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THE AMERICAN ENERGY INITIATIVE, PART 19: FOCUS ON H.R. 4273, THE RESOLVING ENVIRONMENTAL AND GRID RELIABILITY CONFLICTS ACT OF 2012, AND H.R. ———, THE HYDROPOWER REGULATORY EFFICIENCY ACT OF 2012

HEARING

BEFORE THE

SUBCOMMITTEE ON ENERGY AND POWER

OF THE

COMMITTEE ON ENERGY AND COMMERCE

HOUSE OF REPRESENTATIVES

ONE HUNDRED TWELFTH CONGRESS

SECOND SESSION

MAY 9, 2012

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THE AMERICAN ENERGY INITIATIVE, PART 19: FOCUS ON H.R. 4273, THE RESOLVING ENVIRONMENTAL AND GRID RELIABILITY CONFLICTS ACT OF 2012, AND H.R. ———, THE HYDROPOWER REGULATORY EFFICIENCY ACT OF 2012

WEDNESDAY, MAY 9, 2012

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

The subcommittee met, pursuant to call, at 9:03 a.m., in room 2123 of the Rayburn House Office Building, Hon. Ed Whitfield (chairman of the subcommittee) presiding.

Members present: Representatives Whitfield, Shimkus, Walden, Terry, Bilbray, Scalise, McMorris Rodgers, Olson, McKinley, Gardner, Pompeo, Griffith, Barton, Upton (ex officio), Sarbanes, Dingell, Capps, Doyle, and Waxman (ex officio).

Staff present: Charlotte Baker, Press Secretary; Ray Baum, Senior Policy Advisor/Director of Coalitions; Michael Beckerman, Deputy Staff Director; Anita Bradley, Senior Policy Advisor to Chairman Emeritus; Maryam Brown, Chief Counsel, Energy and Power; Allison Busbee, Legislative Clerk; Patrick Currier, Counsel, Energy and Power; Andy Duberstein, Deputy Press Secretary; Cory Hicks, Policy Coordinator, Energy and Power; Heidi King, Chief Economist; Ben Lieberman, Counsel, Energy and Power; Mary Neumayr, Senior Energy Counsel; Michael Aylward, Democratic Professional Staff Member; Jeff Baran, Democratic Senior Counsel; Greg Dotson, Democratic Energy and Environment Staff Director; Caitlin Haberman, Democratic Policy Analyst; and Alexandra Teitz, Democratic Senior Counsel, Environment and Energy.

OPENING STATEMENT OF HON. ED WHITFIELD, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF KENTUCKY

Mr. WHITFIELD. I would like to call this hearing to order this morning. This is the 19th day of our American Energy Initiative hearing, and today we are going to focus on two particular pieces of bipartisan energy legislation. The first one is the Resolving Environment and Grid Reliability Conflicts Act of 2012, and the second is the Hydropower Regulatory Efficiency Act of 2012.

Now, the Resolving Environmental and Grid Reliability Conflicts Act is a bipartisan bill brought forward by our colleagues Mr. Olson, Mr. Doyle, and Mr. Green. I understand that Mr. Green may not be here today because he was called out to do something else, but you are here, Mr. Doyle, so that is great. But this legislation amends the Federal Power Act to clarify that when an electric utility complies with a DOE order to generate electricity in order to prevent a reliability emergency, the generator will not be considered in violation of conflicting environmental laws, which has been a problem in many situations.

The other bill under consideration today is hydropower legislation developed by Representatives Cathy McMorris Rodgers and Diana DeGette. This legislation is another example of a bipartisan effort by Ms. McMorris Rodgers and Diana DeGette. Of course, one of the primary impediments to greater utilization of hydropower resources is the regulatory red tape, which has proven costly, time consuming, and burdensome, even for small—very small hydropower plants.

[The prepared statement of Mr. Whitfield follows:]

Opening Statement of Chairman Ed Whitfield
Energy and Power Subcommittee
Hearing on the American Energy Initiative
May 9, 2012

- This hearing will come to order. This is the 19th day of our American Energy Initiative hearing, and today we will focus on two very important pieces of bipartisan energy legislation:
    - the "Resolving Environmental and Grid Reliability Conflicts Act of 2012", and
    - the "Hydropower Regulatory Efficiency Act of 2012."

- The "Resolving Environmental and Grid Reliability Conflicts Act" is a bipartisan bill brought forward by our colleagues, Mr. Olson, Mr. Doyle, and Mr. Green.

- The legislation amends the Federal Power Act to clarify that when an electric utility complies with a DOE order to generate electricity in order to prevent a reliability emergency, the generator will not be considered in violation of conflicting environmental laws.

- It is no secret that EPA's new power sector rules are going to force a significant portion of our coal-fired generation fleet to retire and these retirements will have negative impacts on the reliability of our electric grid.

- These reliability-related impacts may force DOE to use its authority in order to avoid potential reliability emergencies.

- It is essential that we amend the Federal Power Act so that generators aren't forced to choose between compliance with an emergency order and compliance with EPA regulations. Otherwise utilities are unacceptably forced between a rock and hard place of Federal authority.

- The other bill under consideration today is hydropower legislation developed by Representatives Cathy McMorris-Rodgers and Diana DeGette. This legislation is yet another impressive example of legislation developed in a bipartisan manner.

- One of the primary impediments to greater utilization of hydropower resources is the regulatory red tape, which has proven costly, time-consuming and burdensome, even for small hydropower projects.

- The bipartisan legislation developed by our colleagues helps to alleviate the inefficiencies of the regulatory process so that companies can reduce the amount of time and money wasted on navigating unnecessary administrative obstacles and instead focus their efforts on constructing hydropower projects that will provide affordable and reliable electricity and create thousands of new jobs.

- Both bills make very good policy and should be noncontroversial. I thank the witnesses for being here today, and I want to commend my friends and colleagues – on both sides of the aisle – for their efforts to develop these important pieces of bipartisan legislation. With that, I yield to _____.

[The information follows:]

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112TH CONGRESS
2D SESSION

H. R. 4273

To clarify that compliance with an emergency order under section 202(c) of the Federal Power Act may not be considered a violation of any Federal, State, or local environmental law or regulation, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 28, 2012

Mr. OLSON (for himself, Mr. DOYLE, Mr. TERRY, Mr. GENE GREEN of Texas, Mr. KINZINGER of Illinois, and Mr. GONZALEZ) introduced the following bill; which was referred to the Committee on Energy and Commerce

---

A BILL

To clarify that compliance with an emergency order under section 202(c) of the Federal Power Act may not be considered a violation of any Federal, State, or local environmental law or regulation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Resolving Environmental and Grid Reliability Conflicts Act of 2012".

SEC. 2. AMENDMENTS TO THE FEDERAL POWER ACT.

(a) COMPLIANCE WITH OR VIOLATION OF ENVIRONMENTAL LAWS WHILE UNDER EMERGENCY ORDER.—Section 202(c) of the Federal Power Act (16 U.S.C. 824a(c)) is amended—

(1) by inserting "(1)" after "(c)"; and

(2) by adding at the end the following: "An order issued under this section should require generation, delivery, interchange, or transmission of electric energy only during times necessary to meet the emergency and serve the public interest, and, to the extent reasonable, be consistent with any other applicable Federal law, including any environmental law or regulation, and endeavor to minimize any adverse environmental impacts.

"(2)(A) To the extent any omission or action taken by a party, which is necessary to comply with an order issued under paragraph (1), including any omission or action taken to voluntarily comply with such order, results in noncompliance with, or causes such party to not comply with, any Federal, State, or local environmental law or regulation, such omission or action shall not be considered a violation of such environmental law or regulation, or subject such party to any requirement, civil or criminal liability, or a citizen suit under such environmental law or regulation.

1 "(B) In this paragraph, the term 'environmental law'
2 does not include the Occupational Safety and Health Act
3 of 1970 (29 U.S.C. 651 et seq.).".

4 (b) TEMPORARY CONNECTION OR CONSTRUCTION BY
5 MUNICIPALITIES.—Section 202(d) of the Federal Power
6 Act (16 U.S.C. 824a(d)) is amended by inserting "or mu-
7 nicipality" before "engaged in the transmission or sale of
8 electric energy".

○

DISCUSSION DRAFT

112TH CONGRESS
2D SESSION

H. R. _____

To improve hydropower, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mrs. MCMORRIS RODGERS introduced the following bill; which was referred to the Committee on _____

A BILL

To improve hydropower, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Hydropower Regulatory Efficiency Act of 2012".

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Findings.
Sec. 3. Promoting small hydroelectric power projects.
Sec. 4. Promoting conduit hydropower projects.
Sec. 5. FERC authority to extend preliminary permit terms.

Sec. 6. Promoting hydropower development at nonpowered dams and closed loop pumped storage projects.
Sec. 7. DOE study of pumped storage and potential hydropower from conduits.

SEC. 2. FINDINGS.

Congress finds that—

(1) the hydropower industry currently employs approximately 300,000 workers across the United States;

(2) hydropower is the largest source of clean, renewable electricity in the United States;

(3) as of the date of enactment of this Act, hydropower resources, including pumped storage facilities, provide—

(A) nearly 7 percent of the electricity generated in the United States; and

(B) approximately 100,000 megawatts of electric capacity in the United States;

(4) only 3 percent of the 80,000 dams in the United States generate electricity, so there is substantial potential for adding hydropower generation to nonpowered dams; and

(5) by utilizing currently untapped resources, the United States could add approximately 60,000 megawatts of new hydropower capacity by 2025, which could create 700,000 new jobs over the next 14 years.

SEC. 3. PROMOTING SMALL HYDROELECTRIC POWER PROJECTS.

Subsection (d) of section 405 of the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. 2705) is amended by striking "5,000" and inserting "10,000".

SEC. 4. PROMOTING CONDUIT HYDROPOWER PROJECTS.

(a) APPLICABILITY OF, AND EXEMPTION FROM, LICENSING REQUIREMENTS.—Section 30 of the Federal Power Act (16 U.S.C. 823a) is amended—

(1) by striking subsections (a) and (b) and inserting the following:

"(a)(1) A qualifying conduit hydropower facility shall not be required to be licensed under this part.

"(2)(A) Any person, State, or municipality proposing to construct a qualifying conduit hydropower facility shall file with the Commission a notice of intent to construct such facility. The notice shall include sufficient information to demonstrate that the facility meets the qualifying criteria.

"(B) Not later than 15 days after receipt of a notice of intent filed under subparagraph (A), the Commission shall—

"(i) make an initial determination as to whether the facility meets the qualifying criteria; and

"(ii) if the Commission makes an initial determination, pursuant to clause (i), that the facility

1 meets the qualifying criteria, publish public notice of
2 the notice of intent filed under subparagraph (A).
3 "(C) If, not later than 45 days after the date of publi-
4 cation of the public notice described in subparagraph
5 (B)(ii)—
6 "(i) an entity contests whether the facility
7 meets the qualifying criteria, the Commission shall
8 promptly issue a written determination as to wheth-
9 er the facility meets such criteria; or
10 "(ii) no entity contests whether the facility
11 meets the qualifying criteria, the facility shall be
12 deemed to meet such criteria.
13 "(3) For purposes of this section:
14 "(A) The term 'conduit' means any tunnel,
15 canal, pipeline, aqueduct, flume, ditch, or similar
16 manmade water conveyance that is operated for the
17 distribution of water for agricultural, municipal, or
18 industrial consumption and not primarily for the
19 generation of electricity.
20 "(B) The term 'qualifying conduit hydropower
21 facility' means a facility (not including any dam or
22 other impoundment) that is determined or deemed
23 under paragraph (2)(C) to meet the qualifying cri-
24 teria.

"(C) The term 'qualifying criteria' means, with respect to a facility, the following:

"(i) The facility is constructed, operated, or maintained for the generation of electric power and uses for such generation only the hydroelectric potential of a non-federally owned conduit.

"(ii) The facility has an installed capacity that does not exceed 5 megawatts.

"(iii) On or before the date of enactment of the Hydropower Regulatory Efficiency Act of 2012, the facility is not licensed under, or exempted from the license requirements contained in, this part.

"(b) Subject to subsection (c), the Commission may grant an exemption in whole or in part from the requirements of this part, including any license requirements contained in this part, to any facility (not including any dam or other impoundment) constructed, operated, or maintained for the generation of electric power which the Commission determines, by rule or order—

"(1) utilizes for such generation only the hydroelectric potential of a conduit; and

"(2) has an installed capacity that does not exceed 40 megawatts.".

1 (2) in subsection (c), by striking "subsection
2 (a)" and inserting "subsection (b)"; and
3 (3) in subsection (d), by striking "subsection
4 (a)" and inserting "subsection (b)".
5 (b) CONFORMING AMENDMENT.—Subsection (d) of
6 section 405 of the Public Utility Regulatory Policies Act
7 of 1978 (16 U.S.C. 2705), as amended, is further amend-
8 ed by striking "subsection (a) of such section 30" and in-
9 serting "subsection (b) of such section 30".

10 **SEC. 5. FERC AUTHORITY TO EXTEND PRELIMINARY PER-**
11 **MIT TERMS.**

12 Section 5 of the Federal Power Act (16 U.S.C. 798)
13 is amended—
14 (1) by designating the first, second, and third
15 sentences as subsections (a), (c), and (d), respec-
16 tively; and
17 (2) by inserting after subsection (a) (as so des-
18 ignated) the following:
19 "(b) EXTENSION.—The Commission may extend the
20 term of a preliminary permit once for not more than 2
21 additional years if the Commission finds that the per-
22 mittee has carried out activities under the permit in good
23 faith and with reasonable diligence.".

1 **SEC. 6. PROMOTING HYDROPOWER DEVELOPMENT AT**
2 **NONPOWERED DAMS AND CLOSED LOOP**
3 **PUMPED STORAGE PROJECTS.**

4 (a) IN GENERAL.—To improve the regulatory process
5 and reduce delays and costs for hydropower development
6 at nonpowered dams and closed loop pumped storage
7 projects, the Federal Energy Regulatory Commission (re-
8 ferred to in this section as the "Commission") shall inves-
9 tigate the feasibility of the issuance of a license for hydro-
10 power development at nonpowered dams and closed loop
11 pumped storage projects in a 2-year period (referred to
12 in this section as a "2-year process"). Such a 2-year proc-
13 ess shall include any prefiling licensing process of the
14 Commission.

15 (b) WORKSHOPS AND PILOTS.—The Commission
16 shall—

17 (1) not later than 60 days after the date of en-
18 actment of this Act, hold an initial workshop to so-
19 licit public comment and recommendations on how
20 to implement a 2-year process;

21 (2) develop criteria for identifying projects fea-
22 turing hydropower development at nonpowered dams
23 and closed loop pumped storage projects that may be
24 appropriate for licensing within a 2-year process;

1 (3) not later than 180 days after the date of
2 enactment of this Act, develop and implement pilot
3 projects to test a 2-year process, if practicable; and
4 (4) not later than 3 years after the date of im-
5 plementation of the final pilot project testing a 2-
6 year process, hold a final workshop to solicit public
7 comment on the effectiveness of each tested 2-year
8 process.
9 (c) MEMORANDUM OF UNDERSTANDING.—The Com-
10 mission shall, to the extent practicable, enter into a memo-
11 randum of understanding with any applicable Federal or
12 State agency to implement a pilot project described in sub-
13 section (b).
14 (d) REPORTS.—
15 (1) PILOT PROJECTS NOT IMPLEMENTED.—If
16 the Commission determines that no pilot project de-
17 scribed in subsection (b) is practicable because no 2-
18 year process is practicable, not later than 240 days
19 after the date of enactment of this Act, the Commis-
20 sion shall submit to the Committee on Energy and
21 Commerce of the House of Representatives and the
22 Committee on Energy and Natural Resources of the
23 Senate a report that—

1 (A) describes the public comments received
2 as part of the initial workshop held under sub-
3 section (b)(1); and
4 (B) identifies the process, legal, environ-
5 mental, economic, and other issues that justify
6 the determination of the Commission that no 2-
7 year process is practicable, with recommenda-
8 tions on how Congress may address or remedy
9 the identified issues.
10 (2) PILOT PROJECTS IMPLEMENTED.—If the
11 Commission develops and implements pilot projects
12 involving a 2-year process, not later than 60 days
13 after the date of completion of the final workshop
14 held under subsection (b)(4), the Commission shall
15 submit to the Committee on Energy and Commerce
16 of the House of Representatives and the Committee
17 on Energy and Natural Resources of the Senate a
18 report that—
19 (A) describes the outcomes of the pilot
20 projects;
21 (B) describes the public comments from
22 the final workshop on the effectiveness of each
23 tested 2-year process; and
24 (C)(i) outlines how the Commission will
25 adopt policies under existing law (including reg-

1 ulations) that result in a 2-year process for ap-
2 propriate projects;
3 (ii) outlines how the Commission will issue
4 new regulations to adopt a 2-year process for
5 appropriate projects; or
6 (iii) identifies the process, legal, environ-
7 mental, economic, and other issues that justify
8 a determination of the Commission that no 2-
9 year process is practicable, with recommenda-
10 tions on how Congress may address or remedy
11 the identified issues.

12 **SEC. 7. DOE STUDY OF PUMPED STORAGE AND POTENTIAL**
13 **HYDROPOWER FROM CONDUITS.**

14 (a) IN GENERAL.—The Secretary of Energy shall
15 conduct a study—
16 (1)(A) of the technical flexibility that existing
17 pumped storage facilities can provide to support
18 intermittent renewable electric energy generation, in-
19 cluding the potential for such existing facilities to be
20 upgraded or retrofitted with advanced commercially
21 available technology; and
22 (B) of the technical potential of existing
23 pumped storage facilities and new advanced pumped
24 storage facilities, to provide grid reliability benefits;
25 and

1 (2)(A) to identify the range of opportunities for
2 hydropower that may be obtained from conduits (as
3 defined by the Secretary) in the United States; and
4 (B) through case studies, to assess amounts of
5 potential energy generation from such conduit hy-
6 dropower projects.
7 (b) REPORT.—Not later than 1 year after the date
8 of enactment of this Act, the Secretary of Energy shall
9 submit to the Committee on Energy and Commerce of the
10 House of Representatives and the Committee on Energy
11 and Natural Resources of the Senate a report that de-
12 scribes the results of the study conducted under subsection
13 (a), including any recommendations.

Mr. WHITFIELD. At this time, I would like to recognize Mrs. Rodgers to make any additional comments she may want to make about this legislation.

OPENING STATEMENT OF HON. CATHY MCMORRIS RODGERS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF WASHINGTON

Mrs. MCMORRIS RODGERS. Thank you, Mr. Chairman, and thank you very much for holding the hearing on this legislation. I also want to thank our witnesses who are going to be testifying before the subcommittee today.

In eastern Washington, hydro plays a foundational role, whether it is conventional, small, conduit, hydro. In fact, hydropower provides two-thirds of the electricity in eastern Washington and into the Pacific Northwest. I recognize there is a vast array of clean green energies, including solar, wind, nuclear, but in my opinion, hydro potential should not be overlooked in the important role that it can play in helping make America energy independent. In fact, we could double hydropower electricity in this country without building a new dam, simply by investing in new technologies and upgrades. Only 3 percent of the current dams produce electricity.

That is part of the reason that Congresswoman Diana DeGette and I have been working to expand hydropower production. Today, this committee will examine our bill, the Hydropower Regulatory Efficiency Act. This legislation would facilitate the development of hydropower and conduit projects through several commonsense reforms, such as updating the FERC license exemption standard to streamline the development of more small hydro projects, giving FERC the option to exempt hydro projects generating under 10 megawatts, and conduit projects generating between 5 and 40 megawatts from the permitting process. Also allowing FERC to extend the term of a preliminary permit for up to 2 years, for a total of 5 years, in order to allow a permittee sufficient time to develop and file a license application.

Our bill is timely and targeted, and it will help create jobs and encourage America's competitiveness in the energy sector.

I would also like to take this opportunity to introduce one of our witnesses on today's second panel. I have had the privilege of knowing Andrew Munro for the past few years. Andrew serves on the Grant County Public Utility District in Washington State. He formerly served as the president, CEO, and chairman of the board of the National Hydropower Association. Andrew understands the importance of this legislation, and sees it as a stepping stone for future hydropower legislation.

Again, I thank all the witnesses for participating, and for the chairman for taking the time to hold this hearing today. Thank you.

Mr. WHITFIELD. Thank you. At this time, I would like to recognize Ms. Capps of California. Mr. Rush is not with us this morning, but you are recognized for 5 minutes.

OPENING STATEMENT OF HON. LOIS CAPPS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mrs. CAPPS. Thank you very much, Mr. Chairman, and I want to welcome our witnesses who are being—who are here today to testify.

At today's hearing, as the chairman has said, the subcommittee will examine two pieces of legislation. The first measure is a noncontroversial hydropower bill which we heard Ms. McMorris Rodgers explain, also co-sponsored by Ms. DeGette. It is encouraging to see bipartisan cooperation to promote the types of hydropower that are environmentally responsible. We have significant hydropower potential in California, including in my district on the central coast. When developers and environmentalists can agree on a common framework to utilize some of these resources in ways that are broadly supported, I think it is a good step in the right direction.

On the other hand, I have serious concerns about the Olson bill. Under the Federal Power Act, the Department of Energy has the authority to issue emergency orders to require the generation or transmission of electricity when grid reliability is threatened. Historically, this authority has been used sparingly. In fact, it has only been used on six occasions since 1978. These emergency orders are a measure of last resort. The Olson bill would provide any entity operating under a DOE emergency order with a blanket waiver of all environmental liability that could result from actions necessary to carry out the order. We certainly don't want to force a company to choose between complying with the DOE order and complying with environmental laws, but that kind of conflict has proven to be exceedingly rare. There is only one case from 6 years ago that arguably even falls into that category.

In trying to address those rare conflicts, we need to make sure we don't create bigger problems. As currently drafted, the Olson bill has the potential to become a major loophole that could allow utilities to dodge compliance with environmental requirements. We need to avoid that outcome. The language of the Federal Power Act provision is quite broad. If we add a sweeping liability shield to that broad authority, we may have utilities lining up around the block to get a DOE order so they can avoid meeting environmental standards and installing modern pollution controls.

Under current law, operators have strong incentives to act responsibly and to comply with environmental requirements. With no risk of liability for violations of environmental law, the entities would be very different. We want to make sure the lights stay on, and we all want to treat companies fairly, but let us not throw caution to the wind as we try to address an issue that has affected just one company in the last 35 years.

DOE and EPA are raising serious concerns about the Olson bill. We should take those concerns seriously and approach this issue in a thoughtful and balanced way. I thank all of today's witnesses for being here again, and I look forward to your testimony.

Mrs. CAPPS. At this point, the remainder of my time I would be happy to yield to the gentleman from Pennsylvania, my colleague, Mr. Doyle.

OPENING STATEMENT OF HON. MICHAEL F. DOYLE, A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF PENNSYLVANIA

Mr. DOYLE. I thank my colleague. Mr. Chairman, as you now I am cosponsor of the bill that Ms. Capps just talked about. This bill was the product of many months of work, including consultation with Chairman Upton's staff, Ranking Member Waxman's staff, the Department of Energy, various electricity providers, and many others. Admittedly, it has been a difficult needle to thread.

But I want to remind everybody on this committee, as we have debated numerous EPA regulations that will affect power providers, I have supported greenhouse gas regulations, Federal regulation of coal ash, regulations for industrial boilers, and most recent, the Mercury and Air Toxics Standards. In fact, at this committee's hearing on the MATS rule in February, I said, and I quote, "Here we are trying to sort through claims that 24 years was not long enough for the power sector to prepare and a potential 5 additional years of compliance time provided by the rule, totaling to a full 29 years since the power sector knew controlling mercury would be required is simply too onerous. The time has come, and the time is now, so let us see what we can do about ensuring the rule that has the least negative impact possible on those who matter most, the American consumer."

What I simply want to make clear is that this bill before us today is not intended as a way out of compliance with any EPA regulations. But the fact remains, coal-fired power plant retirements are being announced nearly every month. Since last year, over 106 coal-fired power plants have announced their intention to shut down. It is my hope that these retirements will be managed safely by regional transmission authorities. However, should something go wrong, like an unexpected severe weather event, we have one tool of last resort, emergency orders issued under Section 202(c) of the Federal Power Act. Whether these issues—orders are issued once, twice, or 100 times, it is never acceptable for the Federal Government to require actions from a company that necessitates a choice of which law to violate. This bill attempts to resolve this conflict in a very narrow and responsible way.

I look forward to working with my colleagues as the bill moves through the committee, and Mr. Chairman, I do have a statement for the record from Mr. Green who was unable to be at the hearing today, and I ask unanimous consent that it be inserted into the record.

Thank you.

[The prepared statement of Mr. Green follows:]

GENE GREEN

COMMITTEE ON ENERGY AND COMMERCE

DEMOCRATIC SENIOR WHIP

Congress of the United States
House of Representatives
Washington, DC 20515-4329

May 9, 2012

Statement of Congressman Gene Green
House Committee on Energy and Commerce
Subcommittee on Energy and Power
Hearing on H.R. 4273, the "Resolving Environmental and Grid Reliability Conflicts Act"

Mr. Chairman, I want to state my support for H.R. 4273, the "Resolving Environmental and Grid Reliability Conflicts Act of 2012." While I am not able to attend the hearing this morning, I am glad to see the committee take up this common sense bill.

This bipartisan legislation addresses a longstanding conflict in federal law whereby a company or individual can be held liable for violating environmental laws when complying with a federal order to generate power to avoid blackouts. As a longtime Member of this committee and someone who has worked on both reliability and environmental legislation during that time, I can honestly say that it was never our intention to put electric generating facilities (EGUs) in the position of having to choose between compliance with one law over another. While there have only been a couple instances to date where an EGU has been in this situation, the potential for conflict will only grow as several coal-fired plants are scheduled to be taken off-line in the coming years. As such, we need to address this issue, right here, right now or else we risk threatening our electric reliability.

The legislation before us today clarifies that when a company is under an emergency directive to operate pursuant to Section 202(c) of the Federal Power Act by the Secretary of Energy, it will not be considered in violation of environmental laws or regulations, or subject to civil or criminal liability or citizen suits, as a result of actions to comply with such emergency order. Importantly, though, the legislation clarifies that any such emergency order should endeavor to minimize any adverse environmental impacts.

Mr. Chairman, I want to focus on that last point. Critics of this bill claim that as written the legislation will allow an electric generating facility to ignore environmental regulations. They instead suggest that the Environmental Protection Agency should have a formal role in the emergency order process in order to ensure that any adverse environmental impacts are minimized. It is important to note though that the current 202(c) language does not specifically state that DOE needs to minimize any adverse environmental impacts or even consult with the EPA in writing the emergency order and yet, in 2005 Secretary Bodman and his Energy Department did just that. The 2005 emergency order is very prescriptive in what control equipment should be used, etc. Additionally, Mirant, the company that faced this conflict in 2005, even had an administrative consent decree with the EPA and still found themselves in litigation. So to repeat, under current law there is no language requiring the DOE to take care to

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minimize environmental impacts and consult with the EPA and yet, this is something that they already do So this language just codifies the existing practice and for anyone that doubts the seriousness with which DOE treated the environmental concerns, I refer them to the 2005 emergency order.

I also expect that some might say that this bill is not necessary because it has only happened to one company twice in the last 10 years. However, other EGUs agree that this is going to be a problem in the future. In fact, this bipartisan legislation has support across the utility industry including the Edison Electric Institute, the American Public Power Association, the Electric Power Supply Association, the Tennessee Valley Authority and the National Rural Electric Cooperative Association.

Finally, there are those that say "another time, another place," suggesting that the politics right now do not lend themselves to looking at this issue in a constructive manner. I want to state for the record that I do not see this bill as an anti-EPA bill or an anti-MATS bill and I encourage my colleagues to steer clear of those arguments. However, I think we can all admit that our grid is about to face challenges that it has never faced before due to continuing population growth in certain parts of the country, cybersecurity threats and cheap natural gas prices leading to the retirement of some coal-fired plants. It is irresponsible of us to not get ahead of the issue.

Mr. Chairman, I want to thank Mr. Doyle, Mr. Olson and their staff for their hard work on this bill. I look forward to seeing this bill through the committee process. Thank you.

Mr. WHITFIELD. At this time, I would like to recognize the chairman of the full committee, Mr. Upton of Michigan, for 5 minutes.

OPENING STATEMENT OF HON. FRED UPTON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. UPTON. Well thank you, Mr. Chairman. Today we have two very important pieces of bipartisan legislation before us. I want to commend my colleagues for their hard work and for reaching across the aisle to find common ground in developing both of these bills. Ms. McMorris Rodgers and Ms. DeGette worked together to develop a critical piece of hydropower legislation, the Hydropower Regulatory Efficiency Act of 2012. We know that hydropower is the Nation's largest renewable energy resource, and the bill before us today will help to aid the development of a new hydropower resource. It accomplishes that goal without new subsidies or deficit spending. Instead, it cuts through the red tape to make it easier for this renewable resource to come online to power our communities. This is what "all of the above" is all about. It in turn will stimulate job growth as new hydropower resources are constructed and operated, while the electricity provided by these new projects will provide low cost power to American homes and businesses.

This legislation has great promise for increased hydropower development, including my State of Michigan, which has significant potential for small hydro projects. In addition, Michigan manufacturers produce many of the components vital to the hydropower industry, enhancing the positive economic benefits.

The other bill under consideration today is the Resolving Environmental and Grid Reliability Conflicts Act of 2012, authored by Mr. Olson, Mr. Doyle, and Mr. Green. It is clear that the Nation's generation fleet will be undergoing a significant shift over the next several years and beyond, and although we may disagree on why it is occurring or what the impacts will be, we should be able to agree that ensuring the reliable supply of electricity is paramount. That is why H.R. 4273 is such a critical piece of legislation. The bill protects our Nation's electricity producers from being penalized or sued for violating a conflicting environmental law when they have been directed by the Federal Government to operate during an emergency. Government can't have it both ways. It can't direct the generator to operate for emergency purposes and then turn around and fine them for doing so. It is like having one police officer telling you to speed up while another sits at the end of the street to give you a ticket. It is not fair, which is why I am pleased that our colleagues have developed this bipartisan legislation.

So with that, I will yield to any of my colleagues who wish time. Seeing none, I yield back the balance of my time.

Mr. Olson, do you want my time?

[The prepared statement of Mr. Upton follows:]

Opening Statement of Chairman Fred Upton
Energy and Power Subcommittee
Hearing on the American Energy Initiative
May 9, 2012

We have before us today two very important pieces of bipartisan energy legislation. I want to commend my colleagues for their hard work and for reaching across the aisle to find common ground in developing these bills.

Ms. McMorris Rodgers and Ms. DeGette worked together to develop a critical piece of hydropower legislation: the Hydropower Regulatory Efficiency Act of 2012.

Hydropower is the nation's largest renewable energy resource, and the bill before us today will help facilitate the development of new hydropower resources. It accomplishes that goal without new subsidies or deficit spending – instead, it cuts through the red tape to make it easier for this renewable resource to come online to power our communities. This is what "all of the above" is all about.

This in turn will stimulate job growth as new hydropower resources are constructed and operated, while the electricity produced by these new projects will provide low-cost power to American homes and businesses.

This legislation has great promise for increased hydropower development, including for the state of Michigan, which has significant potential for small hydro projects. In addition, Michigan manufacturers produce many of the components vital to the hydropower industry, enhancing the positive economic benefits.

The other bill under consideration today is the Resolving Environmental and Grid Reliability Conflicts Act of 2012, authored by Mr. Olson, Mr. Doyle, and Mr. Green.

It is clear that the nation's generation fleet will be undergoing a significant shift over the next several years and beyond. Although we may often disagree on why this is occurring or what the impacts will be, we should all be able to agree that ensuring the reliable supply of electricity is paramount.

That's why H.R. 4273 is such a critical piece of legislation. This bill protects our nation's electricity producers from being penalized or sued for violating a conflicting environmental law when they have been directed by the federal government to operate during an emergency.

The government cannot have it both ways. It cannot direct a generator to operate for emergency purposes and then turn around and fine them for doing so. It's like having one police officer telling you to speed up, while another sits at the end of the street to give you a ticket. It's simply not fair, which is why I am pleased that our colleagues have developed bipartisan legislation to resolve this conflict.

Again let me emphasize how pleased I am to see both sides of the aisle working together to bring before this Committee two more examples of strong bipartisan energy legislation.

Mr. WHITFIELD. Mr. Olson is correct. Mr. Barton, it is my understanding, is not going to give a statement, and so Mr. Olson, I recognize you for 5 minutes for your opening statement.

OPENING STATEMENT OF HON. PETE OLSON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. OLSON. Well thank you, Mr. Chairman. I thank the chairman of the full committee for his hospitality, and thank you, Chairman, for bringing H.R. 4273, the Resolving Environmental and Grid Reliability Conflicts Act of 2012, before this subcommittee. I also want to thank the witnesses for appearing here today to provide their input on this important piece of legislation which removes electricity generators from the Catch 22 of conflicting legal mandates that complicate electricity emergencies and threaten grid reliability.

I introduced H.R. 4273 with bipartisan support. I would like to thank my colleagues, Mr. Green and Mr. Doyle, for being the original cosponsors to clarify Congress's intent that compliance in an emergency order issued by the Department of Energy should not be considered a violation of any Federal, State, or local environmental laws or regulations.

This common sense legislation is extremely relevant today, as the Environmental Protection Agency, the Federal Energy Regulatory Commission, and the Department of Energy and others have acknowledged that grid reliability could be threatened due to power plant closures. Secretary Chu, in this hearing room last month, expressed support for the concept of holding power generators harmless when they exceed emission limits when ordered to do so by the grid regulator. One of the safety valves in the toolbox is dealing authority to mandate power generation and transmission under Section 202(c) of the Federal Power Act. It is no silver bullet, but it is a fallback in times of true emergency.

However, as we hear from our witnesses today, 202(c) cannot work effectively unless Congress passes legislation like H.R. 4273 to resolve the potential conflict between the DOE mandate and environmental regulations. Absent legislative action, the risks and costs associated with temporary noncompliance with environmental requirements could prohibit a company from complying with the energy order, placing reliability in jeopardy.

If my home State of Texas has another exceptionally hot summer like they did last summer and the power is shut off, air conditioning goes off, lives will be at risk, particularly elderly and young ones. In fact, last week in my home city of Sugarland, Texas, a young infant died in an automobile when the heat rose to 90 degrees. We had 100 degree heat last summer. If that happens again and the grid goes down, people's lives will be at risk.

This legislation is bipartisan support because it simply ensures a common sense solution to protect grid reliability when it is most needed. I urge my colleagues to support H.R. 4273 to protect grid reliability and to provide certainty to electric providers.

Mr. Chairman, I ask unanimous consent to include records of support for my legislation from the American Public Power Association, the National Rural Electric Cooperative Association, the Electric Power Supply Association, the Edison Electric Institute, the In-

dustrial Energy Consumers of America, and the Midwest Power Coalition. I ask unanimous consent for these letters of support to be inserted into the record.

Mr. WHITFIELD. Without objection.

[The information follows:]

American Public Power Association

1875 Connecticut Avenue NW
Suite 1200
Washington, DC 20009-5715

Ph: 202.467.2900
Fax: 202.467.2910
www.PublicPower.org

April 13, 2012

The Honorable Pete Olson
312 Cannon House Office Building
Washington, D.C. 20515

Dear Representative Olson:

On behalf of the American Public Power Association (APPA), I am writing to express our support for H.R. 4273, the Resolving Environmental and Grid Reliability Conflicts Act of 2012. APPA is the national service organization representing the interests of over 2,000 community-owned, not-for-profit electric utilities. These utilities include state public power agencies, municipal electric utilities, and special utility districts that provide electricity and other services to over 46 million Americans.

The U.S. electric utility sector must address several major recently promulgated and proposed Environmental Protection Agency (EPA) regulations between 2012 and 2020. APPA believes these regulations will likely result in adverse reliability implications for regional electric systems if these environmental regulations go into effect within the time frames now proposed or already mandated.

To address these concerns, APPA supports legislation to provide the needed flexibility in the Federal Power Act to ensure that these pending environmental regulations do not threaten electric reliability. Therefore, we agree with the underpinnings of H.R. 4273, which would enable electric generators to run their power plants for reliability purposes, either when ordered to do so or when doing so voluntarily, without incurring penalties or other legal liability under federal, state, or local environmental laws for their compliance with such orders.

APPA also applauds the language in the bill which would clarify that under Section 202(c) of the Federal Power Act, a utility that is ordered by the Department of Energy to generate power to maintain electric reliability cannot be fined for violating any environmental laws or regulations while running under that emergency order. This immunity would also prevent third parties from bringing citizen suits for environmental law violations (local, state, or federal) that might occur from running an electric generating unit pursuant to such an emergency order.

Thank you for introducing legislation highlighting this important issue affecting electric utilities. While there is still more to be done to address the electric reliability as a result of the new slew of EPA regulations, this bill is an important first step. Please feel free to contact me or the APPA government relations staff with any questions on this important issue.

Sincerely,

Mark Crisson
President & CEO

National Rural Electric Cooperative Association
A Touchstone Energy® Cooperative

Glenn English
Chief Executive Officer

May 8, 2012

The Honorable Pete Olson
United States House of Representatives
Room 312 Cannon HOB
Washington, DC 20515

Dear Rep. Olson:

The National Rural Electric Cooperative Association (NRECA) appreciates your introduction of the "Resolving Environmental and Grid Reliability Conflicts Act of 2012", H.R. 4273. NRECA supports H.R. 4273's effort to protect electric utilities that comply with a Department of Energy (DOE) emergency order from Environment Protection Agency (EPA) fines and private citizen law suits.

Currently, if DOE determines that an emergency exists involving the reliability of the electric grid, DOE has the authority to issue an order involving such generation, delivery, interchange, or transmission of electric energy that, in its judgment, will best meet the emergency. However, it is also clear that although electric utilities comply with a DOE emergency order, if such compliance results in violations of environmental laws or regulations, electric utilities face EPA fines and law suits initiated by private citizens. To address these problems, H.R. 4273 seeks to clarify that electric utility compliance with a DOE emergency order will not violate environmental laws or regulations, subject electric utilities to civil or criminal liability, or activate private citizen law suits.

NRECA strongly supports such clarification and believes the introduction of H.R. 4273 is an important first step in the overall House and Senate process. We look forward to working with Congress to ensure the bill fully resolves the conflict between DOE emergency orders and environmental laws or regulations.

Sincerely,

Glenn English

Electric Power Supply Association
Advocating the power of competition

John E. Shelk
President and CEO

1401 New York Avenue NW
Suite 1230
Washington, DC 20005
202 628 8200
202 628 8260 fax
www.epsa.org

April 25, 2012

Honorable Pete Olson
U.S. House of Representatives
Washington, D.C. 20515

Re: EPSA Support for H.R. 4273, the "Resolving Environmental and Grid Reliability Conflicts Act of 2012"

Dear Representative Olson:

The Electric Power Supply Association (EPSA) is the national trade association for competitive wholesale electricity suppliers, including generators and marketers. EPSA members are major suppliers of electricity nationwide including in the Electric Reliability Council of Texas and elsewhere in your state and in that of your original co-sponsors.

EPSA writes to commend you and your bipartisan original co-sponsors for introducing H.R. 4273, the "Resolving Environmental and Grid Reliability Conflicts Act of 2012." EPSA supports this legislation to resolve the conflict of laws that presently exists when the Secretary of Energy issues an emergency order under Section 202(c) of the Federal Power Act. EPSA agrees that in the carefully defined circumstances addressed by the legislation a party subject to an emergency order to operate a facility should not be liable for violating federal, state or local environmental statutes, nor be subject to citizen suits, for complying with the emergency order.

EPSA agrees that it is important for Congress to address this conflict of laws dilemma. We again commend you and your co-sponsors for coming together in this bipartisan fashion to offer a tailored solution to an identified problem that has occurred in the past and need not occur in the future if your bill becomes law. We look forward to working with you on this bill as the legislative process moves forward.

Sincerely,

John E. Shelk

CC: The Honorable Michael Doyle
The Honorable Charles Gonzalez
The Honorable Gene Green
The Honorable Adam Kinizinger
The Honorable Lee Terry

701 Pennsylvania Avenue, N.W. | Washington, D.C. 20004-2696 | www.eei.org
202.508.5555 | Fax: 202.508.5786 | tkuhn@eei.org

Power by Association

Edison Electric Institute

Thomas R. Kuhn
President

April 26, 2012

The Honorable Pete Olson
312 Cannon House Office Building
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Olson:

On behalf of the Edison Electric Institute (EEI), the association of U.S. shareholder-owned electric companies, I am writing in strong support of H.R. 4273, the "Resolving Environmental and Grid Reliability Conflicts Act of 2012." We applaud you for introducing this bipartisan, narrowly focused legislation. H.R. 4273 would ensure that electricity generators do not face the dilemma of being forced to choose between conflicting legal obligations when acting to comply with an emergency reliability order from the U.S. Department of Energy (DOE).

In extraordinary circumstances, Section 202(c) of the Federal Power Act (FPA) allows DOE to order emergency operation of an electricity generating facility to protect grid reliability. At the same time, environmental laws and regulations may prohibit the same generating facility from full compliance with the order. In such a situation, the owner must choose between violating the DOE emergency order and violating environmental limitations, thus exposing the company to civil and even criminal liability. H.R. 4273 would amend the FPA to clarify that electricity generators would not be liable for violations of environmental laws or regulations, or subject to civil or criminal liability, or citizen suits, as a result of complying with Section 202(c) emergency orders. Importantly, the legislation also would require DOE to tailor the emergency orders to require action only as necessary to meet the emergency and therefore to minimize adverse environmental impacts.

It is important that Congress take action to remedy this inconsistency in energy and environmental law and help safeguard the reliability of our nation's electricity grid. We appreciate your leadership on this important piece of bipartisan legislation and look forward to working with you as it moves forward in the legislative process.

