



November 10, 2021

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Council on Environmental Quality
730 Jackson Place NW
Washington, DC 20503

Attn: Docket ID No. CEQ-2021-0002

Re: Comments on Proposed Phase I NEPA Rule Revisions

Dear CEQ Staff:

On behalf of our member communities and their residential, commercial, and industrial customers, we appreciate this opportunity to provide comments on the proposed revisions to the Council on Environmental Quality (CEQ) rules implementing the National Environmental Policy Act (NEPA) published in the Federal Register on October 7, 2021 (86 Federal Register 55757).

Background on AMP/OMEA

American Municipal Power, Inc. (AMP) is a nonprofit wholesale power supplier and services provider for 134 member municipal electric systems in the states of Ohio, Pennsylvania, Michigan, Virginia, Kentucky, West Virginia, Indiana, and Maryland and the Delaware Municipal Electric Corporation, a joint action agency with nine members headquartered in Smyrna, Delaware. AMP's mission is to serve Members through public power joint action, innovative solutions, robust advocacy and cost-effective management of power supply and energy services. AMP offers a wide variety of services to help member communities improve the quality of municipal utility services to their customers. AMP provides these services on a cooperative, nonprofit basis for the mutual benefit of member communities.

AMP members receive their power supply from a diversified resource mix that includes wholesale power purchases through AMP and the open market, and energy produced at AMP and member-owned generating facilities utilizing fossil fuels, hydroelectric,

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wind, solar and other renewable resources. Assets include AMP Fremont Energy Center, a nominal 700-MW (fired) natural gas combined cycle in Fremont, Ohio, a majority ownership stake in the coal-fired Prairie State Energy Campus, a number of diesel and natural gas peaking units, and hydroelectric, solar and wind projects throughout the region. AMP has actively worked over the past decade to diversify our power supply portfolio to include renewable resources, and continues to explore additional opportunities for new renewable energy resources

The Ohio Municipal Electric Association (OMEA) represents the Ohio and federal legislative interests of AMP and member Ohio municipal electric systems. Although closely aligned with AMP, the OMEA is a separate, nonprofit entity guided by a 16-member Board of Directors. However, subsequent "AMP" references herein also represent the interests and comments of OMEA.

In recognition of our unique position as both a wholesale power supplier and services provider, as well as the owner and operator of electric generating assets, AMP offers the following comments regarding the proposed rule changes. The focus of these comments is on provisions that have the potential to substantively impact AMP and its members.

Prior AMP/OMEA Comments

AMP largely supported the rule changes enacted in 2020 (attached) in the hope that some of those changes would result in more efficient, streamlined, and defensible environmental reviews. As AMP has previously testified before the U.S. Senate Homeland Security and Governmental Affairs Committee; Permanent Subcommittee on Investigations (also attached), environmental reviews add significant costs and delays to projects primarily due, in AMP's experience, to overly broad or duplicative requirements.

In this "Phase I" action, CEQ is proposing to revise three provisions of the 2020 NEPA rules by reverting to the 1978 regulatory approach. Specifically, CEQ proposes: 1) to eliminate language in the description of purpose and need for a proposed action when it is an agency's statutory duty to review applications for authorization; 2) remove limitations on agency NEPA procedures for implementing CEQ's NEPA regulations; and, 3) return the definitions of "effects" to the 1978 version. AMP supports CEQ's proposed changes with respect to limitations on agency NEPA procedures. With respect to the other two proposals, AMP is concerned that these changes, along with further currently unannounced changes planned for "Phase II," will return the entirety of the 2020 NEPA rules to the 1978 *status quo ante*. Such a strategy provides no meaningful improvement to the environmental review process for generation project applicants and owners, like AMP. Further, an efficient and effective NEPA review process will be critical for the development of additional infrastructure supporting the transition to a cleaner electrical grid. NEPA rules developed more than 40 years ago, particularly ignoring guidance and Executive Orders issued since then, are inadequate to address today's challenges and transformation of the nation's evolving energy resources and grid.

