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*Hydropower Licenses and Alternative Licensing Conditions  
in H.R. 6*

Kyna Powers, Resources, Science, and Industry Division

May 12, 2005

**Abstract.** To make sure navigable waters are managed for the public interest, Congress oversees the construction and operation of hydroelectric facilities. Congress directly authorizes federal hydropower projects and requires that private hydropower projects obtain federal licenses. This report summarizes federal licensing and licenseconditioning authority for nonfederal projects, discusses key arguments for and against changing the process through which federal resource agencies issue license conditions, and reviews current legislative proposals to revise federal licensing authority.

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# CRS Report for Congress

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## **Hydropower Licenses and Alternative Licensing Conditions in H.R. 6, 109<sup>th</sup> Congress**

**May 12, 2005**

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# Hydropower Licenses and Alternative Licensing Conditions in H.R. 6, 109<sup>th</sup> Congress

## Summary

In the next ten years, nearly 20% of the nation's nonfederal hydropower projects will require new federal licenses to continue operating. New licenses will establish facilities' operating parameters for the next 30 to 50 years. These operating parameters will affect the total quantity and timing of electricity production. They will also affect flood control, irrigation, municipal and industrial water supplies, recreation, fish and wildlife habitat, and transportation.

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

Reflecting recommendations by FERC and the hydropower industry, the House included a provision to alter federal agencies' license-conditioning authority in the Energy Policy Act of 2005 (H.R. 6). This provision would allow stakeholders to propose alternative license conditions and would require federal agencies to consider and accept the applicant's proposed alternative if it found that the alternative (1) provides for the adequate protection and utilization of the federal reservation, or would be no less protective of the fish resource than the fishway initially prescribed, and (2) costs less to implement, and/or would result in improved operation of the project for electricity production. It also requires that the Secretary of the relevant conditioning agency submit a written statement showing it gave equal consideration to the effects of the original and alternative conditions on energy, flood control, navigation, air quality, and water supply.

Response to the pending provision has been mixed. While the hydropower industry supports the legislation, some environmental organizations oppose the bill, and officials within some conditioning agencies have expressed concerns. Opponents of the legislation contend that it could increase relicensing time, weaken environmental protections, give applicants undue standing in the conditioning process, and weaken FERC's new Integrated Licensing Process. Proponents contend that it would create accountability for the conditioning agencies, decrease the cost of license conditions without diminishing agencies' conditioning authority, and enhance FERC's licensing processes.

This report will be updated as events warrant.

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# Hydropower Licenses and Alternative Licensing Conditions in H.R. 6, 109<sup>th</sup> Congress

## Background and Analysis

Hydropower is one of multiple benefits the nation's waters provide. It accounts for approximately 6% of all electricity consumed in the United States and 15% or more of the electricity consumed in Idaho (86%), Oregon (68%), Washington (68%), South Dakota (45%), Montana (26%), Alaska (21%), and New York (15%).<sup>1</sup> Hydroelectric power is generated by releasing water through a set of turbines. It does not pollute the air and may be turned on or off in a matter of minutes. By storing water behind dams and controlling water releases, some hydropower facilities can generate electricity during periods of high energy demand (so-called *peaking power*).

While hydropower facilities are important sources of clean peaking power, the construction and management of dams are contentious because they affect other water uses and resources. Dams alter rivers by blocking downstream flows and creating reservoirs. These reservoirs may provide some recreational and habitat benefits, but they reduce river recreation and may block the passage of migratory fish, harming the commercial fishing industry that these fish support. Once a hydropower facility is built, its management also affects water uses. For example, the decision of when, how, and how much water to release from a hydroelectric facility affects flood control, irrigation, municipal water supplies, recreation, fish and wildlife habitats, and transportation. (See CRS Report RL31536, *Licensing of Non-Federal Hydroelectric Projects: Background and Current Issues*, by Nicole T. Carter).