Sincerely,

Thomas R. Kuhn

TRK: co

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Industrial Energy Consumers of America
The Voice of the Industrial Energy Consumers

1155 15th Street, NW, Suite 500 • Washington, D.C. 20005 202-223-1420

May 8, 2012

The Honorable Pete Olson
312 Cannon House Office Building
Washington, DC 20515

Re: H.R. 4273, the Resolving Environmental and Grid Reliability Conflicts Act of 2012

Dear Representative Olson:

On behalf of the Industrial Energy Consumers of America (IECA), we support passage of H.R. 4273, the Resolving Environmental and Grid Reliability Conflicts Act of 2012. As large industrial consumers of electricity, the cost and reliability of electricity is very important to competitiveness. When government agencies require electric generators to run their facility, we do not want our providers to second guess the decision because of a potential law suit. We want them to operate and maintain the reliability of the grid.

Reliability of electricity supply is very important. If the power goes out in manufacturing facilities without warning, it becomes a safety issue for facility employees because many facilities have high pressure vessels and or operate furnaces at thousands of degrees Fahrenheit. Product that is in the equipment can be damaged or ruined. Equipment can be either partially or permanently damaged resulting in lost production capacity. For large facilities, costs can quickly run into the tens of millions of dollars.

Thank you for your leadership on this important legislation.

Sincerely,

Paul N. Cicio
President

The Industrial Energy Consumers of America is a nonpartisan association of leading manufacturing companies with $700 billion in annual sales and with more than 650,000 employees nationwide. It is an organization created to promote the interests of manufacturing companies through research, advocacy, and collaboration for which the availability, use and cost of energy, power or feedstock play a significant role in their ability to compete in domestic and world markets. IECA membership represents a diverse set of industries including: chemicals, plastics, cement, paper, food processing, brick, fertilizer, steel, glass, industrial gases, pharmaceutical, aluminum and brewing.

The Midwest Power Coalition

May 7, 2012

The Honorable Pete Olson
312 Cannon House Office Building
U.S. House of Representatives
Washington, D.C. 20515

Dear Representative Olson:

We are writing to express our strong support for H.R. 4273, the "Resolving Environmental and Grid Reliability Conflicts Act of 2012." The Midwest Power Coalition (MPC) is a voluntary coalition of electric utilities whose generation mix relies heavily on coal and we believe H.R. 4273 would provide much needed clarity to conflicting legal obligations if a generator receives an emergency reliability order from the Department of Energy.

Coal-dependent utilities have been making significant investments to transition their fleets towards a cleaner energy future for the last several decades. Because of their efforts, nationwide sulfur dioxide and nitrogen oxide levels have both been reduced by more than 60% since 1990. However, the short compliance timelines of several of the Environmental Protection Agency's (EPA) new air, water, and solid waste regulations will be very challenging for some utilities and could threaten the reliability of parts of the nation's electric grid. H.R. 4273 would ensure that generators will not face the legal dilemma of having to choose between keeping the lights on or complying with environmental laws should a reliability emergency occur.

Thank you for introducing H.R. 4273 and for making the reliability of our nation's electric grid a top priority. Please feel free to contact Zack Hill at 202.347.8133 if the MPC can be of any assistance to you in the future.

Sincerely,

The Midwest Power Coalition

Mr. OLSON. I yield back the balance of my time. Thank you.
[The prepared statement of Mr. Olson follows:]

Opening Statement
The Honorable Pete Olson
Energy and Commerce Committee
Subcommittee on Energy and Power
May 9, 2012

Thank you, Mr. Chairman, for bringing H.R. 4273, the "Resolving Environmental and Grid Reliability Conflicts Act of 2012" before this Subcommittee.

I also want to thank the witnesses for appearing today to provide their input on this important legislation, which would remove electricity generators from the "catch-22" of conflicting legal mandates that complicate electricity emergencies and threaten grid reliability.

I introduced HR 4273 – with bi-partisan support - to clarify Congress' intent that compliance with an Emergency Order issued by the Department of Energy should not be considered a violation of any federal, state, or local environmental laws or regulations.

This legislation is extremely relevant today, as the Environmental Protection Agency, Federal Energy Regulatory Commission, Department of Energy, and others have acknowledged that grid reliability could be threatened due to accelerated power plant closures.

One of the "safety-valves" in the tool box is DOE's authority to mandate power generation and transmission under Section 202c of the Federal Power Act. It's no silver bullet, but it is a fall back in times of true emergency.

However, as we will hear from our witnesses today, 202c cannot work effectively unless Congress passes legislation like HR 4273 to resolve the potential conflict between the DOE mandate and environmental regulations.

Absent legislative action, the risks and costs associated with temporary non-compliance with environmental requirements could prohibit a company from complying with the Emergency Order, placing reliability in jeopardy.

This legislation has bipartisan support because it simply ensures a common sense solution to protect grid reliability when it is most needed. I urge my colleagues to support HR 4273 to protect grid reliability and provide certainty to electricity providers.

Thank you, I yield back.

Mr. WHITFIELD. Thank you, Mr. Olson. Mr. Waxman was delayed a little bit this morning, so we are going to proceed with the hearing, but when he comes in, I am just going to interrupt to give him an opportunity to make his opening statement at that time.

I also want to welcome our witnesses today. We have two panels, and we genuinely appreciate all of you taking time to come up and give us your views and expertise on these two pieces of legislation.

I might also say that we do these hearings, and it really does take a major effort by everyone, by the witnesses, by the staff, and a lot goes into every hearing that we have. And we have had a lot of hearings, and we have repeatedly requested that testimony from witnesses, that we receive it 2 days in advance of the hearing, simply because it gives us an opportunity to more thoroughly review and assess and look at the views of those witnesses. And unfortunately, once again, Ms. McCarthy, we didn't get your testimony until yesterday around 5:00—after 5:00 yesterday, and Ms. Hoffman, we didn't get yours until after 5:00 yesterday, which was considerably later than what we really asked for. Now I know everyone has a lot of demands on their time, and we have talked about this before, but I would really appreciate if in the future you all would make a real effort to get that testimony here at least 2 days before so that we can more thoroughly do our job as well.

So thank you for being here, and at this time, Ms. Hoffman, I will recognize you for 5 minutes for your opening statement.

STATEMENTS OF PATRICIA HOFFMAN, ASSISTANT SECRETARY, OFFICE OF ELECTRICITY DELIVERY AND ENERGY RELIABILITY, DEPARTMENT OF ENERGY; REGINA A. MCCARTHY, ASSISTANT ADMINISTRATOR OF AIR AND RADIATION, ENVIRONMENTAL PROTECTION AGENCY; PHILIP D. MOELLER, COMMISSIONER, FEDERAL ENERGY REGULATORY COMMISSION; AND JEFF C. WRIGHT, DIRECTOR, OFFICE OF ENERGY PROJECTS, FEDERAL ENERGY REGULATORY COMMISSION

STATEMENT OF PATRICIA HOFFMAN

Ms. HOFFMAN. Good morning, Mr. Chairman and members of the committee. Thank you for the opportunity to appear before you today to discuss the Department of Energy's emergency authority under Section 202(c) of the Federal Power Act, and the proposed legislation intended to address the use of this authority and potential conflicts with other Federal, State, and local laws and regulations.

Currently under 202(c) of the Federal Power Act, the Secretary can order a generator to operate, or a grid connection to be made, when, for example, outages occur due to weather events or equipment failures, or when there is or may be insufficient electricity supply available that has a potential to cause a blackout.

Section 202(c) orders are issued only if a determination is made that an emergency exists due to a sudden increase in the demand for electric energy, or a shortage of electrical energy, or a shortage of facilities for the generation or transmission of electrical energy. The Secretary's 202(c) order can direct the temporary connection or operation of facilities for generation delivery, interchange, or trans-

mission of electricity in order to best meet the emergency, and serve the public interest.

The Department views the issuance of 202(c) orders as a measure of last resort to be used only during and in the face of imminent emergencies. Since the Department was formed in 1978, the Secretary has exercised this emergency authority for only six events. Past 202(c) orders were issued to address circumstances such as inadequate supply of electricity during the 1999–2001 California electricity crisis, in response to the 2003 blackout, to address reliability issues resulting from the devastation caused by hurricanes, and to ensure compliance with reliability standards to prevent potential blackouts. Section 202(c) orders are not intended to provide a long-term alternative to environmental compliance. They are available only under limited emergency situations, and are temporary solutions to imminent reliability threats.

If a 202(c) emergency results from inadequate planning, DOE expects the affected entities to take the necessary steps to resolve the problem in order to avoid the need for a continuing emergency order. Generators subject to a 202(c) order are required to operate in compliance with all other applicable laws to the extent possible and, after the reliability threat has been eliminated, the affected generator is still expected to comply with all relevant environmental statutes.

The Department is aware of only one incident of a potential conflict between the emergency order issued under Section 202(c) and an environmental statute. It was the 2005 Potomac River Generation Station order. In this case, Mirant, now GenOn Energy, Inc., ceased operation of the Potomac River Generation Station in response to a letter from the Virginia Department of Environmental Quality requesting that Mirant undertakes actions as necessary to the protection of human health and environment in the area surrounding the plant. In response to requests from the D.C. Public Service Commission, the Secretary issued a 202(c) order requiring the plant to run to ensure compliance with reliability standards for the central D.C. area. Over the next several months, the Department worked closely with EPA and the Virginia DEQ to minimize environmental impacts.

The administration works to ensure the current statutory authorities work together, especially in the context of 202(c) authority. DOE recognizes the importance of working closely with the environmental authorities to achieve the necessary balance between ensuring reliability and addressing emergencies, and achieving environmental protection.

Regarding the proposed changes to Section 202(c) of the Federal act, at this time, the administration has not taken a position on H.R. 4273. Any time generators anticipate reliability issues, they should immediately start planning and working with their grid operators and EPA. As proposed, the amendment to 202(c) could potentially create a disincentive for some generators to use the compliance options EPA provided.

Again, DOE's 202(c) authority is one of last resort, and should not be viewed as an alternative to working with EPA on environmental compliance and with grid operators on any potential reliability issues. The administration works to ensure statutory au-

thorities work together to enable both the reliable operation of the electric system and environmental protection. At the same time, Section 202(c) emergency authority will be considered only when necessary and is not an alternative to environmental compliance, even on a temporary basis. DOE will continue to work through potential conflicts to ensure reliability is met and public interest is served when exercising its 202(c) authority.

This concludes my statement, Mr. Chairman, and I look forward to answering any questions you may have.

[The prepared statement of Ms. Hoffman follows:]

STATEMENT OF
PATRICIA HOFFMAN
ASSISTANT SECRETARY
OFFICE OF ELECTRICITY DELIVERY AND ENERGY RELIABILITY
U.S. DEPARTMENT OF ENERGY
BEFORE THE
COMMITTEE ON ENERGY AND COMMERCE
SUBCOMMITTEE ON ENERGY AND POWER
U.S. HOUSE OF REPRESENTATIVES

MAY 9, 2012

Chairman Whitfield and Ranking Member Rush, thank you for the opportunity to appear before you today to discuss the Department's emergency authority under section 202(c) of the Federal Power Act and the proposed legislation intended to address the use of this authority and potential conflicts with other Federal, state and local laws and regulations.

FEDERAL POWER ACT 202(c) AUTHORITY

Under section 202(c) of the Federal Power Act (FPA), as currently enacted, upon determination that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, the Secretary of Energy may require by order temporary connection of facilities and such generation, delivery, interchange, or transmission of electricity as will best meet the emergency and serve the public interest.[1] The Secretary, to ensure that the lights stay on or are restored more quickly in cases of emergency, may order a generator to operate or a grid connection to be made when, for example, outages occur due to weather events or equipment failures, or when there is or may be insufficient electricity supply available that has the potential to cause a blackout.

The Department views the issuance of 202(c) orders as a measure of last resort to be used only during or in the face of imminent emergencies. Historically, such orders have been issued sparingly by the Secretary who exercised emergency authority for only six events since DOE

[1] 16 U.S.C. § 824a(c).

was formed in 1978.[2] Past 202(c) orders were issued to address circumstances such as inadequate supply of electricity during the 1999-2001 California electricity crisis, in response to the 2003 blackout, to address reliability issues resulting from the devastation caused by hurricanes Rita and Katrina in 2005 and Ike in 2008, and to ensure compliance with reliability standards to prevent potential blackouts, in the case of the Potomac River Generating Station.

The Department is aware of only one instance where there was a potential conflict between a request for an emergency order issued under FPA section 202(c) and environmental statutes: the 2005 Potomac River Generating Station Order. On August 21, 2005, Mirant Corporation, now GenOn Energy, Inc., ceased operation of the Potomac River Generating Station (Plant) in response to a letter from the Virginia Department of Environmental Quality requesting that Mirant undertake such action as necessary to ensure protection of human health and the environment in the area surrounding the Plant. On August 24, 2005, in response to Mirant's decision, the District of Columbia Public Service Commission requested that the Secretary of Energy issue a section 202(c) emergency order requiring the operation of the Plant in order to ensure compliance with reliability standards for the central D.C. area. After due consideration of the emergency petition and investigation of the effects of the Plant shutdown on reliability in the central D.C. area, the Secretary made a determination that without the operation of the Plant there was a reasonable possibility an outage would occur that would cause a blackout in the central D.C. area. This process took several months and included close consultation and coordination with the U.S. Environmental Protection Agency (EPA), and the Virginia Department of Environmental Quality.

Therefore, on December 20, 2005, a section 202(c) emergency order was issued requiring Mirant to operate the Plant in a manner to reduce the risk of a blackout but not at the price of unnecessary exceedances of air quality standards. The order was extended several times pending efforts to address the reliability issue in the central D.C. area and completion by DOE of a special environmental impact statement. On June 6, 2006, EPA issued an Administrative Consent Order (ACO) to Mirant regarding the operation of the generating station. The ACO

[2] FPA § 202(c) orders issued by the Department of Energy are available on the DOE website: http://energy.gov/oe/does-use-federal-power-act-emergency-authority. We are aware as well that, prior to 1978, the Federal Power Commission, DOE's predecessor, also exercised this authority on occasion.

provided that during a situation in which the station was required to run due to outages of other facilities, Mirant would operate the station to produce the amount of power needed to meet the load demand in the central D.C. area, as specified by PJM and in accordance with the DOE Order. The ACO also provided that during such operations, Mirant would take all reasonable steps to limit the emissions of PM-10, NO_X and SO_2 from each boiler, including operating only the number of units necessary to meet PJM's directive and optimizing its use of Trona injection to minimize SO_2 emissions. In a June 2, 2006, letter order to Mirant, DOE directed Mirant to operate the Plant in accordance with the ACO, and on January 31, 2007, DOE's 202(c) emergency order was conformed to align the terms of the order with the ACO. That order expired July 1, 2007, as several new transmission lines were installed and energized resolving the reliability issue. This demonstrates that DOE and EPA worked closely with each other to achieve both electricity reliability and protection of the environment.

Section 202(c) orders are not intended to provide a long-term alternative to environmental compliance. Pursuant to applicable DOE regulations, orders issued under FPA section 202(c) are available only under limited emergency situations and are temporary solutions to imminent reliability threats.[3] Actions issued under this authority are envisioned as meeting a specific situation, such as those for which orders have been issued historically.[4] Potential reliability issues must be verified by DOE before an order is issued, with appropriate conditions. While extended periods of insufficient power supply as a result of inadequate planning or the failure to construct necessary facilities" may also constitute an "emergency" under this authority, in such cases, the affected entity is expected to take the necessary steps to resolve the problem to avoid the need for a continuing emergency order. The duration of issued orders range from a few days to a few months, generally. On some occasions, when necessary, orders may be extended when the emergency is not yet resolved at the expiration of the previous order.[5] As the Mirant example

[3] DOE's Federal Power Act authority under section 202(c) is implemented in accordance with its regulation at 10 C.F.R. §§ 205.370-379 (1981). Under these regulations, an "emergency" is defined as "an unexpected inadequate supply of electric energy which may result from the unexpected outage or breakdown of facilities for the generation, transmission or distribution of electric power." 10 C.F.R. § 205.371. Emergencies may, for example, arise from natural conditions (e.g., weather) or "unforeseen occurrences not reasonably within the power of the affected entity to prevent." *Id.* Further, sudden increases in consumer demand, inadequate generation supply, or regulatory action prohibiting the use of certain facilities may also result in emergencies.
[4] *Id.*
[5] *Id.*

demonstrates, entities subject to a 202(c) emergency order will be required to operate in compliance with all other applicable laws to the extent possible, and after the reliability threat has been eliminated, the affected generator is still subject to all relevant environmental statutes.

The Administration works to ensure that current statutory authorities work together, especially in the context of DOE's 202(c) authority. Under circumstances of potential statutory conflicts, it is the responsibility of the executive branch to administer all statutes in a manner that carefully balances any conflicts that may arise. As demonstrated by the Potomac River Generating Station Order, DOE recognizes the importance of working closely with environmental authorities to achieve the necessary balance between meeting the electricity emergency and achieving environmental protection. With the Order, DOE, in consultation with EPA and the Virginia Department of Environmental Quality, crafted the terms of the final 202(c) order which maximized environmental compliance while achieving the necessary reliability standards. This approach is a valuable example and will be a model to follow should similar situations arise in the future.

PROPOSED LEGISLATION

Regarding the proposed changes to section 202(c) of the Federal Power Act, at this time, the Administration has not taken a position on HR 4273. However, as written, we do have some concerns. Electricity generation owners must start planning and working with their grid operators, and if need be EPA, early on to identify and resolve any reliability issue arising in connection with EPA rules. DOE anticipates most if not all generators are engaged with the regional electric reliability organizations to anticipate and address reliability issues that may emerge. As proposed, the amendment to FPA section 202(c) could potentially create a disincentive for some electricity generators to utilize the options for compliance that EPA has provided. Again, DOE's 202(c) emergency authority is one of last resort and should not be viewed as an alternative to working with EPA on achieving environmental compliance and, if need be, with grid operators on any potential reliability issues.

CONCLUSION

The Administration works to ensure that statutory authorities to work together to enable both the reliable operation of the electricity system and environmental protection. That said, the availability of the section 202(c) emergency authority is one of last resort and will be considered only when necessary and not as an alternative to environmental compliance, even on a temporary basis. DOE will continue to work through potential conflicts to ensure reliability is met and the public interest is served when exercising its 202(c) authority.

This concludes my statement, Mr. Chairman. I look forward to answering any questions that you and your colleagues may have. Thank you.

Mr. WHITFIELD. Thank you very much.

Ms. McCarthy, you are recognized for 5 minutes.

STATEMENT OF REGINA A. MCCARTHY

Ms. MCCARTHY. Thank you, Chairman Whitfield, Ranking Member Rush, members of the subcommittee. Thank you for the opportunity to testify.

Initially, let me emphasize that EPA completely agrees with the goal of maintaining the reliability of the electricity grid. The lights have not gone out in the past, due to Clean Air Act regulations, and our rules won't cause them to go out in the future. However, it is not clear to me what real world problem this legislation is attempting to solve. To the extent that others see potential problems, it is important to resolve any reliability issues that do arise in more, rather than less, environmentally protective ways. This bill decreases the incentives to do so, and could have unintended consequences, creating problems that would not otherwise exist.

Section 202(c) history does not demonstrate the need for legislation to override environmental requirements. The Department of Energy has invoked Section 202 sparingly, and only the 2005 order concerning the Mirant Potomac River Generating Station appears to have had claims that compliance resulted in a conflict with environmental requirements.

But two points are important to understand first. DOE, EPA, and the Virginia Department of Environmental Quality worked cooperatively with one another and with Mirant. DOE's 202(c) order minimized the likelihood of violations of environmental requirements, and EPA's administrative order allowed continued operation of the plant, but it minimized adverse environmental consequences.

Secondly, DOE's order apparently did not require that Mirant violate any environmental law, although Virginia later fined Mirant $30,000 for environmental violations while operating pursuant to the DOE order. Our understanding is that this fine was not a violation compelled by the order; rather, Virginia found that Mirant could have operated the plant in compliance with the DOE and EPA orders, but they simply failed to do so.

A Section 202(c) order is a tool of last resort. It has really been invoked and virtually never implicated any conflict with environmental compliance because affected parties and regulators have a very strong record of addressing potential reliability issues before conflicts arise. EPA has recently promulgated power sector regulations, including the Mercury Air Toxic Standards, or MATS rule, did not create a rationale for amending 202(c). The EPA and DOE's analysis projected that the vast majority, if not all of the sources, will be able to comply with MATS within the Clean Air Act timeframes. In addition to the MATS 3-year compliance date, EPA is encouraging permitting authorities to make a fourth year broadly available, and EPA is providing a clear pathway for units that have shown to be critical for electric reliability to obtain a schedule to achieve compliance within up to an additional year beyond the four. A 202(c) order is not required to get that fifth year.

When faced with the need to resolve reliability issues, current law provides important incentives to select more rather than less environmentally sound solutions. This legislation could change

those incentives. In fact, the legislation could have the unintended consequence of creating problems that wouldn't otherwise arise, increasing the likelihood of conflicts between reliability and compliance with environmental laws. The bill shields power plants from reliability for violations of environmental laws without regard to whether the owner of that facility took responsible actions to comply with environmental requirements, or to mitigate reliability concerns. This would eliminate important incentives for owners to take expeditious actions to comply with environmental requirements and avoid conflicts of this nature.

By decreasing incentives for environmental protective ways of addressing any reliability issues that might emerge, this bill could unnecessarily delay needed public health protections. If the bill results in 202(c) orders that would not exist under current law, it increases the likelihood that facilities will operate in violation of environmental regulations. Additionally, the hortatory statement that DOE should minimize conflicts with environmental laws is not adequate. The bill as currently drafted significantly decreases current incentives for input from EPA and the State and local environmental officials on how best to craft orders that are more, rather than less, environmentally sensitive.

Over the 40-year history of the Clean Air Act, stakeholders working together with State and Federal regulators have had an outstanding track record of substantially reducing pollution while maintaining reliability. In light of this situation, we encourage the committee to very carefully consider the potential unintended consequences of this bill.

Thank you, Mr. Chairman.

[The prepared statement of Ms. McCarthy follows:]

Opening Statement of Regina McCarthy
Assistant Administrator of Air and Radiation
U.S. Environmental Protection Agency

Hearing on Resolving Environmental and Grid Reliability Conflicts Act
Subcommittee on Energy and Power
Committee on Energy and Commerce
May 9, 2012

Chairman Whitfield, Ranking Member Rush, and members of the Committee, I appreciate the opportunity to testify before you today on H.R. 4273, the "Resolving Environmental and Grid Reliability Conflicts Act of 2012." Although the Administration does not yet have a position on this proposed legislation, I would like to make several basic points that I hope will assist the Committee in its consideration of the bill. Based on past experience, EPA believes that the Executive Branch already has sufficient tools to address issues that may arise. Orders under Section 202(c) of the Federal Power Act have been very rare, and the EPA is aware of no instance in which compliance with such an order required any necessary conflict with environmental laws or regulations. Moreover, EPA does not believe that its recently promulgated power sector regulations -- including the mercury and air toxics standards (MATS) rule – change the situation. Further, the bill could have the unintended consequence of creating problems that would not otherwise exist. It could actually increase the likelihood of conflict between electric reliability and compliance with environmental laws, by removing important incentives to take timely actions necessary to avoid or minimize such conflicts. Finally, the bill also could unnecessarily endanger public health.

Section 202(c) of the Federal Power Act provides that, if the Secretary of Energy determines that "an emergency exists," by reason of a sudden increase in demand for electricity or a shortage of electricity or facilities for the generation or transmission of electricity, he can order "such generation, delivery, interchange, or transmission of electric energy as in [the Secretary's] judgment will best meet the emergency and serve the public interest." The Secretary can exercise this authority either upon his own motion or upon complaint by any person, with or without notice or hearing. DOE regulations provide that an "emergency" for these purposes can result, among other things, from "a regulatory action which prohibits the use

of certain electric power supply facilities" or "[e]xtended periods of insufficient power supply as a result of inadequate planning or the failure to construct necessary facilities."[1i]

H.R. 4273 would make two key changes to Section 202(c). First, the bill would provide a blanket shield to any liability for violation of any Federal, State or local environmental law resulting from any action or omission necessary to comply with a Section 202(c) order. Second, it provides that a Section 202(c) order *should* "require generation, delivery, interchange or transmission of energy only during times necessary to meet the emergency and serve the public interest and, to the extent reasonable, be consistent with any other applicable Federal law, including any environmental law or regulation, and endeavor to minimize any adverse environmental impacts." This, however, is not a mandatory requirement, but a hortatory statement.

The history of section 202(c) orders does not demonstrate a need for legislation to override environmental requirements. Section 202(c) has been invoked only six times by the Department of Energy. To the EPA's knowledge, the only such order with regard to which it has been claimed that compliance resulted in a conflict with environmental requirements is the 2005 order concerning the Mirant Potomac River Generating Station ("Mirant Potomac")[2] I wish to emphasize two points here.

First, DOE, the EPA and the Virginia Department of Environmental Quality (VADEQ) worked cooperatively with one another and with Mirant to ensure that the Section 202(c) order minimized the risk of non-compliance with applicable environmental requirements. DOE's order was structured so as to minimize the likelihood of any violation of environmental requirement. The EPA, for its part, after close consultation with DOE, issued an administrative

[1] 10 C.F.R § 205.371

[2] GenOn Energy Inc. (formerly known as Mirant) has made recent statements concerning a citizen suit brought against Mirant in 2001 in connection with its Potrero Power Plant in the San Francisco area. This plant received an administrative order from the EPA to operate above the hours allowed in its operating permit, following a determination from the California Independent System Operator that such operation was necessary to assure electricity reliability in the San Francisco area. DOE did not, however, issue a Section 202 (c) order with respect to the plant that covered the same time period as the EPA's order. The Section 202 (c) order that DOE issued with respect to the 1999-2001 California electricity crisis had expired approximately two months before the EPA order was signed.

order prescribing conditions that allowed continued operation of the plant as required by the DOE order, but that minimized the adverse environmental consequences. Second, it is the EPA's understanding that DOE's order did not require any violation of environmental laws or requirements. Some have drawn attention to the fact that the Virginia Department of Environmental Quality (VADEQ) later fined Mirant approximately $30,000 for environmental violations while operating the plant pursuant to the DOE order.[3] It is the EPA's understanding, however, that VADEQ imposed this fine based on Mirant's failure to implement appropriate operating and maintenance procedures, not because of any violation that was compelled by DOE's order. That is, VADEQ's investigation found that Mirant could have operated the plant in a manner that was in compliance with the DOE and EPA orders, but failed to do so.

A Section 202(c) order is a tool of last resort. The need for such an order arises only when all of the many tools available to avoid a reliability problem have failed and the generation owner is unable or unwilling to undertake an action needed to correct that problem. It should not be surprising that this provision has rarely been invoked and that it has virtually never implicated any conflict with environmental compliance because generation owners, grid planners and operators, and state and federal regulators together have a very strong record of identifying and addressing potential reliability issues before any such conflict arises.

The EPA does not believe that its recently promulgated power sector regulations – including the Mercury and Air Toxics Standards (MATS) rule – change the situation or create any new rationale for amending Section 202(c). The EPA paid close attention to comments raised by stakeholders regarding the time available to achieve compliance with MATS and its other rules, as well its impacts on electric reliability. Before MATS was finalized, the EPA and the Department of Energy (DOE) conducted several analyses of its effects on electric generation resources.[4] The EPA's and DOE's analyses demonstrate that the vast majority, if not all, sources

[3] It is the EPA's understanding that the VADEQ and Mirant settled the violation in a consent order, which assessed a total penalty of $52,000; however, approximately $21,000 of the penalty was attributable to a separate and independent 2008 violation of a federal consent decree that required Mirant take undertake specific environmental projects to protect local residents from fugitive dust.

[4] Environmental Protection Agency (2011). "Resource Adequacy and Reliability in the IPM Projections for the MATS Rule" http://www.epa.gov/ttn/atw/utility/revised_resource_adequacy_tsd.pdf
Department of Energy (2011). "Resource Adequacy Implications of Forthcoming EPA Air Quality Regulations" http://energy.gov/sites/prod/files/2011%20Air%20Quality%20Regulations%20Report_A_120911.pdf

will be able to meet the MATS requirements within the time frames provided under the Clean Air Act.

The EPA's resource adequacy analysis for the MATS rule and the Cross State Air Pollution Rule projected that only a modest amount of generating capacity would become uneconomic to operate under the MATS standards, and removal of this capacity will not adversely affect capacity reserve margins in any region of the country. This retiring generation capacity is an average of more than fifty years old, relatively inefficient, and does not have modern pollution controls installed. In addition, new capacity will be added between now and 2015. It should be noted that over the last few years low natural gas prices and an aging coal generation fleet have been pushing the industry towards less reliance on coal and greater reliance on natural gas.

David Sandalow, DOE Assistant Secretary for Policy and International Affairs, summarized the DOE analysis as "demonstrat[ing] that new EPA rules – which will provide extensive public health protections from an array of harmful pollutants – should not create resource adequacy issues."[5] In addition, a recent Congressional Research Service report (January 2012)[6] reviewed industry data on planning reserve margins and potential retirement of units that do not currently meet the standards and concluded, based on these data "that, although the rule may lead to the retirement or derating of some facilities, almost all of the capacity reductions will occur in areas that have substantial reserve margins."

The EPA took steps in the final MATS rule to address stakeholder concerns that compliance with MATS could not be achieved within the maximum three-year compliance date authorized under the statute. In the final rule, the EPA described in detail the wide range of situations where we believe an additional year for compliance could be granted by permitting authorities. This fourth year – in addition to the three years provided to all sources – is provided by the Clean Air Act as needed to complete installation of control technologies.

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[5] http://energy.gov/articles/energy-department-releases-study-electricity-system-ahead-proposed-epa-air-quality
[6] James E. McCarthy, January 9, 2012. "EPA's Utility MACT: Will the Lights Go Out?" http://www.eenews.net/assets/2012/01/19/document_gw_03.pdf

The EPA is encouraging permitting authorities to make this fourth year broadly available to sources that require it to complete their compliance activities, including installing pollution control equipment, constructing on- or off-site replacement power, and upgrading transmission. The EPA is also encouraging that the fourth year be made available as needed to units that continue to operate for reliability purposes while other units are installing pollution controls.

The EPA is engaging in outreach to states and permitting authorities to help ensure that the fourth year for compliance is broadly available and that the process for sources to request and states to grant the extensions is clear and straightforward. States have used this provision before and they are very familiar with it. As a result, the EPA estimates that sources generally will have until spring of 2016 to comply – one year longer than our analysis indicates is necessary for most sources.

Although the EPA's analysis indicates that most, if not all, sources can comply within three years, and that the fourth year should be available in the broad range of situations described above, the EPA is also providing a clear pathway for units that are shown to be critical for electric reliability to obtain a schedule to achieve compliance within up to an additional year beyond the four years mentioned above. This pathway is set forth in a policy memorandum from the EPA's Office of Enforcement and Compliance Assurance.[7] As stated above, the EPA believes there will be few, if any, situations in which this pathway will be needed. In addition, in the unlikely event that there are situations where sources cannot come into compliance on a timely basis that do not fall into any of these categories, the EPA will address them on a case-by-case basis, at the appropriate time, to determine the appropriate response and resolution. This is consistent with its longstanding historical practice under the Clean Air Act.

As part of the Administration's commitment to maximize flexibilities under the law, MATS was accompanied by a Presidential Memorandum that directs the EPA to take a number of steps to ensure continued electric reliability. These steps include: 1) working with State and local permitting authorities to make the additional year for compliance with MATS provided

[7] EPA Memorandum December 16, 2011. "The Environmental Protection Agency's Enforcement Response Policy For Use of Clean Air Act Section 113(a) Administrative Orders in Relation To Electric Reliability and the Mercury and Air Toxics Standard" http://www.epa.gov/compliance/resources/policies/civil/erp/mats-erp.pdf

under section 112(i)(3)(B) of the Clean Air Act broadly available to sources; 2) working with the Department of Energy, the Federal Energy Regulatory Commission, State utility regulators, Regional Transmission Organizations, the North American Electric Reliability Corporation and regional electric reliability organizations, other grid planning authorities, electric utilities, and other stakeholders, as appropriate to promote early, coordinated, and orderly planning; and 3) making available to the public, including relevant stakeholders, information that describes the process for identifying circumstances where electric reliability concerns might justify allowing additional time to comply. The EPA is in the process of taking a number of steps to implement the directives in this memo.

The EPA is actively engaging power plants and other entities that will be involved in getting power plants retrofitted while maintaining the reliability of the electric grid. The EPA has held, and will continue to hold, a series of discussions with the Department of Energy, the Federal Energy Regulatory Commission, State utility regulators, Regional Transmission Organizations and other planning authorities, the North American Electric Reliability Corporation, regional electric reliability organizations, and generation owners and operators to promote early compliance planning, to support orderly implementation of the MATS standards, and to ensure that any potential, localized reliability concerns are identified and addressed. The EPA has started and will continue discussions with power plant owners and operators to help them understand their responsibilities under the standards and their role in early, coordinated, and orderly planning. The EPA is conducting specific outreach to stakeholders with unique concerns such as rural electric cooperatives, public power facilities, and investor-owned utilities. In addition, the EPA will also engage in outreach to states and permitting authorities to help ensure that the fourth year for compliance is broadly available and that the process for sources to request and states to grant the extensions is clear and straightforward.

More important, the Agency is concerned that, if enacted, this legislation would have the unintended consequence of creating problems that would not otherwise exist. It could actually increase the likelihood of conflicts between reliability and compliance with environmental laws and regulations. The bill would shield a generation owner from any liability for violations of environmental laws or regulations resulting from operation to comply with a Section 202(c)

order, without any regard to whether the owner could have taken or did take any actions to timely comply with the relevant environmental requirements and/or to mitigate the relevant reliability concern. In so doing, the bill would eliminate important incentives for owners to take expeditious actions to comply with environmental requirements and avoid conflicts of this nature. In addition, if a plant were subject to a 202(c) order, the bill would do little to ensure that the generation owner would have appropriate incentives to take expeditious action to eliminate the need for the order to continue – again, either by bringing the source into compliance with environmental regulations or by taking other actions necessary to mitigate the reliability issue. Advance planning and timely action are key to the successful implementation of EPA's power sector rules, and this bill could undercut power plants' incentives to plan and act in a timely fashion.

This bill could also unnecessarily endanger public health. To the extent that this bill results in 202(c) orders that would otherwise be unnecessary under current law, it increases the likelihood that facilities will operate in violation of environmental regulations, with resulting excess emissions of mercury and other air toxics, as well as pollutants that cause smog or fine particle pollution. Additionally, the hortatory statement that DOE should minimize conflicts with environmental laws is inadequate. As compared to current law, the bill decreases the incentives for input from the EPA and State and local environmental officials by authorizing DOE to issue an order absolving a generation owner from liability for running in violation of Federal, State, or local environmental laws, without requiring any consultation with or assent from the EPA or relevant State or local officials. The views of such entities, of course, are highly relevant to determining how best to minimize conflicts with environmental laws and adverse environmental effects.

The Nation's power grid is strong and resilient because numerous agencies and organizations fulfill their obligations to maintain the Nation's electric reliability. Over the 40-year history of the Clean Air Act, these stakeholders – working together with State and Federal regulators – have had an outstanding track record of substantially reducing pollution while maintaining reliability. We remain confident that, together, we have the tools to address any challenges that may arise in connection with the implementation of our power sector rules. In

light of this situation, we encourage the Committee to consider carefully the potential unintended consequences of the bill discussed above.

Mr. WHITFIELD. Ms. McCarthy, thank you. I neglected to say this, but Ms. Hoffman is the Assistant Secretary for the Office of Electricity Delivery and Energy Reliability at the Department of Energy, and of course, Gina McCarthy is the Assistant Administrator for Air and Radiation from the EPA. Mr. Moeller is a Commissioner over at the Federal Energy Regulatory Commission, and I would recognize him for 5 minutes at this time.

STATEMENT OF PHILIP D. MOELLER

Mr. MOELLER. Chairman Whitfield and members of the subcommittee, thank you for the invitation to testify on H.R. 4273, the Resolving Environmental and Grid Reliability Conflicts Act of 2012. My name is Phil Moeller, and I serve as one of four sitting Commissioners at the Federal Energy Regulatory Commission, FERC. I appreciate your interest in addressing the important issues facing the Nation's reliable supply and delivery of electricity.

Along with myself, my three colleagues Chairman John Wellinghoff, Commissioner John Norris, and Commissioner Cheryl LaFleur all support the concept behind H.R. 4273. That is, we all agree that generators of electricity should not be put in a position of having to choose whether to violate Section 202(c) of the Federal Power Act or whether to violate the Clean Air Act when certain generating facilities are needed for crucial electric reliability needs. The testimony of the next panel will describe occasions when generators were forced to make this difficult choice.

The electric power grid can roughly be divided into two categories: the bulk power system, which carries electricity at generally high voltage over great distances, and the distribution system, which takes electricity from the bulk system to serve local needs, such as the needs of a town or city. While short disruptions of local service are common for many people during thunderstorms and other weather-related events, the high reliability of the bulk power grid ensures that wide-scale blackouts are extremely unusual.

But to ensure that the bulk power grid continues to be reliable, Section 202(c) of the Federal Power Act permits the Federal Government to require a power plant to run in certain circumstances, even if the owner of that power plant would rather not run the power plant. In short, the security of this Nation depends on a reliable power grid, and Section 202(c) addresses the need of this Nation to have a reliable system. Ideally, we hope that Section 202(c) will never need to be invoked, but experience indicates that orders under 202(c) are sometimes necessary.

Yet the very operation of a power plant in compliance with a Section 202(c) order can result in a violation of the Clean Air Act. In this sense, Federal law can sometimes require the owners and operators of a power plant to violate either the Clean Air Act or the Federal Power Act. The law should not require citizens to choose which law to violate.

Our Nation has always faced unique challenges to electric reliability, and these challenges could accelerate as older power plants gradually retire or run less frequently, as new technologies allow new power sources to compete with traditional power plants, and as environmental mandates change. While the Commissioners at

FERC sometimes disagree on the extent to which electric reliability can be threatened by the mandates of the Environmental Protection Agency, EPA, all of the FERC Commissioners support the concept that the law should not require a generator to decide whether to violate the Clean Air Act or the Federal Power Act.

At this time, the Commission is working to formulate a role in advising the EPA on the reliability impacts of retiring or retrofitting various power plants in compliance with EPA regulations. Regardless of how well FERC and EPA can coordinate their reliability efforts, a bill like H.R. 4273 is essential to address potential reliability challenges. Like 202(c) more broadly, we hope that the provisions in a bill like H.R. 4273 would never need to be invoked, but erring on the side of reliability is the responsible approach.

Thank you again for the opportunity to testify, and I look forward to working with you in the future and answering any questions today.

[The prepared statement of Mr. Moeller follows:]

Testimony of FERC Commissioner Philip D. Moeller

**Before the U.S. House of Representatives
Committee on Energy and Commerce,
Subcommittee on Energy and Power**

**Regarding H.R. 4273,
"Resolving Environmental and Grid Reliability Conflicts Act of 2012"**

May 9, 2012

Summary

My name is Philip D. Moeller, and I serve as one of four sitting commissioners at FERC. Along with myself, my three colleagues Chairman Jon Wellinghoff, Commissioner John Norris, and Commissioner Cheryl LaFleur all support the concept behind H.R. 4273. That is, we all agree that generators of electricity should not be put in a position of having to choose whether to violate Section 202(c) of the Federal Power Act or whether to violate the Clean Air Act when certain generating facilities are needed for crucial electric reliability needs. The law should not require citizens to violate the law.

Ideally, we hope that Section 202(c) will never need to be invoked, which would avoid any conflict with the Clean Air Act, but experience indicates that orders under Section 202(c) are sometimes necessary. Our nation has always faced unique challenges to electric reliability, and these challenges could accelerate as older power plants gradually retire (or run less frequently), as new technologies allow new power sources to compete with traditional power plants, and as environmental mandates change.

Testimony of FERC Commissioner Philip D. Moeller

**Before the U.S. House of Representatives
Committee on Energy and Commerce,
Subcommittee on Energy and Power**

**Regarding H.R. 4273,
"Resolving Environmental and Grid Reliability Conflicts Act of 2012"**

May 9, 2012

Chairman Whitfield, Ranking Member Rush, and members of the Subcommittee, thank you for the invitation to testify on H.R. 4273, the "Resolving Environmental and Grid Reliability Conflicts Act of 2012". My name is Philip D. Moeller, and I serve as one of four sitting commissioners at the Federal Energy Regulatory Commission (FERC). I appreciate your interest in addressing the important issues facing the nation's reliable supply and delivery of electricity.

Along with myself, my three colleagues Chairman Jon Wellinghoff, Commissioner John Norris, and Commissioner Cheryl LaFleur all support the concept behind H.R. 4273. That is, we all agree that generators of electricity should not be put in a position of having to choose whether to violate Section 202(c) of the Federal Power Act or whether to violate the Clean Air Act when certain generating facilities are needed for crucial electric reliability needs. The testimony of the next panel will describe occasions when generators were forced to make this difficult choice.

The electric power grid can be roughly divided into two categories, the bulk power system which carries electricity at generally high voltage over great

distances, and the distribution system, which takes electricity from the bulk system to serve local needs, such as the needs of a town or city. While short disruptions of local service are common for many people during thunderstorms and other weather events, the high reliability of the bulk power grid ensures that wide-scale blackouts are extremely unusual.

But to ensure that the bulk power grid continues to be reliable, Section 202(c) of the Federal Power Act permits the federal government to require a power plant to run in certain circumstances, even if the owner of that power plant would rather not run the plant. In short, the security of this nation depends on a reliable power grid, and Section 202(c) addresses the need of this nation to have a reliable system. Ideally, we hope that Section 202(c) will never need to be invoked, but experience indicates that orders under Section 202(c) are sometimes necessary.