Purpose and Need (§1502.13)

CEQ should not remove references to the goals of the applicant from the purpose and need statement entirely. Nothing in the 2020 rule addressing purpose and need statements prevents or prohibits a reviewing agency from weighing other, equally important factors during the review process when taking the goals of an applicant into account. However, in many cases, an application is the basis for an environmental review. By

extension, the purpose and need statement should take into account the goals of the applicant, especially when determining reasonable alternatives to the proposed project. Including the applicant's goals streamlines the process by helping to identify reasonable alternatives, particularly given that based on the applicant's goals there is a limited universe of technically and economically feasible alternatives available. This does not mean that agency actions are somehow predetermined, only that alternatives need to be practicable for project proponents to implement while continuing to have a nexus to the original purpose and goal of a project.

Definition of "effects" or "impacts" (§1508.1(g))

CEQ generally proposes to modify the definition of "effects" to remove a requirement that effects be "reasonably foreseeable and have a reasonably close causal relationship" and revert back to 1978 verbiage such that "effects" or "impacts" include direct, indirect, and cumulative effects. Cumulative impacts should be included in the environmental review process. However, CEQ should include limitations or clarifying descriptions of the contours of this analysis in a revised standard that are consistent with prior implementation of NEPA and associated administrative rules to provide clear guideposts with respect to the scope of agencies' reviews.

Additionally, CEQ's statement that agencies should consider the full range of reasonably foreseeable effects in the NEPA process, even where the agency has no jurisdiction or control over such effects is concerning. Reviewing agencies should be restrained by their statutory authority but the proposed rule provides an excess of agency discretion in a way that distorts the borders of that authority. For example, "policies" that are not memorialized in statute or promulgated in accordance with the Administrative Procedures Act (APA) should be excluded from agencies' decisional calculus. Agency environmental reviews and decisions on permits for projects, such as hydropower facilities with operating lifetimes in excess of 50 years, should not be based on reviewing agency or administration policies that do not amount to law or regulations.

Conclusion

If CEQ makes changes to the 2020 rules, AMP respectfully suggests pursuing a more innovative approach that is forward-looking, and not simply re-adopting 40 year old rules that have demonstrably failed to achieve more efficient or effective environmental reviews. We thank CEQ for this opportunity to provide input to the agency and for its efforts to implement practical, workable rules to govern the NEPA regulatory process.

Respectfully Submitted



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Attachments

Comments on Proposed 2020 NEPA Rules

2018 Senate Testimony



March 10, 2020

Via Electronic Filing: <http://www.regulations.gov>
Copy to: NEPA-Update@ceq.eop.gov

Council on Environmental Quality
730 Jackson Place, NW
Washington, DC 20503

Attn: DOCKET ID No. CEQ-2019-003

Re: Updating to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684 (January 10, 2020).

Dear CEQ Staff:

In response to the above-referenced docket, American Municipal Power, Inc. (AMP) and the Ohio Municipal Electric Association (OMEA) hereby provide the following comments for the record. We are in general support of the proposed update to the procedural provisions of the National Environmental Policy Act (NEPA or Act) proposed on January 10, 2020.

Background on AMP/OMEA

Ohio-based AMP is the non-profit wholesale power supplier and services provider for 135 locally regulated municipal electric entities located in Delaware, Kentucky, Indiana, Michigan, Maryland, Ohio, Pennsylvania, Virginia, and West Virginia. AMP's members collectively serve more than 650,000 residential, commercial, and industrial customers and have a system peak of more than 3,400 megawatts (MW). AMP's core mission is to be public power's leader in wholesale energy supply and value-added member services. AMP offers its member municipal electric systems the benefits of scale and expertise in providing and managing energy services.

AMP's diverse energy portfolio makes the organization a progressive leader in the deployment of renewable and advanced power assets that includes a variety of base load, intermediate and distributed peaking generation using hydropower, wind, solar and fossil fuels, as well as a robust energy efficiency program. AMP has actively worked over the past decade to diversify our power supply portfolio, to the point that our assets and power purchase

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agreements provided approximately 25% renewable power in 2018. Our fossil fuel assets currently include a 368 MW ownership share of the 1,600 MW coal-fired Prairie State Generating Company located in Lively Grove, Illinois, as well as the 707 MW (fired) natural gas combined cycle AMP Fremont Energy Center in Fremont, Ohio. Most of AMP's members are in the PJM Interconnection, LLC regional transmission organization footprint, while some members are located within the Midcontinent Independent System Operator, Inc. footprint. The OMEA represents the state and federal legislative interests of AMP and member Ohio municipal electric systems.