To make sure navigable waters are managed for the public interest, Congress oversees the construction and operation of hydroelectric facilities. Congress directly authorizes federal hydropower projects and requires that private hydropower projects obtain federal licenses.<sup>2</sup> This report summarizes federal licensing and license-conditioning authority for nonfederal projects, discusses key arguments for and against changing the process through which federal resource agencies issue license conditions, and reviews current legislative proposals to revise federal licensing authority.

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<sup>1</sup> U.S. Dept. of Energy, Energy Information Administration, *State Energy Data 2001 Consumption*, Table S8, "Electric Power Sector Consumption Estimates, 2001," available at [[http://www.eia.doe.gov/emeu/states/sep\\_sum/html/sum\\_btu\\_eu.html](http://www.eia.doe.gov/emeu/states/sep_sum/html/sum_btu_eu.html)].

<sup>2</sup> Managers of federal dams may implement operational changes similar to those contained in hydropower licenses.

## Licensing Authority

Rivers are national resources that may be used for interstate commerce and can provide multiple benefits. As such, the federal government regulates the construction and operation of facilities that block or pollute navigable waters. Through the 1920 Federal Power Act (FPA; 16 U.S.C. §792), Congress created the Federal Power Commission (FPC), later renamed the Federal Energy Regulatory Commission (FERC), to license all nonfederal hydropower facilities. Using this authority, FERC granted 30- to 50-year licenses to projects located in 45 states (excluding Delaware, Hawaii, Mississippi, North Dakota, and South Dakota, which have no FERC-licensed nonfederal dams). Many of the licenses for these projects were issued during the 1950s and 1960s, and are now expiring. In the next 10 years, 199 projects, or about 20% of all licensed nonfederal hydropower facilities, will need new licenses to continue operating.<sup>3</sup>

To help ensure that FERC licenses protect migratory fish and federally reserved lands (e.g., lands, such as Indian reservations and national forests, that are set apart by the federal government for a special purpose), Congress created a role in the licensing process for certain federal agencies. The FPA requires that FERC include certain agency-established operating conditions in its licenses. For example, §18 of the FPA (16 U.S.C. §811) stipulates that the Secretary of the Interior or the Secretary of Commerce may develop license conditions that direct the applicant to construct and maintain a passageway, called a fishway, through which fish can travel around barriers created by the dam. Furthermore, §4(e) authorizes certain department Secretaries to develop license conditions for facilities located in the federal reservations they manage (16 U.S.C. §797(e)). Under § 4(e), a Secretary may stipulate provisions that are necessary to maintain the reservation for its federally designated purposes. Conditioning authority is not limited to FERC and federal agencies. The 1970 Federal Water Pollution Control Act, commonly known as the Clean Water Act (CWA; 33 U.S.C. §1341), extends such authority to state water pollution-control agencies. Under the CWA, a FERC-issued license must include any conditions that the state deems necessary to maintain state-designated uses or water quality standards. (For more information on §401, see CRS Report 97-488 ENR, *Clean Water Act Section 401: Background and Issues*, by Claudia Copeland.)

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

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

**License Conditions for Projects on Federal Reservations (FPA §4(e)).** Section 4(e) of the FPA applies to hydropower facilities located on federally reserved lands (e.g., Indian reservations and national forests). Under this section, the

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<sup>3</sup> Federal Energy Regulatory Commission, *Hydroelectric Projects Under Commission License*, updated Jan. 19, 2005, at [<http://www.ferc.gov/industries/hydropower/gen-info/projlic.PDF>].

Secretary of the department with jurisdiction over the reserved land has the authority to issue any license conditions necessary to maintain the reservation. Depending on the purpose of the reservation, the agency's conditions may address a range of goals including the preservation or enhancement of recreation, federal lands, and aquatic habitat. For example, the Secretary could require the applicant to schedule periodic water releases for recreation (white-water releases), to release minimum quantities of water for fish migration (minimum flows), to control the rate of water release to reduce habitat disruption (ramping requirements), and to limit reservoir fluctuations to reduce erosion and maintain habitat (reservoir fluctuation limits). The Department of the Interior reports that the Bureau of Indian Affairs, Bureau of Reclamation, National Park Service, and Bureau of Land Management issued §4(e) conditions for 6% of the projects relicensed between 1995 and 2000.<sup>4</sup>