Yet the very operation of a power plant in compliance with a Section 202(c) order can result in violation of the Clean Air Act. In this sense, federal law can sometimes require the owners and operators of a power plant to violate either the Clean Air Act or the Federal Power Act. The law should not require citizens to violate the law.

Our nation has always faced unique challenges to electric reliability, and these challenges could accelerate as older power plants gradually retire (or run less frequently), as new technologies allow new power sources to compete with traditional power plants, and as environmental mandates change. While the

Commissioners at FERC sometimes disagree on the extent to which electricity reliability can be threatened by mandates of the Environmental Protection Agency (EPA), all of the FERC Commissioners support the concept that the law should not require a generator to decide whether to violate the Clean Air Act or Federal Power Act.

At this time, the Commission is working to formulate a role in advising the EPA on the reliability impacts of retiring or retrofitting various power plants in compliance with EPA regulations. Regardless of how well FERC and EPA can coordinate their reliability efforts, a bill like H.R. 4273 is essential to address potential reliability challenges. Like Section 202(c) more broadly, we hope that the provisions in a bill like H.R. 4273 would never need to be invoked, but erring on the side of reliability is the responsible approach.

Thank you again for the opportunity to testify. I look forward to working with you in the future and to answering any questions.

Mr. WHITFIELD. Thank you very much, Mr. Moeller.

Our last witness on the first panel is Mr. Jeffery Wright, who is the Director of the Office of Energy Projects at FERC, so Mr. Wright, thank you for being here and we recognize you for 5 minutes.

STATEMENT OF JEFF C. WRIGHT

Mr. WRIGHT. Thank you, Chairman Whitfield and members of the subcommittee. Again, my name is Jeff Wright, and I am the Director of the Office of Energy Projects at the Federal Energy Regulatory Commission. I appreciate the opportunity to appear before you to discuss the draft legislation entitled "The Hydropower Regulatory Efficiency Act of 2012." The views I express in my testimony are my own.

The Commission regulates over 1,600 non-Federal hydropower projects at over 2,500 dams, pursuant to Part I of the Federal Power Act, or FPA. Together these projects represent 54 gigawatts of hydropower capacity, more than half of all the hydropower in the U.S.

The FPA authorizes the Commission to issue licenses and exemptions for projects within its jurisdiction. About 71 percent of the hydropower projects regulated by the Commission have an installed capacity of 5 megawatts or less.

The Commission has seen an increased interest in small hydropower projects, and has responded by implementing measures to facilitate efficient review of project proposals, including the following: adding new web-based resources to the Commission's Web site to make it easier for applicants to understand and complete the licensing process, updating or creating MOUs with other agencies to improve coordination, continuing our small hydropower hotline and e-mail address to answer applicant questions, and educating potential small hydropower developers through an education and outreach program. With this background, I will turn to the draft legislation.

Section 3 would increase the limit for small hydropower exemptions from 5 megawatts to 10 megawatts. Section 4 would establish various measures to remote conduit hydropower projects. These proposals are consistent with the Commission's policy to promote small hydro generation.

Specifically, Section 4(a) would amend Section 30 of the FPA to establish a procedure whereby conduit projects with an installed capacity of 5 megawatts or less would not be required to be licensed, provided the applicant makes a showing that the project qualifies as a conduit project. I support this provision which would serve to increase the amount of electric generation derived from conduits. This section would also allow the Commission to grant conduit exemptions for all projects with an installed capacity of over 5 megawatts and up to 40 megawatts.

Section 5 of the draft legislation would amend the FPA to authorize the Commission to extend the term of a preliminary permit issued under FPA's Section 5 for up to 2 years. Preliminary permits grant the holder a "first to file" preference with respect to license applications for projects being studied under a permit. Commission staff has heard that the need for environmental studies in

some instances make it difficult to complete a license application within the current 3-year term of the permit, with the result that a developer that has invested substantial time and money studying a project may face the possibility of losing its project based on competition from other entities if it needs to seek a subsequent permit. I therefore support the proposed FPA amendment which could eliminate this problem, and it might be worth considering as an alternative, authorizing the Commission to issue permits for terms up to 5 years, which could avoid the need for developers to go through the process of seeking an extension.

Section 6 would require the Commission to investigate the feasibility of implementing a 2-year licensing process for hydropower developing at existing non-power dams, and for closed loop pump storage projects. I support the goal of an expedited licensing process. It is Commission staff's goal to act on all license applications as quickly as possible, and we have established procedures that allow for great flexibility and efficiency. I am thus though not certain whether an additional licensing process is necessary. We have been able to issue licenses in a matter of a few months where the project proponent has selected a site wisely, stakeholders had agreed on information needs, and State and Federal agencies performed their responsibilities quickly. Moreover, the Commission operates under significant constraints imposed by the FPA and by other legislation affecting the licensing process, including the Clean Water Act, the Coastal Zone Management Act, the Endangered Species Act, and the National Historic Preservation Act, among them.

In the absence of the ability to waive sections of the FPA and other acts, or to set enforceable schedules in licensing proceedings, it is not clear that the Commission, under its existing authorities, can mandate a shortened process.

Section 7 would require the Department of Energy to study the flexibility and reliability that pump storage facilities can provide, and the opportunities and potential generation from conduits. While I cannot speak for the Department of Energy, I do support such research.

In conclusion, there is a great deal of potential for the development of additional hydropower projects throughout the country, including small projects. Working within the authority given it by Congress, the Commission continues to adapt its existing flexible procedures to facilitate the review, and where appropriate, the approval of such projects. Commission staff remains committed to exploring with all stakeholders every avenue for the responsible development of our Nation's hydropower potential. The legislation under consideration will assist in realizing that potential.

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

[The prepared statement of Mr. Wright follows:]

Testimony of

Jeff C. Wright

Director, Office of Energy Projects

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202-502-8700

Before the Committee on Energy and Commerce,
Subcommittee on Energy and Power
United States House of Representatives

Oversight Hearing on
"The Hydropower Regulatory Efficiency Act of 2012"

May 9, 2012

Chairman Whitfield, Ranking Member Rush, and Members of the Subcommittee:

My name is Jeff Wright and I am the Director of the Office of Energy Projects at the Federal Energy Regulatory Commission (Commission or FERC). I appreciate the opportunity to appear before you to discuss the draft legislation entitled, the Hydropower Regulatory Efficiency Act of 2012. As a member of the Commission's staff, the views I express in this testimony are my own, and not those of the Commission or of any individual Commissioner.

I. Background

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

Under the FPA, non-federal hydropower projects must be licensed by the Commission if they: (1) are located on a navigable waterway; (2) occupy federal lands; (3) use surplus water from a federal dam; or (4) are located on non-navigable waters over which Congress has jurisdiction under the Commerce Clause, involve post-1935 construction, and affect interstate or foreign commerce.

The FPA authorizes the Commission to issue either licenses or exemptions for

projects within its jurisdiction. Licenses are generally issued for terms of between 30 and 50 years, are renewable, and carry with them the right to exercise federal eminent domain to obtain property necessary for the construction, operation, and maintenance of a project. Exemptions are perpetual, and thus do not need to be renewed, but do not permit the use of eminent domain. Congress has established two types of exemptions. First, section 30 of the FPA allows the Commission to issue exemptions for projects that utilize, for generation, the hydroelectric potential of manmade conduits that are operated for the distribution of water for agricultural, municipal, or industrial consumption, and not primarily for the generation of electricity. Conduit projects must be located on non-federal lands, and have a maximum capacity of 15 megawatts (40 megawatts if the exemptee is a state or local government entity). Second, in section 405(d) of the Public Utility Regulatory Policies Act, Congress authorized the Commission to grant exemptions for small hydroelectric power projects having an installed capacity of 5,000 kilowatts or less. To qualify for this type of exemption, a project must be located at an existing dam that does not require construction or the enlargement of an impoundment, or must use the hydropower potential of a natural water feature, such as a waterfall. Both types of exemptions are subject to mandatory fish and wildlife conditions provided by federal and state resource agencies.

The Commission has established three licensing processes, with the intent of allowing parties to select the process that is best suited to individual proceedings. The integrated licensing process (ILP) frontloads issue identification and environmental study to the period before an application is filed, and is thus well-suited to complex cases with

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

It is extremely important to note that project developers and other stakeholders, not the Commission, in most instances play the leading role in determining project success and whether the regulatory process will be short or long, simple or complex. The first key issue is site selection and proposed project operation. For example, the processing of applications tends to be expedited when applicants propose projects that: (1) are located at an existing dam where hydropower facilities do not currently exist, (2) would result in little change to water flow and use, (3) are unlikely to affect threatened and endangered species and are unlikely to need fish passage facilities, and (4) involve lands and facilities that are already owned by the applicant. To the extent that a proposed project, even one of small size, raises concerns about water use and other environmental issues, it may be difficult for the Commission to quickly process an application. It is also important to remember that the small capacity of a proposed project does not necessarily mean that the project has only minor environmental impacts.

Another, and related, factor is the extent to which project developers reach out to

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

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

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

process.

II. Commission Efforts Regarding Small and Innovative Projects

The majority of the hydropower projects regulated by the Commission are small projects, with about 71 percent having an installed capacity of 5 megawatts (MW) or less. In recent years, the Commission has seen a greatly increased interest in small hydropower projects, in innovative marine and hydrokinetic projects, and in pumped storage projects, particularly closed-loop pumped storage, which does not involve regular water withdrawals from rivers or other water sources. The Commission has responded by implementing a number of measures to facilitate efficient review of project proposals. In 2007, in order to provide personalized, responsive service to entities seeking to develop small hydropower projects, Commission staff established a dedicated phone line and email address for inquiries on small hydropower, developed a brochure to provide guidance to potential developers of small, low impact hydropower projects, and put these resources and a list of frequently-asked questions on the Commission's website.

In light of the continued growing interest in such development, the Commission held a technical conference on December 2, 2009, at its Washington, D.C. headquarters to explore issues related to licensing, and exempting from licensing, small non-federal hydropower projects in the U.S. The technical conference generated discussion on recommendations that could improve the process for authorizing small hydropower projects. In addition to insights received from the panelists and attendees at the technical conference, written comments were solicited and over 40 comment letters were received from industry representatives; federal, state, and local agencies; private citizens; and non-

governmental organizations. At the Commission's April 15, 2010 meeting, staff reported on the conference and the comments received, and presented an action plan to assist and expedite the review of small hydropower proposals. The action plan adopted the following immediate changes: (1) adding new web-based resources to the Commission's website (www.ferc.gov) to make it easier for applicants to understand and complete the licensing process; (2) updating or creating Memoranda of Understanding (MOUs) with other agencies to improve coordination; (3) continuing our small hydropower hotline and email address to answer applicant questions; and (4) educating potential small hydropower developers through a new education and outreach program.

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

Since the April 15, 2010 Commission meeting, we have signed an MOU with the State of Colorado to expedite the small hydro licensing process (August 2010); updated our MOU with the Army Corps of Engineers (March 2011); launched a small hydro program website (August 2010); participated in small hydro workshops across the U.S.; conducted webinars on our small hydro website (November 2010, December 2010, June 2011, and January 2012); and updated our small hydro brochure. Upcoming outreach efforts will include participating on a small hydro panel in Louisville, Kentucky, as well as conducting a small hydro workshop with the Department of Interior and Alaska state agencies in Sitka, Alaska later this summer. As a result of these efforts, consultation has improved, applications are more complete, and application processing times have been reduced.

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

III. The Hydropower Regulatory Efficiency Act of 2012

The Hydropower Regulatory Efficiency Act of 2012, has the commendable goal of increasing hydropower capacity and generation in United States. I strongly support that goal, and offer comments on specific sections of the bill.

A. Section 4

Section 4 would establish various measures to promote conduit hydropower projects. Again, this goal is consistent with Commission policy and has been a major focus of Commission's staff's effort in the last few years.

Section 4(a) would amend section 30 of the FPA to establish a procedure whereby conduit projects with an installed capacity of 5 MW or less would not be required to be

licensed, provided the applicant makes a showing that the project qualifies as a conduit project. I support this provision, which should serve to increase the amount of electric generation derived from conduits. This section would also allow the Commission to grant conduit exemptions for those projects with an installed capacity of up to 40 MW. This proposed upper limit would apply to non-municipal, as well as municipal applicants.

B. Section 5

Section 5 would amend the FPA to authorize the Commission to extend the term of a preliminary permit issued under FPA section 5 once for up to two years. Preliminary permits grant the permittee a "first-to-file" preference with respect to license applications for projects being studied under a permit. Commission staff has heard anecdotally that developers are concerned that the need for environmental studies in some instances makes it difficult to complete a license application within the current maximum three-year term of a permit, with the result that a developer which has invested substantial time and money studying a project may face the possibility of losing its project based on competition from other entities – particular those with statutorily-granted municipal preference -- if it needs to seek a subsequent permit. I therefore support the proposed FPA amendment, which could ameliorate this problem. It might be worth considering, as an alternative, authorizing the Commission to issue permits for terms of up to five years, which could avoid the need for developers to go through the process of seeking an extension.

C. Section 6

Section 6 would require the Commission to investigate the feasibility of

implementing a two-year licensing process, in particular, with respect to hydropower development at existing, non-powered dams, and for closed-loop pumped storage projects.

I support the goal of an expedited licensing process. Indeed, as I have discussed, it is Commission staff's goal to act on all license applications as quickly as possible, and the Commission has established processes that allow for great flexibility and efficiency. I am thus not certain whether an additional licensing process is necessary. During the last few years, we have been able to issue some licenses in a matter of a few months, where the project proponent had selected a site wisely, stakeholders had agreed on information needs, and state and federal agencies performed their responsibilities quickly. Moreover, the Commission operates under significant constraints imposed by the FPA, and by other legislation affecting the licensing process – the Clean Water Act, Coastal Zone Management Act, Endangered Species Act, and National Historic Preservation Act among them. In the absence of the ability to waive sections of the FPA and other acts, or to set enforceable schedules in licensing proceedings, it is not clear that the Commission, under its existing authorities, can mandate a shortened process.

C. Section 7

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

IV. Conclusion

There is a great deal of potential for the development of additional hydropower projects throughout the country, including small projects and marine and hydrokinetic projects. Working within the authority given it by Congress, the Commission continues to adapt its existing, flexible procedures to facilitate the review and, where appropriate, the approval of such projects. Commission staff remains committed to exploring with project developers, its sister federal agencies, Indian tribes, the states, local government, and other stakeholders every avenue for the responsible development of our nation's hydropower potential. The legislation under consideration will, as I have testified, assist in realizing that potential.

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

Testimony of Jeff C. Wright
Summary of Major Points

- The Federal Energy Regulatory Commission (the Commission) is responsible for, among other things, the siting on non-federal hydropower projects pursuant to the Federal Power Act. This represents over 1,600 projects at over 2,500 dams. The Commission, also pursuant to the FPA, is responsible for issuing exemptions for projects that utilize manmade conduits.
- I support Section 4 of the draft legislation which would establish a procedure to eliminate the licensing of conduit projects of 5MW or less and would grant conduit exemptions for projects up to 40MW.
- I support Section 5 of the draft legislation which would allow the Commission to extend the term of a preliminary permit for an additional two-year period. It is worth considering that the Commission be allowed to issue permits for five years, rather than the current limit of three years.
- I support the goal of Section 6 of the draft legislation to investigate the possibility of a two-licensing process.
- I support the goal of Section 7 of the draft legislation to mandate DOE to study the flexibility and reliability of pumped storage and the opportunities and potential from conduits.

Mr. WHITFIELD. Thank you very much, Mr. Wright, and thank all of you for your testimony.

At this time I recognize myself for 5 minutes of questions. You know, we find ourselves today in a situation where we have a plethora of regulations that are coming out of EPA that are having significant impact on the energy sector production of electricity, as well as on the transportation side. In addition to that, we have been struggling with our economy and demand has been lower for electricity and other energy needs than some times in the past, and we are making an effort to stimulate the economy, keep growing again. And with all of this change taking place, and you see a lot of coal plants closing down today because of regulation and also because of low natural gas prices. And so there is a significant change going on in our country in the electric energy sector.

And everyone talks about that we need an "all of the above" energy program. And I was looking at President Obama's Web site the other day on his campaign, and I really was actually disturbed by it. I would just like to ask the clerk if she would put up this campaign Web site of President Obama. Now, you may not be able to read that, but the thing that bothers me about it is that President Obama has gone around the country, like many of us, and he has talked about we want an "all of the above" energy policy. In that circle on his campaign site, he talks about the energy sectors. He talks about oil, natural gas, fuel efficiency, biofuels, wind, solar, and nuclear. Now, there is one glaring absence, and that happens to be coal, which still provides almost 50 percent of the electricity in America. Many of us get upset about that, because it has a tremendous economic impact on our country. It provides a lot of jobs and it makes us competitive in the global marketplace because coal is still a valuable resource. We have a 250-year reserve of coal, and yet, this administration has been openly in the business of putting coal out of business. For the President to go run around talking about "all of the above" energy policy and even on his campaign Web site to not even mention coal as an important energy sector is unbelievable to me.

Now, we are talking about reliability today on one of these bills and the ensuring reliability and the conflict between environmental laws and reliability and I don't see how anybody could have a problem with this legislation, because we are talking about emergency orders that puts companies in conflict between an environmental law and an emergency order from the Department of Energy. With these reliability issues becoming more and more prevalent, I think we are going to see more and more of this conflict. I am delighted, Mr. Moeller, that FERC—they feel like this is something that we should certainly explore, and I am disappointed that Ms. Hoffman, you and Ms. McCarthy are not willing to support this kind of legislation.

I said I was going to ask a question. I guess I haven't asked a question yet. This is my second opening statement. But we talk about this Utility MACT. I really get upset about it because that Utility MACT was sold to the American people that we were going to reduce mercury emissions, and that is all that anyone ever talked about. We are going to reduce mercury emissions, maybe by .001 percent or whatever, and we have had testimony from all sorts

of groups saying that the technology is not there to meet the requirement, but more important than that, when the analysis was done of EPA's own figures, the experts said there is no benefit significantly from reducing mercury emissions. All of the benefits of the Utility MACT, which is the most costly regulation ever issued, all of the benefits comes from reduction of particulate matter, which is already regulated under another aspect of the Clean Air Act.

So my time is already expired, but I wanted to get that off my chest because I feel like EPA misled the American people on Utility MACT, and deliberately so, and Ms. Capps, forgive me for going 20 seconds over, but I recognize you for 5 minutes of questioning.

Mrs. CAPPS. Thank you, Mr. Chairman, for recognizing me. I am sure I don't need to restate my concerns about the Olson bill which I referred to in my opening remarks. I got that off my chest in the beginning, Mr. Chairman, so now I think I am ready to ask a couple of questions.

You know, this bill before us "waives the ability"—and this is a quote—"under any Federal, State, or local environmental law or regulation"—that is the end of the quote—for an entity complying with the DOE reliability order. That strikes me as very broad language, and Ms. Hoffman, I will start with you. Do you have any idea of what specific laws and regulations are waived by this kind of language?

Ms. HOFFMAN. My apologies. It is a very good question, and I think it is the heart of some of the discussions that have been occurring, and such that it waives, from my understanding, penalties from statutes that are in the Clean Air Act, but it doesn't appear—at least the question that we are trying to struggle with, with respect to administrative compliance orders, does it waive any of those penalties involved in that? And I think that is a part of the discussion that the intent is unsure.

Mrs. CAPPS. I see. It seems to me that because of its broadness that it is very hard to get to the kind of nitty gritty places where you really do have discussions between a variety of agencies. It seems to me this would include Federal, State, and local requirements. It could be as broad as controlling air pollution, controlling water pollution, protecting drinking water for safe disposal of waste, or to protect endangered species. I don't even think that would necessarily be the end of the list.

Maybe I will try this another way. Are you aware of any example of a conflict between compliance with a 202(c) order and a compliance with an environmental requirement, other than an air pollution control requirement?

Ms. HOFFMAN. I am not aware of any.

Mrs. CAPPS. How about you, Ms. McCarthy? Are you aware of some examples of any conflicts under any of these laws?

Ms. MCCARTHY. I do not believe that there is an inherent conflict between 202(c) and EPA moving forward with environmental regulations and compliance with those. No, I am not aware of any that have happened, and I am not aware that there is any need for that conflict to happen.

Mrs. CAPPS. So we have as an example, a single conflict which involved an air pollution limit and the response of this bill as a re-

sult or I guess of that one incident is to waive every requirement that could be considered "environmental" without even knowing what we are waiving necessarily in advance. That is not, in my opinion, a narrowly tailored approach.

Again, Ms. McCarthy, does this make sense to you? From your experience, can you explain anything having to do with this?

Ms. MCCARTHY. I would just explain—the only thing I can tell you is I believe this bill was well-intended to address reliability concerns. We share those concerns and we have made that very clear. But I do not believe that the Mirant case that is being cited actually was the result of any inherent conflict in the use of 202(c). I believe that that—it is actually a good example of how the agencies worked together and with the State agency to address the reliability concern and to ensure that that facility operated to the extent that we could in compliance with environmental regulations. And in fact, the company could have, and for the most part did. It had one problem because it did not, according to the Virginia DEQ, follow the operating and maintenance procedures outlined in those administrative orders. So it was a very successful application of these laws. It had no inherent conflict. It didn't ask the generator to make decisions between maintaining their responsibilities under 202(c) and 113(a), our administrative order in compliance with environmental regulations.

Mrs. CAPPS. So what we do have is a history of negotiations, when potential conflicts are anticipated, that there is a history within the regulators and EPA to come together and to work—to iron things out, to go back and forth and to have a discussion, and that is what is not reflected in this language. In my opinion, I think we can do better than this legislation. I hope the chairman will decide to work to address some of the serious concerns that we have about this legislation before scheduling a markup.

I would yield back my time.

Mr. WHITFIELD. Thank you, Ms. Capps. At this time I recognize the gentleman from Nebraska—Mr. Terry is not here. So Ms. McMorris Rodgers is recognized for 5 minutes for questions.

Mrs. MCMORRIS RODGERS. Thank you. Thank you, Mr. Chairman.

Well, I wanted to start by just having the committee put up that slide again, because I noticed something else was missing. The slide from the—President Obama's approach to energy independence. I didn't see hydropower listed. We have already heard it is the largest source of renewable energy, 8 percent—7 to 8 percent right now. I am even under the impression that Department of Energy has included it as—that they have a goal of doubling hydropower. So I guess I just want to ask the question, what is the role between the Department of Energy and the White House as far as our energy goals moving forward, and where is hydropower?

Ms. HOFFMAN. The Department of Energy closely coordinates with the White House. We have a very strong program, and looking at R&D in the hydropower area, we have had a lot of activities looking at the technical potential of hydropower and consider it a strong part of our portfolio. The research is conducted under the Office of Energy Efficiency and Renewable Energy.

Mrs. MCMORRIS RODGERS. So am I to conclude that President doesn't see a future role for hydropower and that he is actually picking wind and solar over hydropower as a renewable source of energy?

Ms. HOFFMAN. I am sorry, say that again?

Mrs. MCMORRIS RODGERS. Well, am I to conclude that President Obama doesn't see a role for hydropower moving forward, and that he is picking wind and solar as the renewable sources moving forward?

Ms. HOFFMAN. Hydropower is an important part of the administration. I guess I have to look at—that is a campaign Web site and it is part of our portfolio at the Department of Energy and the research and development that we are working on.

Mrs. MCMORRIS RODGERS. OK, so we will keep working to get hydropower listed. OK. We will keep working on that.

I wanted to move over to Commissioner Moeller, because on the previous topic we are hearing—on Olson's bill, the testimony from EPA and DOE today is saying that they don't believe the legislation is necessary to address the potential conflict between Section 202(c) of the Federal Power Act and the environmental laws and regulations. So I would like to ask, Do you agree with EPA and DOE that the legislation isn't necessary to address the conflict?

Mr. MOELLER. Thank you, Congresswoman. I am speaking today in terms of myself and my fellow Commissioners, that everyone supports the concept behind this bill. Personally, I support the bill. I think it has been used—this authority, very rarely. But the fundamental conflict is there. If someone is being asked to run, they are being asked to choose between violating one law or the other, and I just don't think that is fair to put a generator in that position.

Again, I think it has been and hopefully may never be used again, but having it as one of our tools in the toolbox for reliability I think is important. We are entering an unprecedented nature of transitioning our fuel supply in this country on the electricity side away from coal, and as that happens, there will be a variety of local impacts that will be profound, and hopefully we will be working very hard over the next few years to minimize any impacts or disruptions from that. But just in case, when it is peak load, when it is usually very hot and there is an air inversion zone and health and safety is tied to the ability of people to have their air conditioning running, it might just mean that there are occasions where ordering a generator to run to keep people alive is worth the tradeoff temporarily of the provisions of the Clean Air Act.

Mrs. MCMORRIS RODGERS. So I understand FERC held a technical conference last November to consider the potential reliability implications of EPA's power sector regulations, so I would like to ask, do you believe EPA's new and forthcoming power sector regulations pose a threat to reliability due to the expected retirement and retrofitting of a significant portion of the Nation's coal-fired generation fleet?

Mr. MOELLER. Well it has to do with timing and very localized impacts. You heard Administrator McCarthy talk about the fourth year and the fifth year, and that is a pretty complicated topic because there are different conditions on the fifth year. But we have

to do a lot within the next 5 years to make sure that this transition is workable. We are trying to work on it with—at FERC to try and develop a relationship with the EPA so we can advise them more formally on reliability impacts and the regulations.

I am concerned. I think you can look to what is going to happen in northern Ohio, in the new future as to where this new set of issues comes together in a very challenging way over the next 3 years, and I think we will be talking a lot about that over the summer.

Mrs. MCMORRIS RODGERS. Thank you. I yield back.

Mr. WHITFIELD. Thank you. At this time, I recognize the gentleman from Michigan, Mr. Dingell, for 5 minutes.

Mr. DINGELL. Mr. Chairman, thank you. I commend you for this hearing, and I congratulate my colleagues on the committee for bringing this matter to the committee's attention.

These questions are for Patricia Hoffman, but before I do so, I would like to quote from Oliver Twist and Charles Dickens. We have here a situation before us where it appears—and I quote now—"The law is an ass."

Having said these things, is—these questions are to Patricia Hoffman. Yes or no, is the Department of Energy currently required to consult with an environmental entity such as EPA when issuing an emergency order under Section 202(c)? Yes or no?

Ms. HOFFMAN. We are not required. We do consult with EPA as our past exchanges——

Mr. DINGELL. Just yes or no, please. Yes or no.

Ms. HOFFMAN. No, we are not required.

Mr. DINGELL. OK. An emergency order may be declared for other causes. Other causes is a broad term that could include any number of scenarios. Could an emergency order under H.R. 4273 effectively waive a utility for any reason from liability of ever complying with an environmental regulation such as the Mercury or Air Toxics Standards? Yes or no?

Ms. HOFFMAN. No, our order cannot waive——

Mr. DINGELL. Do you believe that there will be enough electricity generation for utilities to maintain their services to rate payers while working to comply with EPA regulations? Yes or no?

Ms. HOFFMAN. I can't answer yes or no to that. That will be dependent on local——

Mr. DINGELL. Then can you tell us what your thinking is on that?

Ms. HOFFMAN. That will be a very site-regional-specific question.

Mr. DINGELL. OK. Would the Department of Energy want to make a comment on that? OK, would EPA want to make a comment on that?

Ms. MCCARTHY. Not at this time, no. Thank you.

Mr. DINGELL. OK. So you haven't got an answer to the question.

Now, within the ISO region there are nearly 10,000 megawatts from coal units that are already complying with the Mercury and Air Toxics Standards, and the Cross Air State Pollution Rule. Some utilities have said that stricter EPA regulations would create a reliability problem in the future, due to the amount of time it takes to install technology to comply with these rules. Do you believe that utilities with coal units can comply with a new mercury rule

within the 3 years stipulated by EPA or within 4 years if they receive an extra year from the local permitting authority? Please answer yes or no. This is to Gina McCarthy.

Ms. MCCARTHY. Yes.

Mr. DINGELL. All right. Now can you assure us that reliability will not be in jeopardy during this time period? Yes or no? I will take it from both EPA and Department of Energy.

Ms. HOFFMAN. No, we cannot assure that reliability——

Mr. DINGELL. Thank you. The other agency, please?

Ms. MCCARTHY. I can assure you that there are systems in place that will make that happen, yes.

Mr. DINGELL. Now, what outreach has EPA done to public utility commissions or public service commissions to talk about new pending rules and regulations? Would you submit that for the record, please?

Now, when working on a disaster-type scenario such as a hurricane, how quickly can EPA issue an administrative consent order relating to any EPA-related issues?

Ms. MCCARTHY. It is case specific. We can issue them very quickly or we can have a more deliberate process.

Mr. DINGELL. I would like a written answer. Would you be more specific on that——

Ms. MCCARTHY. Yes.

Mr. DINGELL [continuing]. If you please? Now, these questions are for Philip Moeller, Commissioner, FERC. Mr. Moeller, to what extent can utilities plan for reliability-related emergencies that might fall under Section 202(c)?

Mr. MOELLER. I believe as part of general reliability concerns they spend an enormous amount of time. Planning for reliability contingencies specific to 202(c)——

Mr. DINGELL. Would you submit that?

Mr. MOELLER [continuing]. I think it would be very plant specific, based on how they will have to comply with the EPA regulations over the next 3 to 4 to 5 years.

Mr. DINGELL. Thank you. Would you please submit that for the record?

Mr. MOELLER. Certainly.

Mr. DINGELL. I want to get an understanding here what happened, and help me, please. This is to all three agencies. Is this statement factual? You have a situation here of where you are functioning under the law. EPA issues one order. The Department of Energy issues a different order, and we find, lo and behold, that the utility is caught in between. Is there any—first of all, is there any relief to be given to the utility under existing law? Yes or no?

Ms. HOFFMAN. I assume you are referring from fines and——

Mr. DINGELL. We talk about this awful situation we have before us. Go ahead if you—please, Ms. McCarthy?

Ms. MCCARTHY. Just a matter of correction, the instance that we are talking about on Mirant wasn't conflicting orders. The issue was that the company decided not to continue to run. EPA issued a 202(c), then we worked with the company, DOE, and the State to issue an administrative order that allowed——

Mr. DINGELL. Now the two agencies—and I apologize to you, Mr. Chairman. The two agencies behaved very well, but the State of

Virginia finally ultimately fined them under its delegated responsibilities under the Clean Air Act. Is that right?

Ms. MCCARTHY. They didn't fine them for complying with those orders, they fined them because they did not comply with the operation and maintenance requirements of those orders.

Mr. DINGELL. OK. Is there any relief that can be given to a utility under these circumstances? Do you have any agreements between the different agencies on giving relief, or on coordinating your decisions? And can you tell me you don't need statutory authority on this? Please respond in writing.

Mr. Chairman, thank you.

Mr. WHITFIELD. Thank you. The gentleman's time is expired. At this time, I recognize the gentleman from Texas, Mr. Olson, for 5 minutes.

Mr. OLSON. I thank the chairman, and my first question is for Ms. McCarthy. Nice to see you again, ma'am. Thanks for coming today.

Ms. MCCARTHY. You too, Mr. Olson.

Mr. OLSON. I am sure you agree on this, but in the event of a true emergency, DOE has the authority to compel power plants to operate to avoid a blackout under Section 202(c), even if that means violating an environmental permit issued by EPA. You mentioned Mirant's situation that happened in 2005, right across the river from here, about 2 miles from here. But you made no mention of another case that happened in 2005 with Mirant in San Francisco, California. In that case—I mean, I will get into some details with the next panel about what happened out there, but the bottom line was Mirant was fined over seven figures, not some 30,000, seven figures, millions of dollars, because they were ordered by the regulator to keep the grid up and running, and because of that they see their permits under EPA, and the City of San Francisco sued them. I mean, do you agree that blackouts could potentially create the greatest environmental threat and public safety hazard, like uncontrolled sewage, heat stroke, and controlled industrial—uncontrolled industrial processes?

As I mentioned in my opening statement, a 7-month-old infant died this past week in Sugarland, Texas. He was in a car, 90 degree heat for a couple of hours. That was—the parents made a terrible mistake, but if our State has another drought heat wave like they did this past summer, 100 degrees every day in Houston, Texas, unprecedented. The hottest August on record. If that happens again and the power goes out, infants all across southeast Texas and elderly people all across southeast Texas, their lives will be at risk.

Would you agree that—I mean, again, blackouts could potentially create the greatest environmental threat and public safety hazards? Yes or no? Losing power in my State, the biggest threat, as opposed to something rolling on behind and fining Mirant for the things they did to keep the power up?

Ms. MCCARTHY. I would agree that reliability has prime concern here, yes.

Mr. OLSON. OK, thank you for that.

And another question for Mr. Moeller. Thank you for coming today, sir, as well. You have been critical of EPA's power sector

rulemaking and its effect on grid reliability. Has the EPA adequately addressed your concerns that you raised in your testimony here before this subcommittee last September with regard to the implementation timeline?

Mr. MOELLER. Well, Congressman, my main concern has been about the timing of the regulations. I am not an epidemiologist so I haven't gotten into the actual regulations themselves, but the concern is over the fourth year and the fifth year of compliance, and whether that is enough. And the fifth year is particularly challenging because it requires a generator to agree to certain things that can make it quite vulnerable again, perhaps, to citizen or other lawsuits.

So it is really about the timing and the focus on local reliability needs that are very load pocket specific in this country, and I can give you examples of those. We are working with the EPA to try and come up with a more formal arrangement so that we can advise them. We have not come to resolution yet, but that is because it is still sitting within the Commission. But to me, it is about timing, and the concern about the fourth and the fifth year and very local reliability impacts.

Mr. OLSON. Well, it sounds like you believe that there will be reliability emergencies in localized areas if EPA's rules are implemented as planned without flexibility.

Mr. MOELLER. I am not sure about emergencies, but I think we can anticipate severe challenges to change out fuel supply, add transmission, build new power plants in a very short amount of time.

Mr. OLSON. Yes or no answer, and my legislation will fix this problem? Yes or no?

Mr. MOELLER. I support your legislation.

Mr. OLSON. Thank you.

Mrs. Hoffman, my last round of questions is for you. I asked you about Secretary Chu, whether he was supportive of efforts to revenue any potential conflict between Federal laws, and this is what he said in a hearing last month. "I am very supportive. We don't want to order a generator to continue to be online to supply emergency backup power and face Federal—from another branch. We are very eager to work through those issues." Were you aware of that statement by Secretary Chu?

Ms. HOFFMAN. Yes, sir, I am.

Mr. OLSON. And you probably have expressed your concerns that there is no neutral body conducting a very specific plant reliability analysis. I believe there is overwhelming acknowledgement from your department, from FERC, from EPA, and from others that without some flexibility, there will be reliability issues.

If I can talk a little bit about in the time I have got here about private generators—not about private generators but about the public municipality generators. Does DOE's jurisdiction extent to public municipality-owned power?

Ms. HOFFMAN. I will check that for the record, but I do not believe the jurisdiction is over municipalities.

Mr. OLSON. And I have got a conflict here. My staff has told me that DOE's regs say yes, they are. You do have jurisdiction over them——

Ms. HOFFMAN. I am sorry.

Mr. OLSON [continuing]. But the DOE staff says no.

Ms. HOFFMAN. Yes, it is. I am sorry.

Mr. OLSON. There you go. My staff said the difference between DOE's regs and DOE's staff. But the Courts haven't ruled on this. The amendments to the Energy Policy Act of 2005 exempt rule electric co-ops and municipality-owned power for Part II of the Federal Power Act, which includes Section 202(c). So would they have to voluntary—they would have to voluntarily comply, correct, right now?

Ms. HOFFMAN. It is my understanding, yes, they would.

Mr. OLSON. OK. I guess I am out of time. I yield back the balance of my time.

Mr. WHITFIELD. Thank you. At this time, I recognize the gentleman from Pennsylvania, Mr. Doyle, for 5 minutes.

Mr. DOYLE. Thank you, Mr. Chairman.

So let us see here. Since 1978, there has been six times that DOE has issued a 202 order, and four of those times involved transmission lines. Only twice generators, right? So only two times since 1978 has this been ordered to a generator to provide power to the grid. In both those instances, in the 2001 case in California, the company Mirant was subject to a citizen lawsuit by the City of San Francisco, and environmental groups for exceedance of the 877-hour operating limit, and was forced to settle the lawsuit at significant expense, and in 2005 during its operation as directed by DOE, the Potomac River plant was forced to exceed its 3-hour max limit on February 23 of 2007, and the Virginia DEQ issued a notice of violation and subsequently fined Mirant for NAAQS exceedances that were a result of Mirant's compliance with the DOE order to run for reliability.

I want to ask a couple questions to Ms. Hoffman. Ms. Hoffman, do you believe if this bill becomes law that the DOE will be inclined to offer more 202 orders? Will there be some incentive here for you to use this 202 section more often than you currently use it?

Ms. HOFFMAN. We do have a concern that there may be an incentive, but from experience that has been demonstrated from the Mirant power plant example, the process that has been in place is that the order has to take in consideration environmental considerations, and we have been working very closely with EPA——

Mr. DOYLE. But I am asking you, is DOE—you issue the order, right?

Ms. HOFFMAN. Yes.

Mr. DOYLE. Are you somehow incentivized—do you think the DOE——

Ms. HOFFMAN. Oh, DOE? No.

Mr. DOYLE. Yes. No, I am asking, are you going to be——

Ms. HOFFMAN. Oh, I am sorry, I thought you were——

Mr. DOYLE. [continuing]. Incentivized to issue more 202 orders as a result of this bill?

Ms. HOFFMAN. No, sir.

Mr. DOYLE. OK, that is the point I want to make. So twice in 30-some years, you have asked a generator to come online, and

there is nothing in this bill that is going to incentivize the DOE to use this section more often than you currently use it.

Ms. HOFFMAN. No, sir.

Mr. DOYLE. OK, thank you.

Also, I want to talk about the 2005 order. Now, we know EPA has no authority in 202, but you routinely work, in the two instances that this has ever happened, with the EPA to minimize environmental risk. In 2005, Section 202 was used by Secretary Bodman in the Bush administration, and did this order include any environmental requirements?

Ms. HOFFMAN. Yes, it did.

Mr. DOYLE. So there is a history in the rare instances that this is used, that even though you are not required to by statute, you do work with EPA cooperatively to minimize environmental risk?

Ms. HOFFMAN. Yes, sir.

Mr. DOYLE. Thank you. Let me ask you another thing. I want to get to this thing about how this somehow incentivizes power companies to not comply with the 5-year rule. I mean, there seems to be the implication here that certain power companies will be incentivized not to comply with the MATS rule and make their necessary upgrades over this 5-year period what, in the hopes that they get a 202 order? I mean, think about how far-fetched that is, that you know, as someone who supports the MATS rule, and a lot of what EPA is doing, what is trying to be suggested here is that these power companies will say well gee, we don't have to comply with this, you know, this 5-year period to upgrade our facilities. We will just hang out here and hope DOE gives us a 202 order. I mean, come on. Let us not make statements or implications that just defy all logic. As a member who sits up on this committee and defends the EPA and what you are trying to do with these standards, to say to this committee that somehow power companies are going to use this as some sort of incentive to not make these upgrades—look. They have to make the upgrades even if there is a 202 rule, is that correct? They still got to make the upgrades, right?

Ms. HOFFMAN. Yes, sir.

Mr. DOYLE. So if power plants want to operate under the laws we are passing right now, they are going to have to comply with this 5-year period to make these upgrades. How are they skirting this? I mean, what are the chances of a company that says we are not going to make these upgrades because we might get a 202 order, what are the chances they are going to get a 202 order? Twice in 38 years?

I understand the concerns that you have, and I share those concerns, but it seems to me that there has got to be a practical way to say to generators in these ultra-rare instances that this occurs, twice in 30-some years, that they are not put in a situation where they have to pick which law to violate. That is all we are trying to do very narrowly with this bill. If the EPA or the DOE has some constructive language that they want to talk to us about before markup, I am receptive to hearing about it, but the implication that somehow power companies are going to use this to start the law I think is far-fetched and a stretch, and the idea that somehow the public health is being endangered because twice in 38 years this order was given—I yield back.

Mr. WHITFIELD. Thank you, Mr. Doyle. At this time I recognize the gentleman from Virginia, Mr. Griffith, for 5 minutes.

Mr. GRIFFITH. First let me ask, do you believe—thank you, Mr. Chairman. Do you believe that we are going to have more problems and more 202 orders issued as opposed to twice in 30 years because of the policies of the EPA, Ms. Hoffman?

Ms. HOFFMAN. I believe there is a potential for some emergency conditions to exist, but there are—if the plant operators truly are transparent and follow the procedures, then I think we can minimize any of those cases.

Mr. GRIFFITH. But because of the power plants that are run by coal that we have already seen that are shutting down, et cetera, is the reason that you made those statements and that you think there are going to be more 202 orders is because of some of the policies that are being brought about by the EPA under this administration?

Ms. HOFFMAN. I think there are a lot of things occurring in the United States right now. We are trying to build transmission, we have increased production on natural gas, the building of natural gas——

Mr. GRIFFITH. All right. And I wish I had——

Ms. HOFFMAN. All of those have to be taken into consideration.

Mr. GRIFFITH. And I wish I had more time, and of course, we don't have the natural gas lines going to all the power plants that may close down, and so a lot of these power plants cannot retrofit. That is also correct, is it not? Yes or no?

Ms. HOFFMAN. Yes.

Mr. GRIFFITH. And so part of your concern is the same concern that we heard from Mr. Moeller earlier, is that, you know, we are just not sure it is all going to get done, even in the best case scenario, it is all going to get done in time, but we are not going to have some situations where we have energy emergencies like Mr. Olson was talking about because of the policies and the timelines put together by the administration's EPA. Isn't that your—in the end, isn't that what you are saying? Yes or no? If there is going to be some slippage because of some of these policies?

