FERC can balance the conditions that the Forest Service determines are needed, in order to protect national forest lands and resources on any particular national forest, as well as any condition FERC may develop, with the nation's need for power generated by that particular hydropower project.

2) *From what I understand, the mandatory conditions that resources agencies place on licensees can make a project uneconomic and are often unrelated to project impacts. Therefore, in some cases the licensee's only recourse may be to fight those conditions and bring a case to court, thereby resulting in delays both in the licensing process and in the enhanced conservation of the resource your agency is bound to protect. I'm going to be a little like King Solomon for a minute here. Bear with me. Because I want to know if you care more about the effective and timely protection of the resource or your agency's own power to impose mandatory conditions. If there were a faster, better way to achieve benefits to the resource by bypassing your right to impose a mandatory condition, would you take it?*

The Forest Service would welcome the opportunity to review any proposal regarding improvements to the federal hydropower licensing process. However, as noted in my direct testimony, the proposals made by Mr. Towns and Mr. Craig would not result in a "... better, faster way to achieve benefits to 'the resource'..." but in an even more prolonged, complex process, that would likely result in less protection of or benefits to the resources on national forest lands. In addition, because the possibility exists that new circumstances, such as the listing of a threatened or endangered species under the ESA may arise, or that the licensee may elect to amend its license, agencies need to retain conditioning authority throughout the life of the license, for the benefit of the licensee, the public, and the impacted resources.

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May 8, 2000

The Honorable Joe Barton, Chairman
Subcommittee on Energy and Power of the Committee on Commerce
United States House of Representatives
Room 2125, Rayburn House Office Building
Washington, DC 20515-6115

Dear Mr. Chairman:

Thank you again for allowing me to testify before your Subcommittee on March 30, 2000. Please find enclosed my responses to the written questions I received from the Subcommittee following my testimony.

Also, please allow me this opportunity to reiterate my opposition to HR 2335, "The Hydropower Relicensing Improvement Act." This bill will not achieve its goals of improving the process and threatens to undermine critical environmental protections. I welcome the opportunity to work with the Subcommittee to find alternative solutions to the concerns raised in the hearing. Please contact me if I can answer any further questions.

Sincerely,

Andrew Fahlund
Policy Director for Hydropower Programs, American Rivers
Chair of the Hydropower Reform Coalition

1025 VERMONT AVENUE, N.W. • SUITE 720 • WASHINGTON, DC 20005-3516
(202) 347-7550 • (202) 347-9240 FAX • www.americanrivers.org

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Questions for Mr. Andrew Fuhlund, American Rivers

Honorable Heather Wilson

March 30, 2000 Hearing on Various Hydropower Bills

1) In the August 23, 1999 edition of *Inside FERC*, your regional director of hydropower programs boasted, "They can challenge in court" when asked about FERC's current recourse if disputes over license conditions arise. Does the nation truly benefit from a hydro licensing process where litigation is the only recourse to resolving disagreements among agencies and applicants?

2) In your literature opposing H.R. 2335, you claim that the bill requires agencies to "balance the public interests of healthy fisheries and land management against the private economic interests of power generation." What about the public benefits of hydropower generation, such as clean air, flood control, water quality, recreation, wildlife refuge preservation, and irrigation? Or do you dismiss such benefits?

3) As you know, this nation is currently facing rising gasoline prices. So the issue of energy supply is receiving a lot of attention. The Energy Information Administration is now predicting a reduction in hydropower generation (from 9% of the nation's total energy generation in1998 to 6.4% by 2020) as the economic value of hydroelectric capacity declines because of environmental preferences that shift generation to off-peak hours and seasons. How do you believe the U.S. will replace this generation, and how will we fill the need for growing energy demand?

4) The Energy Information Administration's outlook for 2000 states that a thousand new generating plants could be needed by 2020 to meet growing demand and to offset retirements. Of this new capacity, 97 percent is projected to be fueled by fossil fuels. EIA only believes 3% will come from non-hydro renewables.

Do you really believe that natural gas will be able to fill this gap, since that source is constricted by significant environmental, land management and safety issues of its own? What if natural gas becomes too expensive to be a practical source of energy generation?