**Fishway Provisions (FPA §18).** Under §18 of the FPA, the Secretary of the Interior and the Secretary of Commerce may require applicants to construct and operate a physical structure, facility, or levee (called a fishway) that allows fish to pass around barriers created by the hydropower project.<sup>5</sup> Fishways provide young migratory fish with a passage around the dam on their way downstream. Without a fishway, migratory fish may traverse the more dangerous passage over the dam via spill, or through the project's turbines. Adult fish may also use fishways, such as fish ladders, to get past the dam on their way upstream to spawn. Without fishways, a hydropower project may block upstream migration. To preserve and enhance fish resources, the Fish and Wildlife Service (FWS) issued §18 conditions for 20% of the projects relicensed between 1995 and 2000. The Department of Commerce, through the National Marine Fisheries Service (NMFS), issued §18 conditions for 7.6% of the projects licensed between 1995 and 2000. In some cases, the NMFS and the FWS issued conditions for the same projects.<sup>6</sup>

## License Conditioning Agencies and the Relicensing Process

Federal resource agencies establish FPA §4(e) and §18 license conditions by working with FERC's licensing processes. FERC's regulations allow three licensing processes: (1) a structured process, known as the Traditional Licensing Process (TLP), (2) a collaborative process, known as the Alternative Licensing Process (ALP), and (3) a new licensing process, called the Integrated Licensing Process (ILP), that is both structured and collaborative. The ILP is the default process. Each of these processes has two phases: a pre-application phase led by the applicant, and a

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<sup>4</sup> Letter by William D. Bettenberg (Interior) to David P. Boergers (FERC), *Hydroelectric Licensing Policies, Procedures, and Regulations: Comprehensive Review*, entered into FERC Docket No. PL01-1-000 on April 16, 2001. (Hereafter referred to as *2001 DOI Letter*.)

<sup>5</sup> U.S. Environmental Protection Agency, "Notice of Proposed Interagency Policy on the Prescription of Fishways under Section 18 of the Federal Power Act," 65 *Fed.Reg.* 80898 (Dec. 22, 2000). See also 16 U.S.C. §811.

<sup>6</sup> *2001 DOI Letter*.

post-application analysis phase led by FERC.<sup>7</sup> As described below, conditioning agencies participate in both licensing phases.

**Pre-Application Phase.** For FERC and other agencies to evaluate a project and develop license conditions, they need information on how the project affects various resources. FERC and conditioning agencies generally obtain this information from the applicant, who conducts studies before submitting a license application.<sup>8</sup> Specifically, FERC's licensing process requires an applicant to consult with stakeholders, including conditioning agencies, before the applicant proposes a study plan.

The pre-application process can be delayed when the applicant disagrees with the conditioning agencies about the need for, or content of, particular studies. Agencies, unlike FERC, do not have the authority to require applicants to conduct studies. However, agencies' authority to issue license conditions does provide applicants with an incentive to resolve study disagreements. Prior to the recent rule-making, conditioning agencies and applicants could use FERC's still-existing Dispute Resolution Service (DRS). (The DRS mediates license disputes, and can call on FERC staff to help clarify issues, but has no authority over the outcome.) Now, based on the recent FERC rule, applicants and stakeholders may first try to resolve disputes through voluntary discussions. If this voluntary process fails, however, conditioning agencies can file for study dispute resolution. When this occurs, FERC convenes a panel to review the dispute and make a recommendation to the director of FERC's Office of Energy Projects. This process may help to reduce litigation and the initiation of studies late into the licensing process. (For more information on this process, see CRS Report RL31903, *Relicensing of Non-Federal Hydroelectric Projects: Summary and Discussion of Procedural Reform Proposals*, by Kyna Powers.)

**Post-Application Phase.** Once the applicant completes the studies and submits the license application, FERC evaluates the study results and develops the license. FERC's role is to develop a license that balances hydropower, recreation, ecological, cultural, and other aspects influenced by the project. This license may include conditions proposed by various resource agencies. Currently, agencies develop license conditions that may or may not incorporate suggestions from other stakeholders. After the agency submits its conditions, FERC *must* include them in its license unless FERC finds that the conditions are unrelated to the agencies' FPA jurisdiction. If the conditions are outside the agencies' jurisdiction, FERC may refuse to include them in its license.