Ms. HOFFMAN. There are concerns of potential impact——

Mr. GRIFFITH. OK, I am going to take that as yes and I have got to move on.

Let me switch gears. Mr. Moeller, if I might, and you may have to give me answers later because I am asking you about a bill that is not technically before us, but it does deal with hydropower, and I will address it generally to both you and Mr. Wright. Does FERC currently require private property rights to be considered when issuing a license under the Federal Power Act, and what about when the Commission is reviewing shoreline management plan—the shoreline management plans? Now let me give you some background so you understand. I represent the 9th District. My colleague, Robert Hurt, represents the 5th District of Virginia. He has Smith Mountain Lake, I have Claytor Lake. We have huge shoreline management issue situations, and there is a feeling by the folks there that the private property owners along the shores and in the case of at least Smith Mountain Lake, because I used to do title work in that area, some of the owners actually own the under-

lying land and AEP has the right to flood, and there are concerns about that.

So the question is—because Mr. Hurt has a bill in to make it clear—but does FERC currently require private property rights to be considered when issuing a license?

Mr. MOELLER. We have spent a lot of time on Smith Mountain Lake, but Jeff—Mr. Wright is much closer to it than I am on a daily basis. I think we will probably want to get back to you in writing, but I will——

Mr. GRIFFITH. And that is fine, because you should not have expected these questions today and I appreciate that. But if you could get back to me, because my big concern is that if we don't take these things into consideration, some of the folks there are worried that their docks and maybe even boathouses may be impacted, and even though there may be the authority there, do we not have then a taking—if the shoreline management plan does not take into consideration a taking for which either the government or—I guess it would be the government would be responsible for then reimbursing these folks for the damage to their property, not only the damage of the taking of that particular dock or boathouse, but also the obvious diminution in value of their property rights. So if you all could think about that and get some answers back to me, I would greatly appreciate it. And I would ask also if you all believe that private property is, in fact, a local economic interest, which would be covered, I think, under some of the current language.

Mr. MOELLER. Private property rights are a very significant part of whenever we do a relicensing on shoreline management plans, and related to titles they get very complicated, but I think we try to do our best to manage the various uses of a project that of course respects private property rights.

Mr. GRIFFITH. And I appreciate that. Last but not least, I think the bill we have before us is a good step on small hydropower generation, which is interesting it is not in the plan along with coal. You know, it is kind of interesting, I have got coal and I have got hydro, and both of them are not considered "all of the above" by the administration. What—can you tell me, what are the biggest barriers to greater hydropower development in the United States? Either one of you can take it.

Mr. WRIGHT. Right now, I think one of the biggest barriers to licensing are problems with mandatory conditions we have from other State, Federal, tribal. We are compelled under the Federal Power Act to include mandatory conditions from the land management agencies, Fish and Wildlife Service, National Marine Fishery Service. We have to wait on the Clean Water Act permits that are delegated to State governments. Even exemptions, the conduit exemptions, the 5 megawatt exemptions, are subject to mandatory conditions from State and Federal fish and wildlife agencies.

Mr. GRIFFITH. Thank you very much, and regrettably my time is up. Mr. Chairman, if you want to give Mr. Moeller time to respond I am happy with that, but my time is up.

Mr. SHIMKUS [presiding]. Your time is up.

Mr. GRIFFITH. I yield back. Thank you.

Mr. SHIMKUS. The—Mr. Moeller with have other opportunities with other questions. Mr. McKinley—Mr. "Coal Ash" is recognized for 5 minutes.

Mr. MCKINLEY. I am curious. Back when former Chairman Dingell raised a question back to both of you, I want to make sure I heard it right because of my hearing impairment. Did he say to you, Ms. Hoffman, can you assure us of reliability or that there would not be a blackout or brownout? How was that worded again? Can you share with me how that question came? And you said no, you could not assure, but Gina—Ms. McCarthy, she—you said yes, you could. So what was the question?

Ms. HOFFMAN. We could not absolutely assure that we cannot prevent——

Mr. DINGELL. Will the gentleman yield?

Mr. MCKINLEY. Yes, sir, I yield to you.

Mr. DINGELL. And I thank the gentleman for his courtesy. Can you assure us that reliability will not be in jeopardy during this time period? Please answer yes or no.

Mr. MCKINLEY. OK, thank you.

Mr. DINGELL. And I thank the gentleman.

Mr. MCKINLEY. So having—there was a yes—there was a no and a yes. So Mr. Moeller, do you agree with the EPA that they can give us that assurance?

Mr. MOELLER. Well I never make any assurances on reliability, so no.

Mr. MCKINLEY. So between the two of you, you heard her just testify that she could, and my question to you, from your position you are not—Ms. McCarthy, I will get back to you.

Ms. MCCARTHY. OK.

Mr. MCKINLEY. So Mr. Moeller?

Mr. MOELLER. We are working hard to make sure that we have a process with the EPA that deals with the timing issues. We haven't resolved that yet. It is of great concern to me that we have the proper process that allows our reliability experts to weigh in on the individual load pocket situations where a major plant, or maybe even a minor plant, is shut down but because of where it is in the grid, it is necessary perhaps to maintain voltage support for that part of the grid.

Mr. MCKINLEY. So if I could take from the former chairman, the answer is yes or no, do you agree that she could make that statement that she can assure us?

Ms. MCCARTHY. Mr. McKinley, I did not make that statement.

Mr. MCKINLEY. You did not?

Ms. MCCARTHY. I did not.

Mr. MCKINLEY. I misunderstood. I thought you said yes.

Ms. MCCARTHY. I said there were processes in place to address those issues.

Mr. MCKINLEY. I am sorry?

Ms. MCCARTHY. I assured the gentleman——

Mr. MCKINLEY. Could you speak a little closer to your mic?

Ms. MCCARTHY. I am sorry. I am sorry to interrupt, but I did not make assurances and EPA is not in the reliability business, and I understand that.

Mr. MCKINLEY. Well that is for sure you are not.

Ms. MCCARTHY. What I said was that there are processes in place to address reliability concerns as they arise.

Mr. MCKINLEY. OK. I just thought your answer back to Chairman Dingell was yes.

Ms. MCCARTHY. I think I made it very clear that I assured him that there were processes in place to address issues relating to reliability.

Mr. MCKINLEY. OK. Now the last time, Ms. McCarthy, you were here, there was a discussion between you and the DOE and it was about some of the new regs that were out, especially with the discharge, and you seem taken back by the fact that DOE had just reduced spending. You were saying how carbon capture and the like—but DOE had just cut the funding for research on that. Have you found out—have you done—have you raised the question about why did they cut back on carbon capture?

Ms. MCCARTHY. I am sorry, I don't—I do recollect that issue coming up and I know it was related to the Greenhouse Gas New Source Performance Standard, but I do not have any further information at this point to share with you.

Mr. MCKINLEY. I hesitate—with all due respect, I hesitate to ask you to eventually get back to us, because I am still waiting since last January for information from your office. But if you could, please, I would like to understand your position. If you are pushing for carbon capture but yet DOE is cutting funding and research, I think it is a contradiction here. The left hand doesn't know what the right hand is doing, and it is something that affects us on energy policy.

Ms. MCCARTHY. Congressman, if there is something that we owe you at any length in time in terms of response, I will take care of that immediately, but I will say that the rule that you are referencing is based on technologies that we believe is available today.

Mr. MCKINLEY. And that was one of the questions we asked.

Ms. MCCARTHY. Yes.

Mr. MCKINLEY. Show me where one plant that has that commercially available, when MIT is doing it—MIT's carbon capture initiative right now is underway to try to get to a point, but you are representing that it is a commercially—you said that it was commercially available when we asked. Name one plant in America that has a facility like this. You said you will get back to us.

Ms. MCCARTHY. I apologize.

Mr. MCKINLEY. I am still waiting.

Ms. MCCARTHY. We will get back to you right away.

Mr. MCKINLEY. Can you name one now?

Ms. MCCARTHY. I am terrible with names. They all sound so nice when you name utilities. No.

Mr. MCKINLEY. You beat the bell.

Mr. SHIMKUS. The gentleman's time is expired——

Mr. MCKINLEY. We will talk again.

Mr. SHIMKUS. And there are none.

Ms. MCCARTHY. OK.

Mr. MCKINLEY. Thank you very much.

Mr. SHIMKUS. The Chair recognizes the gentleman from Oregon, Mr. Walden, for 5 minutes.

Mr. WALDEN. I thank the gentleman.

I know when the President was running for office, President Obama said that, you know, his idea on coal was to end up with——

Mr. SHIMKUS. Would the gentleman yield?

Mr. WALDEN. Yes.

Mr. SHIMKUS. I didn't see my colleague from the neighboring State here, so you are recognized, Mr. Sarbanes, for 5 minutes.

Mr. WALDEN. I will yield back and start over at a later date.

Mr. SHIMKUS. You need to rework your statement anyway. You were humming around, so——

Mr. SARBANES. Thank you, Mr. Chairman. I appreciate it.

I am still getting my head around the issues here, but I certainly understand why a power plant or a company that is exercising its best efforts to try to make transitions and take steps to meet environmental standards, if something occurs that forces them to exceed to reliability requirement and therefore, they are put into conflict with some of these standards that they would, under those circumstances, expect to get some protection from liability and other exposure, because they are exercising all the best efforts and doing the things that we want them to do. But I can also see situations where there be an incentive to drag one's feet potentially—and this could be done consciously or unconsciously perhaps—thereby creating a situation where a crisis would occur in terms of reliability if you were unable to continue on. And that is the dynamic, the tension here that we are looking at, because we want to offer some protection where you genuinely put in this position of having to continue on and maybe violate some standards. At the same time, we don't want people to be able to gain the system in some ways. And I would appreciate it, Ms. McCarthy, if you could maybe speak a little bit more to any concerns you might have about that, or examples we have seen where that kind of thing has occurred and could occur in the future if there was a real broad blanket exemption or reliability protection put in place.

Ms. MCCARTHY. Thank you, Congressman. I would say that I don't disagree with the stated goals as you articulated them. All I will say is I don't believe that there any inherent conflict that warrants Congress to be concerned at this point, and there is no conflict in the application of the laws and the regulations as we have managed them under these laws. And I would say that in one instance you had a company that was provided a 202(c) order, as well as a 113(a) order. The combination of those was to provide a sure pathway to address reliability and a clear pathway to stay in compliance with environmental regulations. It was very successfully done. The company failed, according to the Virginia DEQ, to actually comply with those effectively and they were fined a minimal amount. We are dealing with a company that had compliance problems before, a company that continues to have compliance problems. I am sorry, not a company, a facility. The current owner was just fined in February almost $300,000 for six violations of pollution standards. So it was not unusual. It is unfortunate that they did not fully comply, but I don't think we would be sitting here now had they, and I don't think that warrants congressional action.

Now in terms of the problem with what might this signal be, we all agree that the DOE 202(c) order is a last resort. Our only con-

cern is that that last resort be not turned into a path of least resistance, because right now we have great activity in energy among our energy colleagues in terms of planning for compliance under MATS, making sure that they address any reliability issues, working with the three agencies that you see represented here. I just don't want this to change that dynamic and to make them understand that a 202(c) order could be available to them with no planning, with no advanced action, with no working with their environmental regulators or energy regulators, and provide them an opportunity to do nothing in the interim, and then to cause a reliability problem as a result.

Mr. SARBANES. Well, I think it is a fair concern, and we just need to be careful that the fix that we are attempting to design here is not overbroad with respect to the original problem that has been raised.

Ms. MCCARTHY. Congressman, can I make one correction? Just for Mr. Olson, the Potrero Utility incident was not related to 202(c). It was not a 202(c) issue, which is why we believe that the Mirant issue is the only one that is relevant in here, and in fact that isn't a problem in and of itself.

Mr. SARBANES. Thank you. I yield back.

Mr. SHIMKUS. Gentleman's time is expired. Chair recognizes the gentleman from Oregon now.

Mr. WALDEN. Are you sure about that?

Mr. SHIMKUS. Mr. Walden. I am not sure, but we are going to try.

Mr. WALDEN. All right. I thank the gentleman—chairman.

Families in America are really struggling with the cost of energy, whether it is trying to fuel up their vehicle so they can go to the grocery store or take their kids to school or after school activities. This is—the Obama administration is one that I think has a horribly misguided energy policy. It is not "all of the above." That was actually something Republicans talked about for a long time. Our only failure was that we didn't trademark that saying in time. But the President is on his Web site—and I assume he doesn't disown his own Web site, since it is his Web site. And it talks about all our energy resources and then leaves out 57 percent of the energy side of energy. No coal and no hydro is listed here. That is about 57 percent or more of America's energy. He seems to think the future of energy is Solyndra. To quote, "The true engine of economic growth for our country will always be companies like Solyndra. The future is here at Solyndra. We are poised to transform the way we use power, the way we power our homes, our cars, and our businesses." This is part of why a lot of Americans who are actually paying the bills and living in the real world in the middle class are concerned about the direction of this President and this administration and his failed economic policies that have left us in a horrible situation with the smallest workforce since 1981. Those of us with kids who are about to graduate from college are figuring where they are going to live on the hide-a-bed in the basement because they are moving back home. It is a real problem.

And then you go back to his comments in, I believe, San Francisco when he was running for office when he said, "Let me sort of describe my overall policy. What I have said is that we will put

a cap and trade system in place that is as aggressive, if not more aggressive, than anybody else's out there." This is President Obama running. "I was the first to call for 100 percent auction of the cap and trade system, which means that every unit of carbon gas emitted will be charged to the polluter. That will create a market in which whatever technologies that are out there that are being presented, whatever power plants that are being built, that they would have to meet the rigors of that market and the ratcheted down caps that are being placed imposed every year." So if somebody wants to build a coal powered plant, they can, it is just that it will bankrupt them because they are going to be charged a huge sum for all that greenhouse gas that is being emitted. This is President Obama again. "This will also generate billions of dollars we can invest in solar wind, biodiesel, and other alternative energy approaches. The only thing I said with respect to coal, I haven't been some coal booster. What I have said is that for us to take coal off the table," and this is as he said it, "ideological matter as opposed to saying if technology allows us to use coal in a clean way, we should pursue it. So if somebody wants to build a coal power plant they can, it is just that it will bankrupt them." Barack Obama, running for office.

Now, we know by his own Web site he doesn't think coal or hydro are part of an "all of the above" energy strategy. Coming from the Pacific Northwest, we actually think hydro is pretty important. And actually, a lot of our electricity comes from coal. We also have wind. We are now trying to figure out how to integrate wind into the grid and into a hydro grid. It is a very difficult process. In some parts of the country we now have negative energy pricing, where we are paying energy providers not to produce energy at certain times because we have a surplus. Taxpayers and ratepayers begin to wonder about that policy.

We have a great record in the Northwest on saving energy through conservation. We are very proud of that. I drive a hybrid on both coasts. I try and do my part. I can and I do. But this administration's policies are taking this country off the edge and driving up energy prices.

The Keystone Pipeline, another example where we could be working with our partners across the border in Canada, not only to create American jobs but to use North American energy and bring it here and refine it here and create jobs, and the President stands in the way of that, President Obama.

And so it is—I am just going to tell those of you and the agencies—Ms. Hoffman, you said earlier that you coordinate—the Department of Energy coordinates closely with the White House on Energy issues. I assume that means you also coordinate closely with the White House on energy issues like Solyndra. You must have. We have other committees looking into that and trying to figure out just how closely all that got coordinated. But at the end of the day, some of us actually believe in an "all of the above" energy policy. We are deeply concerned that EPA has the lowest number predicting in terms of gigawatts that are going to come off the grid as a result of the Obama administration's policies. I think my colleague here is going to talk about that a little bit.

We got to have a different direction. Part of us are concerned about the grid and its reliability because of the policies coming from this administration. My time is expired.

Mr. SHIMKUS. I thank the gentleman for his questions. Chair now yields to Mr. Waxman for——

Mr. WAXMAN. Thank you.

Mr. SHIMKUS. Would the ranking member—Chairman Upton, before I got here, said that he would give you 5 minutes for an opening statement and then a round of questions.

Mr. WAXMAN. That was very gracious of him, Mr. Chairman, and what I would prefer to do is to have my opening statement made part of the record and proceed now for 5 minutes.

Mr. SHIMKUS. That—we would greatly appreciate that. Without objection, so ordered.

Mr. WAXMAN. Thank you.

[The prepared statement of Mr. Waxman follows:]

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED TWELFTH CONGRESS

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Opening Statement of Rep. Henry A. Waxman
Ranking Member, Committee on Energy and Commerce
Hearing on "H.R. 4273, Resolving Environmental and Grid Reliability Conflicts Act of 2012, and Discussion Draft of
H.R. ___, the Hydropower Regulatory Efficiency Act of 2012"
Subcommittee on Energy and Power
May 9, 2012

Today, we will be considering two pieces of legislation. One is a thoughtful bipartisan bill. I believe the other bill is well-intentioned, but it has some serious problems that need to be addressed.

The first piece of legislation is a bipartisan discussion draft that will facilitate the development of new, environmentally responsible hydropower projects. It was introduced by Ms. McMorris-Rogers and Ms. DeGette.

Their staffs have worked closely with the Committee staff to produce this discussion draft. We have had extensive discussions with interested stakeholders and agencies. It has been a good, cooperative process that has produced balanced, bipartisan legislation. The discussion draft is supported by both hydropower developers and environmentalists.

The second piece of legislation is the Olson bill. This bill would shield utilities complying with a Department of Energy emergency order from any liability for noncompliance with any federal, state, or local environmental law or regulation resulting from actions taken to comply with the DOE order.

I understand the basic concern expressed by proponents of the Olson bill. Nobody wants to force a company to choose between complying with a DOE order and complying with environmental laws.

In reality, this type of conflict rarely, if ever, arises. Over the years, the Secretary of Energy has issued just a handful of section 202(c) emergency orders. Only two of those orders required generation facilities to run for reliability purposes. An actual conflict between a DOE order and environmental requirements may have happened, at most, one time.

In essence, the bill's supporters argue that Congress needs to legislate now to avoid a repeat of a problem that may have occurred just once, six years ago.

The larger concern with this bill, however, is that it is far broader than the narrow issue it purports to address.

Under current law, if a utility is ordered by DOE to run a power plant for reliability purposes and it anticipates that it may violate an environmental requirement administered by EPA, the utility would need to negotiate with EPA for an administrative order or consent decree, which would protect the company against any EPA enforcement action. That's what Mirant did with the Potomac River plant back in 2006.

EPA plays an important role in minimizing environmental impacts when a unit must run for reliability reasons. But under this bill, a utility has no incentive to reach an agreement with EPA to minimize the environmental impacts of operating under a DOE order.

That's because all potential liability for environmental violations would be waived by the issuance of the DOE order. EPA's role is eliminated. And the public is left with no assurance that unnecessary pollution will be avoided. This bill is drafted in a way that creates the potential for a big loophole in environmental protections.

The bill does include some non-binding language encouraging DOE to narrowly tailor its emergency orders. But that language is not mandatory. It provides no guarantee that the orders will minimize environmental impacts.

The liability waiver contained in this bill is very broad. It waives liability under every federal, state, or local environmental law or regulation. It doesn't just apply to the Clean Air Act. It would completely waive any liability for failing to comply with the Clean Water Act, the Endangered Species Act, and any other federal law you can think of that could be characterized as an environmental law. It also clearly waives liability under a host of state and local laws. And there is no time limit on the liability waiver.

This approach creates an incentive for electric utilities to delay installation of required pollution controls, betting that at the end of the day DOE will have to issue an order to keep the lights on and shield the power plant from liability for its illegal pollution. This poses a serious threat to the recently finalized mercury air toxics rules as well as other important rules.

Under the bill, DOE could order a coal plant to run that generates coal ash that it places in an impoundment. If that impoundment bursts, as it did in Kingston, Tennessee, the spill could blanket nearby communities, pollute miles of streams and rivers, and cost over a billion dollars to clean up.

Under the language of this bill, the company operating that plant could be shielded from any liability for the damage. I think we can all agree that would be a terrible outcome.

I look forward to examining these issues with our witnesses.

Mr. SHIMKUS. And the ranking member is recognized for 5 minutes.

Mr. WAXMAN. Thank you very much. Section 202(c) of the Federal Power Act gives the Secretary of Energy the authority to order a utility to generate or transmit electricity in an emergency situation. This authority is really a last resort. Only a handful of orders have been issued over the years. There has only been, at most, one case where DOE ordered required actions that led to noncompliance with environmental requirements, and even in that case it is not clear that noncompliance was necessary. One reason we rarely face this conflict is that potential issues are worked out with the regional grid operators and the environmental regulators. If that is insufficient, both DOE and EPA are involved in addressing potential conflicts. With enforceable environmental requirements in place, operators have a strong incentive to minimize the extent of any noncompliance with such requirements.

But this bill would change all that. It would allow DOE to waive liability for all environmental violations, eliminating the current incentives for operators to minimize noncompliance. The bill also removes EPA's important role in the process.

Ms. Hoffman, does DOE have the expertise to determine the appropriate environmental safeguards that should apply to a generation plant ordered to run under a 202(c) order?

Ms. HOFFMAN. DOE has the capability to do NEPA assessments and NEPA follow the requirements under the National Environmental Policy Act. What would—DOE relies on EPA and the environmental organizations is to look at is their need to develop an administrative compliance order.

Mr. WAXMAN. So you would—you could consult with EPA?

Ms. HOFFMAN. Yes, sir. We do and we have.

Mr. WAXMAN. If you choose—even if you do choose to consult with EPA, nothing in this bill requires that, nor does this bill require you to incorporate any of their suggestions. Right now, if a utility wants protection from liability for noncompliance with an environmental requirement, it must go to EPA and obtain an administrative order or enter into a consent decree. Ms. McCarthy, how would EPA handle a request from a company concerned that compliance with a 202(c) order would violate a Clean Air requirement?

Ms. MCCARTHY. We actually enter into a discussion with that company. We enter into a discussion with the State and the local community, and we make sure that we design any relief in a way that mitigates any environmental concerns and to the extent possible complies with environmental laws and regulations.

Mr. WAXMAN. Is this a process that can be completed quickly, if necessary?

Ms. MCCARTHY. It is.

Mr. WAXMAN. That process gives everyone the assurance that the company is doing its best to minimize the extent of environmental harm, but this bill would simply waive all environmental requirements for companies operating under a 202(c) order. Ms. McCarthy, with a free pass from all environmental requirements, would a company have any incentive to talk to EPA?

Ms. MCCARTHY. Not that I am aware of.

Mr. WAXMAN. In the example cited by GenOn, the company was operating under an administrative order. It was not at risk of EPA enforcement. Ms. McCarthy, if this bill were limited to situations where an EPA administrative order or consent decree were in place, would that ameliorate some of your concerns about the effects of this bill?

Ms. MCCARTHY. Some of the concerns would indeed be ameliorated by such a change.

Mr. WAXMAN. If we were trying to balance reliability needs and environmental protections, I just think it doesn't make sense to cut environmental regulators out of the process. I think what we have here are legitimate concerns. We ought to look at them carefully, balance them, so that we don't go too far.

And with that, I want to work with my colleagues on this subcommittee to see if we can achieve those goals. I yield back my time.

Mr. SHIMKUS. Chairman—Ranking Member yields back his time. Chair now recognizes Chairman Emeritus, Mr. Barton, for 5 minutes.

Mr. BARTON. Thank you, Mr. Chairman, for holding this hearing in the series of continuing hearings on our Nation's energy policy.

My first question is just to ask each of the senior officials whether their agency supports or opposes these two bills. Ms. Hoffman, does the Department of Energy support both bills, oppose both bills, undecided?

Ms. HOFFMAN. We don't have a position at this time on both bills.

Mr. BARTON. On either?

Ms. HOFFMAN. On either bill.

Mr. BARTON. What about you, Ms. McCarthy, what is EPA's position?

Ms. MCCARTHY. The administration doesn't have an official position, nor does EPA.

Mr. BARTON. So you all are neutral also?

Ms. MCCARTHY. We have raised concerns with the bill, but we——

Mr. BARTON. But officially you are——

Ms. MCCARTHY. We have no official position at this time.

Mr. BARTON. Neutral. What about the FERC, Mr. Commissioner?

Mr. MOELLER. I was allowed to speak for my colleagues to say that the four of us support the concept behind 4273, and I will let Mr. Wright address the——

Mr. BARTON. Well, I just want to kind of get a baseline on where the administration is, and apparently the administration is neutral, according to the Department of Energy rep, the Department of EPA—the agency of EPA, and the Commission.

I think it is a true statement what Ms. McCarthy said in her written testimony and what Mr. Waxman just alluded to, that there haven't been many cases in the past where we had to invoke this Section 202(c), and I think that is primarily for two reasons. Number one, we tended to have fairly substantial reserve margins so there has never really been an operating emergency, or not very frequently, and number two, until very recently most of the electricity generated in the United States was generated under State

regulatory—under State issues where they have a regulated power market. They don't have an open market like we have now in Texas where it is basically a merchant power market. But as the EPA continues to issue more and more stringent environmental regulations, those reserve margins are going down. And as more and more States open up their markets to competition, the economic consequence of that is always that you take the older, less efficient plants out of operation so you don't—and you are not able to keep a reserve margin in what used to be called the rate base.

So I think it is timely that these two bills, especially the first bill, H.R. 4273, have been put into play because in the future, I think you are going to see situations where reserve margins are not adequate and where you are going to have potential for blackouts. I have been told by several authorities, both in the private sector and the public sector in Texas, that we are going to have rolling blackouts this summer if we have heat like we did last summer. And last summer, there were deaths in Dallas, Texas, from the heat when some of our less robust populations air conditioners were stolen and the people couldn't—didn't the mobility nor the ability to call for help and they suffered the fatal consequences.

So Ms. McCarthy, in your written testimony you speak that—about a concern, to use your term, that if H.R. 4273 were to become law, that it could have a possible negative health consequence. Do you not agree that if you have a blackout for any extended period of time in an area that is having a high heat situation, that that is a higher potential for health than giving some sort of emergency operation to an older power plant that might violate for a small amount of time some very stringent environmental law?

Ms. MCCARTHY. I would absolutely agree that maintaining electricity reliability, it is critical. But that is why we have been working so closely with the regional transmission organizations, planning entities, including ERCOT, to try to understand the concerns and to address them in a way that maintains flexibility, that maintains reliability, and that is cost effective. And we believe we are working on those issues, and very effectively.

Mr. BARTON. Well I appreciate that, and my time is about to expire. I do want to say, Mr. Chairman, I strongly support both of these bills. You know, obviously they are subject to tweaking and being improved, but I think the concept in both bills is noble and I hope that the subcommittee moves them, the full committee moves them, and that we can work with our friends in the Senate and on the House floor to get these to the President's desk. I see no downside to either of these bills and I see a huge positive upside.

Mr. SHIMKUS. The ranking member—chairman emeritus yields back his time. Chair now recognizes himself for 5 minutes.

Thank you all for being here. You know, there was a Christian book published years ago called "Evidence that Demands a Verdict." It was laying out the facts, historical accuracies, and just makes a claim that people need to make a decision. The evidence of this administration's attack on coal is clear. I mean, we talked about it the last time you were here, Ms. McCarthy, about all the five rules and regs, MERC, Boiler MACT, cooling towers, shutting down plants now. Greenhouse gas had just come out a day or two

before, no new coal-fired power plants. We have the President's statement that I played last hearing about his—what he—what his desire was to do as President of the United States for coal. Now we have Obama II, the second term, no coal in his "all of the above" energy. It is clear—the evidence is clear that this administration has a deep-seated hatred for coal and electricity generated by that coal. And of course, we don't even talk about the Region 5 administrator and his crucifixion statement.

So we just can't go that way. I mean, you just can't keep coming here and saying yes, we really do like coal. Everything is going to be OK, because the evidence outweighs any public statements of no, we really do like it. Everything will be OK. We had a great hearing last year on reliability, and I want to put the bar chart up. Mr. Walden sort of mentioned it. The bar chart is an analysis of EPA rules and regs, and what the effect is going—on electricity generation around this country. The smallest little bitty bar, the 10 gigawatt, that is the EPA's analysis. Everything else is—the closest one—well, there is one close to that, the—Citibank is 15, but everything else is 25. EEI is 75.

So this isn't a debate really—Chairman Emeritus Barton was right. When you have an oversupply of electricity, one, you have low prices, but it mitigates this problem. When supply is going to be constrained based upon these rules, we are going to see this happening a lot. So this is one of the few times we are trying to get ahead of the curve, not talk about problems of the past. Even if EPA is right and it is only 10 gigawatts, that is a lot of base load offline because of regulations.

Now in that hearing, as I recall, DOE agreed with EPA, and my question to you, Ms. Hoffman, was who did that analysis under the DOE?

Ms. HOFFMAN. The DOE's study that was done was by Policy International, and the Department of Energy.

Mr. SHIMKUS. Policy, the policy sector. Don't you have an electricity sector group?

Ms. HOFFMAN. Yes.

Mr. SHIMKUS. Why would you have the policy folks do the analysis, and not the experts in DOE on electricity?

Ms. HOFFMAN. The study was done because it was a coordination across multiple agencies and the policy sector took the lead on that study. Our office——

Mr. SHIMKUS. Because it is a policy position, not one based upon science?

Ms. HOFFMAN. It was done based on modeling and analysis of information and data that was available.

Mr. SHIMKUS. I think we are awaiting a response in writing on this question. I think it was asked to be responded by mid-April, and we have yet to see it. Can you ensure that that gets to us to address this issue?

Ms. HOFFMAN. I will, sir.

Mr. SHIMKUS. Because the problem is this. I believe at least—I believe 40, which is probably the medium of this, which is four times more the EPA, which gives us four times more, so maybe we only had two. Now we may have eight. And then what happens?

Let me go to—my time is rapidly moving by. Let me just ask Ms. McCarthy, what are some of the tools you have? Let me go quicker than this. Is one tool the consent order?

Ms. MCCARTHY. Yes.

Mr. SHIMKUS. How quickly can it—can a consent order be activated?

Ms. MCCARTHY. A consent order is not just action by EPA, but it also needs to go to the courts as well. So it is a more lengthy process than an administrative order.

Mr. SHIMKUS. And how—the 2005 case that we are—how long did that take?

Ms. MCCARTHY. The 2005 case I believe took 6 months for the agency to do an administrative order——

Mr. SHIMKUS. So that is not really a timely response to fix a problem.

Ms. MCCARTHY. It—that was a situation that had no advanced warning. I don't want the committee to believe that that is——

Mr. SHIMKUS. Like an emergency.

Ms. MCCARTHY [continuing]. In place under the——

Mr. SHIMKUS. Like an emergency.

Ms. MCCARTHY. Say that again?

Mr. SHIMKUS. Like an emergency. That is when no advance——

Ms. MCCARTHY. Well it happened——

Mr. SHIMKUS. No advanced notice, that is why it is an emergency situation.

Ms. MCCARTHY. That is exactly why under the——

Mr. SHIMKUS. That is why we can't wait 6 months.

Ms. MCCARTHY. We established——

Mr. SHIMKUS. Let me ask another question. An administrative consent order, does it protect the company from citizen lawsuit liability in all cases?

Ms. MCCARTHY. It does not.

Mr. SHIMKUS. Thank you. My time is expired. I will now like to recognize my colleague, Mr. Scalise, for 5 minutes.

Mr. SCALISE. Thank the gentleman from Illinois, the chairman for yielding, and for raising these questions. I think it is important as we look at the legislation at hand, and I am strong supporter of both pieces of legislation. I think Mr. Olson and Doyle and others brought a strong bipartisan bill to address a serious problem that we have seen out there, especially as it relates to emergencies. I think from testimony today it shows that while these are isolated, that people that produce power for our country are unfortunately posed with a dilemma in the event of an emergency. And we are here for that reason, and again, with a very strong bipartisan group of cosponsors on the legislation, because I think there is the recognition that if a company is placed in this decision, you want them to be able to act based on what is best for consumers, while not being concerned that if they follow the order that they are given, they are going to be sued on the other side just for complying with the order.

And so Ms. McCarthy, in your testimony—and this is following up on Mr. Shimkus's comments—you say the EPA believes that the Executive Branch already has sufficient tools to address issues that may arise, and that was the reason you gave for—one of the rea-

sons you gave for the lack of need for this legislation, but yet, you just admitted in your testimony and your answer to Mr. Shimkus that the tools that you have, even including a consent order, do not prevent some outside lawsuit being brought forward. And so how can you say that the legislation is not necessary and you have the tools when, in fact, you don't maintain those tools to prevent outside lawsuits that we are trying to prevent just because somebody complied with an order?

Ms. MCCARTHY. We have issued administrative orders, last year alone, 1,300. We are dealing with an instance here in which we have a tool that is very reliable, a tool that is well thought out——

Mr. SCALISE. What tool are you talking about, consent orders?

Ms. MCCARTHY. The administrative order. A consent order is used very effectively as well, but the administrative order, which is what is in question here, is for all practical purposes a significant protection for both the generator involved and a significant source of protection for the community in terms of reducing pollution as the result of the need to comply with reliability and address reliability concerns.

Mr. SCALISE. So the consent order, the ability for you to issue those orders—and I will ask the question again. Does that ability that you have, the tool that you have, prevent a third party lawsuit from coming forward on the same issue?

Ms. MCCARTHY. I am sorry. You are using different terms. I just want to make sure I am answering your question correctly. A consent order does go to the court and does offer that protection.

Mr. SCALISE. How long does that take?

Ms. MCCARTHY. And administrative order does not directly, but——

Mr. SCALISE. A consent order—when you say consent order provides that protection, does the consent order prevent a third party lawsuit?

Ms. MCCARTHY. No.

Mr. SCALISE. That is the question.

Ms. MCCARTHY. A consent decree does. An administrative order, for practical purpose, does but it legally—there is a risk of civil action. It has almost never happened and in times——

Mr. SCALISE. Well, we are talking about almost never, but we are only talking about select emergencies, which is what this bill is specifically dealing with. And so when you say there is still that risk there, you know, on one hand you are saying you have got the tools in your tool chest, but then you——

Ms. MCCARTHY. It is impractical——

Mr. SCALISE. But you just acknowledged that there still is a risk. What we are trying to do is remove that risk. That is what the bill is being brought forward to address, is to address the risk that you are acknowledging exists.

Ms. MCCARTHY. I understand that. The only thing I think that we are disagreeing with is whether or not this tool is—the law is crafted effectively to address that issue while still minimizing the extent that pollution will be emitted and significantly protecting public health, which we believe the current system actually does.

Mr. SHIMKUS. Well let me ask you this question, because Commissioner Moeller earlier in his testimony said that all four current

FERC Commissioners support the concept behind this legislation that we are discussing so that generators are not in the position of having to choose whether to violate Section 202(c) of the Federal Power Act, or whether to violate environmental regulations. So I guess how would you respond to his testimony that all four Commissioners, including the chairman, support this?

Ms. MCCARTHY. I would join——

Mr. SCALISE. I think that this is actually solving a problem.

Ms. MCCARTHY. I would join in the chorus that reliability is essential to maintain, and that generators shouldn't be put in a position of having to choose with compliance between two orders. What I would suggest, however, is that they are not put in that position now. They never have been, and I don't anticipate that they will be as a result of any actions that——

Mr. SCALISE. But you did acknowledge that there is that risk that we are addressing—and I think it is the question, on one had you are saying you support the concept behind it, maybe you have some differences in how it is drafted, but then in your testimony "EPA believes that the Executive Branch already has sufficient tools to address issues that may arise, yet later as we were talking, you acknowledged that there are risks still even with your tools. There are still risks.

Ms. MCCARTHY. If there is a legal risk in practical terms, it has not happened.

Mr. SCALISE. And we are just making sure that not only in practical terms but in legal terms it doesn't happen by removing the risk. By removing risk——

Ms. MCCARTHY. I understand.

Mr. SCALISE [continuing]. You actually give everybody the comfort that they can go and do what they need to provide power without that risk.

Ms. MCCARTHY. I understand that. We just want to make sure that the cure is commensurate with what you find——

Mr. SCALISE. And that is why I think you have got a broad bipartisan group of members that came together to make sure that cures right.

One final question I want to ask you before my time expires. Earlier in the year, Mr. Terry, I believe it was, on our committee had asked Administrator Jackson who was before our committee if EPA would start posting petitions on your Web site so that we could see the petitions that are being brought forward, and Administrator Jackson acknowledged that yes, she would start posting and said it was easy to do, and yet still to this day there are no postings. Can you tell us why, months later, that still hasn't happened and do you have any kind of timeframe of when we will start being able to get that public information out in a transparent manner so that people can see this on the Web site?

Ms. MCCARTHY. I will make sure that I take your concern back, and we will respond to that right away.

Mr. SCALISE. I appreciate that and I yield back the balance of my time.

Mr. SHIMKUS. Gentleman yields back his time.

Mr. WALDEN. Mr. Chairman, just to follow up on.

Mr. SHIMKUS. Is there objection for 1 minute for Mr. Walden? Without objection, so ordered. You are recognized for 1 minute.

Mr. WALDEN. Because I asked the same question of Administrator Jackson, and she committed that she would do that and make that change, and I have been busy on other matters, and so I would share in what Mr. Scalise raised regarding Mr. Terry, and would appreciate a response.

Ms. MCCARTHY. I will make sure I——

Mr. WALDEN. Because she indicated it wouldn't be a problem and you would get right on it, so——

Ms. MCCARTHY. I will bring that back. Thank you.

Mr. WALDEN. Thank you.

Mr. SHIMKUS. I thank my colleague, and Chair now recognizes my colleague from Kansas, Mr. Pompeo, for 5 minutes.

Mr. POMPEO. Thank you, Mr. Chairman. I have been waiting 16 months to say this.

I agree with Mr. Doyle. I read the objections Ms. Hoffman and Ms. McCarthy have, and you are concerned that you will create an incentive for power plants to sort of do nothing and hope they will get an order. It doesn't hold much weight for me, much concern, and I think the likelihood of that happening is pretty low.

Are there any other concerns that you all have besides that one that—I didn't read them, but are there concerns besides that concern of a generator sort of gaining the systems and hoping on hope that they get one of these orders to keep them in the clear?

Ms. HOFFMAN. I don't have any other concerns. I think part of the process is making sure that we work diligently through the process in such that the Executive Order, the 202(c) order is clear under the terms of reliability event is happening, and how long and the duration of that event, as well as any administrative order is clear on the terms and conditions under which a power plant would operate.

Mr. POMPEO. I appreciate that. Thank you.

Ms. McCarthy, are there concerns other than that, that risk?

Ms. MCCARTHY. The only other concern is that I believe it is extremely important for EPA and the States to be engaged in this decision and have a clear role to minimize pollution when you are addressing a reliability problem.

Mr. POMPEO. All right, thank you. I appreciate that.

Let me try and get—I listened to the colloquy between, Ms. McCarthy, you and Mr. Scalise. There have only been two, and we are concerned that this might happen, this disconnect. I will describe to you why I think folks are concerned about it, and it has to do, I think, with the increased likelihood as these regulations come into place that we see this issue arise more and more. You and I back in February talked about Utility MACT and whether suppliers had said yes, we can actually build this darn thing that is compliant. I asked you if you had a certification from suppliers that they could. I was hearing they couldn't get these plants financed because no supplier would come in and say we can actually do that in the real world. At that point, you said you had no written guarantees from suppliers. Have you received any since then, since the time we spoke back in February, that they can build MATS and Utility MACT compliant facilities?

Ms. MCCARTHY. We are actually looking at that issue, and as you might guess, we have received petitions to look at that issue, so we will be addressing it.

Mr. POMPEO. I appreciate that. I just want to talk about one of the petitions that came from Institute of Clean Air Companies, representing a lot of the folks who are going to be tasked with actually doing this work. They are very, very concerned that they can't build these plants, and this starts to get to this reliability risk that I think now exists more than it may have in the years that we talk about there being very few of these 202(c) orders required.

Ms. MCCARTHY. I really appreciate the fact that this concern has been raised about new facilities. I just want to clarify that it is not a concern about the existing facilities continuing to operate.

Mr. POMPEO. That is correct. Their petition relates to particularly mercury measurement, the capacity to measure mercury in an accurate and timely way.

Ms. MCCARTHY. We will definitely be taking a look at that. Thank you.

Mr. POMPEO. Great, thank you.

With that, I yield back the balance of my time, Mr. Chairman.

Mr. SHIMKUS. The gentleman yields back his time. The Chair now recognizes the late-coming Mr. Gardner, who is trying to get to his seat, for 5 minutes for questions.

Mr. GARDNER. Thank you, Mr. Chairman. Thank you for recognizing me, and thank you to the witnesses. I won't take long with my questions this morning.

To Ms. McCarthy, thank you very much for being here.

Tristate is a wholesale electric power supplier in Colorado that is owned by the 44 cooperatives generating, transmitting electricity, and has come to my office many—multiple times trying to talk about their compliance with EPA's Utility MACT standards, and whether it would likely cost Tristate about $1 million. That is their estimate, that it would likely cost them $1 billion. This is partly due to the fact that they will have to install three FCRs which remove nitrogen oxide at the Tristate Craig facility in Craig, Colorado, and so I would like to ask you to confirm this because I know you don't have the numbers in front of you, but I am asking you to comment on the rural co-ops which are nonprofits and member-owned. And so the first question is do you agree that some customers will see increases in their rates due to some of the rules EPA is trying to implement?

Ms. MCCARTHY. We actually have modeled some slight increases in energy and they differ region to region.

Mr. GARDNER. And so those rates would increase. How do you propose the nonprofits comply with these rate increases, apart from passing on these costs to the rate payers?