Because of AMP's structure, we closely follow regulatory initiatives that have the potential to impact our members. This proposed regulation would provide a streamlined approach to permitting new projects that maintains strong environmental protection while concurrently improving predictability, transparency and oversight.

AMP/OMEA Comments

AMP and OMEA are supportive of the proposed update to the procedural provisions of NEPA. CEQ promulgated the current NEPA regulations over 40 years ago and, in the interim, there has been a proliferation of guidance and case law interpreting and directing the NEPA review process. In order to adhere to these procedures, project proponents must not only understand the regulations, but also understand different agency interpretations of these rules and the impact of judicial decisions on both programmatic and project-specific aspects of environmental reviews.

As AMP has previously testified before the U.S. Senate Homeland Security and Governmental Affairs Committee Permanent Subcommittee on Investigations (attached), NEPA environmental reviews add significant costs and delays to projects due to overly broad or duplicative requirements. Project owners must navigate multiple federal regulatory programs and permitting processes, each with their own decision-making processes and authorities. As such, it is important to AMP that any update to NEPA implementing regulations be directed at clarifying and streamlining the review process, while adhering to the Congressionally mandated goals of the Act. AMP is hopeful that the proposed regulatory changes, specifically those outlined below, will result in more efficient, streamlined, and defensible environmental reviews.

Lead Agencies (1501.7)

AMP supports the revisions to 40 Code of Federal Regulations (CFR) Part 1501.7(g). Specifically, when a proposed action requires review by more than one federal agency, all the federal agencies involved must jointly publish their findings.

AMP also supports the proposed changes to 1501.7(h), namely clarifying the role of the lead agency to serve as project manager: determining the purpose and need for the proposed action, identifying reasonable alternatives for evaluation, and developing the schedule and milestones for environmental reviews and authorizations. We also support the language requiring issues be elevated within agencies for timely resolution when there are disputes or missed deadlines.

In addition, it may be beneficial to identify the lead agency for specific categories of federal projects in the revised rules. Identifying the lead agency early in the process is one of many components of the rule that should address historical delays inherent in the review process.

AMP does not believe the concept of “joint lead agencies” as referenced in 1501.7(b) is effective or efficient, since this will lead to confusion and make dispute resolution more challenging. It is not difficult to imagine a project with several “joint lead” agencies and the challenges such a situation engenders – in many instances, this is the status quo.

1501.8 Cooperating agencies

AMP believes it is important to include further direction for potentially cooperating agencies pursuant to 1501.8(c). It is entirely understandable that a cooperating agency may have competing programmatic obligations or other constraints that preclude involvement in supporting an environmental review as requested by the lead agency. Unfortunately, this can result in instances where an agency, after having declined to participate in some or all of the evaluation, will then object to the findings and conclusions of the environmental review.

Cooperating agency objections presented in this manner result in delays and additional effort for both project owners and participating agencies. Such a situation could be avoided by mandating that, if a cooperating agency invokes this provision, that agency be precluded from commenting (pursuant to 1503.3), referring a dispute to the Council (e.g. pursuant to 1504), or otherwise challenging the findings and conclusions of the environmental review.

1506.2 Elimination of duplication with State, Tribal, and local procedures

AMP supports revisions to the NEPA regulations that will increase efficiency by either adopting or incorporating by reference earlier environmental analyses and documentation completed by Federal, State, tribal, or local governments. This will reduce redundancies and provide the lead agency with relevant information to support timely decision making. To better facilitate the use of prior environmental analyses and documentation, agencies should assess such information and determine its usefulness during the scoping period.

1501.9 Scoping

Scoping represents the beginning of the process for the EIS and is used to engage interested parties and agencies in determining the boundaries of the environmental issues to be evaluated and identify significant environmental impacts as early in the process as possible. AMP supports changes to 1501.9, including the proposed elimination of the existing requirement that an agency cannot start the scoping process until it publishes a Notice of Intent (NOI). The proposed rules would allow an agency to start the scoping process as soon as the action is sufficiently developed for agency consideration.