A key issue prompting legislative proposals is that under the current processes, applicants and other stakeholders have little opportunity to contest certain agency conditions. However, some administrative activities are underway. In September

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<sup>7</sup> Federal Energy Regulatory Commission, *Final Rule* (Docket No. RM02-16-000, Order No. 2002), at [<http://www.ferc.gov/whats-new/comm-meet/072303/H-1.pdf>].

<sup>8</sup> In some cases, FERC requests additional studies after the applicant has submitted the license application.



2004, the Department of the Interior released a proposed rule to establish an administrative appeals process for license applicants, but no other stakeholders.<sup>9</sup>

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

## Cost of Mandatory Conditions

Through the relicensing process, FERC often establishes license conditions designed to preserve and enhance resources affected by hydropower projects. While these conditions often generate environmental, recreational, or other benefits, they may also generate costs for the applicant. In 2001, FERC calculated the median cost of a license's protection, mitigation, and enhancement measures, including state agency conditions, as \$246 per kilowatt (kW) of capacity under the TLP and as \$58 per kW under the ALP.<sup>10</sup> However, these figures were criticized by the General Accounting Office (now Government Accountability Office) because they are based on a sample of projects that submitted their costs to FERC and not on a representative sample.<sup>11</sup>

License conditions may result in two types of costs: fixed capital costs such as construction of installations, and variable costs that arise from changes in management. For example, license conditions may require applicants to purchase or construct installations, including fishways, boat ramps, and fish screens. Variable costs, such as changing facility operations, may also decrease total hydropower production. For example, minimum flow requirements, white water releases, or fishway releases may reduce the facility's total generation when the water is not released through turbines. According to FERC, conditions placed in the license for

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<sup>9</sup> "Procedures for Review of Mandatory Conditions and Prescriptions in FERC Hydropower Licenses." 69 *Fed. Reg.* 174 (Sept. 9, 2004).

<sup>10</sup> Federal Energy Regulatory Commission, *Report to Congress on Hydroelectric Licensing Policies, Procedures, and Regulations — Comprehensive Review and Recommendations Pursuant to Section 603 of the Energy Act of 2000* (Washington, DC: May, 2001), available at [[http://www.ferc.gov/legal/ferc-regs/land-docs/ortc\\_final.pdf](http://www.ferc.gov/legal/ferc-regs/land-docs/ortc_final.pdf)]. Hereafter referred to as the *Section 603 Report*.

<sup>11</sup> U.S. General Accounting Office, *Licensing Hydropower Projects: Better Time and Cost Data Needed to Reach Informed Decisions about Process Reforms*, GAO-01-499 (Washington, DC: May 2, 2001).

environmental protection reduce average annual hydropower generation by 1.59%.<sup>12</sup> While these conditions may decrease total electricity generation, they may also reduce the facility operator's leeway to store water behind the dam for release during periods of peak demand.<sup>13</sup> If hydropower is removed from the supply of peaking power, additional generation by other higher cost producers may be required. At the same time, FERC estimates that efficiency improvements (e.g., new turbines) made during relicensing, increase hydropower generation capacity by an average of 4.06%.<sup>14</sup>

While license conditions generate costs for applicants, the absence of conditions could cause (and may already have caused) harm to other stakeholders. For example, operating dams without fishways or minimum water releases for fish could harm fish stocks and people that enjoy or depend on fish (e.g., Native Americans, commercial fishermen, anglers, and fish consumers). Similarly, operating dams without constraints on reservoir fluctuations and water release rates may increase stream-bank and reservoir-bank erosion. Such erosion generates costs for owners of shoreline or river-front property (including taxpayers as owners of federal lands).