Ms. MCCARTHY. Mr. Gardner, I would indicate that our analysis that we did with the Mercury and Air Toxics Standard indicated that the energy prices would likely fall within the range of what we have seen in 1990 and historic fluctuations. We saw between 1 and 3 percent increases, which means about—for an American family about $3 a month increase on their electricity bill.

Mr. GARDNER. And so that is just the only way they can do that is to pass those increased costs onto their rate payers?

Ms. MCCARTHY. I have trouble answering that question because I don't live in the energy world, but my understanding is that compliance can be achieved by lower demand as well as increased generation, fuel switching, and the number of techniques.

Mr. GARDNER. Thank you. Yield back my time.

Mr. SHIMKUS. Would the gentleman yield to me for just one moment?

Mr. GARDNER. Yes, I yield.

Mr. SHIMKUS. I think that is the point that we are trying to drive home. You are right, Ms. McCarthy, you do not live in the energy world, but then you make extrapolations on gigawatt issues that are reliability concerns based upon a chart I saw. DOE rolls over in acceptance of your electricity generation or lack thereof analysis, and when you have the people in the field who are disputing that analysis on the gigawatt issue, we are debating with an environmental agency, not our Department of Energy. And if the analysis was close to what industry, financial people, FERC, EEI say, then we would cut some leeway, but the administration's proposal—actually the environmental rules and the effect on the electric grid of 10 gigawatts is laughable. And so we—you can do all the analysis on emittance you want, but we reject the premise that you all are experts in electricity generation, cost of building plants, and developing those.

You still have a couple minutes. This allows me to ask Mr. Moeller—make a point. Congressman Griffith mentioned a lake facility and property, of course, Vicky Hartzler would be happy if I would mention Lake of the Ozarks and those issues of those, which is commutable distance in my district, but you all have been somewhat helpful in easing some of the concerns. I think there are still some issues out there, and we would hope that you would——

Mr. DINGELL. Mr. Chairman.

Mr. SHIMKUS. Yes, sir.

Mr. DINGELL. We have not addressed the question of whether or not there are rights to judicial review of these different questions, and if so, how they are applied. Could I ask just a couple yes or no questions on this?

Mr. SHIMKUS. The time is my colleague from Colorado.

Mr. DINGELL. Well, I don't want to intrude on his time.

Mr. GARDNER. I would be happy to yield to the gentleman from Michigan if the gentleman——

Mr. SHIMKUS. I am done.

Mr. DINGELL. Well, you are all very kind and I thank you.

These are for Ms. Hoffman and DOE. Is an order under Section 202(c) currently subject to judicial review, yes or no?

Ms. HOFFMAN. Yes.

Mr. DINGELL. Yes. Can somebody file suit now to stop an emergency order as being antithetical to the public interest either for health safety or other reasons, yes or no?

Ms. HOFFMAN. They have to seek a rehearing.

Mr. DINGELL. Now, would it still be subject to review if the Olson bill were to be adopted?

Ms. HOFFMAN. Yes.

Mr. DINGELL. Today there is a question whether DOE can actually order a generator to violate a law administered by EPA or an-

other agency. If this bill were to be signed into law, would this action put a thumb on the scale in the eyes of the court that Congress intends Section 202(c) to trumpet environmental laws? This goes to Ms. McCarthy.

Ms. MCCARTHY. My understanding is that it would give essentially a pass on environmental laws with the exception of OSHA.

Mr. DINGELL. Is there in any statute or any regulation or in any cooperative management between the sundry departments down there a provision which requires consultation, or which permits consultation between DOE, EPA, and/or the State agencies which were participants in these matters as we went through the case that we are discussing today?

Ms. MCCARTHY. I am sorry. I don't believe there is any written requirement for that——

Mr. DINGELL. OK.

Ms. MCCARTHY [continuing]. But because environmental laws have not been preempted for compliance purposes, that DOE consultation always includes EPA to ensure that we are not conflicting the generators who have to comply with 202(c).

Mr. DINGELL. Now does EPA—do both of the agencies, EPA and DOE have to consult, or may they consult, or may they not consult? What is the law on that?

Ms. MCCARTHY. We have to consult to the benefit of the generator to ensure that we are providing them a clear pathway——

Mr. DINGELL. Is that required by both agencies or not?

Ms. HOFFMAN. It is not required. The law does not have any statement, the existing law or——

Mr. DINGELL. Now if they do not consult or if they do consult, is that appealable by any party or other person not a party.

Ms. HOFFMAN. No.

Mr. DINGELL. No. Mr. Chairman, I thank you for your courtesy and I thank my colleague. Thank you very much.

Mr. SHIMKUS. We thank the chairman emeritus. I think your questions are very helpful. We would like to now again thank the first panel for your time and your due diligence in answering our questions.

We would like now to ask the second panel to join us. OK, we are almost getting there. If we could ask folks to take their seats and get the door in the rear closed. We want to thank the second panel. Obviously we have two groups, the first three on reliability, the second from the hydro issue. Many of you are well-experienced at congressional hearings and testimony. Your full statement will be submitted for the record. You will have 5 minutes and I will recognize you left to right, and then—recognize you left to right, and we can begin.

First I would like to recognize the Honorable Betty Ann Kane, chairman of the D.C. Public Service Commission. Again, your full statement is in the record. You have 5 minutes. Welcome.

STATEMENTS OF BETTY ANN KANE, CHAIRMAN, PUBLIC SERVICE COMMISSION, DISTRICT OF COLUMBIA; DEBRA L. RAGGIO, VICE PRESIDENT FOR GOVERNMENT AND REGULATORY AFFAIRS AND ASSISTANT GENERAL COUNSEL, GENON ENERGY, INC.; STEPHEN BRICK, CONSULTANT, ON BEHALF OF THE ENVIRONMENTAL INTEGRITY PROJECT; ANDREW MUNRO, DIRECTOR, CUSTOMER SERVICE DIVISION, GRANT COUNTY (WASHINGTON) PUBLIC UTILITY DISTRICT, ON BEHALF OF THE NATIONAL HYDROPOWER ASSOCIATION; KURT JOHNSON, PRINCIPAL, TELLURIDE ENERGY, ON BEHALF OF THE COLORADO SMALL HYDRO ASSOCIATION; AND MATTHEW RICE, DIRECTOR, COLORADO CONSERVATION, AMERICAN RIVERS

STATEMENT OF BETTY ANN KANE

Ms. KANE. Thank you very much, Mr. Chairman, and members of the committee. I am very pleased to have the opportunity to be here this morning to discuss our comments on the Resolving Environmental and Grid Reliability Conflicts Act of 2012.

As we understand it, the intention of the bill is to more clearly define the situations in which emergency orders may be issued under the Federal Power Act, and to limit the liability of electric generators when obeying such an order. This bill speaks directly to a very difficult and challenging experience of the D.C. Public Service Commission in its efforts to ensure electric reliability service in the Nation's capital. We believe that—I will speak of the experience and describe how enactment of the bill could prevent such situations in the future, and hopefully could lead to a more timely resolution of these kinds of conflicts.

My attorney is always happy to say that nothing that I say in my testimony or in answering questions has any relationship to any open case currently before the D.C. Commission.

The D.C. Commission is an independent agency of the government of the District of Columbia. It was actually first established by Congress in 1913. We are coming up on celebrating our centennial next year, and reaffirms the Home Rule Charter Agency under the District's Self-Government Act. It is a quasi-judicial regulatory agency, and like our fellow Public Utility Commissions in the other 50 States, our statutory responsibility is to ensure the provision of safe, affordable, and adequate natural gas, electricity and telecommunications services. Specifically in relation to this legislation, we have a responsibility under district law and through our oversight of the Potomac Electric Power Company to ensure that the Nation's capital has an adequate supply of electricity at all times.

In the summer of 2005, a situation arose, which has been alluded to. At that time, we were served—the city was served by three must-run power plants, none of which were actually owned by Pepco. We are a restructured state. One of these—all three of them are must-run units. One of these plants, which at the time was owned by the Mirant Company, an independent power provider, the Potomac River Generating Station, on August 22, 2005, issued a press release, suddenly announcing it was going to shut down the plant in just 2 days. This plant is located in the City of Alexandria, just across the river from the District. It doesn't supply electricity

to anyone in Virginia. It is connected to the District's power grid through several transmission lines that run under the river. We understand that Mirant announced its shutdown of the plant in response to emissions abatement concerns which had been raised by the Virginia Department of Environmental Quality, acting under the Federal Clean Air Act, and Mirant said that it could not satisfy the Department's concerns at any level of output. Apparently it had tried some reductions previously.

The D.C. Commission immediately responded to this announced shutdown by filing an emergency petition on August 24, asking the Federal Energy Regulatory Commission and the Department of Energy to order the plant to continue to operate. The continued operation was critical to ensuring that the downtown sectors of the District, including the White House, the Capitol, and other important Federal as well as District government agencies had adequate access to electric supplies. This was in the summer.

The plant was shut down for 28 days. Finally, on September 21, 2005, the company voluntarily resumed operations at a reduced level. I was not on the Commission at the time, but my staff tells me that every day during the hot summer period at the end of the summer that the plant was not operating, they prayed for mild weather. The Federal agencies did not respond for several more months. The Secretary of Energy issued an order in December of 2005, which directed the continued operation of the plant to ensure reasonable electricity reliability, but also said that the company shall utilize pollution control equipment and measures that maximize—to the maximum extent possible reduce the magnitude and duration of any exceedance of the air quality standards. The Federal Energy Regulatory Commission issued its order in January, 2006, and that directed Pepco and RTO PJM to come up with an immediate plan, as well as a long-term plan for transmission to ensure electric reliability in the District. And finally, EPA issued its administrative compliance order on June 1, 2006, about 10 months after the initial shutdown.

There were some extensions of the DOE order so that transmission could be—capacity could be installed. The Commission itself issued an order ordering building of new transmission lines. But during the time that the lines were being built and the DOE order was still in effect, the plant was operating in order to supply electricity when needed, and during that time the plant was fined $52,000 while it was—by EPA while it was—excuse me, by Virginia while it was operating under the DOE order.

We believe that the resolving legislation would relieve must-run generators from having to pay such fines while they are operating under an emergency order from another agency under Section 202(c) of the Power Act, and we—therefore, we support the legislation. We also hope that the bill could be useful in assuring that emergency orders could be obtained in sufficient time to compel a generating plant to continue operating. As I said, for the 28 days that we were without the plant operating, electricity reliability was in peril, and it was another 118 days from the first shutdown until we got the DOE order, making them—ordering them to resume operation. Only the voluntary decision of the plant's owner shortened the period of heightened risk.

This was not a comfortable experience for the Commission, and it should not be a comfortable experience for the Commission. No State agency wants to be in a position to have to go to a Federal agency and ask them to do something that is going to cause a company to violate what another Federal agency ordered them to do, or what another State has ordered them to do. And we believe that the legislation can help resolve that conflict while supporting the obligation of State utility commissions to carry out their responsibility for the reliability and safety of electric transmission, distribution, and supply systems under their jurisdiction.

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

[The prepared statement of Ms. Kane follows:]

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Summary of Testimony of Betty Ann Kane

Chairman of the Public Service Commission of the District of Columbia

Before the U.S. House of Representatives

Committee on Energy and Commerce, Subcommittee on Energy and Power

On H.R. 4273, the "Resolve Environmental and Grid Reliability Conflicts Act of 2012"

May 9, 2012

H.R. 4273 speaks directly to a difficult and challenging experience of the D.C. Public Service Commission in its efforts to ensure reliable electricity service in the Nation's Capital. Enactment of H.R. 4273 could prevent or quickly resolve conflicts in the future between the enforcement of air quality regulations and the need to obtain peak load electricity generation.

My Testimony describes a situation in 2005 - 2006, when the Mirant Corporation issued a press release announcing it was going to shut down the Potomac River Generating Station in just two days. The PRGS, located in the City of Alexandria, Virginia, is connected to the District's power grid through several transmission lines. Mirant announced its shutdown of the PRGS in response to emissions abatement concerns raised by the Virginia Department of Environmental Quality, acting under the federal Clean Air Act. The Testimony outlines the subsequent steps taken by the D.C. PSC, the Federal Energy Regulatory Commission and the U.S. Department of Energy to ensure continued operation of the PRGS during peak demand summer months while minimizing environmental consequences. I conclude by describing the steps taken by the D.C. PSC, Pepco and PJM to expand transmission capacity in and around the Washington, D.C. area to address the eventual shutdown of the PRGS.

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Chairman of the Public Service Commission of the District of Columbia

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On H.R. 4273, the "Resolve Environmental and Grid Reliability Conflicts Act of 2012"

May 9, 2012

Mr. Chairman, members of the Subcommittee on Energy and Power, Good Morning. My name is Betty Ann Kane. I am the Chairman of the District of Columbia Public Service Commission. Thank you for the invitation to appear before you today to provide comments on H.R 4273, the "Resolve Environmental and Grid Reliability Conflicts Act of 2012." As I understand it, the intention of H.R. 4273 is to more clearly define situations in which emergency orders may be issued under the Federal Power Act and to limit the liability of electric power generators when obeying such an order. The provisions of H.R. 4273 speak directly to a difficult and challenging experience of the D.C. Public Service Commission in its efforts to ensure reliable electricity service in the Nation's Capital. I am pleased to have the opportunity to share that experience and to describe how enactment of H.R. 4273 could prevent such situations in the future and lead to a more timely resolution of those kinds of conflicts. I must also state for the

record that nothing in my testimony has a relationship to any open case currently before the D.C. Commission.

The District of Columbia Public Service Commission is an independent agency of the government of the District of Columbia, first established by Congress in 1913 and reaffirmed as a Home Rule Charter Agency under the District of Columbia Self-Government and Governmental Reorganization Act of 1973, Pub. L. No. 93-198, title IV, § 493(a), 87 Stat. 774 (1973). The Commission is a quasi-judicial regulatory agency. Like our fellow public utility commissions in the other 50 states, our statutory responsibility is to ensure the provision of safe, affordable, and adequate natural gas, electricity and telecommunications services by the public utilities and service providers licensed to do business in the District. Specifically, the D.C. Public Service Commission has a responsibility under District law, and through our oversight of the Potomac Electric Power Company ("Pepco") in the District of Columbia, to ensure that the nation's capital has an adequate supply of electricity at all times. In the summer of 2005, a conflict between the need for electric reliability and environmental laws came close to compromising the electric supply in Washington, D.C. for residents, businesses and local and federal government agencies.

In the summer of 2005, the District of Columbia was served by three must-run power plants, the Benning Road Generating Station, the Buzzards Point Generating Station, and the Potomac River Generating Station. As a result of legislation enacted by the D.C. Council, these plants were not owned by our local distribution company but were owned by independent generating companies. These plants included what are called "must-run" units, which means that they were crucial to the reliability of electricity supply at peak times. Consumers relied upon

these plants during hot summer days when, due to limitations in transmission capacity at the time, it was not possible to import sufficient power into the District from other generators.

On August 22, 2005, Mirant Corporation, an independent power provider, who then owned one of these must-run plants, the Potomac River Generating Station ("PRGS" or "Plant") issued a press release announcing it was going to shut down the Plant in just two days. The PRGS is located in the City of Alexandria, just across the river from the District, but it does not supply any electricity to Virginia. It is connected to the District's power grid through several transmission lines. Mirant announced its shutdown of the Plant in response to emissions abatement concerns raised by the Virginia Department of Environmental Quality ("VA DEQ"), acting under the federal Clean Air Act.

The D.C. Commission immediately responded to this announced shutdown by filing emergency petitions on August 24, asking the Federal Energy Regulatory Commission ("FERC") and Department of Energy ("DOE") to order the Plant to continue to operate. The continued operation of the PRGS was critical to ensuring that the downtown sectors of the District, including the White House, the Capitol, and other important federal, as well as District government agencies, had adequate access to electricity supplies.

The PRGS was shut down for twenty-eight (28) days. Finally, on September 21, 2005, Mirant voluntarily resumed operation of the Plant at a reduced level. I was not on the Commission at the time, but staff tells me that every day during that hot end of summer period that the plant was not operating they prayed for mild weather. The Federal agencies did not respond for several more months. The Secretary of Energy issued Order No. 202-05-3, in Docket No. EO-05-01, on December 20, 2005, which directed the continued operation of the

PRGS to ensure "reasonable electric reliability . . . [that also] minimizes any adverse environmental consequences." The FERC issued its Order on January 9, 2006, in Docket No. EL05-145-000, directing Pepco and PJM Interconnection, L.L.C. ("PJM"), the Regional Transmission Organization with responsibilities for electric transmission covering the Washington, D.C. area, to file an immediate plan, as well as a long-term plan, to ensure the maintenance of electric reliability in the Washington, D.C. area.

Pepco and PJM have been working since this period to expand transmission capacity in and around the Washington, D.C. area to address the eventual shutdown of the Potomac River Generating Station. On March 6, 2006, in Formal Case No. 1044, Order No. 13895, the D.C. Commission approved Pepco's emergency application for a certificate of convenience and necessity to construct two 69kV overhead transmission lines and accepted notice of the proposed construction of two 230kV underground transmission lines. Further, the D.C. Commission, in Order No. 13907, established a Demand Response Working Group to develop near term solutions to bolster options for addressing reliability concerns. The necessary transmission capacity was fully installed on June 22, 2007. It took 16 months to install after the emergency certificate of convenience and necessity was issued, but that time period was greatly shortened because it made use of preexisting conduits under the Potomac River. As of the most recent assessment from PJM, issued in September 2011, the planned shutdown of the Plant in October of 2012 would not cause any reliability issues, but additional transmission capacity would be required before 2016, when load growth would again require use of the Plant.

The Department of Energy issued a series of orders extending its original December 2005 emergency order to ensure that the Potomac River Generating Station continued operating until

the additional transmission capacity was installed. On March 23, 2007, at the direction of PJM, and in accordance with the Department of Energy's order, the Plant was operating to ensure a reliable supply of electricity in the District while a transmission line was down for maintenance. During this event, the VA DEQ cited the owners of the Plant for its operations, which exceeded applicable emission standards. Mirant was fined $52,000 during the course of providing the necessary electricity supply to Washington, D.C.

A complete chronology of the PRGS incident is attached to my testimony.

The "Resolving Environmental and Grid Reliability Conflicts Act of 2012" would relieve must-run generators, like the Potomac River Generating Station, from having to pay such environmental fines, while they are operating under an Emergency Order from another agency pursuant to Section 202(c) of the Federal Power Act. Because the proposed legislation would enable generation companies to operate electric plants without fear of penalties for violations of other laws when required to do so by emergency orders of FERC and DOE, for example, I am supportive of this bill. The proposed law would also encourage generators to keep plants operational for emergency use to maintain electric reliability and prevent any premature plant retirements based solely on having to pay fines for operating in emergency situations.

I also hope that H.R. 4273 could be useful in ensuring that emergency orders can be obtained in sufficient time to compel a generating plant to continue operating. For the twenty-eight days that the Potomac River Generating Station was shutdown, the electric reliability of the Nation's Capital was imperiled because environmental regulations compelled the immediate shutdown of a must-run generating facility. It was another one-hundred and eighteen (118) days from the date the plant was first shutdown until the Department of Energy issued an emergency

order directing the Plant to resume operations. Only the voluntary decision of the Plant's owner shortened this period of heightened risk. The electricity consumers of the District of Columbia, including the offices, facilities and operations involved in all three branches of government, as noted in the DOE Order, were fortunate not to have required the additional capacity provided by the Potomac River Generating Station during the twenty-eight days before Mirant voluntarily restarted the Plant. If Mirant had not voluntarily resumed operation, that luck would have to have held out over four times as long for the proposed legislation to have an impact. It is important that the legislation also remove any barriers to ensure that the Department of Energy and FERC have the authority necessary to issue section 202(c) orders in an expedited manner.

The PRGS experience was not a comfortable one for the D.C. Commission. No state agency wants to be in a position to have to go to a federal agency and ask them to do something that is either going to cause a company to violate what another federal agency has ordered them to do, or what a neighboring state has ordered them to do. The provisions of H.R. 4273 can resolve that conflict while supporting the obligation of state utility commissions to carry out their responsibility for the reliability and safety of the electric transmission, distribution and supply system under their jurisdiction.

Thank you for allowing me this opportunity to explain to the Committee why the passage of the "Resolving Environmental and Grid Reliability Conflicts Act of 2012" is important and necessary for the future of electric reliability. I would be happy to answer any questions.

Attachment: Chronology – Summary of Events in 2005 - 2008

Date	Event Description
August 19, 2005	Mirant submitted to VA DEQ an emissions modeling study which showed emissions contributed to significant localized exceedances of the National Ambient Air Quality Standards
August 19, 2005	VA DEQ issued a letter to Mirant requesting immediate actions to protect human health and environment, including either reduced level of operation or shut down of PRGS. This letter asked Mirant to provide a summary of the actions taken by August 24, 2005
August 21, 2005	Mirant reduced production of all units at the Plant to their minimum load
August 22, 2005	Mirant issued a press release to shut down Potomac River Generation Plant on August 24, 2005
August 24, 2005	DCPSC filed emergency petition with DOE and FERC
August 24, 2005	Mirant shut down all five units of the PRGS
September 21, 2005	Mirant resumed its operation at the reduced level
December 20, 2005	DOE issued the Emergency Order, Order No. 202-05-3, expiration date October 1, 2006

Date	Event Description
January 9, 2006	FERC order issued
March 6, 2006	DCPSC Issued Order No. 13895, approving the proposed two 69 kV lines and accepting notice of the construction of two 230 kV lines
September 28, 2006	DOE extended the expiration date until December 1, 2006
November 21, 2006	DCPSC requested an extension of Order No. 202-05-3
November 22, 2006	DOE issued an order allowing for extension for effective time period to February 1, 2007
January 31, 2007	DOE issued an order allowing for extension for effective time period to July 1, 2007
March 23, 2007	VA DEQ issued NOV, date of violation – February 23, 2007
June 22, 2007	Transmission capacity was fully installed
July 2, 2008	VA DEQ issued enforcement order by consent (imposing a fine of $52,000)

Mr. SHIMKUS. Thank you. I would now like to recognize Ms. Debra Raggio, Vice President, Government and Regulatory Affairs, and Assistant General Counsel for GenOn Energy, Incorporated. Welcome. You are recognized for 5 minutes.

STATEMENT OF DEBRA L. RAGGIO

Ms. RAGGIO. Good morning, Chairman and members of the subcommittee. I appreciate the opportunity to testify in support of H.R. 4273, the Resolving Environmental and Grid Reliability Conflicts Act of 2012, which I would call a good government and truly bipartisan piece of legislation. I thank Congressmen Olson and Doyle for working together in such a bipartisan fashion, along with Congressmen Green, Gonzalez, Sullivan, Terry, and Barton, who are also cosponsors on this subcommittee.

To begin with, I would like to share four observations on the legislation.

First, there currently is a conflict of law, and notwithstanding Ms. McCarthy's statement, a generator can be ordered to run by the Department of Energy, and if the generator has no choice but to violate an environmental limit in following the order, the company can be subject to fines, as well as lawsuit liability. The situation is fundamentally unfair, and it also creates potential reliability issues during an emergency.

Second, this is not a one company issue. I am testifying for GenOn because we have experienced this conflict firsthand, but it could happen to any generator. Accordingly, the legislation is widely supported by various participants in the industry. These groups and companies don't always agree on all issues. It includes APPA, NRECA, EPSA, EEI, and companies like Exelon, NRG, Alliant Energy, Ameren, We Energies, as well as GenOn. This is quite a diverse group of companies. In addition, as you heard, all four FERC Commissions and Secretary of Energy Chu have recognized the need to remedy the conflict.

Third, the legislation is not anti-environmental or anti-EPA. I believe it does not impact compliance with any recent EPA regulations, or provide an avenue for a generator to shirk its responsibilities. Environmental compliance is paramount, but reliability during an emergency is paramount as well, and that reliability could be threatened by a company questioning whether to follow the DOE order and run during an emergency, or not run and comply with its environmental limits. Under this legislation, a company is only protected if it has no choice but to violate an environmental limit when it runs as directed by the Department of Energy for an emergency. There is no environmental hall pass here. Rather, if a company runs as ordered by DOE during an emergency, it will just not be sued or fined for an unavoidable environmental violation.

Fourth, the legislation is not intended as a criticism of EPA or DOE. Both agencies have to manage their own statutory mandates. It is simply a fact that those mandates may conflict during a reliability emergency. This wasn't an intent that they conflict, but they do. Therefore, a statutory fix is needed, otherwise a company is stuck in the middle of the two conflicting mandates.

Today, Section 202(c) of the Federal Power Act gives DOE the authority to require a generator to operate only in the event of a

true emergency as needed to meet and serve the public interest. Twice, Mirant Corporation, a predecessor company to GenOn, was required to run for reliability, and both times we had no choice but to violate the environmental limit to keep the lights on. In both situations, we were subject to fines or citizen lawsuit liability. Any generator, coal, gas, or otherwise, could face this situation. For example, a company could be ordered by DOE to run for cyber security reasons, or a dual fuel gas plant could be ordered to run on oil because gas is unavailable. The company may have no choice but to exceed an environmental limit in order to comply with the order. There needs to be clear government directive to run in the event of a true emergency. In such event, the government should want a company to salute and operate as directed by DOE to keep the lights on. A company should not be running to court for an answer during an emergency. The emergency could require a very quick response, and a court may not be able to act in time. This conflict needs to be decided by the legislature, not by a court, especially during an emergency.

The legislation gives no additional authority to DOE. They have the authority currently. Nor does it take authority away from EPA, which does not have jurisdiction under the Federal Power Act. It merely prevents a company from being fined or sued for complying with a Federal order.

Thank you very much for the opportunity to speak with you about this issue, and I am very pleased to answer any questions you might have.

[The prepared statement of Ms. Raggio follows:]

Statement of
Debra L. Raggio
Vice President and Assistant General Counsel
GenOn Energy, Inc.
Before the Subcommittee on Energy and Power
Committee on Energy and Commerce
U.S. House of Representatives

May 9, 2012

SUMMARY OF TESTIMONY

As one of the largest competitive generators of wholesale electricity in the United States, GenOn, Inc. ("GenOn"), has focused our core mission on creating value for our owners through the generation and marketing of electricity in a safe, reliable, and environmentally responsible manner. And yet, in emergency situations where reliability must be preserved to provide power to preserve the safety of communities, the current state of Federal emergency authority—encompassed in Section 202(c) of the Federal Power Act ("FPA")—conflicts with this mission by forcing companies to choose whether to comply with an emergency run order or violate environmental obligations.

GenOn's predecessor company, Mirant Corporation ("Mirant"), faced this exact situation during the California energy crisis in 2001 and again in 2005. In each case, the company acted in compliance with a directive to run for reliability to keep the light on, and in each case this compliance led to liability for the company. This liability risk creates uncertainty for generators during emergencies when communities are at risk and stability is most needed.

H.R. 4273 resolves this conflict by amending the FPA to clarify that when a company is under an emergency directive to operate pursuant to Section 202(c) of the FPA by DOE, it will not be deemed in violation of environmental laws or subject to civil or criminal liability or citizen suit as a result of actions to comply with such emergency order. GenOn urges the subcommittee to support this legislation and I would be pleased to answer any questions you might have.

I. INTRODUCTION

Chairman Whitfield, Ranking Member Rush, and members of the Subcommittee, I appreciate the opportunity to testify before you today as you consider H.R. 4273, the Resolving Environmental and Grid Reliability Act of 2012. My name is Debra Raggio and I am testifying on behalf of GenOn Energy, Inc. ("GenOn"), one of the largest competitive generators of wholesale electricity in the United States. I have worked for GenOn, and its predecessor company Mirant Corporation ("Mirant"), for over ten years and have the position of Vice President for Government and Regulatory Affairs and Assistant General Counsel. Headquartered in Houston, Texas, GenOn has close to 3,100 employees and a generation portfolio of approximately 23,700 megawatts with facilities located across the country.

As a company, our core mission is to create value for our owners through the generation and marketing of electricity in a safe, reliable, and environmentally responsible manner. It is these very tenets—safety, electric reliability, and environmental stewardship—that are at issue before the subcommittee today. The tension between reliability needs and environmental regulations has long existed, but the potential for conflict has recently been highlighted by increasingly stringent environmental restrictions and cybersecurity initiatives. The value or virtue of these recent actions is neither the subject of this legislation nor the topic of this hearing; however, it is undeniable that members of both parties and all sides of the issue have discussed the use of existing emergency authorities as a way to resolve concerns about electric reliability. If situations do arise that implicate these authorities, H.R. 4273 will serve a vital role in ensuring that companies have a clear understanding of the legal issues at hand.

As a general matter, there may be ways to resolve the conflict between environmental regulations and emergency authorities in situations where there is sufficient advance notice. For

example, in some cases, a generator may be able to work with the U.S. Environmental Protection Agency ("EPA") and other environmental authorities to adjust permit restrictions so that units known to be needed for reliability can continue operating, or to obtain a consent decree so that the generator operating to preserve reliability is relieved from liability for violations of such restrictions. Any such solution must have a solid legal basis, and there must be adequate time to allow for the process to work. In a true emergency, however, there may not be enough time for a generator to go through the procedural and other steps required to obtain adequate assurances that it will not be subject to significant penalties and liability if it violates environmental restrictions in the course of operating to maintain reliability. Such uncertainty could impede a company's ability or willingness to operate at the time when reliability is most threatened.

Some have argued that conflicts between reliability needs and environmental rules could ultimately be addressed through Section 202(c) of the Federal Power Act (the "FPA"), which gives the Department of Energy ("DOE") authority to direct the operation of electric generation plants in order to maintain the reliability of the bulk power system during an emergency. These parties claim that Section 202(c) allows DOE to "override Clean Air Act [(the "CAA")] control requirements in limited emergency circumstances where there is a finding that an electric emergency exists."[1] Unfortunately, neither DOE nor any of the relevant environmental

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[1] *Impacts of EPA Regulations on Electric System Reliability: Hearing Before the U.S. House of Representatives Comm. on Energy and Commerce, Subcomm. on Energy and Power* (Sept. 14, 2011) (Testimony of Susan F. Tierney, Ph.D., Managing Principal, Analysis Group, Boston at 30), *available at* http://republicans.energycommerce.house.gov/Media/file/Hearings/ Energy/091411/Tierney.pdf. *See also* Paul J. Miller, Northeast States for Coordinated Air Use Management, *A Primer on Pending Environmental Regulations and Their Potential Impacts on Electric System Reliability* at 22 (Sept. 19, 2011) (claiming that DOE "can override [CAA] requirements under section 202(c) of the [FPA] in limited emergency circumstances"), *available at* http://www.nescaum.org/documents/primer-on-epa-reg-impacts-20110919-update.pdf; Letter from John R. Norris, Commissioner, Federal Energy Regulatory Commission to Lisa A. Murkowski, United States Senate at 3 (Oct. 7, 2011) (asserting that DOE's Section 202(c) authority will allow it "to order a plant to continue operating in the unlikely event of a reliability emergency precipitated by compliance with

authorities has taken the position that authority under Section 202(c) of the FPA trumps environmental law. Nor is there any express statutory language in the FPA, the CAA or other environmental laws, or judicial precedent, supporting such a position. Indeed, as explained below, two cases – both involving the predecessor to GenOn, Mirant – demonstrate the difficulties that a generator may face when operating to maintain reliability in a true emergency when such operation conflicts with applicable environmental restrictions.

II. STATUTORY BACKGROUND

Section 202(c) of the FPA gives DOE authority to order the operation of generation facilities for reliability reasons. Specifically, Section 202(c) currently provides:

> During the continuance of any war in which the United States is engaged, or ***whenever the Commission determines that an emergency exists*** by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, ***the Commission shall have authority,*** either upon its own motion or upon complaint, with or without notice, hearing, or report, ***to require by order*** such temporary connections of facilities and ***such generation***, delivery, interchange, or transmission ***of electric energy as in its judgment will best meet the emergency and serve the public interest.*** If the parties affected by such order fail to agree upon the terms of any arrangement between them in carrying out such order, the Commission, after hearing held either before or after such order takes effect, may prescribe by supplemental order such terms as it finds to be just and reasonable, including the compensation or reimbursement which should be paid to or by any such party.[2]

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environmental rules"), *available at* http://energy.senate.gov/public/_files/100711CommissionerNorrisResponse.pdf.

[2] 16 U.S.C. § 824a(c) (2006) (emphasis added). Although the text of Section 202(c) refers to "the Commission," authority under that provision resides with the Secretary of Energy, rather than the Federal Energy Regulatory Commission ("FERC"). Under Section 301(d) of the Department of Energy Organization Act (the "DOE Act"), 42 U.S.C. § 7151(b) (2006), the powers previously vested in the Federal Power Commission under the FPA (and other statutes) and not expressly reserved to FERC were transferred to, and vested in, the Secretary of Energy. Although the DOE Act reserved to FERC powers to require interconnection of electric facilities under Section 202(b) of the FPA and DOE has since delegated certain other powers, including those provided by Section 202(a), to FERC, Section 202(c) authority remains with the Secretary of Energy.

At the same time, various environmental laws impose limitations on a generation facility's operations. For example, Section 109 of the CAA directs EPA to promulgate National Ambient Air Quality Standards ("NAAQS") to protect the public health and welfare.[3] Section 110 of the CAA, in turn, requires each state to adopt a State Implementation Plan ("SIP") to achieve the NAAQS within such state.[4] Upon EPA's approval of a SIP, "its requirements become federal law and are fully enforceable in federal court."[5] EPA is authorized to enforce its NAAQS through administrative, civil, or criminal actions.[6] In addition, a state "may enforce its regulations through state proceedings,"[7] and a citizen has the authority to bring a civil action against any person in violation of emissions standards or limitations.[8]

FERC could potentially order relief similar to that available under Section 202(c) of the FPA by exercising some combination of its authority under Sections 207 and 309 of the FPA. Section 207 provides that, if FERC determines, "upon complaint of a State commission," that "any interstate service of any public utility is inadequate or insufficient, the Commission shall determine the proper, adequate, or sufficient service to be furnished, and shall fix the same by its order, rule, or regulation . . . ." 16 U.S.C. § 824f (2006). Section 309 authorizes FERC "to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of [the FPA]." 16 U.S.C. § 825h (2006). To date, orders compelling generation in emergencies have been issued under Section 202(c), not Sections 207 and 309. *Cf. DC Pub. Serv. Comm'n*, 114 FERC ¶ 61,017 at P 2 (2006) (the "FERC Potomac River Order") (order issued under Section 207 of the FPA requiring long-term plan to maintain adequate reliability where DOE had already ordered a facility to operate).

[3] *See* 42 U.S.C. § 7409 (2006).

[4] *See* 42 U.S.C. § 7410 (2006).

[5] *Her Majesty the Queen v. City of Detroit*, 874 F.2d 332, 335 (6th Cir. 1989). *See also, e.g., Union Elec. Co. v. EPA*, 515 F.2d 206, 211 (8th Cir. 1975).

[6] *See* 42 U.S.C. § 7413 (2006).

[7] *Union Elec.*, 515 F.2d at 211. *See also, e.g., Environmental Def. v. Duke Energy Corp.*, 549 U.S. 561, 567 (2007) ("States were obliged to implement and enforce" NAAQS).

[8] 42 U.S.C. § 7604 (2006).

III. EXAMPLES OF CONFLICTS

As mentioned above, GenOn, via its predecessor company Mirant, has experienced two instances where the conflict at the heart of today's hearing resulted in legal consequences for the company. These two situations are described briefly below.

- **Potrero Power Plant (2001)**

In 2001, beginning at the height of the California energy crisis, Mirant's Potrero Power Plant in the San Francisco area was dispatched by the California Independent System Operator (the "CAISO") at a relatively high rate to maintain reliability.[9] Because the Potrero Power Plant had a relatively low annual operating limit of 877 hours, Mirant became concerned that it would be unable to operate as needed by the CAISO while remaining within its operating limit. In order to ensure that the plant could operate as needed to preserve reliability, Mirant worked to obtain written approvals from local and federal regulators – the Bay Area Air Quality Management District ("BAAQMD") and EPA, respectively – allowing the plant to operate for more than 877 hours.[10] Nonetheless, Mirant was subjected to a citizen lawsuit by the City of San Francisco and environmental groups for exceedance of the 877 hour operating limit,[11] and was forced to settle the lawsuit at significant expense.

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[9] DOE exercised its authority under Section 202(c) of the FPA to compel operation of generation facilities during the California energy crisis, ordering certain generators to make energy available to the CAISO for a period of approximately two months. *See Notice of Issuance of Emergency Orders Under Section 202(c) of the Federal Power Act*, 65 Fed. Reg. 82,989 (Dec. 29, 2000).

[10] *See* Compliance and Mitigation Agreement between Mirant Potrero, LLC and the Bay Area Air Quality Management District at § 2.1 (Mar. 29, 2001); *Mirant Potrero LLC*, R9-2001-04, Administrative Order on Consent at § IV.4 (Apr. 6, 2001), *available at* http://www.epa.gov/region9/energy/generators/r9200104mirant.pdf.

[11] *See* Rachel Gordon, *Potrero Hill power plant operator sued/S.F., groups seek pollution controls*, San Francisco Chronicle (June 19, 2001), *available at* http://articles.sfgate.com/2001-06-19/news/17605126_1_mirant-corporation-pollution-clean-air-act; First Amended Complaint for Injunctive and Other Relief and Demand for Jury Trial, City & County of San Francisco v. Mirant

- **Potomac River Generating Station (2005)**

On August 24, 2005, Mirant's Potomac River Generating Station (the "Potomac River Plant") was shut down to comply with orders of the Virginia Department of Environmental Quality (the "Virginia DEQ") in response to modeled, localized NAAQS exceedances. On that same day, the District of Columbia Public Service Commission (the "DC PSC") filed petitions with DOE under Section 202(c) of the FPA and with FERC under Sections 207 and 309 of the FPA requesting that Mirant be compelled to operate the Potomac River Plant to maintain reliability.

In response, the Virginia DEQ argued to FERC that because "there is no express authority granted to the Commission pursuant to FPA §§ 207 or 309 – or for that matter any other section of the FPA – to issue an order that would contravene the CAA," the Commission had "no discretion to issue any order with respect to generation of electrical power at the Potomac River Plant unless that order complies with the CAA."[12] Similarly, the Virginia DEQ objected before DOE that:

> Congress has not given the [FPA] primacy over the [CAA]. Nowhere in the [FPA] – § 202(c) or elsewhere – is there language providing that reliability concerns take precedence over federal and state environmental laws. Further, § 201(a) of the [FPA] expressly preserves state jurisdiction over electric generation. The [FPA] also does not preempt Virginia law or the Director's authority pursuant to Virginia law, because obligations arising under the federally approved [SIP] are a matter of both state and federal law.[13]

Potrero, LLC, No. C-01-2356 PJH (N.D. Cal. Aug. 20, 2001); First Amended Complaint, Bayview Hunters Point Community Advocates v. Mirant Potrero, LLC, No. C-01-02348-PJH (N.D. Cal. Aug. 20, 2001).

[12] Motion of Robert G. Burnley, Director, The Commonwealth of Virginia Department of Environmental Quality to Deny the District of Columbia Public Service Commission's Petition on the Grounds that the Commission May Not Grant the Requested Relief; or, in the Alternative, to Defer Action Pending Further Analysis of Environmental Impacts of Requested Relief at 6, Docket No. EL05-145-000 (filed Oct. 11, 2005).

[13] Letter from Commonwealth of Virginia Department of Environmental Quality to Kevin Kolevar, Director, Office of Electricity Delivery and Energy Reliability, U.S. Dept. of Energy at 2, Docket No.

On December 20, 2005, DOE ordered Mirant to resume operating the Potomac River Plant under Section 202(c) in order to maintain the electric supply to Washington, D.C.[14] The 2005 DOE Order stated that "[o]rdering action that may result in even local exceedances of the NAAQS is not a step to be taken lightly. . . ."[15] DOE did not, however, provide any assurance to Mirant that compliance with the order would not subject it to liability for those exceedances. Instead, the order said only that DOE had "sought to harmonize those interests to the extent reasonable and feasible by ordering Mirant to operate in a manner that provides reasonable electric reliability, but that also minimizes any adverse environmental consequences from operation of the Plant."[16]

After the Potomac River Plant resumed operating in compliance with the DOE order, the EPA issued an Administrative Compliance Order by Consent, which set forth certain operating standards "taking into account the seriousness of the modeled NAAQS exceedances and the concerns of DOE regarding electric reliability in the Central D.C. area,"[17] and required Mirant to operate the Potomac River Plant "as specified by PJM and in accordance with the [2005] DOE

EO-05-01 (Nov. 23, 2005) (citation omitted), *available at* http://www.gc.doe.gov/oe/downloads/letter-clarifying-position-director-virginia-department-environmental-quality-regarding.

[14] *See DC Pub. Serv. Comm'n*, DOE Order No. 202-05-3 (Dec. 20, 2005) (the "2005 DOE Order"), *available at* http://www.gc.doe.gov/oe/downloads/department-energy-order-no-202-05-3. Orders extending the 2005 DOE Order, as well as other documents relating to the DC PSC's petition before DOE are available at the DOE website. *See* http://www.gc.doe.gov/oe/services/electricity-policy-coordination-and-implementation/other-regulatory-efforts/emergency. *See also* FERC Potomac River Order, 114 FERC ¶ 61,017 at P 28 (2006) (addressing the DC PSC's petition under Section 207 of the FPA "in light of the immediate nature and short-term relief granted to the DC [PSC] by the Secretary of Energy").

[15] 2005 DOE Order at 8.

[16] *Id.* at 8-9. *See also id.* at 5 ("In response to the environmental concerns raised, this order seeks to minimize, to the extent reasonable, any adverse environmental impacts. Should EPA issue a compliance order directed to operation of the Plant, DOE will consider whether and how this order should [be] conformed to such order.").

[17] *See Mirant Potomac River LLC*, Administrative Compliance Order by Consent at 4, Docket No. CAA-03-2006-0163DA (June 1, 2006).