5) I understand that you have taken the position that licensees have to conduct studies on decommissioning and consider "original conditions" as the environmental baseline during the relicensing process. How do you justify making licensees mitigate for original conditions which have not existed for more than 50 years? Do you believe that holding hydroelectric projects up to the environmental standards of 50 years ago is practical? Doesn't this make as much sense as having highway and bridge maintenance

mitigate for the "original conditions" that existed prior to the development of the Washington beltway and the Wilson Bridge?

How would you respond to the suggestion that the consideration of "original conditions" is just an excuse for promoting the decommissioning alternative?

Do you support consideration of continuing benefits of hydroelectric projects?

BRINGING RIVERS TO LIFE

American Rivers

HYDROPOWER REFORM COALITION

**Response to Supplemental Questions**
**House Commerce Committee**
**Energy and Power Subcommittee**

**Andrew Fahlund**
**Policy Director for Hydropower Programs, American Rivers**
**Chair of the Hydropower Reform Coalition**
**May 8, 2000**

1. I do not remember the particular interview, nor do I have any of the context for which the answer was given, but there seems to be some confusion in the way that it is worded. FERC does not challenge disputes over licensing conditions in court. Licensees, members of the public, and other intervenors do. I believe that the question probably had to do with what *licensees* can do if they dispute mandatory conditions imposed by a resource agency.

   The answer is that during the relicensing process, agencies work with licensees in an iterative process in the development of so-called mandatory conditions. These conditions are based on legal mandates and corresponding goals and objectives and supported by studies conducted by the licensee and other evidence and data collected by agencies or other parties to the proceeding. Agencies will usually submit draft conditions to which licensees may respond. Subsequently, agencies may amend those conditions or submit them as final. Because each case is different and variables can change beyond anyone's control, flexibility is critical to all parties in this process.

   If after discussion and negotiation there is still disagreement about license conditions, parties can challenge the conditions in federal court or state court in the case of issues relating to certification under Section 401 of the Clean Water Act.

   The nation does not benefit from processes that lead to litigation however, we do not believe that is the only recourse in the current system. Many avenues currently exist for resolution of disputes however, all parties, including license applicants, must be willing to cooperate and seek common ground while maintaining basic environmental standards. The Commission's new alternative licensing process promotes cooperation and

collaboration that can greatly enhance the kind of dialog over mandatory conditions discussed above. FERC has also created an Office of Dispute Resolution that can help parties work through differences in license conditions. However, as with many regulatory actions, substantive disagreements will persist and litigation is often the result.

In fact, we believe that HR 2335 will only provoke more litigation - precisely what we should all seek to avoid. By raising a host of new criteria of review, developing a series of new processes, and inserting vague language in a number of places, HR 2335 will inevitably lead participants in the FERC process into the courts to seek clarification and new forms of relief. In undermining the authority of federal and state resource agencies, HR 2335 will create a disincentive for licensees to collaborate and negotiate because applicants will view their chances to be better in court.

2. Indeed hydropower generation can have benefits including low cost, domestic energy, and low air emissions and the dams and impoundments associated with hydropower production can also have important benefits – flood control, water supply, flat water recreation. Each dam, each project, and each river is different and the specific circumstances will dictate how these benefits, as well as the environmental costs are related. The environmental community does not dismiss these benefits out of hand, otherwise, we would be asking for wholesale elimination, not modernization, of hydropower facilities.

   However, one cannot assume that the kinds of changes that we seek in hydropower operations have a direct relationship to these benefits. For instance, construction and operation of a fish ladder has no impact on clean air or flat water recreation. Many of the beneficial uses of the hydropower project would continue with or without changes in the electrical generation, and some are enhanced by such changes.

3. The report that you reference by the Energy Information Administration's (EIA), Energy Outlook 2000, indeed forecasts both a loss in total hydropower output and a decline in the relative percentage of U.S. generation. The loss in total hydropower output between now and 2020 is forecasted by EIA to be 1%. That 1% loss, consistent with testimony provided to the Senate Energy and Natural Resources Committee by FERC Chair James Hoecker, is measured against a baseline of projects that have operated previously with little to no environmental mitigation to protect rivers. These project can have miles of dry, bypassed river reaches, dramatic fluctuations in flows from trickle to torrent, poor water quality with significantly low dissolved oxygen, and no fish passage for migratory species. The one percent loss of hydropower translates to a 0.1% loss in total electrical output with only half of that, 0.05% being attributed to FERC regulated projects.