## Proposed Changes to the License-Conditioning Process

A number of issues emerged as the first wave of hydropower projects were relicensed throughout the 1990s. These issues have prompted Congress to hold hearings and take other actions to examine the licensing process. The 106<sup>th</sup> Congress directed FERC to conduct a comprehensive review of the policies, procedures, and regulations guiding the licensing process and report to Congress (§603 of the Energy Act of 2000, P.L.106-469). FERC responded in May 2001, with recommendations on how to reduce the length and expense of obtaining a new license.<sup>15</sup> In addition to administrative proposals, the *Section 603 Report* proposed legislative changes to the relicensing process. One class of proposals focused on agencies' mandatory conditioning authority. For example, FERC suggested that Congress grant it the authority to reject or modify resource agencies' conditions and that Congress require agencies to better support their license conditions. While the hydropower industry tends to support these FERC recommendations, environmental organizations and some officials within federal and state agencies oppose these suggestions and any other proposed reduction in resource agencies' current license-conditioning authority. Opponents of FERC's legislative proposal contend that administrative reforms, such as FERC's rule establishing the ILP and development of agencies' administrative review processes, are adequate to improve the relicensing process.

Legislative proposals incorporating some of these suggestions have been introduced in Congress in recent years, but none has been enacted. For example, hydroelectric titles passed both chambers during the 107<sup>th</sup> Congress. (H.R. 4, the

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<sup>12</sup> *Section 603 Report*.

<sup>13</sup> Not all dams have storage capacity. Some facilities, known as run-of-river projects, have little storage, thus they depend on daily water inflows to generate hydropower.

<sup>14</sup> *Section 603 Report*.

<sup>15</sup> *Ibid*.

Securing America's Future Energy Act, passed the House August 2, 2001, and the Energy Policy Act, also H.R. 4, passed the Senate April 25, 2002.) This legislation was the basis of relicensing legislation proposed in the 108<sup>th</sup> Congress. Title III of H.R. 4 (107<sup>th</sup> Congress) was incorporated into H.R. 6 as passed by the Senate during the 108<sup>th</sup> Congress. Title III of H.R. 6 also passed the House (House H.R. 6), though with substantive differences. The conference agreement<sup>16</sup> contained similar language to the House-passed bill, and is the basis of legislation proposed in the 109<sup>th</sup> Congress.

## **Hydroelectric Relicensing Legislation in the 109<sup>th</sup> Congress**

Section 231 of H.R. 6, as passed by the House in the 109<sup>th</sup> Congress, focuses on federal agencies' license conditioning authority under §4(e) or §18 of the FPA. It would provide license applicants, but not other interest groups, with the opportunity for a trial-type hearing on facts related to agency-proposed license conditions. It would allow all entities to propose alternative conditions. However, the conditioning agency would be required to consider alternatives proposed by applicants, but not other entities, and accept them if the alternative (1) "provides for the adequate protection and utilization of the federal reservation," or is "no less protective of the fish resource than the fishway initially prescribed," and (2) "costs less to implement, and/or will improve operation of the project for electricity production."

H.R. 6, as passed by the House, would also require the conditioning agency to justify its decision to accept or reject the alternative after giving "equal consideration" to a broad range of factors. These factors include energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to the preservation of other aspects of environmental quality). This section of the proposed legislation differs from some earlier versions of the bill (e.g., the Senate-passed version from the 108<sup>th</sup> Congress), which would have required the agency to include such factors in its justification, but not to consider them equally.

H.R. 6 would also establish a system for reviewing the agency's decision when it rejects the applicant's alternative. Specifically, it states that FERC could refer the agency's decision to its Dispute Resolution Service (DRS). Unlike its current mediation role, the proposed legislation would require the DRS to review the facts and issue a non-binding advisory. The Secretary of the conditioning agency would then reconsider his or her decision and may or may not accept the advisory.