Order."[18] During its operations as directed by DOE, the Potomac River Plant was forced to exceed its 3-hour NAAQS limit on February 23, 2007. Accordingly, in 2007, the Virginia DEQ issued a Notice of Violation[19] and subsequently fined Mirant for actions that were a result of Mirant's compliance with the DOE order to run for reliability. Had the Potomac River Plant been required to operate such that it would have violated a plant-specific environmental permit limit, Mirant would have faced significant additional penalties, including claims from citizen lawsuits under the CAA.

IV. H.R. 4273: A RESPONSIBLE PATHWAY FORWARD

The examples cited here are by no means confined to GenOn and can easily recur as more environmental regulations are promulgated and reliability challenges become increasingly likely. Some have suggested that, given enough time, EPA could enter into a court-approved consent agreement that would ensure that a generator required for reliability is protected from liability for any CAA (or other environmental law) violations that may result. There is debate as to whether such an order would protect a generator from potential citizen lawsuit liability. But with enough time it may be possible to thread the needle so that a generator needed for reliability is not subject to environmental penalties or liability.

In an emergency, however, electricity generators are unfairly forced to weigh the risks and costs of violating environmental permits against the risks and costs of non-compliance with a DOE emergency order to run, creating uncertainty at a time when stability and prompt action is most

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[18] *Id.* at 14.

[19] *See* Letter from Jeffery A. Steers, Regional Director, Commonwealth of Virginia, Department of Environmental Quality to Michael Stumpf, Group Leader – Plant Operations, Mirant Potomac River Generating Station, Notice of Violation Re: Mirant Potomac River Generating Station, Facility Registration No. 70228 (Mar. 23, 2007). *See also* Letter from Michael Stumpf, Mirant Potomac River, LLC to Jeffrey A. Steers, Regional Director, Department of Environmental Quality, Northern Virginia Regional Office, Re: Response to March 23, 2007 Notice of Violation (May 11, 2007).

needed. It is imperative that there be clear authority within the federal government to direct actions that can balance an emergency reliability need with binding environmental regulations.

H.R. 4273 offers a clear way to conclusively ensure that the tools needed to maintain the reliability of the grid are available in the face of conflicting environmental requirements. The bill amends the FPA to clarify that when a company is under an emergency directive to operate pursuant to Section 202(c) of the FPA by DOE, it will not be deemed in violation of environmental laws or subject to civil or criminal liability or citizen suit as a result of actions to comply with such emergency order. Specifically, the bill inserts the following language into Section 202(c) of the FPA:

> "To the extent any omission or action taken by a party, which is necessary to comply with an order issued under [section 202(c)], including any omission or action taken to voluntarily comply with such order, results in noncompliance with, or causes such party to not comply with, any Federal, State, or local environmental law or regulation, such omission or action shall not be considered a violation of such environmental law or regulation, or subject such party to any requirement, civil or criminal liability, or a citizen suit under such environmental law or regulation."

This language ensures that in an emergency situation, without adequate time and even with full cooperation of reliability and environmental regulators, the reliability of the grid will not be compromised in critical emergency situations as a result of even relatively minor environmental exceedances. GenOn urges the Subcommittee to support H.E. 4273 as a responsible step toward resolving this issue. To be clear, this legislation need not – and, indeed, should not – be allowed to delay environmental or cybersecurity initiatives. Rather, reform of Section 202(c) of the FPA should be pursued on a parallel track that ensures that the potential conflict between reliability and environmental concerns is resolved before the next emergency requiring DOE to exercise its authority under this provision.

Mr. SHIMKUS. Thank you for saving us some time and yielding back.

The Chair now recognizes Mr. Stephen Brick. He is a consultant on behalf of the Environmental Integrity Project. Sir, you are welcome. Your written statement is in the record, and you are recognized for 5 minutes.

STATEMENT OF STEPHEN BRICK

Mr. BRICK. Thank you, Mr. Chairman, and good morning. My name is Steve Brick, and I appear today on behalf of the Washington-based Environmental Integrity Project, a nonprofit—I am sorry—a nonprofit organization advocating for more effective enforcement of environmental law. I am an independent consultant, having worked for more than 30 years on various energy and environmental policies. During that time, I have represented public utility commissions, State and Federal environmental agencies, a wide range of nonprofit groups, and various private industries. I appreciate the opportunity to address the subcommittee.

I have two concerns with the proposed legislation. First, I think it is unnecessary. U.S. DOE emergency orders have been issued only rarely, and we expect this to continue in the future. Existing systems and regulations can and are being adapted to address grid reliability environment conflicts.

Second, the legislation grants an environmental hall pass anytime DOE issues an emergency order. Environmental regulators, either U.S. EPA or its designee, would be cut out of the process. Environmental controls of all sorts could be turned off during emergency situations with impunity. In addition, the emergency order could become an avenue for exempting older fossil plants from making required upgrades. This would result in unacceptable environmental degradation, and would potentially distort power markets.

The problem that the legislation purports to fix is not unfolding in an emergency fashion. Power sector and its regulators are dealing with the intersection of three factors. First, significant levels of pending fossil plant retirements; second, new Federal air regulations affecting the electric power sector; and third, a need to maintain the reliability of the Nation's electric transmission system. None of these factors is a surprise.

The Nation's power plant fleet is aging, and as new, more efficient capacity has been built, it has become widely understood that some older plants would retire. The Utility Mercury and Air Toxics Standards finalized in December, 2011, have been under consideration for over 2 decades, so the electric power sector has had more than adequate time to prepare. Transmission system reliability has been a utility concern for many decades. Plant retirements and new environmental regulations are already being considered within established transmission planning processes.

The changes to the emergency provisions of the Federal Power Act proposed in the bill are the wrong response to our actual situation. We are not faced with an emergency, nor is it in the public interest to resolve all potential conflicts in emergency mode. Such a practice would unnecessarily tip the balance away from environmental protection.

I firmly believe that there are legitimate concerns about the reliability impacts of projected power plant retirements, but these are already being addressed by regional transmission organizations, power plant owners, economic and environmental regulators, and the public. Environmental factors can be incorporated into existing planning and regulatory processes in an orderly fashion, ensuring that the health and resource benefits of all environmental regulations are achieved while maintaining grid reliability.

In the very rare instance of a DOE emergency order, two things can be done to mitigate the environmental impact. First, require that all existing environmental controls continue to operate. This is needed to prevent environmental backsliding. Second, condition emergency orders arising from retirement deferrals using the following procedure. First, specify the transmission situations under which the power plant will be needed to protect reliability; second, determine the environmental consequences of the projected operation; third, assess options for completing transmission upgrades needed to permit retirement; and fourth, limit waivers from environmental regulations to those few hours of operation needed to address reliability shortfalls identified in the analysis. Under this approach, plant operation would be strictly limited to the specific reliability conditions. Deferred retirements should be limited to one 2-year period, giving time for transmission owners to complete necessary upgrades or otherwise resolve the emergency.

The operation of plants operating under a deferred retirement scenario should be very low, generally less than 200 hours per year. This procedure allows continued operation of power plants for a limited time under strict reliability conditions to address genuine emergencies. It would not force owners to invest in new pollution control equipment on old plants that they intend to retire. The approach harmonizes reliability and environmental concerns, and it does not require new legislation to be put into effect.

Thank you very much for your time, and I am happy to answer any questions you have.

[The prepared statement of Mr. Brick follows:]

TESTIMONY
BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON ENERGY AND POWER
May 9, 2012

BY STEPHEN BRICK
FOR THE ENVIRONMENTAL INTEGRITY PROJECT

Good morning. My name is Stephen Brick, and I appear today on behalf of the Washington-based Environmental Integrity Project, a nonprofit organization advocating for more effective enforcement of environmental law. I am an independent consultant, having worked for more than thirty years on various energy and environmental policies. During that time, I have represented public utility commissions, state and federal environmental agencies, a wide range of non-profit groups and private industries. I appreciate the opportunity to address the sub-committee.

I have two concerns with the proposed legislation:

- **First, the legislation is unnecessary**. US DOE emergency orders have been issued only rarely, and we expect this to continue in the future. Existing systems and regulations can and are being adapted to address grid reliability-environment conflicts.
- **Second, the legislation grants an environmental "hall pass"** any time DOE issues an emergency order. Environmental regulators—either US EPA or its designee—would be cut out of the process. Environmental controls of all sorts could be turned off during emergency situations with impunity. In addition, the emergency order could become an avenue for exempting older fossil power plants from making required environmental upgrades. This would result in unacceptable environmental degradation and would distort power markets.

The problem that the legislation purports to fix is not unfolding in an emergency fashion. The power sector and its regulators are dealing with the intersection of three factors (1) significant levels of pending fossil power plant retirement, (2) new federal air quality regulations affecting the electric power sector, and (3) a need to maintain the reliability of the nation's electric transmission system. None of these factors is a surprise.

The nation's power plant fleet is ageing, and as new, more efficient capacity has been built, it has become widely understood that some older plants would retire. The utility mercury and air toxics standards, finalized in December 2011, have been under consideration for over two decades, so the electric power sector has had more than adequate time to prepare. Transmission system reliability has been a utility concern for many decades. Plant retirements and new environmental regulations are already being considered within established transmission planning processes.

The changes to the emergency provisions of the Federal Power Act proposed in the bill are the wrong response to our actual situation. We are not faced with an emergency, nor is it in the public interest to resolve potential conflicts in emergency mode. Such a practice would unnecessarily tip the balance away from environmental protection.

I firmly believe that there are legitimate concerns about the reliability impacts of projected power plant retirements, but these are already being addressed by regional transmission organizations, power plant owners, economic and environmental regulators, and the public. Environmental factors can be incorporated into existing planning and regulatory processes in an orderly fashion, insuring that the health and resource benefits of all environmental regulation are achieved while maintaining grid reliability.

In the very rare instance of a DOE emergency order two things can be done to mitigate the environmental impact:

- First, require that all existing environmental controls continue to operate. This is needed to prevent environmental backsliding.
- Second, condition emergency orders arising from retirement deferrals using the following procedure: (1) specify the transmission situations under which the power plant will be needed to protect reliability, (2) determine the environmental consequences of that projected operation, (3) assess options for completing transmission upgrades needed to permit retirement, and; (4) limit any waivers from environmental regulations to those few hours of operation needed to address the reliability shortfalls identified in the analysis.

Under this approach, plant operation would be strictly limited to the specified reliability conditions. Deferred retirements should be limited to one two-year period, giving time for transmission owners to complete necessary upgrades or otherwise resolve the emergency. The operation of plants operating under a deferred retirement scenario should be very low—generally less than 200 hours per year. This procedure allows continued operation of power plants for a limited time under strict reliability conditions to address genuine emergencies. It would not force owners to invest in new pollution control equipment on old plants that they intend to retire. The approach harmonizes reliability and environmental concerns, and it does not require new legislation to be used.

Thank you for your time. I am happy to answer any questions members may have.

Mr. SHIMKUS. Thank you, Mr. Brick. Now I would like to recognize Mr. Andrew Munro, Director, Consumer Service Division, Grant County Public Utility District, on behalf of the National Hydropower Association. Sir, you are welcome and you are recognized for 5 minutes.

STATEMENT OF ANDREW MUNRO

Mr. MUNRO. Good morning, Chairman Whitfield and members of the subcommittee. I am Andrew Munro, immediate past President of the National Hydropower Association, NHA. Thank you for this opportunity to share NHA's perspective on the Hydropower Regulatory Efficiency Act of 2012.

We urge swift markup of the bill and support House passage as soon as possible. We commend the bipartisan leadership shown by the bill's cosponsors. In particular, I wish to thank Congresswoman Cathy McMorris Rodgers, who is from my home State, the other Washington.

My message today is simple. Hydropower is also part of the solution. This message is for President Obama, for Congress, and the American people. This bill supports sustainable hydropower generation that will strengthen our economy, environment, and also our renewable energy supplies. Think about this one statistic. Of the 80,000 dams that currently exist in the United States, just 3 percent are utilized to generate renewable energy. Just 3 percent. The Hydropower Regulatory Efficiency Act puts America on a path to tap this available existing infrastructure and employ hundreds of thousands of American workers.

With a current generation capacity of 100,000 megawatts, hydropower, as you know, is America's largest renewable and represents 7 to 8 percent of all U.S. generation. It also supports a strong economy, employing 300,000 American workers. NHA recently completed a supply chain snapshot that illustrates 2,000 U.S. companies working hydro across the United States.

One of the myths about U.S. hydropower is that there are no new opportunities. In fact, the opposite is true. Hydro has a lot more to offer. According to a Navigant study, 60,000 megawatts of new hydro capacity and 1.4 million cumulative jobs could be created in the next 15 years. Now, these are domestic, good-paying jobs in manufacturing, construction, engineering, and operations. In fact, 75,000 megawatts of hydropower is currently in the FERC queue.

Now, the U.S. hydropower industry is absolutely committed to sustainable growth that is sustainable in every way. We commend the Hydropower Regulatory Efficiency Act because it employs common sense, balanced terms to support growth with our existing infrastructure. According to the Department of Energy, there is 12,000 megawatts of new hydro that could be developed at existing non-powered dams. This would increase U.S. hydro capacity by 15 percent. Let me repeat. Twelve thousand megawatts without building another new dam. That is enough energy to serve 4.5 million residential customers.

One more data point. Hydropower's attributes, being renewable, reliable, and affordable, was the primary factor for BMW SGL to build a new automotive carbon fibers plant in my utility service

territory in Grant County, Washington, with initial investment of $100 million and 80 new local jobs. It was reliable hydropower that was the primary reason for this new manufacturing plant to be built in the United States, and specifically in Grant County, Washington.

Now, NHA's ambitious goal to double sustainable hydropower jobs is achievable, and it is necessary. Further, it aligns with the Department of Energy's Wind and Water Program goal to achieve 15 percent of the Nation's electricity using hydropower by the year 2030.

This bill contains balanced and common sense provisions, and supports a dynamic agenda that is supportive in a bipartisan fashion. Now, I am just going to mention two provisions here quickly. Section 6 requires FERC to investigate a 2-year pilot licensing process for hydro at non-powered dams and pumped storage—closed loop pumped storage projects. NHA appreciates past efforts to improve the licensing process, however, the timelines for this type of sustainable hydro is not on par with, for instance, a gas plant, which is about a 2-year process. We think this makes a great positive step forward without—while still maintaining environmental standards and performance.

We also see significant potential in the low impact small hydro and conduit projects. Due to the lack of economies of scale for these small projects, the licensing costs serve as a financial disincentive. This bill makes another positive step forward for these small low impact projects.

In closing, I wish to highlight the collaboration demonstrated by two organizations appearing before you today, American Rivers and the National Hydropower Association. For the past several years, we have mutually and purposely called upon our organizations to lead together in how we can help support a sustainable energy future. We hope that this is just the beginning of more collaborations to come, and we invite Congress to join us in supporting this bill for swift passage.

Thank you.

[The prepared statement of Mr. Munro follows:]

Written Testimony of Andrew Munro

On behalf of

The National Hydropower Association

Before the

U.S. House Energy and Power Subcommittee

Regarding

The American Energy Initiative:
Hearing on the Hydropower Regulatory Efficiency Act of 2012

May 9, 2012

National Hydropower Association
25 Massachusetts Ave., NW Suite 450 | Washington, DC 20001
Phone: 202.682.1700 | Fax: 202.682.9478 | www.hydro.org

Written testimony of the National Hydropower Association before the House Energy and Power Subcommittee regarding the Discussion Draft of the Hydropower Regulatory Efficiency Act of 2012. Presented by Andrew Munro, Past President of the National Hydropower Association, May 9, 2012.

Summary of Major Points

Hydro by the Numbers:

- America's largest renewable (two-thirds of all U.S. renewable electricity generation)
- 7-8 percent of total U.S. electricity generation
- Employs 300,000 Americans
- Avoids 225 million metric tons of CO2 annually
- 100,000 MW – current installed capacity (including pumped storage)
- Supply chain snapshot = 2,000 U.S. companies

Hydropower's Potential:

- 80,000 U.S. dams – just 3 percent are hydropower
- 400,000+ megawatts = total untapped U.S. potential from conventional, pumped storage and marine and hydrokinetic resources (DOE/Navigant)
- 15 percent goal of U.S. electric generation by 2030 (DOE)
- 60,000 megawatts by 2025 (Navigant)
- 12,000 megawatts at existing, non-power dams (DOE)
- 1.4 million jobs = potential American cumulative jobs by 2025 (Navigant)
- 365,000 megawatt-hours = potential from Bureau of Reclamation canals and conduits

Hydropower Regulatory Efficiency Act of 2012:

- Urge swift passage; balanced, common sense legislation supported by American Rivers and NHA.
- Finds significant untapped U.S. hydro potential and job growth opportunities.
- Requires FERC to investigate 2-year licensing for non-power dams and closed loop pumped storage.
- Increases the small hydro FERC exemption from 5 to 10 MW.
- Removes conduit projects under 5 MW from FERC jurisdiction and increases the conduit exemption to 40 MW.
- Directs the Secretary of Energy to study the technical flexibility that existing pumped storage facilities can provide to support intermittent renewable electric energy generation.

Introduction

Good morning Chairman Whitfield, Ranking Member Rush and members of the Subcommittee. I am Andrew Munro, immediate past president of the National Hydropower Association (NHA) from 2009-2011. I am also director of the customer service division at the Grant County Public Utility District (Grant PUD) located in the central region of the state of Washington.

Grant PUD is a consumer-owned utility that serves a rural, predominantly agricultural population. We own and operate significant electric generation assets, all of which are 100 percent renewable! Hydropower, small irrigation-canal hydro and wind power comprise our total combined generating capacity of 2,000 MW, with the vast majority of capacity coming

from our two hydropower projects, Priest Rapids and Wanapum Dams. These valuable renewable resources support reliable electricity delivery, clean air and significant economic benefits for millions of families and businesses throughout the Pacific Northwest.

The National Hydropower Association (NHA) is dedicated exclusively to advancing the U.S. hydropower industry, including conventional hydropower, pumped storage, conduit power and marine and hydrokinetic technologies. Hydropower is America's leading source of domestic renewable electricity and provides between 7-8 percent of total U.S. electricity generation and almost two-thirds of all renewable electricity generation. [1]

NHA represents nearly 200 companies from Fortune 500 corporations to family-owned businesses. Our members include public and investor-owned utilities, independent power producers, developers, equipment manufacturers, law firms and environmental and engineering companies.

Thank you for this opportunity to share with you the NHA's perspective on an important piece of legislation – the *Hydropower Regulatory Efficiency Act of 2012*. We urge the Subcommittee to proceed swiftly to mark-up the bill, and we support House passage as soon as possible. We commend the leadership shown by the cosponsors of the bipartisan legislation. I would like to personally thank and recognize a Member of this Committee from my home state – the "other Washington" – Congresswoman Cathy McMorris Rodgers.

[1] http://www.eia.gov/electricity/monthly/epm_table_grapher.cfm?t=epmt_1_1

Hydropower is Part of the Solution

My message today is simple – **Hydropower is part of the solution.**

It is possible to double sustainable hydropower capacity, preserve our environment and create over a million domestic jobs across the country. We must commit to both sustainable energy and preserving the environment. The *Hydropower Regulatory Efficiency Act* does both, which is why NHA and American Rivers support swift passage of this bipartisan legislation.

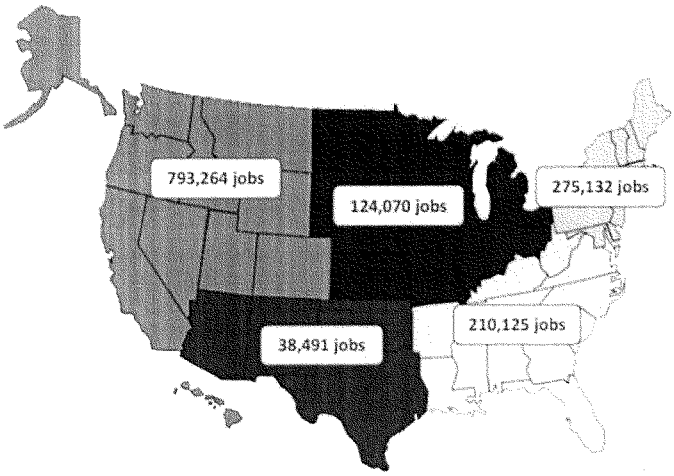
Building a sustainable energy future will require the efficient use of all climate-friendly technologies, including hydropower.

One of the myths about hydropower is that there are no new opportunities for development. In fact, the opposite is true.

Right now, there are proposed hydropower projects totaling 75,000 megawatts with pending license applications and preliminary permits filed with the Federal Energy Regulatory Commission (FERC). These projects span every sector of the waterpower industry. And while every proposed project may not be built, the list demonstrates the large universe of untapped hydropower potential that exists.[2]

[2] FERC currently reports 581 proposed projects with pending license and license exemption applications, as well as issued and pending preliminary permits, in 47 states.

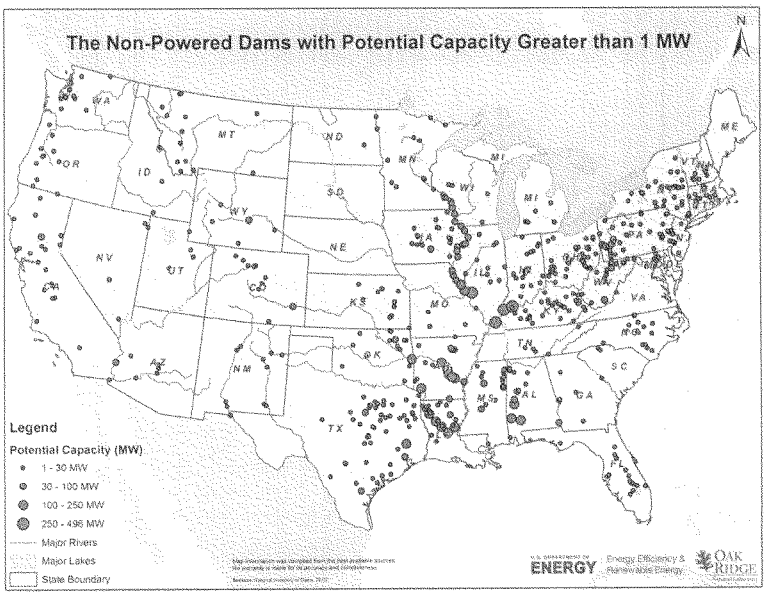
In 2009-2010, NHA commissioned a study examining the hydropower industry's growth and job-creation potential. Conducted by Navigant Consulting, the study found that the nation could add up to 60,000 megawatts of new capacity by 2025 and create 1.4 million cumulative jobs across the country[3] – 700,000 direct and indirect jobs in the hydropower industry and the industry supply chain with another 700,000 induced jobs across the economy as a result of the hydropower project development activity.[4] See NHA map below.[5]



[3] A cumulative job is a job-year, which is defined as 1 person working full-time for 12 months.
[4] Job Creation Opportunities in Hydropower, Final Report, September 20, 2009. Final Report Update with state breakdowns, April 26, 2010.
http://hydro.org/wp-content/uploads/2010/12/NHA_JobsStudy_FinalReport.pdf
http://hydro.org/wp-content/uploads/2011/02/NHA-Annual-Conf-Frantzis-pres-Final-7.pdf
[5] http://hydro.org/wp-content/uploads/2010/12/NHA-study-highlights5.pdf

Think about this fact – Of the 80,000 dams in the U.S., just 3 percent generate renewable hydroelectricity; just 3 percent!

The Department of Energy and Oak Ridge National Laboratory recently released a report that identified 12,000 megawatts of new hydropower could be developed at existing non-powered dams – equivalent to increasing existing hydropower generation capacity by 15 percent. A majority of this untapped energy is concentrated in just 100 non-powered dams, which could contribute 8,000 megawatts. The top 10 non-powered dams alone could add 3,000 megawatts. Eighty one of the top 100 dams are U.S. Army Corps of Engineers (USACE) facilities.[6] See DOE map below.



[6] http://www1.eere.energy.gov/water/pdfs/npd_report.pdf

Let me repeat: 12,000 megawatts of available, reliable, job-creating hydropower can be developed without building a single new dam. This is enough renewable energy to serve 4.5 million residential customers.[7]

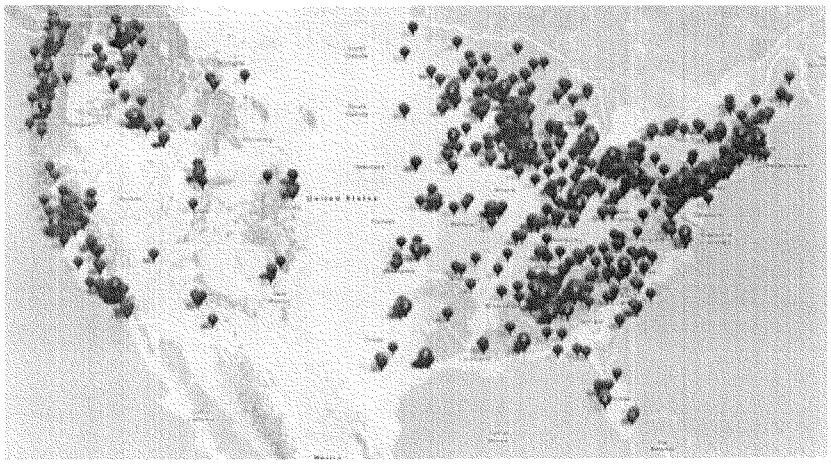
Last month, the Bureau of Reclamation also released a new study that identified 373 existing canals and conduits that have the combined potential of generating over 365,000 megawatt-hours of additional hydropower annually – enough renewable energy to power another 35,000 households.[8]

Hydropower Supply Chain

Hydropower currently employs 300,000 Americans, and attracts and supports significant economic opportunities across the country.

NHA recently completed a supply chain snapshot, which illustrates hydropower's significant contribution to the economic engine of our nation. Our initial supply chain review (which represents only a small fraction of NHA members), found that nearly 2,000 U.S. companies participate in the development, licensing, construction, and operation of hydropower projects across the U.S.[9] See NHA map below.

[7] Based on 50 percent capacity factor; and average U.S. residential customer energy consumption = 11,496 kWh annually (Energy Information Administration 2010 Data).
[8] http://www.usbr.gov/power/CanalReport/index.html
[9] http://hydro.org/why-hydro/available/hydropower-supply-chain-snapshot/



Electric Grid Stability Benefits

Hydropower also provides a myriad of other benefits, including managing river flow for species and habitat protection, water supply, recreation opportunities, irrigation, flood control and navigation.

And importantly, hydropower and pumped storage provide essential grid reliability and stability services, such as the ability to quickly meet changing demand in electric load, firming for intermittent variable resources, such as wind and solar, and blackstart capability in times of an outage (such as the August 2004 East Coast blackout, where hydropower projects in New York and Canada operated continuously and also served as the base for restoring power to millions of Americans).

Commitment to Environmental Protection

The U.S. hydropower industry is committed to future growth that is sustainable in every way. NHA commends the sustainable nature of the *Hydropower Regulatory Efficiency Act* because it recognizes that much of the near-term growth can be achieved by maximizing existing U.S. infrastructure.

For our part at Grant PUD, we are increasing renewable power supplies through a modernization effort at our existing hydro plants.

At our Wanapum Dam, we are installing more efficient generation equipment and environmental enhancement technologies. The advanced-design hydropower turbines and generators will boost the project's generation capacity by 12 percent, and has a fish passage survival rate of 97 percent (above our license goal of 95 percent). We also built an innovative $35 million fish "slide" (or bypass), which studies show a fish survival rate of 99 percent for steelhead salmon. We can have fish and new sustainable hydropower.

The Hydropower Regulatory Efficiency Act of 2012

The results of the recent studies cited above confirm that NHA's ambitious goal to double domestic hydropower capacity and jobs is achievable. In fact, the Department of Energy's Wind

and Waterpower program recently highlighted how waterpower technologies can provide 15 percent of the nation's electricity needs by 2030.[10]

However, these goals are only attainable with bipartisan leadership to promote these opportunities nationwide. Simply put, conducting business as usual will not work. The *Hydropower Regulatory Efficiency Act* is an immediate step forward that Congress can take to improve regulatory efficiency and tap into our nation's undeveloped renewable energy resources in a pro-active and balanced approach.

Crucial near-term policy changes that are needed include:

- A more efficient regulatory process with greater intergovernmental cooperation;
- Tax policies that encourage more investment in hydropower deployment;
- Re-investment in the federal hydropower system; and
- Renewed commitment to innovative R&D initiatives.

The *Hydropower Regulatory Efficiency Act* establishes a dynamic and sustainable hydropower agenda for the nation. It will advance project deployment and increase licensing efficiencies for development on non-powered dams and closed-loop pumped storage projects. It removes low-impact conduit projects from FERC jurisdiction while increasing the size of the small hydropower exemption process, thus bringing more renewable energy to the electric grid. The

[10] Waterpower Fast Facts from *Water Power for a Clean Energy Future*, 2012. http://www1.eere.energy.gov/water/pdfs/wp_accomplishments_brochure.pdf

bill requires further assessment of the pumped storage and conduit potential in the U.S. The bill brings all of these benefits while ensuring continued environmental reviews and public participation are part of the development process.

NHA believes the *Hydropower Regulatory Efficiency Act of 2012* contains balanced and common-sense provisions, achieved through outreach to government agencies, the environmental community and other stakeholders. I will now highlight some of the provisions of particular interest to NHA and the hydropower industry.

2-Year Licensing Pilot

Section 6 would promote development at existing non-powered dams and closed-loop pumped storage by requiring FERC to investigate a 2-year pilot licensing process for these projects.

NHA and the industry appreciate the work of Congress, FERC, and other agencies and stakeholders on past improvements to the regulatory environment for hydropower development. For example, the consensus provisions contained in EPAct of 2005 and the 2003 integrated licensing process (ILP). However, the hydropower regulatory process remains considerably longer than that of other energy resources, such as wind or natural gas. The ILP is structured to be completed in 5 to 5.5 years followed by the time needed for construction, while the development timeline for wind and natural gas projects can be as short as 18-24 months.

At a time when project developers are competing for a limited pool of investor funding, or utilities are seeking the most efficient investment for their customers and shareholders, hydropower project development is put at a competitive disadvantage. Section 6 attempts to address this disparity. It does not mandate a 2-year process, but requires FERC to examine the possibility and move forward with a pilot process or report back to Congress if such a process is deemed not practical. However, NHA believes a 2-year process is possible and improvements can be made while maintaining environmental standards and resource protection.

Small Hydro and Conduit Projects

Sections 3 and 4 of the bill assist small conventional projects and conduit power facilities. Section 3 would increase the FERC small hydropower exemption process to 10 MW. Currently, only projects under 5 MW qualify. This would double the scope of the exemption. Section 4 would remove conduit projects under 5 MW from FERC jurisdiction and also allow any conduit projects under 40 MW to use the FERC conduit exemption process.

NHA believes there is significant growth potential in the small hydro/conduit power sectors of the industry and we have witnessed numerous towns and counties across the country re-examine the feasibility of retrofitting their local dam infrastructure or invest in irrigation power projects and other conduit applications. The proposed regulatory improvements provide these low impact projects the ability to more efficiently navigate the licensing process. Due to the lack of economies of scale with smaller projects, the licensing costs serve as a financial disincentive to pursue these facilities.

Grid Stability and Resource Studies

Section 7 of the bill directs the Department of Energy to conduct a study of pumped storage opportunities to support intermittent renewable electricity generation and provide grid reliability benefits. A second study is directed for a national conduit power potential assessment.

An often untold story of renewable energy growth in Europe is the fact that the load balancing and other grid services needed to integrate these resources (while maintaining a reliable power system) are being provided by hydropower resources – and in particular pumped storage projects. Analyzing opportunities to increase services from pumped storage projects here in the United States will help to address a system operations concern that has increased in recent years.

For conduit potential, there has never been a comprehensive national report developed. The recent Bureau of Reclamation study is an excellent start, but opportunities exist beyond irrigation conduits, including within commercial buildings, as well as wastewater treatment facilities that should be studied and analyzed.

The *Hydropower Regulatory Efficiency Act* is good policy that appropriately recognizes the vital role of hydropower as an affordable, reliable, available and sustainable domestic energy source that has much more to contribute to our nation's electricity supply.

Conclusion – Hydropower is Part of the Solution

In closing, I wish to particularly acknowledge the collaboration demonstrated by two organizations appearing before you today in support of the bill. Over the past several years, American Rivers and the National Hydropower Association have mutually and purposely called upon our respective organizations to demonstrate leadership together in an effort to move our country forward on sustainable energy policy.

Our organizations have jointly supported hydropower technologies in renewable energy and tax policies. The *Hydropower Regulatory Efficiency Act of 2012* also supports the mutual goal to increase sustainable hydropower growth. Hydropower is an important part of the solution and NHA urges you to move swiftly in passing this bipartisan bill. NHA also hopes our groups' collaboration on this bill leads to additional opportunities to work together with Congress and stakeholders to address further challenges to the growth of hydropower resources.

I thank the Subcommittee for providing me this opportunity to testify on hydropower's current and future role in meeting our nation's environmental, energy and economic objectives and I look forward to answering your questions.

Mr. OLSON [presiding]. Thank you, Mr. Munro. Our next guest is Mr. Kurt Johnson. Kurt is the President of the Colorado Small Hydro Association. Mr. Johnson, you have 5 minutes for an opening statement, and please hit the little button there in front of you, sir.

STATEMENT OF KURT JOHNSON

Mr. JOHNSON. Thank you, and I am a PowerPoint guy, so if you could bear with me and look up at the screen. Thank you. I would like to commend the leadership of Congresswomen McMorris Rodgers and DeGette on this bipartisan common sense legislation. It is a long overdue, cost effective, common sense measure, and I am pleased that we are finally making it happen, thanks to the leadership of these members of Congress and this committee.

Hydropower is not a new idea. Pictured here, this is the Ames Power Station. This is actually about 3 miles from my house. It went online in 1891. Small hydro, typically it is local, it is reliable, it is clean. It was a good idea 120 years ago. It is still a good idea. We can have a lot more of it if we can get the regulatory reform that is being discussed here today.

Small hydro is a job growth opportunity. In Colorado, we have got hundreds of folks currently employed in the industry, and we can get a lot more jobs in Colorado in small hydro if we can get the right policies in place.

Small hydro is an economic development opportunity for rural areas, probably for obvious reasons. Many hydro projects are located in rural areas. You have a number of job creation benefits initially when you build a project. I might work with carpenters, plumbers, electricians, concrete pourers on project construction. There is also ongoing financial benefit associated, once a given project is in place. A rancher like this might have an electricity bill that he has to pay to spin a center pivot irrigation system. With a small hydro system, that can cover that bill. For larger systems, once you have a hydro plant in place, say at an existing dam, you will have an ongoing revenue source that will lower costs to the water users and create benefits in perpetuity.

Andrew talked about the 80,000 dams nationwide that currently don't have hydro. In Colorado, various Federal and State assessments have estimated that we got a couple thousand. Pictured here are some examples of local projects that I happen to be familiar with and have worked on, existing dams and existing conduits that do not have hydro that are potential economic opportunities to build hydro.

Towns have opportunities for generating hydro power. In the mountains where I live, a typical municipality will have—next slide, please. A typical municipality will have, you know, a water line running a thousand feet up a hill, put various pressure reduction valves to supply the municipal treatment plant. In most cases—many cases, those can be retrofitted cost effectively with small hydro if you didn't have burdensome regulations impeding the development of these types of small projects.

The current FERC process is basically broken for small hydro permitting. I think the FERC staff has made a valiant effort in recent years within the existing statutory and regulatory framework;

however, for particularly small projects the system just plain does not make sense. You can have situations where the cost of complying with FERC regulations exceeds the cost of the hydro equipment itself. It just does not make sense. We in Colorado in the past couple years had a pilot program to seek to streamline FERC licensing or permitting program. To date, we have got two projects that have completed the system, another four that are currently before FERC. We shouldn't have two, we should have 200 a year that are being proved and built in Colorado. I think that experiment has demonstrated that the system is still time consuming and costly.

Basically the system is broken. This next slide shows a picture of the table of contents for what you might expect for typical conduit exemption application. You know, requiring this level of detailed regulations for non-controversial small projects on existing conduits does not make any sense. It is stifling development. It has stifled development for decades in the past, and it is continuing to do so today. There is enormous costs there. You have projects not built, jobs not created, rural incomes not increased, and harmful emissions not avoided simply because of these burdensome regulations for, again, non-controversial small projects. Building a project, you have to run around and get lots of letters from various agencies, which takes a lot of time. Well-intentioned, folks, but nothing necessarily moves fast in government. Small hydro is already pretty complicated for some of the reasons noted here. It is unnecessary to have the kind of permitting requirements added on top of what can already be a complex project development.

The bill being talked about here today created what I describe as Hydro 1040–EZ, which is a brilliant, brilliant, brilliant idea. Again, this is long overdue. This enables small, non-controversial projects to get out of the system quickly and leave FERC's staff to focus on more important and more controversial projects.

As discussed, the bill will expedite hydro development at existing non-power dams nationwide. The bill also calls for some new resources estimates completed by the Federal Government. They are pictured here. I actually have a copy of a report completed by—last year. These types of resource assessment reports have led directly to new development and new business for developers like myself. It is sort of the kernel that starts the whole process. It is a really brilliant idea that is included in this bill.

So in summary, I think again, long overdue, common sense, bipartisan reform legislation. I thank the committee for their work on this issue and would be happy to answer any questions.

[The prepared statement of Mr. Johnson follows:]

Written Testimony of Kurt Johnson
On behalf of
The Colorado Small Hydro Association
Before the
U.S. House Committee on Energy & Commerce
Regarding the Hydropower Regulatory Efficiency Act of 2012

MAY 9, 2012

Colorado Small Hydro Association
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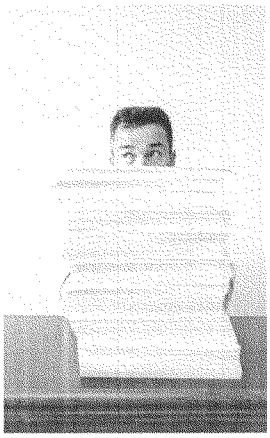
Testimony of Kurt Johnson, representing the Colorado Small Hydro Association, before the House Energy and Commerce Committee Energy and Power Subcommittee regarding the Hydropower Regulatory Efficiency Act of 2012

Summary of Points



- We had the right ideas about small hydro 120 years ago.
- Small hydro presents a substantial, largely-untapped opportunity for economic development in Colorado and throughout the nation.
- Colorado currently has hundreds of hydro-related jobs, a number of which could grow substantially given the right federal and state policies. Small hydro is particularly significant as an economic development opportunity for rural areas.
- In recent years, FERC has made a valiant effort to improve the accessibility of information regarding small hydro permitting requirements.
- The current permitting process for small hydro is still costly and burdensome -- serving as a barrier to more rapid small hydro development.
- ***FERC exemption applications are lengthy and time consuming to prepare.***
- Securing approval letters takes months.
- The FERC process is particularly burdensome for very small projects, where the cost of FERC compliance can potentially exceed the cost of hydro equipment.
- Colorado took a pro-active step to address this problem by working with FERC to streamline the current permitting framework in the form of a Memorandum of Understanding with FERC.
- So far, however, starting with well over 20 initial applications to the program, only two small hydro projects in Colorado have completed the FERC process through the Colorado program and four more are awaiting final FERC approval -- underscoring the need to further simplify the process for non-controversial hydro projects.
- The bill provides a brilliant solution to the problems described above -- providing a mechanism to streamline and accelerate approval for non-controversial small hydro projects.

The bill provides long-overdue, common-sense reform which will accelerate the development of small hydro – creating jobs in rural areas and leading to substantial new distributed, base-load, emissions-free renewable energy generation. I urge the Committee to support the bill and proceed to House passage as soon as possible.

Introduction

Good morning Chairman Whitfield, Ranking Member Rush and members of the Subcommittee. I am Kurt Johnson, President of the Colorado Small Hydro Association (COSHA) and Principal at Telluride Energy, a small hydro development and consulting firm located in Southwestern Colorado.

I would like to thank Colorado Representative Diana DeGette for the opportunity to be here today to talk about the Hydropower Regulatory Efficiency Act of 2012, which COSHA strongly supports. I'm very glad that Congress is actively exploring ways to accelerate development of small hydro, a renewable energy source which can provide reliable electricity without creating harmful emissions.

My main message to you today is simple: the Hydropower Regulatory Efficiency Act of 2012 provides long-overdue, common-sense reform of small hydro regulation which will be enormously beneficial to the U.S. small hydro industry, helping to create jobs -- particularly in rural areas. I urge the Committee to support the bill and proceed to House passage as soon as possible.

Key Points

We had the right ideas about small hydro 120 years ago.

We seem to have lost sight of a great idea that Nikola Tesla had 120 years ago: for generating electricity, it makes sense to harness available mechanical energy with small hydro systems wherever available -- generating distributed, reliable, renewable energy.

In 1891, the Ames Hydroelectric Generating Plant near Telluride, Colorado went online with engineering by Tesla. The 3.5-megawatt Ames hydro plant was the world's first power plant to generate, transmit and sell alternating-current electricity for commercial purposes.

In Western Colorado, the Delta-Montrose Electric Association, together with the Uncompahgre Valley Water Users Association, is currently developing a 6-megawatt hydro plant utilizing water coming through the Gunnison Tunnel, dug more than 100 years ago.

President Taft came to Western Colorado in 1909 to open the Gunnison Tunnel, the first project undertaken by the U.S. Bureau of Reclamation. Although irrigation for agriculture was the primary motivation behind the construction of the Gunnison Tunnel, the potential to generate electricity resulting from the project was noted by the media of the day. A reporter from the *New York Times* who covered President Taft's opening of the Gunnison Tunnel wrote on August 22, 1909: "The water, after it leaves the tunnel, will have 372 feet to fall, which can be used to generate electric power sufficient to light every town and every farmhouse in the Uncompahgre Valley and provide power for all kinds of commercial and industrial purposes."