   The decline in relative percentage of hydropower in the nation's energy mix from 9% to 6.4% can be explained by the loss described above (although only 0.1%) and the fact that in the face of projected growth in demand, sources other than hydropower will be meeting those needs. Hydropower is not continuing to grow because of the currently low cost of electricity and because the vast majority of profitable sites are already occupied.

Let us consider just how much energy then must be "replaced" from loss in FERC regulated hydropower. If we expect to loose 0.05% of our total energy supply, that could be replaced merely by retrofitting XXXXX households with one new compact fluorecent lightbulb. Countless studies have shown that with cost effective modifications and use of existing technology, we can reduce our nation's energy demand by 50%. That is more than enough to make up for not only the small amount of hydropower lost in an effort to restore our nation's rivers, but also would leave plenty of surplus for addressing air quality concerns from fossil fuel plants.

4. I am not an expert in natural gas markets, generation, or distribution, and I do not have insight into the assumptions that go into EIA's modling of future energy supply or demand but I am happy to share American Rivers' views on energy policy generally. National energy policy generally should favor energy efficiency and emerging clean technologies such as solar, wind, and fuel cells through a variety of incentive mechanisms and appropriate pricing of alternatives. If energy producers internalized their external costs of production, prices would more accurately reflect the true cost and more environmentally friendly alternatives would become cost effective. As for natural gas specifically, we support requirement of appropriate environmental mitigation measures for these projects, just as we do for hydropower.

5. American Rivers' positions on decommissioning and the use of an appropriate environmental baseline are neither simple nor static, as we have undergone some evolution in our thinking on these subjects over the past few years. However, I will try to clarify both positions and provide answers to your questions.

   The reference to "original conditions" alludes to an issue commonly described to as "baseline". This issue involves a longstanding dispute over how to measure the impacts and the requisite mitigation for a hydropower project. American Rivers and many of our conservation partners hold a position, supported by years of legal and regulatory precedent that hydropower licenses are a privilege and not a right, with a discrete beginning and end. Upon expiration of a license, hydropower owners must apply for a new license. This entails a recommitment of the public waterway to a specific and dominant use – hydropower generation.

   American Rivers believes that license applicants must mitigate for ongoing impacts of the hydropower project not for original conditions. In order to measure the extent of those ongoing impacts, one should consider what the environment would be like without the project. This does not suggest that the project will or should be removed but rather provides a point of reference to accurately evaluate the ongoing impacts of continuing to operate the project.

   While we and others have argued procedural details such as the character of the "no action alternative" with respect to the development of an environmental review document, the issue at hand is really a question of how to measure impacts of a project

that has impacted the environment for at least thirty years and will continue to affect the public's river for at least thirty more.

FERC is obligated under NEPA and the Federal Power Act to analyze and mitigate cumulative impacts and it acknowledge that these include past, present and future impacts. The Commission has stated that "[P]ast environmental impacts are relevant in determining what measures are appropriate to protect, mitigate, and enhance natural resources. . . Enhancement may in many cases constitute a reduction of the negative impacts attributable to the project since its construction."

With respect to project decommissioning, NEPA requires consideration of all reasonable alternatives of which decommissioning is one. While a robust analysis for project decommissioning may not be necessary in many cases, it is an alternative that merits enough consideration to enable decision-makers to rule it out. Consideration of this alternative does not constitute an excuse for promoting this alternative any more than consideration of the Commission's no-action alternative – status quo or 30-year old license conditions – should be an excuse for imposing no additional environmental requirements at the project.

As with any energy generation source, hydropower must meet basic environmental standards. In the case of hydropower, these include fish passage, federal lands protection, and water quality.