### **Discussion**

Response to the relicensing legislation in the 109<sup>th</sup> Congress is mixed. The hydroelectric industry supports the legislation, but some environmental organizations and some officials within relevant government agencies have expressed concerns. While the National Hydropower Association is more supportive of H.R. 6 than

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<sup>16</sup> As noted above, the conference agreement did not pass by the end of the 108<sup>th</sup> Congress.

previous bills, some environmental organizations view the Senate-passed version from the 108<sup>th</sup> Congress as preferable. According to FERC, H.R. 6 (as passed by the House in the 108<sup>th</sup> and 109<sup>th</sup> Congresses) would provide accountability by making agencies justify their conditions relative to the proposed alternatives and the conditions' effects on multiple resources. The hydropower industry contends that this legislation would decrease the cost of license conditions. On the other hand, some environmental organizations and officials within conditioning agencies have expressed concerns that the legislation would further increase the length of the relicensing process, diminish environmental protection, reduce the effectiveness of FERC's new ILP, and give license applicants more authority in the license conditioning process than other stakeholders.<sup>17</sup> These issues are discussed below.

**Length of Process.** If enacted, H.R. 6 would add additional steps to the licensing process. Specifically, it would require that federal agencies determine whether or not a proposed alternative meets the environmental and cost criteria described above, and determine how the alternative and agencies' conditions affect energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to preserving other aspects of environmental quality). H.R. 6 would also allow license applicants to initiate a trial-type hearing on issues of material fact. Both of these provisions could add an undetermined amount of time to the licensing process. H.R. 6 would also establish a 90-day process for the DRS and FERC to review the agency's conditions. This provision was not included in the Senate-passed H.R. 6 from the 108<sup>th</sup> Congress.

From the perspective expressed by industry and FERC, H.R. 6 as passed by the House during the 108<sup>th</sup> and 109<sup>th</sup> Congresses would improve the license conditions, thus justifying additional process time. Furthermore, supporters of the legislation contend that additional procedure on the front end could decrease delays at the end of the process. However, some environmental organizations, such as the Hydropower Reform Coalition, contend that the administrative hearings called for in H.R. 6 could add 2-3 years<sup>18</sup> to a licensing process (including the pre-application phase) intended to take 5-5.5 years. Furthermore, some opponents of the legislation contend that the administrative appeals processes under development and the new ILP will sufficiently improve the relicensing process.

**Environmental Issues.** Under the FPA, Congress granted FERC the authority to issue hydropower licenses, but gave federal land and water management agencies the responsibility for protecting federal reservations and maintaining fish resources. When issuing license conditions to fulfill their responsibilities under §4(e) and §18 of the FPA, conditioning agencies are not required to analyze stakeholder recommendations. Under H.R. 6, the agency "must consider" the alternative conditions offered by the license applicant. After such consideration, the agency would be required to accept the alternative if it found that the proposal meets

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<sup>17</sup> See, for example, Hydropower Reform Coalition, *Oppose Hydropower Section in the Energy Bill: More Red Tape and Less Environmental Protection*, available at [<http://www.americanrivers.org/site/DocServer/05fulltextandcritique.doc?docID=282>].

<sup>18</sup> *Ibid.*

specified environmental and cost criteria (e.g., the proposed alternative adequately protects the resource).

Although federal conditioning agencies could reject an alternative condition that did not meet the bill's environmental and cost criteria, environmental organizations are concerned that the bill would distract agencies from their focus on protecting fish and federal reservations by requiring them to give equal consideration to the effects on energy supply, distribution, cost, and use; flood control; navigation; water supply; and air quality (in addition to preserving other aspects of environmental quality). They further contend that the agencies do not have adequate resources to conduct these additional studies. Supporters of the bill contend that requiring agencies to balance the multiple effects of their conditions would help ensure that license conditions are established in the public interest.

While the equal consideration clause may expand the agencies' focus, the effect of this language on the conditions designed to protect fish and federally reserved lands would depend on how the agencies interpret their responsibility to make sure that the alternative is "no less protective of fish resources," or that it provides "adequate protection and utilization of the reservation." Environmental organizations are concerned that the language contained in H.R. 6, which states that the alternative "will be no less protective of the fish resource than the fishway initially prescribed," could open the door for applicants to propose non-fishway alternatives to fishway conditions.<sup>19</sup> For example, environmental organizations are concerned that the legislation would allow the applicant to propose maintaining fish populations by means such as stocking the river with hatchery fish. Environmental organizations generally find this and other mechanisms to be less successful than fishways in maintaining naturally-diverse migratory fish populations. However, industry representatives contend that such concerns regarding the effectiveness of alternative conditions are unwarranted. They contend that the provisions preserve agencies' authority to reject alternatives which are "less protective of the fish resources than the agencies' alternative." Therefore, the applicant's ability to substitute other mechanisms for fishways, would depend on the agency's determination of the protectiveness of the alternative.