In the past, small hydro was used as a generating source because it was the only choice. Over the last 120 years, many small hydro generating plants – including in the small mountain town of Ophir where I live – were simply shut down because of the advent of the modern, central station, large power plants. In the future, I hope we will return to small hydro -- not because it is the only choice, but because it is the smart choice. The bill being discussed here today will help make that future possible.

Small hydro presents a substantial, largely-untapped opportunity for economic development in Colorado and throughout the nation.

Small hydro frequently takes advantage of existing infrastructure, including dams, pipelines and irrigation canals.

Colorado -- and the nation – has substantial untapped small hydro opportunity at existing dams. The Colorado Dam Safety Branch oversees a total of about 2,900 dams with 1,937 dams of jurisdictional size. Of these, about 1,819 are non-federal dams.

In March of 2011, the Bureau of Reclamation released a report highlighting hydro development opportunities at existing Reclamation dams. In April of 2012, Oak Ridge National Laboratory released a report analyzing the potential for hydro development at existing non-powered dams across the nation. Both reports identified substantial untapped hydro generation opportunities at existing dams.

There is also substantial opportunity for hydro development at existing canals, which can potentially be cost-effectively retrofitted with hydro. Reclamation recently completed an assessment of hydro potential in Reclamation-owned canals which can serve as a model for broader national conduit assessment as is called for in the bill.

There are also opportunities for small hydro development utilizing existing pipelines. Bob Risch, mayor of the mountain community of Ouray, Colorado realized that an abandoned water supply pipeline created an opportunity to save money for the city and offset the electricity load for the city-owned Hot Springs Pools. With a grant from the Colorado Governor's Energy office, in 2010 Ouray completed installation of a 20-kW hydro system.

For many mountain towns, the municipal water system consists of a pipeline high up a mountainside that carries water down to a water treatment plant. The water system typically must install pressure-reducing valves that can sometimes be profitably retrofitted with small hydro.

The town of Orchard City, Colorado budgeted $200,000 in their 2012 capital budget to install hydro generation which could also serve as a pressure reduction mechanism for a municipal water treatment plant. They contacted me requesting assistance with the project – in effect seeking to just replace one type of valve which dissipates excess pressure while yielding no

useful benefit – and replacing it with a hydro system which would be able to capture that mechanical energy and put it to good use -- generating electricity to offset the electricity consumption of the adjacent water treatment plant. Construction, however, will likely not take place in 2012 because the city would need to first secure a conduit exemption from FERC in order to build the project.

Colorado currently has hundreds of hydro-related jobs, a number of which could grow substantially given the right federal and state policies. Small hydro is particularly significant as an economic development opportunity for rural areas.

Organizations active in the Colorado Small Hydro Association include consultants and project developers (including my company, Telluride Energy), engineers, lawyers, financiers, environmental consultants, construction companies and equipment manufacturers. Small hydro project opportunities are typically located in rural areas, which are particularly in need of economic development. Small hydro project construction creates job opportunities for tradespeople including concrete workers, plumbers, carpenters, welders and electricians. Following project construction, electricity sales from a hydro plant can create an ongoing revenue stream for farmers, ranchers, municipalities and water districts – providing funds which can be used to maintain and improve aging water infrastructure.

In recent years, FERC has made a valiant effort to improve the accessibility of information regarding small hydro permitting requirements.

In December 2009, FERC held a public conference to solicit input from small-hydro developers about how to make the permitting process easier. FERC subsequently published updated small-hydro permitting information on its website, including templates to simplify the process and FERC has also held permitting process webinars to explain their requirements. These efforts are greatly appreciated by developers, but underlying problems remain.

The current permitting process for small hydro is still costly and burdensome -- serving as a barrier to more rapid small hydro development.

Under current guidelines, small hydro projects can receive either a 5 MW Exemption or Conduit Exemption. But the term "exemption" is misleading. Once a project receives an exemption, it does not need to go through that process again (unlike licensed projects that must be relicensed every 30-50 years). However, it is not an exemption from the original permitting regulatory process and it does not provide an exemption from what are still very onerous paperwork requirements.

FERC exemption applications are lengthy and time consuming to prepare.

A typical exemption application for a small hydro system may be on the order of 100 pages, including all the necessary explanatory text, diagrams, maps, letters and appendixes. Gathering all the necessary information and compiling it can take months, requiring expensive consulting assistance from engineers, attorneys, professionally licensed surveyors and environmental consultants.

Securing approval letters takes months.

Part of the exemption application process involves securing agency concurrence letters from a wide variety of federal and state agencies as well as relevant tribes. For example, below is a list of entities that might need to provide support letters for a small hydro project in Southwest Colorado:

- U.S. Forest Service
- Local County Government
- Colorado Historical Society
- American Rivers
- Colorado Division of Wildlife
- Trout Unlimited
- Colorado Department of Public Health and Environment
- Colorado Department of Water Resources
- National Park Service
- Ute Tribe

The problem is, agencies can be unfamiliar with hydro, unfamiliar with hydro developers, unfamiliar with FERC requirements, and not necessarily incentivized to respond expeditiously to someone interested in securing an agency letter in order to secure a FERC exemption for a small hydro project.

The FERC process is particularly burdensome for very small projects, where the cost of FERC compliance can potentially exceed the cost of hydro equipment.

The resources needed to obtain a hydropower permit or exemption from FERC represent a particularly disproportionate burden for the developers of small projects – stifling development both in Colorado and nationwide. According to the Colorado Governor's Energy Office, in the past 35 years, only 26 federal permits have been issued for hydropower projects in Colorado. Hiring consultants to complete FERC small hydro exemptions for the smallest projects may typically cost somewhere between $10,000 and $30,000. $10,000 is more than the total hydro equipment installation cost for a typical small (1-2 kilowatt) residential micro-hydro system.

Colorado took a pro-active step to address this problem by working with FERC to streamline the current permitting framework in the form of a Memorandum of Understanding with FERC.

In August of 2010, the Colorado Governor's Energy Office (GEO) signed a Memorandum of Understanding with FERC to create a FERC streamlining program for Colorado small hydro projects. GEO's Small Hydro Permitting Process was designed to assist developers of small, low-impact hydropower projects in applying for a FERC permit. Projects that qualified for the program were required to use existing infrastructure and have very low potential impacts on the environment.

The GEO's contractor pre-screened projects to comply with a specific set of conditions. These conditions ensured that the candidate projects utilized an existing infrastructure for which hydropower is an incidental use, without increasing current water diversion. Additionally,

projects that adversely affect water quality, wildlife or cultural resources were excluded from the program.

GEO submitted the applications that successfully completed the program to FERC, together with the agencies' letters of approval. For projects submitted though the state's process, FERC agreed to waive the 1st and 2nd stages of consultation. These two stages, which focus on engaging stakeholders in the permitting process and delineating the studies necessary to support the application, can be time consuming. Within 30 days of receipt, FERC agreed to notify the state if the application is accepted. When FERC accepted an application, it declared the project ready for environmental analysis and solicited comments, recommendations, and terms and conditions from relevant agencies and the general public, who had 30 days for filing responses.

So far, however, starting with well over 20 initial applications to the program, only two small hydro projects in Colorado have completed the FERC process through the Colorado program and four more are awaiting final FERC approval -- underscoring the need to further simplify the process for non-controversial hydro projects.

Notwithstanding the commendable efforts of government and contractor staff in the Colorado-FERC pilot program, the underlying problem remains: the process is simply too costly and time consuming for non-controversial small hydro projects. The primary beneficiaries of the current regulatory requirements are the consultants paid to help comply with them. In addition to all the expense, the time required to complete the FERC applications is substantial. FERC may be able to complete an exemption within 60 days of receipt of a completed application – but that comes on top of all the time required to compile the application.

The Hydropower Regulatory Efficiency Act of 2012

The bill provides a brilliant solution to the problems described above -- providing a mechanism to streamline and accelerate approval for non-controversial small hydro projects.

Through the 45 day public noticing process, the bill provides an opportunity for public involvement as needed and provides a way to make sure that a proposed small hydro project is indeed non-controversial and consistent with environmental protection requirements. The process called for in the bill also frees up FERC staff to focus on hydro projects for which there may be potential issues of concern -- as opposed to processing paperwork for non-controversial small projects.

The bill will also expedite opportunities for incidental hydro utilizing available pressure in existing pipelines.

There is a widespread lack of understanding regarding how much energy is consumed in moving water through pipelines – energy which could be captured and/or recaptured with rapidly emerging pipeline hydro technologies. There are hundreds of thousands of pressure reduction valves in water systems nationwide. With the right policies in place, many of these could be cost-effectively retrofitted with small hydro, supporting a burgeoning industry of technology companies seeking to exploit this largely-untapped energy resource.

Conclusion

If we are going to succeed at implementing an "all-of the-above" domestic energy strategy, we need to dramatically step up the pace of utilizing the massive, currently-untapped resource of small hydro. The bill provides long-overdue, common-sense reform which will accelerate the development of small hydro – creating jobs in rural areas and leading to substantial new distributed, base-load, emissions-free renewable energy generation. ***I urge the Committee to support the bill and proceed to House passage as soon as possible.***

Mr. OLSON. Thank you, Mr. Johnson. Our last opening statement is to be given by Mr. Matthew Rice. Mr. Rice is the Colorado Director of American Rivers. You have got 5 minutes for your opening statement, and hit the microphone. Thank you.

STATEMENT OF MATTHEW RICE

Mr. RICE. Thank you, Mr. Chairman, members of the committee. Good morning, and thank you for inviting me to testify. My name is Matt Rice, and I am the Colorado Director for American Rivers. I am also a lifelong fly angler, kayaker, and former fly fishing guide. I love rivers and consider myself extremely lucky that my job is to protect them.

American Rivers is the Nation's leading voice for healthy rivers and the communities that depend on them. We believe rivers are vital to our health, safety, quality of life, and to the economies that depend on them. American Rivers supports the Hydropower Regulatory Efficiency Act. We have worked for years trying to improve hydropower's environmental performance, and we recognize that hydropower will be an important part of our Nation's future energy mix, especially given the urgent need to reduce the use of fossil fuels.

The key is getting hydropower right. Even small hydropower can have a huge impact on river health and the future generations that depend on those rivers. Poorly done hydropower has cost species to go extinct and put others, including some with extremely high commercial value, at great risk. However, there is tremendous potential and growing interest in developing incidental hydropower projects that add new generation to existing dams and conduits. These projects cause less environmental harm than new dam construction, and are the focus of this bill.

After we opened our Colorado office last year, we started working with the Colorado governor's energy office on a streamlined permitting hydropower pilot program, the result of a Memorandum of Understanding with the Federal Energy Regulatory Commission. Our experience with this innovative program offers some important lessons that are relevant to the Hydropower Regulatory Efficiency Act.

First, giving the public an opportunity to review new hydropower projects does more than protect natural resources. It also offers developers certainty, giving them a clear idea of controversy and viability before they make a big investment.

Second, existing regulations are flexible enough to expediate permitting of good hydropower projects. A typical FERC license can take up to 5 years to secure, but after 16 months of the Colorado program, FERC has issued two exemptions, has four additional projects poised to receive final approval, and one additional project pending submission. Only two applicants had completed their project design upon enrollment, and both of those applicants have already received exemptions.

The value of the program is even clear when viewed in historical context. In 16 months, seven projects have been approved or are near approval. Only 15 new projects had been approved in Colorado over the past 20 years.

Third, the MOU pilot program demonstrated that applicants are not always in the best position to judge whether or not their project will be controversial. Out of 28 applications submitted to the State, only 10 met the criteria for expediated permitting, often because they were too—they were considered too controversial. Those projects can still be permitted, but they will require an additional level of scrutiny to ensure that they are not causing harm. Public review and comment works. The 45-day public review period outlined in Section 4(b) and Section 4(c) of the Act is critically important, because it provides a safeguard to protect against projects that are disguised as conduits, such as an example in Aspen, Colorado, that I cite in my written testimony. However, Section 4 also provides developers with the certainty that truly non-controversial projects can receive expediated review and move forward quickly.

I am proud that the Hydropower Regulatory Efficiency Act is the result of a spirit of collaboration, both among members from both sides of the aisle, as well as the industry and conservation groups.

Here is why I think the Hydropower Regulatory Efficiency Act gets the balance right. First, the Act encourages appropriate hydropower development, like adding turbines to non-power dams, canals, pipes, or adding updated, more efficient equipment to existing dams.

Second, the Act protects the public interest, providing the 45-day public review period I referenced earlier.

Finally, the Act will help improve the regulatory process while avoiding the stale concept that regulations are the only barriers that need to be removed. At American Rivers, we are not fans of process for its own sake. Time is money for environmental NGOs too. But make no mistake, it is because, not in spite of, our regulatory system that hydropower has fewer environmental impacts today than it did years ago. Getting to these solutions takes careful study that can, in some cases, still take longer than 2 years. These laws and regulations are there for good reason and work well, but that doesn't mean they can't be improved. Our experience with the Colorado program has shown us that there are good projects that can get permitted in 2 years or less. We want good projects to get built faster, but it is not good for rivers or the industry, frankly, if a bad project gets fast tracked and causes real damage. We are committed to continuing to work with the committee, the industry, and others to achieve the twin goals of more capacity and better environmental outcomes.

Thank you for the opportunity to testify before this committee, and I look forward to your questions.

[The prepared statement of Mr. Rice follows:]

American Rivers
Thriving By Nature

Written Testimony
of Matthew Rice
Director, Colorado Conservation
American Rivers

Hearing: The American Energy Initiative: Hearing on the "Resolving Environmental and Grid Reliability Conflicts Act of 2012" and the "Hydropower Regulatory Efficiency Act of 2012"

Subcommittee on Energy and Power,
U.S. House Committee on Energy and Commerce

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1 Introduction

Chairman Whitfield, Ranking Member Rush, and Members of the Committee: thank you for this opportunity to testify today. I am confining my remarks to one of the bills before you today, H.R. 3680, the Hydropower Regulatory Efficiency Act. I am pleased to be able to share American Rivers' perspective on this bill that is before your Committee today.

American Rivers is the nation's leading voice for healthy rivers and the communities that depend on them. We believe rivers are vital to our health, safety and quality of life. American Rivers mobilizes an extensive network comprised of tens of thousands of members and activists located in every state across the country. We have been working to protect and restore the health of rivers that have been impacted by hydropower dams since we were founded in 1973. We also serve on the Steering Committee of the Hydropower Reform Coalition, a broad consortium of more than 150 national, regional, and local organizations with a combined membership of more than one million people. In doing so, we represent stakeholders – from canoeists to conservationists to lake homeowners – that seek to improve the water quality, fisheries, recreation, and general environmental health of rivers that have been damaged by antiquated hydropower dam operations. Coalition members are active in most of the hydropower licensing proceedings currently pending before the Federal Energy Regulatory Commission (FERC), the Bureau of Reclamation, and the Army Corps of Engineers, and have constructively contributed to numerous hydropower-related policy discussions. Most recently, we worked with your staff, and the staff of bill sponsors Representative McMorris Rodgers and Representative DeGette, as well as industry representatives as you developed HR 3680, the Hydropower Regulatory Efficiency Act which is before your Committee today.

American Rivers supports HR 3680, the Hydropower Regulatory Efficiency Act, and we are grateful for the work of you and your staff on this important legislation.

2 Towards a balanced Federal hydropower policy that encourages environmentally responsible hydropower development and operation

American Rivers is emphatically *not* anti-hydropower. Conventional hydropower is one of the oldest and most well-established among a growing number of technologies that provide low-emissions alternatives to fossil-fuel energy. Nationally, hydropower provides about 96,000 megawatts of capacity, representing nearly 7% of total generation. We expect that hydropower will continue to be a part of our nation's energy mix for years to come, and accordingly we have signed dozens of agreements supporting the operation of hydroelectric dams that together provide our nation with thousands of megawatts of generating capacity. Reasonable modifications have dramatically improved the performance of these dams, providing fish passage, improving flows, enhancing water quality, protecting riparian lands, and restoring recreational opportunities.

American Rivers supports the development of new hydropower resources that can be brought online while avoiding significant additional harm to local ecosystems. In recent years, we worked closely with the National Hydropower Association to craft renewable energy legislation that provides incentives for new hydropower development. In short, we support hydropower that is developed and operated in a

responsible manner that avoids harm to America's precious river resources. Given the very real environmental and social impacts of global climate change – especially on vital freshwater systems –we understand the need to develop new sources of energy that can replace America's reliance on fossil fuels. Hydropower will be an important part of this mix.

However, we also know that the energy we receive from hydropower comes at an enormous cost to the health of our nation's rivers and communities. Hydropower is unique among renewable resources in the scale at which it can damage the environment. Hydropower's environmental and social impacts are serious and extremely well documented. Hydropower dam operations are responsible for the extinction and near-extinction of a number of species. Hydropower plants often divert water around entire sections of river, leaving them dry or constantly alternating between drought and flood-like conditions. Hydropower dams have flooded forests, destroyed fisheries, diminished recreational opportunities, and decimated the local – mostly rural – economies that depend on those resources.

The harm caused by most hydropower dams can be avoided if hydropower is sited, constructed, and operated in a responsible manner, particularly if management decisions are made at a basin-scale rather than at the individual project level. A few simple changes can make an enormous difference in the health of a river. Hydropower operators can change the timing of power generation to mimic a river's natural hydrologic conditions, stabilize lake levels and dam releases to protect riverside land from erosion, provide fish ladders and other measures that protect fish and allow them to pass safely upstream and downstream of dams, restore habitat for fish and wildlife, alter the design and operation of plants to maintain appropriate temperature and oxygen levels in rivers, and provide public access and release water back into rivers so that people can fish, boat, and swim. These types of changes have a miniscule impact on overall generation: when FERC studied more than 240 non-federal dams where such measures had been introduced, it found that such changes cost, on average, only 1.6% of power generation. Indeed, since many of these modifications involve replacing outdated generating equipment with more efficient modern technology, overall generating capacity has actually *increased* by 4.1%. The benefits to human and natural communities have been immense.

When it comes to water, climate changes everything – when, where and how much water is available, how water is used, and the ecosystems in which humans, fish and wildlife live. Warmer temperatures are increasing evaporation and lowering water levels in rivers and aquifers. Mountain snowpack, which acts as a natural reservoir that releases water throughout summer months, is shrinking and melting earlier in the year. Precipitation is also becoming more erratic and shifting towards winter months. As a result, droughts and floods alike are becoming more frequent and more intense. These changes may make our hydropower system less reliable in the coming decades. They also highlight the urgent need to improve the environmental performance of existing hydropower dams. Poorly operated hydropower plants radically alter the timing, magnitude, and duration of streamflows, change water temperature, and stress aquatic species. In other words, hydropower operations anticipate – and exacerbate – the impacts of climate change on our rivers and watersheds.

Developed responsibly, hydropower can increase our nation's portfolio of emissions-free energy. However, we must consider more than just increased megawatts. America is still blessed with many healthy, free-flowing watersheds, wetlands and floodplains that provide numerous services and values.

We must preserve these intact systems and promote them as a vital part of our water supply and flood protection infrastructure. At the same time, we must rehabilitate rivers and streams that have been damaged by existing hydropower projects, and protect habitat from further degradation. A failure to improve the health of rivers now will doom more species to extinction as the world warms. Now and in the years to come, we need hydropower projects that are sited, built, and operated to produce power while minimizing impacts to the rivers that sustain America's human and natural communities. Federal agencies with a role in U.S. hydropower policy, including the Bureau of Reclamation, the U.S. Army Corps of Engineers, the Department of Energy, and the Federal Energy Regulatory Commission must make the enhancement of environmental quality – at existing and new sites alike – a top priority.

A balanced and responsible hydropower policy must take seriously both the promise of hydropower and the risks of hydropower development. It must encourage responsible development while also continually holding developers and federal operators accountable for their environmental impacts and insisting on the strictest performance standards. It must remove obstacles to development while recognizing at the most fundamental level that a high level of environmental performance and the costs of achieving that performance are not an "obstacle" to development but a fundamental and necessary component of it. It must encourage new development to take place while also accepting that some sites are simply not appropriate for new or increased hydropower production. Congress must address both sides of this equation equally.

3 The Hydropower Regulatory Efficiency Act (HR 3680)

The Hydropower Regulatory Efficiency Act is a good step towards a well-balanced U.S. hydropower policy like the one described above. American Rivers joined the National Hydropower Association in working with the bill's sponsors to help them to craft a bill that would meet the twin goals of encouraging the development of new hydropower capacity while enhancing hydropower's environmental performance. We would like to thank all of the parties involved with drafting this bill for their extremely hard work and willingness to incorporate our perspective.

American Rivers supports this bill for three main reasons. First, we believe that it appropriately distinguishes between those hydropower projects which should be encouraged and those which should not and directs its attention towards the former. Second, it provides opportunity for FERC to make a determination on the project's qualification and allows the public 45 days to review, support or oppose FERC's determination. Third, it encourages regulators and stakeholders alike to work together to find creative and innovative ways to improve the existing regulatory process without falling into the all-too-common trap of equating critical environmental protections with "regulatory barriers.

3.1 HR 3680 encourages appropriate hydropower development

American Rivers supports the development of hydropower projects that are sited, constructed, and operated in a responsible manner so as to avoid harm to America's precious river resources. HR 3680 recognizes that not all new hydropower development is appropriate, and accordingly addresses those types of projects which can be brought online with the least impact to aquatic resources. Hydropower projects that re-use existing water and hydropower infrastructure such as conduits, irrigation ditches and other pipelines are the best candidates for responsible development.

Finally, an increasing number of developers – especially in the west – are exploring off-stream hydroelectric development. Some developers propose to place turbines in existing water conveyance pipes. Others are adding hydropower capacity to irrigation canals. Still others are placing turbines in municipal water treatment facilities. Many of these projects have the potential to create substantial environmental benefit. For instance, some irrigation districts are using the revenue from power sales to fund projects that will result in the more efficient use of water, leaving more water in the river to provide ecosystem services. H.R. 3680 opens a public dialogue about ways that the regulatory process for these projects might be improved to bring capacity online faster while protecting the environment and public health and safety; the updated definition of "conduit" in Section 4 will prevent abuse of the existing exemption by ensuring that it is only applied to appropriate projects that use water infrastructure that was built for some other legitimate beneficial use.

Turbines can also be added to many existing hydropower and non-hydropower dams. While these retrofits are not appropriate in every case, they offer new capacity for minimal additional environmental impacts when done right. In some cases, retrofitting existing dams for hydropower can leverage additional environmental improvements to the affected river reach. For instance, a pending retrofit at the Holtwood project on the Susquehanna River in Pennsylvania will more than double that project's generating capacity while also providing for substantially improved fish passage. Several years ago, American Rivers worked closely with the hydropower industry and Members of Congress to craft legislative language that would encourage such forward-thinking development. This language has since been incorporated into the federal law which provides a Production Tax Credit for Renewables, providing developers with an incentive to develop at existing dams that are currently operated for flood control, navigation, and water supply and that could be developed without harmful changes to river flows. HR 3680 addresses development at non-powered dams by directing FERC to explore ways in which these projects might be regulated more efficiently.

3.2 HR 3680 protects the public's interest and provides developers certainty upfront as to whether their conduit project is controversial, viable, or likely to be to be built.

The vast majority of conduit projects are non-controversial and do not harm the environment. These projects are the focus of section 4 of H.R. 3680 and can responsibly be exempted from licensing. There is, however, always a possibility that projects intentionally or unintentionally could be disguised, mistakenly designed as a conduit, or that the regulations are misinterpreted in order to qualify under the legislation. The 45 day public review period will provide a safeguard ensuring that only qualified projects are granted exemption from licensing. Our experience working with the State of Colorado, hydropower developers, and the Federal Energy Regulatory Commission on the Colorado streamlined permitting hydropower pilot program and on other hydropower projects in the state underscores the importance of this provision in the Act. The qualifying criteria used in Colorado program also provides a potential model that could further increase the efficiency of small hydropower permitting, and as FERC studies ways to improve the permitting of new hydropower development at existing non-powered dams, we will encourage FERC to draw heavily from the lessons we have learned from the Colorado MOU experiment.

American Rivers opened an office in Colorado in April 2011 and immediately engaged the Colorado Governor's Energy Office, their consultants and the Federal Energy Regulatory Commission regarding the state's streamlined permitting hydropower pilot program. We supported and continue to actively

support this program and are committed to ensuring its success. Initially, we were concerned that the state did not provide an adequate mechanism for the public to review the potential MOU projects. While the vast majority of these projects are non-controversial, we were concerned that if a controversial project with environmental issues were somehow able make it through the state's prescreening process only to be challenged before FERC, it would damage the credibility of the program and the industry as a whole. The State agreed with us and changed its policy to allow for public review at the beginning of the prescreening process. This policy not only protects the public's interest in their water resources, it also gives developers more certainty sooner as to whether the project is controversial, viable, or likely to be completed.

There are several important lessons from the Colorado MOU program that are relevant to H.R. 3680 and this hearing today.

First, existing regulations are flexible enough to allow environmentally benign hydropower projects to be permitted in an expedited timeframe. In 16 months, FERC has issued two new exemptions for projects in Colorado. Fouradditional projects are awaiting final FERC approval, and one project is pending submission to FERC. Two of the qualifying projects have been delayed because of property right or water right issues, several more were not ready to develop, and one project is awaiting its power purchase agreement. It is important to understand that the pilot program was implemented in a limited time and only 2 applicants had completed their project design upon enrollment. Both of these projects have received exemptions from FERC. Designing a project takes time and these delays would have happened regardless of regulations or lack thereof.

Second, the MOU Pilot Program showed us that applicants are not always the best judges of the level of controversy or the environmental impacts associated with their own projects. Out of 28 applications received by the state, only 10 were deemed eligible to participate. This suggests that 64 percent of applicants incorrectly determined that that their projects met Colorado's criteria or that they would be considered non-controversial.

The 45 day public review period outlined in Section 4 (b) and Section 4 (c) of the Hydropower Efficiency Act of 2012 is important because it developers with the certainty of knowing that their projects will not be controversial before they have invested significant resources in development. It also protects the public's interest in limiting the streamlined regulatory process to those projects which are unlikely to harm valuable natural resources.

This safeguard is critical to catch projects being proposed by developers that are intent on bending the rules. For example, The City of Aspen, Colorado is proposing to rebuild a 1.1 MW conventional hydropower project that operated from 1890 to 1958. The proposal includes a significant increase in diversion from two streams beyond their municipal water supply demands to feed the facility. The proposed project is extremely controversial within the community and Aspen is currently in litigation with upstream water right holders. In an effort to expedite the permitting and avoid environmental review of the project, Aspen chose to pursue a Small Conduit Exemption for the project. But Aspen had a problem: it did not have a conduit. So the city built what is in reality a hydropower penstock and misleadingly labeled it as a conduit in order to receive favorable regulatory treatment.

While Aspen eventually backed off of its pursuit of a conduit exemption because of public pressure, it continues to maintain that the project should qualify for FERC's conduit exemption. If H.R. 3680 were to become law without this critical provision for a notification period, neither the local community nor affected water rights holders would have had an opportunity to challenge Aspen's incorrect characterization of the project, and Aspen may well have been able to construct the project without any meaningful public review.

The Colorado MOU pilot program does a good job of ensuring that participating projects reflect the goals of the program by requiring applicants adhere to specific criteria including:

- The primary purpose of the infrastructure will remain, e.g., most commonly municipal water supply and irrigation;
- There will be no significant change in operation of the infrastructure including timing of water delivery;
- The water delivery system will have all necessary water rights, permits, licenses or other approvals required by any local, state, or federal authority;
- The project will not adversely affect water quality;
- The project will not adversely affect fish passage;
- The project will not adversely affect a threatened or endangered species;
- The project will not adversely affect a non-conduit cultural resource;
- The project will not adversely affect a recreational resource; and
- The project will not increase diversion or water quantity.

The above criteria could provide a good starting point in the development of a set of criteria for hydropower that may be relatively easy to permit quickly. Combined with due diligence, and an opportunity for public review, it may be possible to further increase the efficiency of permitting responsible hydropower projects that are beyond the immediate scope of the Hydropower Efficiency Act of 2012.

3.3 HR 3680 aims to improve the regulatory process for hydropower without falsely equating critical environmental protections with "regulatory barriers."

The Act directs FERC to explore ways "to improve the regulatory process and reduce delays and costs" associated with hydropower development. As a frequent participant in regulatory proceedings for individual hydropower projects, American Rivers has an interest in reducing inefficiencies in these regulatory proceedings as well as the costs associated with participating in them.

Our enthusiasm for regulatory reform, however, is tempered by our recognition that the existing permitting system for hydropower provides critical protections for the ecological health of rivers, public safety, recreation, and many other non-power values. American Rivers emphatically does not subscribe to the notion that our nation's environmental, health, and safety regulations constitute "barriers" in need of streamlining, "delays" that must be shortened, or "costs" that need to be reduced. Hydropower is not intrinsically clean energy: it must be sited, constructed, and operated in an appropriate manner, or it can cause enormous environmental damage. Laws like the Federal Power Act, the Clean Water Act, the National Environmental Policy Act, and the Endangered Species Act are critical to ensuring that

hydropower is done right. We encourage this Committee to be clear that any proposed modification to the regulatory process for hydropower that would weaken any of these vital environmental protections would be unacceptable.

In our view, HR 3680 largely gets this distinction right, recognizing FERC's willingness to innovate to help good projects get built more quickly. When developers choose appropriate sites for hydropower projects and invest in addressing resource issues up front, FERC has shown remarkable flexibility in processing license applications quickly and efficiently. For example, we have seen FERC staff waive pre-filing requirements with the concurrence of stakeholders in cases where there are no controversial resource issues. FERC recently published a list[1] on its website of more than 20 hydropower projects that have been permitted in less than *one* year since 2006 and the above described 2010 Memorandum of Understanding with the State of Colorado[2] that identifies classes of projects that are likely to be permitted quickly, with FERC agreeing to expedite the processing of those applications where the state has conducted pre-screening to ensure that there are no complex or contentious resource issues at stake.

Despite FERC's willingness to be flexible, there are a number of points in the process where FERC can do better. For instance, FERC's Integrated Licensing Process was designed to synchronize FERC's NEPA scoping and record development with the information requirements of other state and federal agencies that have separate – and critical – statutory responsibilities. These other agencies can now can identify at the beginning of a licensing those information gaps that must be filled in order for them to complete their own processes. Some applicants are unwilling to provide this information because it might result in additional requirements to mitigate project impacts. The resulting stalemate is a perennial source of delay in licensing. While FERC staff have the authority to order applicants to provide this information, they often choose not to do so, arguing that the information is not necessary for FERC's licensing decision. This may be technically true – FERC may not consider the information necessary for its own analysis – but the reality is that FERC cannot issue a license until it has received a Water Quality Certification from the state and all required ESA consultation is complete. Staff may be able to work with agencies to narrow the scope of the necessary information, but ultimately those agencies must decide what information is necessary for them to act. The Commission should direct its staff to improve their cooperation with other federal and state agencies, especially where those agencies have identified a need for information that will enable them to fulfill their own responsibilities and clear the path for FERC to issue a license. By doing so, FERC would substantially increase the likelihood that licenses will be issued on time and with an appropriate set of environmental protections.

HR 3680 directs FERC to solicit recommendations like these from the public and examine how it might implement such improvements to the licensing process. It then directs the Commission to test some of those ideas through a pilot process and ultimately report to Congress on what works, what does not, and

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[1] http://ferc.gov/industries/hydropower/gen-info/licensing/small-low-impact/expedite-process/projects-expedited.xls

[2] http://ferc.gov/legal/maj-ord-reg/mou/mou-co.pdf

how it intends to translate those lessons into more formal policies that improve the licensing process. This gives FERC the flexibility to conduct controlled experiments, further refining some of the tools it is already using to permit noncontroversial projects more quickly. Any resulting policy change will be better by virtue of having been tested in a real-world situation first.

HR 3680 also gives FERC the ability to limit this flexibility to only those projects where it is likely to work. A one-size-fits-all two year process is unlikely to be appropriate for all projects. Hydropower projects that feature more complex resource issues often need more time to process, and this is entirely appropriate. Consider, for instance, two proposals to add hydropower to an existing dam. The first would add a turbine to an existing control structure at the base of the dam to capture uncontrolled flows that are already passing through the dam. The second proposes to divert water from behind an existing dam to a powerhouse two miles downstream, dewatering a section of river that is known as a high-quality trout stream and a popular destination for canoeing. While the first project might be quite simple to license, the second would almost certainly require one or more season of studies in order to determine appropriate operating guidelines that would protect the river's existing fisheries and recreational resources. It would be very difficult to fit such a project into a two-year process while still adequately addressing these complex resource issues.

American Rivers supports this inquiry, and we look forward to participating in the Commission's examination of its licensing processes. We also encourage the Committee to ensure that FERC will have sufficient resources to complete this undertaking. FERC has more new applications for preliminary permits and hydropower licenses before it now than at any other time in recent memory. The new requirements that HR 3680 proposes to place on the Commission should not become a workload burden for Commission staff that creates the very processing delays that it was designed to reduce.

Conclusion

A balanced U.S. energy policy must recognize that hydropower has impacts as well as promise, and it should address both. New hydropower development must be sited, operated, and mitigated responsibly, and it must simultaneously encourage increased generation and improved environmental stewardship at new and existing projects. American Rivers supports the development of new hydropower resources that can be brought online responsibly, avoiding significant additional harm to local ecosystems. HR 3680 represents a substantial step forward down this path, and American Rivers is pleased to be able to support it.

Thank you again for this opportunity to testify before the Committee today. I look forward to answering your questions.

Mr. OLSON. Thank you, Mr. Rice, and now we will go to member questions for 5 minutes. The first questions will be asked by my colleague from Washington, Ms. McMorris Rodgers.

Mrs. MCMORRIS RODGERS. Thank you, Mr. Chairman, and I wanted to direct my questions to Mr. Munro, and thanks again for making the trip from Washington State to be here. Great testimony. I appreciate you highlighting the important role that hydropower is playing in the Pacific Northwest.

I wanted to ask if you would just elaborate a little bit more. You talked about BMW, but we have seen where hydropower really has transformed the economy in Washington State. There are other companies, high tech companies that are locating in the Basin area because of low cost hydropower, reliable. And I just wanted you to at least elaborate a little bit more on what other job creation we have seen in recent years.

Mr. MUNRO. I would be happy to, and thank you. This BMW plant is a great example highlighting how hydropower in itself, because it is reliable, it is a base load, it is available. BMW SGL when they were looking worldwide for their new automotive carbon fiber, which is a lightweight strong plastic material that is going to their new, all electric vehicle, they wanted a life cycle emissions free resource. It was important for their customers that they have that, and as they looked around the world, the wind was not reliable enough. Hydropower was the renewable that was reliable for them. So they have reiterated to us that that was the very key reason that they ended up locating in Grant County. It was, I think, between us and Quebec, and they decided to go with Grant County in the United States. It is an important local economic development opportunity for a primarily agricultural-based rural populated area. And then we also have Davis Centers, we have Microsoft, Yahoo, that are locating in our service territory because of that renewable and reliable electricity.

Mrs. MCMORRIS RODGERS. Great. We often tell the positive story of hydropower and how it transformed Washington State, the whole Columbia Basin project in many ways, and you can even point to Boeing locating Kaiser Aluminum. But it is exciting to see these more recent companies that are expanding because of what hydropower has to offer.

Now a little earlier we where hearing a little about the administration's energy independence goals moving forward. Would you just elaborate on the steps that we have taken in recent years and how we got DOE, Department of Energy, to actually commit to a goal of doubling hydropower by 2030? I was disappointed that it wasn't listed or included in President Obama's chart there, but would you just elaborate a little bit more on what we have seen from Department of Energy recently?

Mr. MUNRO. Well we are disappointed as well. We have really been talking to the administration about having hydropower as part of the overall solution, and we have done our—as an industry, we have taken the time to do our analytics to really study what are the opportunities. It has been, I think, a mindset that we are not going to build a new Hoover Dam. Well that is true, but now what we have found is we have already invested in a lot of infrastructure in the country. We have dams that exist already we can

modernize or existing hydropower. There is small low-impact conduit power. So through our jobs studies we have shown that we can expand, support job creation in every State in the country, that also expands renewable energy supplies. We are still trying to get that through to the top levels of the administration. We are getting support, though, at the lower levels at Department of Energy. We are happy to see that, but we really need everybody to understand and change their thinking about hydro, that we can have both hydropower and fish.

Mrs. MCMORRIS RODGERS. Yes. And to Mr. Munro and Mr. Johnson, if you would just talk a little bit about how hydro can—hydropower can contribute overall to grid security and reliability, which is also on the forefront of Congress's mind.

Mr. MUNRO. And it is an important base load resource. I think in terms of our energy security, it is absolutely essential that if we can expand sustainable hydropower and closed loop pump storage opportunities, we absolutely ought to do that. Grant PD is an example. We are 100 percent renewable. Most of that is hydro generation. We do have wind. We are also integrating wind in Montana to keep a reliable system. But if after conservation—if we were to develop a resource, it is a combined cycle gas plant, which is fine. That is a base load resource. If there are opportunities, though, where we can develop hydropower, again, that is really the only renewable that is base load that can also provide the same amount of reliability that, say, a gas plant could.

Mr. JOHNSON. It is probably also worth pointing out that it can be distributed in small, and so if you can have distributed base load clean energy, that enhances grid reliability so that, you know, if you have one giant plant that goes down, you got a problem. If you have a number of smaller also base load plants, only one of them goes down, you have less of a problem.

Mrs. MCMORRIS RODGERS. Thank you very much, Mr. Chairman. I want to thank Mr. Rice with American Rivers for your testimony and your support of the legislation too, and I yield back.

Mr. OLSON. Thank you. The Chair recognizes my colleague, Mr. Doyle, from Pennsylvania for 5 minutes of questions.

Mr. DOYLE. Thank you, Mr. Chairman. Ms. Raggio, the testimony on our first panel seemed to indicate that there are conflicting stories about the 2005 202(c) order. Could you clarify what violation—what the violation was that led to a fine from Virginia DEQ, and how many hours GenOn was actually in violation of environmental regulations, or Mirant?

Ms. RAGGIO. Yes, absolutely. There is some confusion, and I can actually say that I am probably the only one on either panel who lived through it. We ran in accordance with the DOE order. The order took approximately 4 months to be issued. At that time, it was very clear about environmental limits and what we could do. After that, an administrative consent order almost a year after we shut down was imposed, and the DOE order adopted the administrative consent order. We ran under that. Both of those orders had very clear procedural requirements we had and protections we had to follow, and we followed them all. Throughout the process, DEQ committed, as they did in their comments to DOE, that they did not believe that DOE had the authority and they would enforce

against us. We had one, one 3-hour NAAQS violation in 2007, and when we did, DEQ was true to their word. They came in, they said you violated, and they issued an NOV. They also said we did not follow certain pollution control requirements in their allegations, but we could not follow those requirements and still be in compliance with the DOE order. But we were in compliance with the ACO, as evidence that EPA did not enforce against us, nor did DOE. So it was an after the fact view back as to what we had done. But to say that we were not fined because we ran under the DOE order is wrong. We would not have had the exceedance but for the order.

Mr. DOYLE. Thank you for the clarification.

Ms. RAGGIO. Certainly.

Mr. DOYLE. Mr. Brick, first of all, I want to say that there are many things in your testimony that I agree with, like the fact that legitimate concerns about reliability impacts of projected power plant retirements should be addressed by RTOs. I agree with that.

I am just not sure I understand some of your concerns. You tell us in your testimony "that the problem this legislation purports to fix is not unfolding in an emergency fashion." I just want to be clear, I don't believe compliance time for EPA regulations are creating an emergency, and certainly not one that warrants a 202(c) order, but I do think it is foolish to ignore the fact that we are asking for great changes from our electric generating fleet, changes and upgrades that we need, and that I support. The need for those changes, along with lower fuel costs, has already spurred the retirement of over 100 coal-fired plants, and most of those retirements are in my neck of the woods. We just have one tool of last resort for power supply emergencies, and that is the Section 202 order. Do you think that tool has ambiguities about which Federal law to follow?

Mr. BRICK. First of all, let me say I am not a lawyer so——

Mr. DOYLE. Neither am I, sir.

Mr. BRICK. You are asking me for a legal opinion when I am not really qualified to give one, but I think it is clear from the testimony that we have heard that there is some potential conflict in the law.

Mr. DOYLE. And so do you think—if that is the case, do you think it is wise that we try to address and try to fix any ambiguities in our law so the power suppliers know what to expect when a 202 order is issued?

Mr. BRICK. It isn't—and once again, I am offering you a legal opinion when I don't really have the basis for doing that. It isn't obvious to me that that can't be done perfectly reasonably without making any statutory changes. The agencies know how to talk to each other, and you know, if anything, it seems to me that the single example that we have heard about this morning—and again, I don't have all the facts on that so I can't really talk authoritatively about it. That seems to me to be kind of a bad example, and I would like to think that we have learned from that bad example and we are not going to make that mistake again going forward.

Mr. DOYLE. Well, we have only had two instances in 34 years and we are 0–2 when it comes from addressing the ambiguities, and I think that is what has us concerned, that in the two in-

stances where we have asked generators to come online, there was a citizen lawsuit in one case and a fine by Virginia DEQ in the other. That is all we are trying to address, these ambiguities in the law. I think, you know, between now and markup time, if we hear any good suggestions how to make it better, we will certainly incorporate them in the bill.

But I want to thank you for your testimony today, and Mr. Chairman, I see that my time is expired.

Mr. OLSON. I thank my colleague. The Chair yields himself 5 minutes for questions.