We support the consideration of continuing benefits of a hydropower project in just the same way that we support consideration of continuing impacts. Again, ongoing impacts may include continuing to fragment and inundate riverine ecosystems, increase downstream water temperatures, or maim or kill fish caught in turbines. These benefits and impacts should be considered incrementally in the context of various operational alternatives – not simply for the presence/absence scenario of decommissioning.

Oregon
John A. Kitzhaber, M.D., Governor

Department of Environmental Quality
811 SW Sixth Avenue
Portland, OR 97204-1390
(503) 229-5696
TDD (503) 229-6993

May 8, 2000

The Honorable Joe Barton
Committee on Commerce, Subcommittee on Energy and Power
Room 2125, Rayburn House Office Building
Washington, D.C. 20515-6115

Dear Chairman Barton:

Thank-you for your further interest in my testimony on HR 2335 on behalf of Governor John Kitzhaber and the Western Governor's Association. Please accept the response provided below: it is intended to address both of the questions you posed, since the answer to both is the same. As a follow-up to a question asked at the hearing concerning how Western Governors Association positions are developed, I have also appended a copy of the resolution on hydropower adopted by the Western Governors in June, 1999.

For the record, the questions you posed were:

1. Does HR 2335 diminish State authority to attach mandatory conditions to FERC licenses under the Clean Water Act?

2. Does HR 2335 diminish State authority to require that hydroelectric projects conform to State management plans under the Coastal Zone Management Act?

The answer requires a bit of history for context. The governors have directed their Association and staff to continue working with state and federal water quality and natural resource agencies and the Western States Water Council in opposing amendments to limit state and federal agency mandatory conditioning authority and to seek sponsorship of legislation restoring full state authority over state waters under the Federal Power Act. They have further directed staff to make the Federal Energy and Regulatory Commission hydropower relicensing process more effective and efficient by working with all parties that either participate in or are affected by that process.

These directives come directly from state experience with the hydropower industry, which has been conducting a multi-pronged strategy to reduce meaningful state participation in the relicensing process through the courts, through legislation, and though administrative initiatives, most of which are referenced in the governors' resolution, WGA 99-016.



DEQ-1

For Example:

- Protection of state authority over the control, appropriation, use, or distribution of water and of any water property right from preemption was a key component of the compromise that enabled Congress to enact the FPA in 1920. In 1946, industry succeeded in restricting states' authority with respect to water rights for federally licensed hydropower projects in the First Iowa Hydroelectric Case, and the Commission quickly quit treating states as partners. In the early 1990's, industry achieved mixed results when it challenged state authority under section 401 of the Clean Water Act. Ultimately the U. S. Supreme Court affirmed state 401 authority in Public Utility District No. 1 of Jefferson County and City of Tacoma v. State of Washington Departments of Ecology, Fisheries and Wildlife. Upon losing that case, industry immediately stepped up its legislative efforts to restrict state and federal mandatory conditioning authority. At the same time industry and FERC pursued a line of cases to enable FERC to determine which state 401 conditions were applicable and which were not.

- Since the late 1980's industry has conducted a steady education campaign to convince members of Congress that state and federal mandatory conditions must be reduced to recommendations for FERC's consideration. In 1995, the campaign brought success in the House. After the Transportation Committee agreed to drop a provision restricting state 401 authority, industry then sprang a floor amendment to HR 961 that would have enabled FERC to convert state 401 conditions to recommendations. The House voted three to one against the state position. During that time, Western states and the Western States Water Council met with industry representatives to discuss and resolve industry concerns. The discussions ended when the 401 amendment was adopted. Mr. Towns voted against the 401 amendment to HR 961, but twice during the hearing on HR 2335 mentioned that a weakness of the current bill was that it did not address state conditioning authority under CWA section 401.

- The governors have long worked to make the relicensing process more effective and efficient. To that end the governors directed WGA and the WSWC to work with FERC to develop a memorandum of agreement to improve the process. In 1993 after over a year's work, FERC terminated the effort. So far FERC has been a far better partner in working with the states to improve the process through the current Hydropower Interagency Working Group. But Commissioners change and during the hearing, one commissioner advocated transferring far more authority from the state and federal mandatory conditioning agencies to the Commission. Also, FERC has not always been neutral in its regulatory decisions toward the states. For example, in 1987 FERC unilaterally redefined the one-year period which states have under the CWA to review license applications to begin when the state receives an application instead of the then-prevailing practice of starting the clock when the applicant submitted a complete application. FERC then applied the new definition to pending

applications and retroactively waived state 401 requirements for 227 projects in 32 states.