1501.11 Tiering

AMP supports the proposed language on 1501.11 related to tiering, which encourages agencies to eliminate repetitive discussions on issues, exclude from consideration issues that have already been decided, and allow the lead agency to validate the findings of other agencies and incorporate them as their own. We suggest that agency use of prior determinations be predicated on those decisions being final and effective (i.e. not under appeal or subject to appeal).

1506.6 Public involvement

To ensure optimal interagency coordination of environmental reviews and authorization decisions, AMP supports the proposed transparent project tracking between the federal agencies as well as the applicant. In addition, we support utilization of modern electronic communications to publish relevant documents and aid public participation. These proposals are consistent with current practices of many regulatory agencies in other contexts.

1501.10 Time limits

In general, AMP supports shortening the environmental review process, while still meeting the requirements of the Act, by setting time limits to which federal agencies will be held accountable. CEQ notes in the proposal that despite anticipating a one-year timeframe for completing the review process for complex projects, between 2010 and 2017 a quarter of projects required more than 6 years for completion. AMP supports the proposed presumptive two-year limit for the lead agency to complete an EIS and a one-year limit to complete EAs. Further, AMP agrees with CEQ that it is counterproductive to establish “hard and fast” time limits and supports the exercise of limited lead agency discretion to establish or modify environmental review time limits under certain circumstances.

1502.7 Page limits

AMP believes CEQ proposals to define a “page” and establish page limits are well intentioned but unneeded when considering the likely impacts on document length of other aspects of the proposed rule. Specifically, we believe that clarification of lead agency responsibilities, refining the universe of reasonable alternatives for evaluation, and explicitly allowing the use of prior scientific and technical research should result in shorter and more timely environmental reviews.

1506.5 Combining documents

AMP believes that allowing a private applicant or their contractor to prepare an EIS, rather than just an EA, is of substantial benefit, particularly the elimination of the provisions requiring a contractor to certify that they do not have a financial or other interest in the project. We agree that the responsible federal official should provide guidance, participate in document preparation, be responsible for the EIS scope and content, and independently evaluate the EIS prior to approving it.

1508.1 Definitions

AMP supports the revisions to the following definitions in 1508.1:

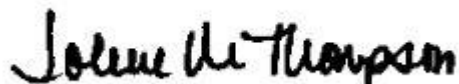
(q) Major Federal Action: AMP supports CEQ clarifying that continuing activities are major federal actions for purposes of NEPA only when they involve significant changes to the current environment. This provision will allow reauthorization of existing projects in an efficient, cost-effective manner when the federal action involves no new ground-disturbing activity or changes to existing operations, and otherwise maintains the existing status quo.

(z) Reasonable alternatives: AMP agrees with the proposal to focus NEPA analysis on a range of reasonable alternatives rather than all reasonable alternatives. Limiting agency analyses to alternatives that are technically and economically reasonable, and meet the purpose and need for the proposed action, is a well-considered and legally defensible approach.

Closing

While by no means exhaustive, the comments provided represent issues of most concern to AMP/OMEA relative to the proposed regulation. We thank CEQ for this opportunity to provide input to the agency and for its recognition of the need for practical, workable revisions to the NEPA regulatory process.

Respectfully submitted



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Att.

**U.S. Senate Homeland Security and Governmental Affairs Committee
Permanent Subcommittee on Investigations**

Roundtable Discussion

**Washington D.C.
June 27, 2018**

Written Statement of

**Jolene S. Thompson,
Executive Vice President, American Municipal Power, Inc. (AMP)
Executive Director, Ohio Municipal Electric Association (OMEA)**

Introduction

Good morning. My name is Jolene Thompson. I am the Executive Vice President of American Municipal Power, Inc. (AMP) and Executive Director of the Ohio Municipal Electric Association (OMEA). I am pleased to have the opportunity to appear before you to discuss AMP's experience with the Federal Permitting Improvement Steering Council and FAST-41 process and want to express our appreciation for the support provided by Senator Portman for our projects, as well as his efforts and those of other subcommittee members to pursue balanced regulatory reforms.