My questions are going to be for you, Ms. Raggio. First of all, my colleagues should know that Ms. Raggio's employer, GenOn, was formerly Mirant, which is the poster child of why we are here today. I mean, because they are the ones who were exposed to conflicting regulations putting reliability compliance in direct conflict with environmental regulations, forcing them to choose how to proceed and expose themselves to legal liability.

I realize that these cases are rare. There have only been two as my colleague from Pennsylvania mentioned. But with EPA's regulations, this explosion of regulations, shutting down our coal plants all across the country. We have got—we have pretty good power—excessive power grids, but we have got a very slim margin right now. Just one example from the real world, the Cross State Air Pollution Rule, CSAPR. When EPA announced that they were enacting that rule—in the rulemaking and they included text in that almost immediately Luminant, the largest coal producer in Texas, announced that they would shut down two coal plants. Our State is the fastest growing State in the country. We cannot lose power generators in Texas if we are going to keep our people healthy.

And so Ms. Raggio, I would like to give you an opportunity to respond to all the comments and concerns you have heard, particularly from the prior panel. I mean, you were said to be a repeat offender. I heard that from the EPA witness. Talk about—they mention you might have some perverse incentives if H.R. 4273 becomes law to exceed your permits and not upgrade your facilities in hopes of having some sort of grid crisis where you can, you know, have this done through 202(c). Do you want to set the record straight?

Ms. RAGGIO. Well to the extent we have offended any law, we did it on our own, except for these two situations we weren't ordered to do so. And that is the problem. When a company makes a mistake or acts improperly, it pays the fine and it is enforced against. It is a completely different situation when you are complying with a Federal order and then facing those penalties and fines.

I find it confusing how a company could plan its long-term compliance in hopes that DOE would come in and issue a 202(c) order. I almost think that would require some kind of collusion between Department of Energy and the company to circumvent a requirement that gives you a pretty long lead time to comply. It is also an extremely transparent process, compliance right now. My company is deciding right now for 2015 and '16 whether we are going to put on controls to comply, whether it is economic and affordable to do so, or whether we are going to shut down. It is difficult to see how someone could hide beneath FERC and the ISOs, and the

PSCs watching them, and then pop up at the last minute and say we are here, we didn't put on controls. DOE, save us.

I don't see that as really credible, although I assume anything is possible.

Mr. OLSON. Thank you for those answers. If you know that crystal ball, please let me know because we have got the second leg of the Triple Crown coming up, and I am not a horse guy, but—I got a couple questions for you, Chairwoman Kane, and thank you for coming here today. I want to go back to 2005 when the DOE ordered Mirant, the Potomac River Generating Station, to go on the status of must run plant, to operate to protect the electricity supply to Washington, D.C. The generator, at the time being Mirant, complied with the order and was later fined by the Virginia Department of Environmental Quality for a 3-hour NAAQS violation. You mentioned in your testimony that everyone was praying for mild weather. Walk me through what could have happened if a blackout occurred in Washington, D.C. Government buildings being shut down, you mentioned the White House, hospitals losing their power, with all these tourists here staying in hotels, maybe needing some sort of medical care. Tell me what happened if Mirant hadn't complied and done what they were supposed to do and keep the power up and running.

Ms. KANE. It would have created a very, very difficult situation. We depended on that plant for peaking in the hot summer months, and the DOE itself had said in its order that there would have been a blackout, had one of the other lines been down and the plant not been able to operate. And so that is why—DOE also obviously looked at it as a temporary situation. I want to address that, too. It was an emergency we did not take lightly, going to a Federal agency and asking them to order a company to run, asking them to essentially oppose the actions of a State. And the Virginia Department of Environmental Quality continued to oppose the petitions and the actions all the way through. But we knew how serious the situation would have been, particularly in the summer, and we then also in response to that acted very quickly ourselves to order the building of additional lines, 269 KB lines and then 239 KB lines so that the plant in the future if there was a problem could be bypassed. But that took—even by waiving—we waived the 6-month filing period, the notice period, we did expedited proceeding. It still took almost 18 months to get all of those—almost 2 years, rather to get the new big lines in place, which was because there were conduits under the river. They could happen more quickly, but it was a very scary situation, and we know how people react in Washington where there is a power outage just from a thunderstorm, and you can imagine if the whole downtown area, the whole central D.C. area, there was no power available.

Mr. OLSON. Thank you, ma'am. I am out of time, but I think you would say that violating a 3-hour air quality standard may have averted a greater crisis here in our Nation's capital. I am out of time. I yield to the Ranking Member of the full committee, Mr. Waxman from California.

Mr. WAXMAN. Thank you very much for yielding to me.

Ms. Raggio, I want to be sure that I understand the concerns that supporters of the Olson bill are trying to address. Your con-

cern is the rare instance where compliance with a 202(c) order will require a company to violate an environmental requirement, is that correct?

Ms. RAGGIO. That is correct.

Mr. WAXMAN. So when operating under a 202(c) order, should a plant be allowed to run without limit, or should it only be allowed to run when needed to address the reliability problem?

Ms. RAGGIO. No, as set forth in the draft legislation, it should only be allowed to run during times necessary to meet the emergency, and be consistent with any environmental law or regulations and endeavor to minimize adverse environmental impacts.

Mr. WAXMAN. Well, the bill seems to encourage limiting the time of operation to the time of the emergency need, but it is not mandatory. Do you think it ought to be mandatory?

Ms. RAGGIO. It should be whatever you want the agency to be doing.

Mr. WAXMAN. OK.

Ms. RAGGIO. I think the mandatoriness should be upon the agency in its order, and then the company should have to comply with the order.

Mr. WAXMAN. Should a plant continue to run its existing pollution control equipment during the emergency operation?

Ms. RAGGIO. Absolutely, if you can do both.

Mr. WAXMAN. But the bill doesn't require this either. I am concerned that the language in this bill is far broader than the issue you say you want to address.

Let me take an example. A plant is operating under a 202(c) order generates coal ash that it places in an impoundment. The impoundment bursts, as it did in Kingston, Tennessee. The spill blankets nearby communities, pollutes miles of streams and rivers, and costs over $1 billion to clean up. Under the language of this bill, the actions of operating the plant and disposing of the waste as required by the order "result in" noncompliance with multiple environmental laws. Thus, a company should be shielded from any liability for the damage.

Ms. Raggio, that is not your intent here, is it?

Ms. RAGGIO. Absolutely not, and I actually think that omission would not be considered necessary to comply with the DOE order, so it would not be protected, but that is just my opinion.

Mr. WAXMAN. I fear the sweeping language of the bill provides that any action necessary to comply with the order that results in an environmental violation shall not be subject—not subject to party's liability, so I am concerned about that language.

Mr. Brick, what are your views on this bill? Is it narrowly tailored? Does it preserve any formal role for the environmental regulators? Is it necessary and sensible?

Mr. BRICK. As I said at the beginning, I don't think the bill is necessary. I think that existing processes can and are being used right now to harmonize environmental concerns with reliability concerns. I think that as drafted, it is too broad and I do think, although I completely agree with what I have heard from most people that it is nobody's intent, really, to use it as a hall pass, plain language of the bill really does seem to be a hall pass. And in that case, you can conjure any kind of interruption or—of in-plant envi-

ronmental equipment that might be deemed necessary somehow during the emergency, and I think it would be easy to change the language to restrict it to more reasonable set. Particularly because—and I mean, this is something that hasn't been said in this hearing. We design these plants and their pollution control equipment to operate under all circumstances, and so I really do, again, without going into all the details on the Potomac case, I really think that represents an exception, and a rare exception as opposed to something that is commonplace in the industry.

Mr. WAXMAN. Would it be safe to say that you don't think the legislation is necessary, but if we are going to have legislation, it needs to be more carefully tailored?

Mr. BRICK. Yes.

Mr. WAXMAN. And is it also your view that we need to preserve a formal role for environmental regulators?

Mr. BRICK. Yes.

Mr. WAXMAN. And in that way, the bill would balance out the concerns you think are already—could be met under existing law, but would it do any harm if we narrowed it down in that way?

Mr. BRICK. If it were narrowed in the way that you described, I don't think it would do any harm necessarily.

Mr. WAXMAN. I understand the concern that is motivating the supporters of this bill, but the bill languages goes way beyond what I think is necessary to address that narrow concern, so I agree with your views.

I yield back, Mr. Chairman. Thank you.

Mr. OLSON. And I thank the Ranking Member of the full committee. The Chair now recognizes the gentleman from West Virginia, Mr. McKinley.

Mr. MCKINLEY. Thank you, Mr. Chairman.

I was curious, Mr. Brick, when I saw you on the panel. You were with the Environmental Integrity Project, and back in August of 2010, you all issued a document called "In Harm's Way: Lack of Federal Coal Ash Regulation Endangers Americans and Their Environment". Were you involved in that study and developing that report?

Mr. BRICK. No, sir, I am a consultant to EIP and I work for them on electric reliability issues.

Mr. MCKINLEY. OK. I was curious to learn a little bit more of the perspective, because it is—the integrity—when you talk about the Environmental Integrity Project, when you read the report and see how it has been rebuked by other entities, it lessens the credibility of EIP. I was hoping that you may have—be able to illuminate us, educate us a little bit about how they could be so wrong in their findings. But you are saying you have no awareness of it whatsoever?

Mr. BRICK. I haven't even read the report.

Mr. MCKINLEY. But if you—I mean, wouldn't you question if in the report there were things that—in a report of a group that you represent lacked technical data, unfounded and misleading comments not technically possible, statement is unsubstantiated, referenced contaminate levels are incorrect, errors, statement is inappropriate and misleading, unsubstantiated. Wouldn't that tend to

make you uncomfortable with EIP's ability to testify on any matter, especially on the one on which they wrote a report?

Mr. BRICK. Sir, all I can say is that I haven't had anything to do with that particular report, and all I can tell you is that on transmission reliability issues, which I take very seriously, I think I bring the highest level of technical expertise and credibility to EIP. I can't really make any comment on projects that I haven't been involved in.

Mr. MCKINLEY. But again, I guess my point was that if you had responses like that, wouldn't you question the integrity of a report that had that kind of rebuff by other environmental groups, specifically the Pennsylvania Department—if you heard an environmental group making those kind of claims, wouldn't you question whether or not EIP has legitimate issue, if you read that as—are you an engineer?

Mr. BRICK. No, sir, I am an environmental scientist.

Mr. MCKINLEY. OK. No sense harming you any further. I think you are representing a group that has lost some integrity in what they have represented, so——

Mr. BRICK. I am sorry you think so——

Mr. MCKINLEY. I look forward——

Mr. BRICK [continuing]. And I am sorry I can't be more responsive.

Mr. MCKINLEY. Maybe you will have someone else from the group come that can answer this, because we are not getting good answers. I was looking forward to chatting with you a little bit about your attack on industry and what it is doing to fly ash around this country. It is unsubstantiated based on incorrect, incorrect tracks. So I apologize if it is just you because you are not the one to do, but we are waiting for the right person to walk through those doors.

Mr. BRICK. I will send the message along.

Mr. MCKINLEY. Thank you very much, and I will yield back my time.

Mr. OLSON. Thank the gentleman from West Virginia. Chair now recognizes for 5 minutes the gentleman from Maryland, Mr. Sarbanes.

Mr. SARBANES. Thank you, Mr. Chairman.

Ms. Raggio, in the first panel that we had here, Ms. Capps had asked Ms. Hoffman and Ms. McCarthy if they could describe or tell us the list of laws that would be covered by the liability under the bill, this broad waiver that is in the bill, and they were not able to do that. I wonder if you have a sense or if you could describe some of the Federal, State, local environmental laws and regs that would be—would have liability waiver with respect to that.

Ms. RAGGIO. I can't really speak to all the panoply of laws that are out there facing our power plants. I know there are many. Water, air, solid waste. The issue is really to be broad so that an emergency might impact any of those laws, and a company might be ordered by DOE to take an action that would violate any of those laws. And if you have no choice but to comply, you shouldn't be fined or hit down or sued. That is the intent. So the broadness was—I believe the intent was to go to covering all of the potential

things that could happen in an emergency that none of us can imagine, because it is an emergency and it shouldn't happen.

But the key is that you can only be protected if taking that action was absolutely necessary to comply with the order, so if you are out there dumping things in the river and it wasn't required by the order, there is no protection.

Mr. SARBANES. Of course, the flip side of it being that broad and applying to all laws is that there are many out there that you wouldn't think would need to be waived under the circumstances that one can imagine, and so you get into this situation where if the bill were interpreted where some of us might have concerns, it might be that, in fact, the Federal Government is getting into the business of saying to a State or locality, you know, we don't know what the particular regulation or law that you may have on the books is, but whatever it is, it is going to be waived, which is a fairly heavy-handed way to proceed here. And I think that is one of the dangers that we have some concerns about.

Do you know how many different environmental requirements have ever actually posed a conflict with a 202(c) order?

Ms. RAGGIO. I only know it being invoked twice for generation. Our company was impacted both times. It was imposed during 2001 for the California energy crisis. We complied, thinking the DOE order was still in place. It had expired by the summer of 2001, which to me is curious because we were all still in the height of the emergency.

Mr. SARBANES. And was the sort of category of regulation that was in conflict there?

Ms. RAGGIO. Air.

Mr. SARBANES. Air, OK.

Ms. RAGGIO. It was air both times.

Mr. SARBANES. So we have not seen it with respect to, you know, endangered species, drinking water, waste disposal, so we don't have evidence of that kind of conflict having been presented——

Ms. RAGGIO. Not yet.

Mr. SARBANES [continuing]. To this stage.

Ms. RAGGIO. Not yet, no.

Mr. SARBANES. Well, I guess I share Chairman Waxman's, I guess, anxiety that this might be overbroad, and I also have a sense that if the EPA, for example, is in a position to issue an administrative order in these emergency circumstances that is very tailored to the situation at hand, that they are in a position to kind of limit what the liability protection would apply to.

And so I think we can perhaps refine this going forward. I would like to get your views on that.

Ms. RAGGIO. I just note that the administrative order would not protect us from citizen lawsuit liability, so even if we worked it out with EPA, we could have an environmental group out there that doesn't care and will sue us.

Mr. SARBANES. Mr. Brick, do you have an opinion on that?

Mr. BRICK. If you are asking me do I have an opinion on whether or not an administrative order would still leave them open to some fines——

Mr. SARBANES. Well, it is more do you have an opinion on whether balance can be struck? And your view is that frankly, the status

quo allows for that now, but whether this balance can be struck between, you know, our expectations on the environmental side and providing some kind of protection here.

Mr. BRICK. Yes. I think in answer to that, yes, I think a balance can be struck and I think the way you strike the balance is—because again, I think these things unfold—even in the emergency situation, it takes 100 days to develop an order. You know the likely environmental organizations to involve in a conversation, get them involved in a conversation and then I think you diminish the chances that you are going to have subsequent legal action.

Mr. SARBANES. Thank you.

Mr. OLSON. The gentleman yields back. The Chair now recognizes the gentleman from the Commonwealth of Virginia, Mr. Griffith, for 5 minutes of questioning.

Mr. GRIFFITH. So Mr. Brick, what do you do when the organizations are involved and one of them, not the Federal Government, but the State government says yes, we don't agree?

Mr. BRICK. I think that any case where there is delegated authority to the State, it is going to be the State air quality agency that should be involved in the conversation about what is going to happen during this reliability conversation.

Mr. GRIFFITH. OK, and here is where it gets really interesting for Ms. Raggio's company. As I understand it, Virginia didn't get that power. We just had the plant. So why would Virginia, which has its power delegated from the Feds, want to help out the District of Columbia and maybe Maryland, I don't know, but help out the District of Columbia when they feel like they may get in trouble? Because here is what I see might have happened, all right? Now I don't know, I didn't study this issue at the time, and maybe I should have because I was vice chairman of the Joint Commission of Administrative Rules and Regulations of the Commonwealth of Virginia at that time, as well as being the Majority Leader of the Virginia House of Delegates.

But here is what I suspect, because we ran across this in some other situations where DEQ felt like if they didn't strictly enforce the rules, EPA would come in and take either their power away or their money away. Now, if you are sitting there and you are not sure what is going to happen either now or in the future, and you are DEQ and you are like you have been trained repeatedly by the EPA, you do what we tell you to do, you follow these rules or we are going to either take the power away or we are going to take your money away from your State, and you don't want to have to answer to people like me as to why suddenly we lost money and why didn't you follow the rules? What do you do when you are this lady trying to do what she is supposed to do to help out, under the order, the District of Columbia? That is the reason why this bill is important, because that lady didn't have any choice in her mind—or her company, I know it wasn't your decision—but her company didn't feel like it had any choice, notwithstanding the fact that they were told in advance DEQ is not going to go in that direction. And how do you make all that work? I mean, people—we have heard the testimony today that people think it is not necessary because everybody worked together, but they didn't work together. In at least 50 percent of the cases that have happened in the last 30

years, they didn't work together, and in enforcing EPA regulations, the DEQ was authorized and supposed to enforce, the company who provided power to make sure that D.C. didn't go down the tubes for a period of time gets fined.

Now let me tell you something. Here is my problem, and I think Ms. Raggio would agree with me. That is a sense where every common person in this country—they might say we don't want the pollution, we don't want this, we don't want that, but everybody is going to look at that situation and say that is not just, and part of our jobs as members of Congress—and we fail at this a lot. I have only been here 2 years. I am trying to straighten it out. But we are supposed to set up rules that if you are a citizen of this United States, whether you are a human being or a corporation, if you follow the rules that are coming down, you don't get punished. You may not agree with the rules, you may come here and lobby to change those rules, but if you are following the rules, you don't get punished. And we have a situation where without the language like this bill has, somebody was following one set of rules and got punished.

And so my concern is, how do we solve that, Ms. Raggio—and I apologize Mr. Brick, but you opened it up there right t the end. Ms. Raggio, do you see it any different? Is there anything I haven't covered as to what happened in this situation, and—we have got about a minute. Did you all sense that DEQ was doing this on their own, or because they had it drilled into their minds that they had to enforce these rules or else the EPA might take their authority away from them somewhere down the road?

Ms. RAGGIO. I sat through the working together process. When this first started, we had EPA, DOE, Virginia DEQ, and Mirant in the room. EPA said before the ACO that they would enforce against us if we violated a NAAQS. I turned to DOE and said well then I can't run under your order because they are going to enforce against me, and then DOE said well then we will put you in jail.

Mr. GRIFFITH. OK, so it is better to face a fine than jail time.

Ms. RAGGIO. I guess. I thought well——

Mr. GRIFFITH. I used to represent criminal defendants. It is better.

Ms. RAGGIO. We are all from the same government here. So the Federal Government worked it out and DEQ continued throughout the process saying they did not believe that DOE had the authority to order us to run in violation of their limit. It was a legal issue for them. They filed very clearly in response to the DOE order. I don't know what their intent was. I don't know if they felt threatened by EPA. I can't testify to that, but I can say they were true to their word throughout the whole process.

Mr. GRIFFITH. And of course, Virginia citizens didn't want the pollution, and of course, they weren't the ones that were going to have the blackout. So that created another dilemma that should have been at the Federal level resolved, and this bill would help take care of that problem, wouldn't it? Yes or no?

Ms. RAGGIO. Yes.

Mr. GRIFFITH. I yield back my time. Thank you, Mr. Chairman.

Mr. OLSON. The gentleman yields back, and seeing no members seeking recognition, we are at the end here. So the Chair wants to

thank the witnesses so heartily for coming here and giving us your time, your expertise. We greatly appreciate it, you giving us this opportunity to ask questions of you. For all the members, the record will stay open for 10 days for statements, and without objection, this hearing is adjourned.

[Whereupon, at 12:29 p.m., the subcommittee was adjourned.]

[Material submitted for inclusion in the record follows:]

Rep. Rush Opening Statement- E & P Hearing on H.R. 4273, the "Resolving Environmental and Grid Reliability Conflicts Act of 2012" and the "Hydropower Regulatory Efficiency Act of 2012" (May 9, 2012)

Thank you, Mr. Chairman.

Mr. Chairman, I have repeatedly said that I have an open mind on energy issues and while protecting the public health and the environment are part of my core values and have been a hallmark of my voting record, I also have repeatedly said that I look for commonsense proposals to come out of this subcommittee.

Mr. Chairman, while I think some of the language in H.R. 4273 should be tightened up to ensure that this provision could not be used for more broader purposes, I believe that the bill before us can be an example of commonsense legislation that was brought about through compromise and bipartisan collaboration.

Today, we are requiring our energy companies to undergo a transformation to cleaner, more efficient operating facilities through the MATS standards and other Clean Air Act provisions.

I fully support this transformation and have resisted every effort to rollback these provisions or weaken them in any manner, but I believe we must also have contingencies in place to prevent blackouts and loss of power, especially during the extremely hot and cold months when the public health could be endangered.

So when there is a emergency situation where a company is being ordered by DOE to ramp up productivity, in order to prevent a blackout, but in doing so they would also risk being in noncompliance with environmental regulations, then it makes sense that we provide legal

protection for these companies if they are simply following DOE's instructions for the greater public good.

In hearing after hearing I have argued that complying with MATS standards and other EPA regulations will not cause significant energy shortages because the experts from DOE and FERC have assured us that this is the case.

So I believe that in order to ensure that we are able to effectively protect our constituents from potential power shortages we must strengthen the language in Section 202C so that DOE has the tools necessary to address this issue, but we are not burdening utilities with two competing and opposing mandates.

I believe that it is possible for us to come together in a bipartisan way and produce commonsense, effective legislation that addresses this issue, without allowing for broad, ambiguous language that companies can use as a way to skirt other, non-germane environmental regulations.

So I want to work with my colleagues on this issue so that these concerns are addressed and we are able to come up with a legislative fix for a problem that I believe deserves a solution.

Thank you, Mr. Chairman, and with that I yield back my time.

Department of Energy
Washington, DC 20585

August 3, 2012

The Honorable Ed Whitfield
Chairman
Subcommittee on Energy and Power
Committee on Energy and Commerce
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

On May 9, 2012, Patricia Hoffman, Assistant Secretary, Office of Electricity Delivery and Energy Reliability, testified regarding "The American Energy Initiative" – H.R. 4273, the "Resolving Environmental and Grid Reliability Conflicts Act of 2012" and H.R. ___, the "Hydropower Regulatory Efficiency Act of 2012".

Enclosed is the answer to one question that was submitted by Representative Dingell to complete the hearing record.

If we can be of further assistance, please have your staff contact our Congressional Hearing Coordinator, Lillian Owen, at (202) 586-2031.

Sincerely,

for

Christopher Davis
Deputy Assistant Secretary
for Congressional Affairs
Congressional and Intergovernmental
Affairs

Enclosure

cc: Bobby L. Rush, Ranking Member, Subcommittee on Energy and Power

Printed with soy ink on recycled paper

QUESTION FROM REPRESENTATIVE DINGELL

Q1. Is there relief that can be given to utilities under existing law?

A1. The Department of Energy has broad authority under section 202(c) of the Federal Power Act to order a generator to operate in order to alleviate an emergency situation. The Federal Power Act itself, however, does not contain an explicit mechanism for "relief" of a utility in the hypothetical circumstance where compliance with the terms of a section 202(c) order unavoidably results in violation of a governing requirement under the environmental laws, such as emission limitations in a permit issued under the Clean Air Act. Beyond the Federal Power Act, relevant environmental statutes may provide additional flexibility to address or avoid potential compliance violations, depending on the situation and the applicable requirements. To date, DOE has received only one section 202(c) petition in which environmental compliance played a role. In that case, the Department was able to issue an order relieving emergency reliability conditions without placing the affected utility in a conflict with environmental law.

In August 2005 the Mirant Potomac River Generating Station ceased operations after receiving a letter from the Virginia Department of Environmental Quality (DEQ) regarding mitigating modeled exceedances of national ambient air quality standards. In response to Mirant's decision, the District of Columbia Public Service Commission requested that the Secretary of Energy issue a 202(c) emergency order requiring the operation of the Mirant generating station in order to ensure compliance with electric reliability standards for the central D.C. area.

Pursuant to that request, DOE conducted an independent analysis of the electricity reliability situation in the central D.C. area and analyzed the plant's role in ensuring a sufficiently reliable supply of electricity to that area. Based on that analysis, DOE determined that without the operation of the Potomac River generating station there was a reasonable possibility an outage would occur that would cause a blackout in the central D.C. area. Therefore, on December 20, 2005, DOE issued a 202(c) emergency order requiring Mirant to operate the station. Prior to and after the issuance of that order, DOE worked closely with the United States Environmental Protection Agency and the Virginia Department of Environmental Quality to coordinate efforts to provide operational scenarios for the plant that provided electric reliability to the Central D.C. area while not causing modeled NAAQS violations. Through this means, compliance by Mirant with the provisions of the 202(c) order itself would still enable compliance with the environmental law obligations because the 202(c) order itself was crafted to avoid such violations. DOE's order was designed to avoid requiring action by Mirant that would result in violation of environmental law.

DOE and EPA have consulted regarding the potential effect of EPA regulations on electric reliability and possibilities to mitigate any such effects. Given the flexibilities and time afforded for compliance under the EPA regulations issued to date, the Department expects that emergency circumstances necessary to exercise authority under section 202(c) stemming from EPA rules will be rare and only invoked as a last resort. DOE is committed to working with stakeholders to maintain grid reliability while and

ensuring environmental protection. With cooperation, existing statutes and regulations should be sufficient to address any grid reliability concerns.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG 0 7 2012

OFFICE OF CONGRESSIONAL
AND INTERGOVERNMENTAL RELATIONS

The Honorable Ed Whitfield
Chairman
Subcommittee on Energy and Power
Committee on Energy and Commerce
United States House of Representatives
Washington, DC 20515-6115

Dear Chairman Whitfield:

Thank you for your letter of May 24, 2012, requesting responses to Questions for the Record following the May 9, 2012, hearing entitled, "The American Energy Initiative," focusing on H.R. 4273, the "Resolving Environmental and Grid Reliability Conflicts Act of 2012" and H.R. ___, the "Hydropower Regulatory Efficiency Act of 2012."

The responses to your questions are provided as an enclosure to this letter. Again, thank you for your letter. If you have any further questions, please contact me, or you staff may contact Cheryl Mackay in EPA's Office of Congressional and Intergovernmental Relations at (202) 564-2023.

Sincerely,

Laura Vaught
Deputy Associate Administrator
for Congressional Affairs

Enclosure

cc: The Honorable Bobby L. Rush, Ranking Member

EPA Responses to Questions for the Record

Hearing on Resolving Environmental and Grid Reliability Conflicts Act
Subcommittee on Energy and Power
Committee on Energy and Commerce
May 9, 2012

The Honorable Ed Whitfield

1. The Committee requested EPA to provide the total cost of the Utility MACT rule, and EPA responded on May 8, 2012 by providing an estimate of the capital costs of approximately $35 billion. EPA has not provided an estimate of the present value total of all costs, but NERA Economic Consulting, using EPA's own modeling estimated they would exceed $80 billion.

a. Does EPA disagree with NERA's estimate?

The EPA includes the estimated costs of all its rules in the Regulatory Impact Analysis (RIA), as required by Executive Order 12866. These costs include the incremental annualized costs, as incurred by the utility industry, along with the impact on electricity prices and other key power sector variables.

The EPA believes the NERA report lacks transparency because the full model results, assumptions and documentation of NERA's models are not publically available or otherwise subject to the open examination. In contrast, the EPA's analyses are fully documented and publicly available as part of the official rule record, as required by law. In addition, none of the metrics that the NERA report uses to evaluate the effects of the regulations analyzed, including Gross Domestic Product (GDP), take into account the benefits of implementing those regulations.

Although insufficient information is available to examine the analyses thoroughly, based on the few details that are available, we believe that the NERA report significantly overestimates the costs for the Mercury and Air Toxics Standards (MATS), also called the Utility MACT, by assuming more scrubber installations than the EPA projects; this assumption is based on NERA's artificial and unjustified limitation of using dry sorbent injection (DSI) technology only on units no larger than 300 MW that burn sub-bituminous coal. Currently available data do not rule out the use of DSI for bituminous coals.

b. When will EPA provide this Committee with an estimate of the rule's total cost, including both the capital cost and also the ongoing operating costs?

In response to the Committee's previous request, the EPA has provided annualized costs of MATS in accordance with industry norms, which is how utilities will pass along costs to consumers, in practice. These annualized costs include the incremental amortized capital and annual operating costs associated with MATS. Additionally, EPA estimates that the total capital costs of the final rule, which (through financing) are actually spread out over time periods up to 30 years, amount to about $35 billion. We have not calculated the present value of all costs (or benefits) across multiple individual years. Please see Chapter 3 of the Regulatory Impact Analysis for a full explanation of the EPA's analysis.

2. The Institute of Clean Air Companies, a trade association representing approximately nearly all of the suppliers of control equipment needed to comply with the Utility MACT rule, states that their member companies cannot guarantee to their utility customers that they can meet the stringent new-plant standards. They wrote to EPA on April 16, 2012, stating:

> **"Utilizing the appropriate, commercial [mercury] continuous emissions monitoring systems ("CEM") and dry sorbent trap systems with required quality control/quality assurance protocols in place, our member companies cannot ensure that the final new source [mercury] standard can be achieved in practice."**

a. Will EPA revise the standards given that they are not presently achievable in the real world?

On July 20, 2012, EPA notified petitioners – including the Institute of Clean Air Companies -- of our intent to grant reconsideration of certain new source issues, including measurement issues related to mercury and the data set to which the variability calculation was applied when establishing the new source standards for particulate matter and hydrochloric acid, that may affect the new source standards. The EPA plans to issue a Federal Register notice shortly, initiating notice and comment rulemaking on the new source issues for which the agency is granting reconsideration.

We anticipate that the focus of the reconsideration rulemaking will be a review of issues that are largely technical in nature. Our expectation is that under the reconsideration rule new sources will be required to install the latest and most effective pollution controls and will be able to monitor compliance with the new standards with proven monitoring methods. As a result, the final reconsideration rule will maintain the significant progress in protecting public health and the environment that was achieved through the rule published in February, while ensuring that the standards for new sources are achievable and measurable.

3. How many coal-fired generating units are subject to the Utility MACT rule?

a. How many existing coal-fired generating units does EPA believe currently meet the Utility MACT standards?

Based on the information the EPA has about electric utility steam generating units (EGUs)– either data that the EGUs acquired over the past five years or new data that they gathered as part of the 2010 information collection request (ICR)– the EPA estimates there are approximately 1400 EGUs (1100 coal-fired, 300 oil fired) potentially covered by the standards. Of the 252 coal-fired EGUs for which the EPA received data (prior to the final standards) from the companies for mercury, particulate matter and hydrochloric acid, 68 coal-fired EGUs already exhibited the ability to achieve the level of all of the final emission limits for existing sources with their current control configuration (i.e., before MATS). As the EPA does not have data for the remainder of the EGUs, we cannot speak to their status with respect to compliance with MATS.

b. How many coal-fired generating units does EPA project will be required to install control equipment to comply with the Utility MACT rule?

EPA's MATS rule allows each individual facility to make a business decision about the most cost-effective way for them to meet the rate-based MATS standards. EPA's regulatory impact analysis of MATS, which was finalized in December, found that by 2015 a portion of U.S. coal-fired capacity will install control technology to meet the MATS standards as in Table 1.[1]

Table 1 – Additional controls estimated to be installed by 2015 due to EPA's MATS rule

Controls	Additional controls estimated to be installed by 2015* (units)	Additional controls estimated to be installed by 2015* (capacity)	Additional controls as percentage of 2010** coal-fired capacity (%)
Dry FGD (dry scrubbers)	128	20 GW	6%
Dry Sorbent Injection	161	44 GW	14%
Activated Carbon Injection	308	99 GW	31%
Fabric Filters	156	102 GW	32%
Scrubber Upgrades	198	63 GW	20%
Electrostatic Precipitator Upgrades	73	34 GW	11%

* Integrated Planning Model run by EPA, 2011.
** 2010 data from EPA's NEEDS v.4.10_PTox.

[1] Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards. Available online at <http://www.epa.gov/ttn/ecas/regdata/RIAs/matsriafinal.pdf>

c. **Has EPA confirmed that vendors providing control equipment will guarantee that they can meet the standards for existing plants under the short timelines in the rule?**

During the development of the rule we considered all available information including information from control vendors. Based on this information, we believe that with the flexibilities discussed in the preamble (including the ability of state permitting authorities to grant a one-year extension and an additional year where necessary for reliability critical units) companies should be able to comply with MATS while continuing to provide reliable affordable electric power.

The Honorable John D. Dingell

1. What outreach has the EPA done to public utility commissions or public service commissions to talk about new and pending rules and regulations?

The EPA has participated in a number of meetings with public utility commissioners and is scheduled to participate in a number of additional meetings. The EPA participated with commissioners from across the country in the FERC-NARUC Forum on Reliability and the Environment in February 2012 and expects to participate in the two remaining meetings of the Forum later this year. In addition, the EPA has participated in regional meetings of commissioners, including an April meeting with the Southeastern Association of Regulatory Utility Commissions and a June meeting with the Mid American Regulatory Commissioners, and the NARUC-NACAA-NASEO meeting held this July. The EPA communicates with commissioners through other forums as well.

2. When working in a disaster type scenario, such as a hurricane, how quickly can EPA issue an administrative consent order relating to any EPA issues?

3. Is there relief that can be given to utilities under existing law?

This answer responds to both Questions 2 and 3. How quickly the EPA can issue a Section 113(a) administrative consent order will vary based on the specific circumstances at issue.

Note that strong storms often affect or threaten vehicle fuel supplies, and we are used to expeditiously exercising our related mobile source authorities. Pursuant to Section 211(c)(4)(C)(ii) of the Clean Air Act, the EPA has explicit authority to waive fuel regulations, provided certain conditions established by Congress are met. Prior to issuing a waiver, the EPA coordinates with the Department of Energy to survey fuel supplies, work with affected states and develop a response plan that must be approved by both the EPA Administrator and the Secretary of the Department of Energy. This process typically takes one to two weeks and can be accomplished faster if necessary.

Although there is no direct parallel to the mobile source fuel waiver provision under the stationary source provisions of the Clean Air Act, if circumstances warrant, we could exercise our Section 113(a) administrative authority in an expeditious fashion.

Pursuant to the process described in the "The Environmental Protection Agency's Enforcement Response Policy For Use Of Clean Air Act Section 113(a) Administrative Orders In Relation To Electric Reliability And The Mercury and Air Toxics Standard" (available at: www.epa.gov/compliance/resources/policies/civil/erp/mats-erp.pdf), we expect companies to conduct early compliance planning and to seek an administrative order from the EPA well in advance of the relevant compliance date. This would give us a fair amount of lead time to negotiate an administrative order.

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C. 20426

Office of Commissioner Philip D. Moeller

June 8, 2012

The Honorable Ed Whitfield
Chairman
Subcommittee on Energy and Power
United States House of Representatives
Washington, DC 20515

Dear Chairman Whitfield:

Thank you for your continuing interest in our work at the Federal Energy Regulatory Commission (FERC), and for providing me with an opportunity to express my views on the subject of how actions by the Environmental Protection Agency (EPA) could impact the reliability of our nation's electric system.

Enclosed is my response to the question asked by the Honorable John D. Dingell. As always, I am available to meet with you to discuss this or any other matter concerning the work of the Commission.

Sincerely,

Philip D. Moeller

Answer of Commissioner Philip Moeller to the Question Asked by the Honorable John D. Dingell

1.: To what extent can utilities plan for reliability-related emergencies that might fall under Section 202c?

Answer: In order to fully answer your question, I believe it is important to use the term "generators" instead of utilities. A generator in a vertically integrated market will often—although not exclusively—be owned by a utility. In these cases a utility may have the ability to place any costs associated with reliability emergencies into their "rate base". A utility in this situation would presumably work with its regional reliability coordinator, state utility commission, and other state and federal agencies to plan for such an emergency.

However, in organized wholesale markets, a generator will often be owned by an independent power producer and will have a very different decision process to address planning for reliability related emergencies. A generator in this situation would presumably work with its regional reliability coordinator and state and federal agencies to address such an emergency, but it would usually have less direct involvement with its state utility commission. The wholesale market operator would also have a significant role in determining how to run the market in the event of a reliability emergency.

Ultimately, although the owners of generators can plan for any contingency including emergencies, they cannot control the timing of required governmental approvals for their plans. Delays in action by governmental agencies can place generators in the position of not being able to fulfill their societal obligation to both keep the lights on and comply with environmental mandates.

FRED UPTON, MICHIGAN
CHAIRMAN

HENRY A. WAXMAN, CALIFORNIA
RANKING MEMBER

ONE HUNDRED TWELFTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON ENERGY AND COMMERCE
2125 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6115

Majority (202) 225–2927
Minority (202) 225–3641

May 24, 2012

Mr. Jeffrey C. Wright
Director
Office of Energy Projects
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

Dear Mr. Wright:

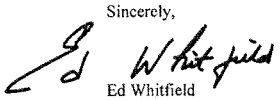
Thank you for appearing before the Subcommittee on Energy and Power on Wednesday, May 9, 2012, to testify at the hearing entitled "The American Energy Initiative." This day of the hearing focused on H.R. 4273, the "Resolving Environmental and Grid Reliability Conflicts Act of 2012" and H.R.___, the "Hydropower Regulatory Efficiency Act of 2012."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for 10 business days to permit Members to submit additional questions to witnesses, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and then (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on Friday, June 8, 2012. Your responses should be e-mailed to the Legislative Clerk, in Word or PDF format, at Allison.Busbee@mail.house.gov.

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,



Ed Whitfield
Chairman
Subcommittee on Energy and Power

cc: Bobby L. Rush Ranking Member, Subcommittee on Energy and Power

Attachment

The Honorable Henry A. Waxman

1. **Mr. Wright, is FERC drafting a memorandum of understanding with the California State Water Resources Control Board relating to Clean Water Act section 401 issues that arise in the hydropower licensing process?**

Yes

a. If so, what is the status of this effort and when do you expect it to be complete?

FERC staff is currently exchanging drafts of a memorandum of understanding (MOU) with the staff of the California State Water Resources Control Board (Water Board). We expect this process will be completed within the next six months.

b. Are there any outstanding substantive issues still being negotiated?

Thus far, the FERC and Water Board staffs have discussed coordination of FERC's pre-filing application process under the Integrated Licensing Process and the Water Board's need to scope environmental issues under the California Environmental Quality Act (CEQA). We are currently planning to discuss post-filing coordination of the development of FERC's environmental document under the National Environmental Policy Act (NEPA) and the Water Board's preparation of a Water Quality Certificate under section 401 of the Clean Water Act.

c. Will the MOU address FERC's current policy that the California State Water Resources Control Board cannot retain party status in a licensing proceeding if it cooperates in the preparation of FERC's NEPA document?

Initial discussions between FERC and the Water Board staffs focused on the preparation of a cooperative NEPA document that would also comply with the requirements of CEQA. FERC staff explained that any agency wishing to cooperate on a FERC environmental document would have to agree not to intervene in the particular licensing proceeding to allow for unrestricted inter-agency communication consistent with FERC's regulations governing ex-parte communications. FERC and Water Board staffs discussed possible ways the Water Board could both intervene while acting as a cooperating agency including separation of decisional and non-decisional staff. However, the Water Board staff ultimately indicated that it could not cooperate on an environmental document even under those circumstances. Therefore, the MOU will not address the FERC/Water Board cooperation in the preparation of FERC's NEPA document.

In a FERC integrated licensing process proceeding, agencies with mandatory conditioning authority pursuant to sections 4(e) or 18 of the Federal Power Act or section 401 of the Clean Water Act may request studies pursuant to 18 CFR § 5.9 to help inform the development of such conditions.

2. Since the implementation of the integrated licensing process, how many studies have been requested by agencies with such mandatory conditioning authority?

1,260

3. How many of those requested studies has FERC included in its final study plan determinations?

Of the 1,260 studies requested, 839 were approved in the final study plan determination, and 294 were approved with modifications.

4. How many of those requested studies has FERC declined to include in its final study plan determinations?

Of the 1,260 studies requested, 127 were not adopted in the final study plan determination.

The Honorable Morgan Griffith

1. Based on local concerns at Smith Mountain Lake, Claytor Lake, and Lake of the Ozarks, Congress directed FERC in the FY12 Energy & Water Appropriations report to identify and report back on improvements that could be made to address concerns with the licensing and shoreline management process. Where is the Commission in this process and what changes does it believe need to be made?

The Commission staff is working on a response to the directive in the Appropriations report. I will forward you a copy of staff's response when it is complete.

2. My colleague, Robert Hurt of Virginia, has introduced the "Supporting Home Owner Rights Enforcement Act" (H.R. 3663), which would include minimizing infringement on the useful exercise and enjoyment of property rights as a consideration under Section 4(e) of the Federal Power Act. Do you

believe this would be a positive step to address these and future concerns at hydroelectric projects licensed by the Commission?

I do not believe such a step is necessary. See responses to questions 3 and 4.

3. Does FERC currently require private property rights to be considered when issuing a license under the Federal Power Act? What about when the Commission is reviewing a Shoreline Management Plan? If FERC already does so, would it be reasonable to codify this requirement in statute to ensure it continues to be considered going forward? If not, why not?

Section 10(a)(1) of the Federal Power Act requires the Commission, when issuing a license, to find that the project adopted will be best adapted to a comprehensive plan for improving and developing a waterway or waterways. To the extent that issues regarding private property rights are identified by the Commission or raised by others, the Commission will consider them. The same is true in developing shoreline management plans.

4. Since there are individual landowners within project boundaries, why should minimizing impacts on the enjoyment and use of private property not be given equal consideration when reviewing a license?

There are private lands within the boundaries of some, but by no means all, regulated projects. In licensing projects, the Commission examines all issues that arise, including concerns expressed by landowners, whether or not their property is located within the project boundary, regarding impacts on their lands.

○