Governors have long recognized the economic importance of hydropower and supported its development-subject to a strong state role. Utilities are valued and essential partners in the economic development and health of our states. As a result, each state has a strong working relationship with its utilities. Nationally, however, the industry conducts its activities through a legislative-legal committee and a regulatory affairs committee. The legislative group aggressively pursues ways to gain an upper hand in the relicensing process, and the above examples reflect such strategies.

In contrast, the regulatory affairs group works with states and other interested parties in a manner that develops trust and results in incremental improvements in the relicensing process. This is the approach that the governors have directed their states to pursue and that they believe will bring improvements to the relicensing process within their states and nationally. In 1997, Oregon brought stakeholder representatives together to develop a model process that addresses both public and industry needs. The new Oregon law ensures early identification of environmental and resource concerns and ensures maximum efficiency and reduced costs to applicants by requiring careful coordination of the state and federal application processes. We expect similar results from identifying and applying best practices within our states and from state participation in the federal Interagency Work Group, the EPRI national review group, and the national and regional conferences held in collaboration with the National Hydropower Association that are detailed in my testimony.

More specifically, the bill as drafted will result in a loss of mandatory authorities in an unknown number of relicensings. By requiring federal resource agencies to meet impractical and resource-intensive process standards, and to base their conditions on a balance of factors outside their expertise and traditional jurisdiction, the bill will greatly diminish those agencies' ability to write conditions that will stand up in court, or under the expedited review process created in Section 32(e) of HR 2335. In cases where a Section 32(e) review demanded by an applicant is not completed within 180 days, the bill states that a mandatory condition may be treated by FERC as a recommendation. Since the review is to be conducted by an independent outside reviewer, agencies have no control over the length of time the reviewer takes to complete the review. This means that any mandatory condition has potential to be reduced to a recommendation on procedural grounds, and then overruled by FERC.

The bill also has potential to diminish the effectiveness of 401 conditions that are placed in licenses. Good water quality is just one of many factors that are necessary for the survival of aquatic species. Salmonids, for example, depend on both quality and quantity of habitat. Good habitat includes structure (such as large woody debris) that provides hiding places, an intact food web, and access to adequate spawning gravels--in addition to suitable water quality. The federal authorities addressed in HR 2335 help

ensure that suitable habitat will exist, in adequate quantities, and that efforts to meet water quality standards for characteristics such as temperature and dissolved oxygen do, in fact, result in protection of aquatic species.

Recent experience shows that the relicensing process can be greatly shortened and achieve broad public support if project operators enter relicensing with the premise that fish and wildlife and water quality regulations must be met. FERC's new alternative collaborative relicensing process is a positive step and incentive, which will help restore the efficient and effective interaction of our federal/state system of governance.

Thank-you again for your interest in states' perspectives concerning the relicensing of hydropower projects.

Sincerely,

Lynne Kennedy

Lynne Kennedy
Hydroelectric Certification Program Coordinator

**Policy Resolution 99 - 016**
**State Authority Regarding the Federal Hydropower Licensing Process**

June 15, 1999

SPONSORS: Governors Kempthorne and Kitzhaber

BACKGROUND

The licenses for over 100 Western hydroelectric projects, many encompassing multiple dams, are due to expire between now and 2010. In addition to the tremendous workload required to relicense these projects, states face legislative and judicial challenges to their authority under section 401 of the Clean Water Act (CWA) and to their participation in the Federal Energy Regulatory Commission (FERC) relicensing process under the Federal Power Act (FPA). Relicensing may provide the only opportunity during the next 50 years to address the effects a facility has on water quality, fisheries and other natural resources which were unknown or not addressed when projects were first licensed.