On September 7, 2017, the CEO and President of American Municipal Power, Inc. (AMP) testified before the U.S. Senate Homeland Security and Governmental Affairs Committee, Permanent Subcommittee on Investigations, to discuss the importance of reasonable, timely and cost-conscious permitting of generation projects, as well as the Federal Permitting Improvement Steering Council (FPISC) and FAST-41 process. Mr. Gerken's testimony focused on the licensing and permitting process for AMP's remaining hydropower project -- the proposed 48 MW R.C. Byrd run-of-the-river hydropower project, which would be located in Ohio at the existing USACE Gallia Locks and Dam on the Ohio River, as well as provided AMP's unique perspective on infrastructure development and regulatory processes given that we recently completed the largest development of new run-of-the-river hydropower generation in the United States. This effort consisted of four new projects located in Kentucky and West Virginia at existing U.S. Army Corps of Engineers (USACE) dams along the Ohio River, totaling more than 300 megawatts (MW) and representing nearly \$2.6 billion in capital investment, along with an estimated 1,600 direct jobs, more than 1,000 indirect jobs, \$342 million in payroll and the use of vendors from at least 12 states during construction. (R.C. Byrd would join new and existing hydropower projects in AMP and AMP member portfolios registering more than 600 MW of hydropower in the region.)

AMP's RC Byrd hydropower project is one of the 34 projects in the initial FPISC inventory of covered projects. This written statement provides an update on the RC Byrd hydropower project since Mr. Gerken's testimony in September of last year, as well as AMP's experience with the FPISC process and recommendations based upon that experience for improvements for your consideration. I have appended Mr. Gerken's testimony hereto for reference.

Background Points

□ American Municipal Power, Inc. (AMP) is the wholesale power supplier and services provider for 135 member municipal electric systems in nine states. AMP has a diverse generation portfolio, including a mix of fossil and renewable resources.

□ AMP has a unique perspective on infrastructure development and regulatory processes as we are in the process of completing the largest development of new run-of-the-river hydropower generation in the United States today. Our four projects are located at existing U.S. Army Corps of Engineers (USACE) dams along the Ohio River.

□ Hydropower projects are expensive to plan for and build, typically beginning as above-market resources; however, their operational, economic and environmental attributes make hydropower a good investment in the long term.

□ Regardless of where in the country you are located, the siting and permitting processes for any new generating asset are not for the faint of heart; the licensing and permitting processes for hydropower are especially arduous and typically take more than a decade.

□ While the Federal Energy Regulatory Commission (FERC) is the lead agency, approvals for hydropower developments must come from myriad federal and state agencies and require separate and sometimes duplicative permitting by the USACE and state resource agencies.

AMP's Experience

As a public power entity, AMP is unique in our resource planning approach because we are able to take a longer view than investor-owned utilities that are subject to quarterly profit reports. Our member city, village, town and borough council members have been willing to invest in certain projects that will be above market in the early years because of the overall benefits in the long term. Our development of hydropower generation is a good example – the price of power from these facilities will be above market in the early years, competitive in the middle years, and below market in the later years once the debt service is paid off. However, when you take into account the many positive attributes associated with hydropower, like the ability to provide baseload power (unlike many other renewable resources); the lack of fuel risk, emissions and waste streams; and, long life span (80 to 100 years); the value of the investment is clear even in the early years.

Hydropower projects can also provide a significant revenue stream to the federal government. For instance, AMP's budget for FERC fees for 2018 across our projects is in excess of \$5 million. Additionally, the USACE receives electricity at no cost from the projects for lock and dam operations, which amounts to an additional \$900,000 a year from our projects.

Hydropower is unique compared to other infrastructure projects. First, in our region, hydropower projects are limited from a practical standpoint to existing dams and the generation capacity are finite. Additionally, hydropower projects on federal locks and dams are subject to multiple duplicative and extremely arduous regulatory approval processes.

While we understand the need to balance environmental protection with economic development, and anticipate that there will be some bumps along the road, AMP has found that regulatory timelines do not align efficiently across the numerous required permits, various agencies and different jurisdictions. AMP's RC Byrd project, thus far, has served as an example of the regulatory challenges of hydropower projects.