**Effectiveness of the Integrated Licensing Process (ILP).** In 2004, FERC created a new licensing process called the Integrated Licensing Process (ILP). This process was intended to improve the licensing process by increasing FERC participation in the early phases and creating a study dispute resolution mechanism. Environmental organizations and some officials within conditioning agencies assert that H.R. 6 could weaken the ILP by reducing incentives for applicants to engage actively in early consultations with resource agencies. Specifically, opponents of the legislation contend that license applicants would be less willing to consult and negotiate with resource agencies if the agencies do not have the authority to issue final license conditions. Conversely, FERC and the hydropower industry contend that this legislation would not reduce agencies' conditioning authority, and thus

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<sup>19</sup> See the Hydropower Reform Coalition's May 6, 2003 press release regarding the energy bill, available at [<http://www.americanrivers.org/site/DocServer/05ggsenatefloorhydrotr.doc?docID=283>].

would not alter an applicant's incentive to negotiate with agencies. (For more information on the ILP, see CRS Report RL31536, *Licensing of Non-Federal Hydroelectric Projects: Background and Current Issues*, by Nicole T. Carter.)

**Participation in the Conditioning Process.** Under current law, the recommendations of industry and non-industry stakeholders are given similar weight in agencies' conditioning process. A key concern of environmentalists and other nonutility stakeholder groups is that H.R. 6 would increase the applicant's input relative to other stakeholders. H.R. 6 would entitle license applicants, but not other stakeholders, to a trial-type hearing through which they could counter disputed factual issues related to the agency's proposed conditions. Furthermore, H.R. 6 would require that agencies consider the applicant's alternative conditions but not the conditions offered by "other interested parties."<sup>20</sup> Some non-industry stakeholders would prefer to see this section expanded to require that agencies consider alternatives offered by any stakeholder. However, some officials within conditioning agencies are concerned that they may have insufficient resources to consider all industry-proposed alternatives in addition to other stakeholder-proposed alternatives.

**Dispute Resolution Process.** If the Secretary does not accept an applicant's alternative, H.R. 6 allows FERC to refer the dispute to its Dispute Resolution Service (DRS). After consultation with the Secretary and the Commission, the DRS would issue a non-binding advisory and the Secretary would make a final determination. Supporters of this provision contend that the process would help hold agencies' accountable for their decisions. Others, however, point out that the DRS is a facilitative entity that is not currently set-up to make recommendations. They suggest that the administrative review processes agencies are currently developing may be adequate, or that another process should be used (e.g., a body similar to the Dispute Resolution Panels established pursuant to the Final Rule). Still others contend that this process, which results in a non-binding Dispute Resolution Service advisory, is unnecessary and lengthens the licensing process.

## Conclusion

As H.R. 6 moves from the House to the Senate, differences between H.R. 6 (109<sup>th</sup> Congress) and the Senate-passed version (108<sup>th</sup> Congress) leave multiple topics for debate. In particular, the House-passed bill would establish trial-type hearings for license applicants, but no other stakeholders; would require agencies to consider all water resource uses equally; and would create a mechanism for reviewing conditioning agencies' decisions. While these provisions were incorporated into the Conference agreement on H.R. 6 (108<sup>th</sup> Congress) and have support from the hydropower community, opponents remain among other river users.

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<sup>20</sup> U.S. Congress, House, Energy and Commerce, Subcommittee on Energy and Air Quality, testimony of Leon Szeptycki, General Council of Trout Unlimited, on Comprehensive National Energy Policy, March 12, 2003.

## For Additional Reading

### CRS Reports

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

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

### Other Documents

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

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