The CWA sets a national goal of eliminating the discharge of pollutants into navigable waters and an interim goal of providing for swimming and recreation and for the protection and propagation of fish and wildlife. The CWA recognizes state primacy and authorizes a state to carry out the Act under its own laws and regulations if these are at least as protective as federal law. An authorized state must adopt water quality standards that meet or exceed the Act's requirements.

To prevent state standards from being violated by federal activities, Section 401 of the CWA requires an applicant for a federal license or permit to apply for certification from the state that potential discharges from the activity will not violate state standards. The state must deny certification if compliance can not be ensured. If necessary, the state can condition these activities to ensure compliance with the standard. Any such federal license, such as a FERC hydropower license, must include these conditions.

State involvement in administration of the Clean Water Act is essential to assure that local goals are met at the same time that water quality is protected. States consider land use, economic development, and other locally-adopted policies in their decisions regarding the allocation of the privilege to discharge waste. Normally, no one discharger is given the privilege to use up all the capacity of a waterbody to assimilate potential discharges; to do so would result in prohibitive pollution-abatement costs for other potential dischargers, thereby curtailing much desired development.

States' ability to allocate waste loads among desired development activities has been challenged in the courts by both the hydropower industry and FERC, setting a number of legal precedents. Following several industry challenges to state authority under Section 401, in 1994 the Supreme Court in Public Utility District No. 1 of Jefferson County and City of Tacoma v. State of Washington Departments of Ecology, Fisheries and Wildlife ruled clearly in favor of the states' authority. This decision clarified that FERC and the industry could not virtually ignore the role of states. The decision found that the state acted properly and within federal water quality law when it conditioned a water quality certification for the proposed Elkhorn hydropower development on the Dosewallips river. The certification included instream flow conditions determined by the state, in consultation with federal and state fishery agencies and tribes, designed to protect salmon and steelhead trout, in this case a designated beneficial use of the waters of that river.

Western Governors have long seen the economic importance of hydropower and supported its development subject to a strong state role. WGA, then in the form of the Western Governors' Conference, testified and lobbied for hydropower legislation that culminated in the FPA. Since 1987, WGA has had formal policy urging reversal of the First Iowa Hydroelectric case which restricted states' authority with respect to water rights for federally licensed hydropower projects.

WGA has worked to make licensing and relicensing more effective and efficient, directing its staff and the Western States Water Council (WSWC) to work with FERC to develop a memorandum of agreement to improve the process. In 1993, after nearly a year's work, FERC terminated the effort. WGA and WSWC also met with industry representatives to discuss and resolve industry concerns. That effort ended when the House adopted a floor amendment to the CWA in 1995 to convert state 401 certification authority to recommendations. WGA testified for retention of state authority when the Senate held an oversight hearing in 1998.

GOVERNORS' POLICY STATEMENT

The critical importance of water resources to the well being of the people of the Western states underscores the necessity that federal decisions on siting and relicensing of hydropower projects give appropriate deference to state policies and decisions regarding development and operation of such projects. The states have an essential role in protecting their natural resources and environment, protecting security of existing rights, and preserving options to provide for orderly water development in the future. It is imperative that any final relicensing process should continue to maintain high environmental standards while preserving low cost power.

Congress should refrain from weakening or removing a vital tool for states to influence hydropower siting and operation within their borders and upon their waters. Section 401 of the CWA is operating as it was intended and should be retained without amendment. The changes to section 401 approved by the House in H.R. 961 in 1995 were ill-considered and are opposed by the Western Governors.

Industry's argument that it is unfairly subjected to dual federal-state regulation is inherently invalid. We live in a federal system in which a host of proposed projects, including mining and other activities, even on federal lands, must comply with both state and federal law as a precondition for operation. Exemption of hydropower facilities would be to the detriment of all other water users who would be required to pay for the water quality mitigation that should rightfully have been provided by the hydropower facility.

However, it is appropriate for everyone to have a common understanding of the problems and reasons for any delays in the process. The Western Governors call upon FERC to provide an annual report to Congress, the Administration and Governors identifying any impediments to completion of relicenses.

Certification authority under section 401 of the CWA is especially important at this time. Our states are working closely with federal and private partners to restore fish populations under the Endangered Species Act and, in the face of consent decrees, to develop total maximum daily (pollutant) loads (TMDLs) for discharges into state waters so as to bring them into compliance with water quality standards.