Licensing for the R.C. Byrd Project, which would be located at the Gallia Locks and Dam in Ohio on the Ohio River, began in 2007. A decade later, on August 30, 2017, FERC issued the final license, with the delay largely due to issues raised by the USACE. The time from initial application to final approval from regulatory agencies can best be described as a gauntlet, taking a decade and costing millions of dollars.

During the FERC licensing process, although FERC is the lead agency, the public and mandatory conditioning agencies, including State and Federal Fish and Wildlife Service (FWS) agencies, are consulted to ensure that activities during initial construction and ongoing operation are carried out in a manner that safeguards wildlife, including endangered or threatened species. In addition, USACE serves as a mandatory conditioning authority under Section 4(e) of the Federal Power Act. The USACE actively participates in the FERC licensing process, including the development of the National Environmental Policy Act (NEPA) environmental assessment for the Project. The USACE uses this authority to influence the direction and extent of FERC license articles. Through a Memorandum of Understanding (MOU) with the USACE, FERC includes a series of license articles in licenses that were created to help protect the USACE navigation interests established in the Rivers and Harbors Act of 1899. The articles also include a requirement that the licensee provide power for the USACE dam for the term of the license.

In spite of the active participation of the conditioning agencies throughout the FERC licensing process, after the FERC license process has been completed, the USACE has several additional regulatory approvals that an applicant must obtain to get a final approval to start construction of a hydropower project. One of these regulatory processes involves Section 10 of the Rivers and Harbors Act, which prohibits unauthorized obstruction or alteration of any navigable water without a permit from the USACE. The USACE retains its post licensing authority under Section 404 of the Clean Water Act, which regulates the discharge of dredged, excavated, or fill material in wetlands, streams, rivers, and other U.S. waters. In general, to obtain what is termed the "404 permit," applicants must demonstrate that the discharge of dredged or fill material will not significantly degrade the nation's waters and that there are no practicable alternatives less damaging to the aquatic environment.

Prior to issuance of the 404 permit, a "408 Approval" must be provided by the USACE. The intent of this approval is to protect government property and ensure the facilities are not compromised by other non-federal developments. The Section 408 Approval is granted by the USACE once they complete their evaluation of a project, involving reviews of the technical aspects of a project, specifically the water retaining structures and their interface with the existing USACE facilities, as well as completion of a physical hydraulic model to verify that a project will not have any detrimental effects on navigation into or out of the locks.

USACE authorizations begin at the District level where the locks and dams are operated, but also require approval from the Division, and ultimately from the Director of Civil Works from the USACE Headquarters. In our experience, there is wide variability

between the District evaluations. For example, some Districts will defer to FERC license-based evaluations by the State Preservation Office for cultural impacts, and state and federal FWS agencies for issues within their areas of expertise. However, another District will conduct a repetitive evaluation of these same criteria and reach different conclusions. In the case of R.C. Byrd, despite FERC's Environmental Assessment (EA) and concurrence by FWS agencies, the USACE stated that they would pursue the same environmental issues previously raised, but that FERC determined should not be included in the EA, to their satisfaction through their subsequent permit process. As such, for planning purposes, it is assumed that the issuance of the 408 Approval and 404 Permit will take anywhere from 12 to 36 months after issuance of the FERC license in spite of many of the issues having already been resolved by FERC.

This method of permitting costs licensees millions of dollars in capitalized interest. Extended permitting timeframes and redundant review of issues has caused AMP to not award supply contracts until after permits are issued, which results in longer construction schedules and increased costs. For our recent hydropower projects, AMP had to delay financing at significant cost to members. By a point of comparison, we estimate that we lost 50 basis points for financing our hydro projects when compared to our financing for our investment in the Prairie State Generating Company over a six month period. This was a direct result of uncertainty associated with USACE permitting.

In addition to the FERC license and the USACE's Section 408 and 404 permit processes, the Environmental Protection Agency (EPA), through the states, requires a 401 Water Quality Permit under the Clean Water Act (CWA). The intent of the 401 Permit is to provide for the protection of the physical, chemical, and biological integrity of water bodies.