More generally, the rights of states to control the fate of their water resources needs to be restored by the Congress. The Federal Power Act should be closely examined and amended to clarify and strengthen Congress' historic deference to state primacy over water resource allocation and management. Further, Congress should require that any projects that remain under FERC jurisdiction not be licensed unless or until they acquire a water right or the functional equivalent from the affected state or states.

In the interim, each state should continue implementing model statutes and best practices that develop a unified state position, bring the early participation of all interested parties into the process, and coordinate the review of projects, which, when feasible, are consistent with and avoid duplication with federal agency and tribal reviews. Recent experience shows that the relicensing process can be greatly shortened and achieve broad public support if project operators enter relicensing with the premise that fish and wildlife and water quality regulations must be met. FERC's new

alternative collaborative relicensing process is a positive step and incentive, which will help restore the efficient and effective interaction of our federal/state system of governance.

GOVERNORS' MANAGEMENT DIRECTIVE

This resolution is to be transmitted to the President, the Chairman and ranking minority member for the appropriate committees of the United States Congress, and the Western delegation.

The staff is directed to continue working with the Governors, state and federal water quality and water and natural resource agencies, and the Western States Water Council in opposing amendments to limit state and federal agency mandatory conditioning authority and to seek sponsorship of legislation restoring full state authority over state waters under the Federal Power Act.

The staff is directed to work with state and federal agencies, tribal nations and local governments, the FERC, the hydropower industry, and the environmental community to make the relicensing process more effective and efficient. Staff also is directed to help states participate in the dialogue between FERC and agencies with mandatory conditioning authority and to work with all interested parties in sponsoring workshops and providing technical assistance to ease the relicensing workload that faces our states.
This resolution was originally adopted in 1998 as WGA resolution 98 - 014.

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Approval of a WGA resolution requires an affirmative vote of two-thirds of the Board of the Directors present at the meeting. Dissenting votes, if any, are indicated in the resolution. The Board of Directors is comprised of the governors of Alaska, American Samoa, Arizona, California, Colorado, Guam, Hawaii, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Northern Mariana Islands, Oregon, South Dakota, Texas, Utah, Washington and Wyoming.

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Western Governors' Association
600 17th St. Suite 1705 South
Denver, CO 80202-5452
Ph: (303) 623-9378
Fax: (303) 534-7309

WESTERN GOVERNORS' ASSOCIATION

Benjamin J. Cayetano
Governor of Hawaii
Chairman

Dirk Kempthorne
Governor of Idaho
Vice Chairman

James M. Souby
Executive Director

Headquarters:
600 17th Street
Suite 1705 South Tower
Denver, Colorado 80202-5452

(303) 623-9378
Fax (303) 534-7309

Washington, D.C. Office:
400 N. Capitol Street, N.W.
Suite 388
Washington, D.C. 20001

(202) 624-5402
Fax (202) 624-7707

www.westgov.org

May 15, 2000

The Honorable Joe Barton
Chairman
Subcommittee on Energy and Power
House Committee on Commerce
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

The Honorable Rick Boucher
Ranking Member
Subcommittee on Energy and Power
House Committee on Commerce
2322 Rayburn House Office Building
Washington, D.C. 20515-6115

Dear Sir:

On March 30, 2000, Lynne Kennedy, an official with the State of Oregon, delivered testimony on HR 2335, a bill to amend the Federal Power Act to improve the hydroelectric relicensing process. She testified on behalf of the State of Oregon and the Western Governors' Association, which she had been assured concurred in the testimony. I have since learned that the WGA review process was incomplete. Governor Kempthorne of Idaho, a cosponsor of WGA's Resolution on hydropower, had not been consulted and does not concur in the testimony. Therefore, WGA does not hold the consensus position on the legislation as reflected in Ms. Kennedy's testimony.

I apologize for this confusion. This was in no way an oversight on Ms. Kennedy's part but resulted from an administrative oversight at WGA. We will convene the concerned states to review our policy on this issue and inform Congress as our policy is developed.

Sincerely,

James M. Souby

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