R.C. Byrd and FAST-41

In 2007, AMP decided to pursue a license for a 48 MW hydropower plant at the R.C. Byrd (Gallia) Locks and Dam on behalf of the AMP member community of Wadsworth, Ohio (the licensee) for potential subscription to interested AMP members. As described in Mr. Gerken's testimony, AMP spent years on permitting this project.

On July 14, 2014, FERC issued a draft Environmental Assessment. Shortly thereafter, a stalemate between AMP and FERC on the one hand and USACE and USFWS on the other began as a result of a disagreement about the necessary timing of a Physical Hydraulic Model Study, estimated to cost \$1-\$2 million. USFWS and USACE requested that AMP complete the full hydraulic study prior to receiving the FERC license. AMP agreed to perform the study post-license but has been unwilling and unable to do so pre-licensing, as it would put the study cost at risk if the project did not proceed. As an alternative to performing the full study prior to license issuance, AMP provided as much detail as possible, recognizing that this project was notably similar to our other recent projects. The impasse resulted in USFWS's inability to draw a conclusion on whether the project would adversely affect mussels and bats.

Much of 2016 was spent gathering and submitting additional information to FERC in an attempt to address USFWS and USACE comments. During this time, USFWS continued their evaluation of whether the project would impact endangered species, including freshwater mussel species and the Northern Long Eared Bat.

Concurrent with this process and stalemate, AMP's experience with the FAST-41 process began on September 22, 2016, when R.C. Byrd was included as one of the 34 projects in the FPISC inventory of covered projects. In early 2017, AMP staff participated in two conference calls to educate and familiarize FAST-41 staff with hydropower permitting and explain specific challenges associated with R.C. Byrd. We also exchanged information with Senate staff who were following the process.

For reasons AMP attributes to the new visibility on the RC Byrd project as a result of being added as a FPISC covered project, after a lengthy exchange, concurrence was reached between FERC and USFWS (which has both the statutory responsibility and technical expertise on Endangered Species Act determinations) that the project would not likely jeopardize endangered mussels or bats and the final Biological Opinion (BO) was issued by the USFWS in June of 2017. This decision was facilitated by FAST-41's efforts to encourage FERC to make a decision. FERC issued a letter explaining its EA to USFWS and requesting concurrence within 30 days from the date of receipt of the letter. Notably, FERC also indicated that FERC would take failure to respond as concurrence that FERC had met its responsibilities and would resolve the matter. Consequently, USFWS concurred and issued a final Biological Opinion on June 19, 2017. Due to disagreements with FERC's conclusions, USACE withdrew support of FERC's determination and explained that USACE would address the same issues through the mandatory USACE 404 and 408 permit process to USACE's satisfaction.

As noted above, the final license was received on August 30, 2017. AMP's economic commitment to this project now exceeds \$4 million.

For the reasons just described, although the FAST-41 Committee's permit and license processing guidance has been helpful, our experience places the value of FAST-41 on: (1) agency accountability through making agency actions and timeliness highly visible; and (2) the ability to informally resolve longstanding disputes and shepherd permits/licenses to completion. To that end, we are thankful for the assistance we received to break a log jam and strongly encourage the committee to continue its efforts and not allow it to sunset.

Recommendations

Once AMP received the license, AMP began reviewing its obligations to comply with each license article, many of which require significant and ongoing coordination with the conditioning agencies. One of the standard license articles obligates the licensee to enter into an agreement with the USACE to coordinate plans for site access and activities within 90 days from the issuance of the license. Specifically, referred to as a Memorandum of Understanding (MOU), the agreement identifies the location of the

facility and the study and construction activities, and terms and conditions under which studies and construction will be conducted. Importantly, other license obligations are contingent upon completion of the MOU. Specifically, AMP cannot begin the required Physical Hydraulic Modeling Study and the Sediment Transport Modeling Plan prior to completion of the MOU because AMP is not permitted to begin the initial core drilling without the MOU. Without the core drilling, potential powerhouse locations cannot be determined. Without a potential powerhouse location, any hydraulic studies and the impact on mussel beds could also not be determined.

AMP took the initiative to draft an initial MOU and sent it to the USACE Huntington District for their review on October 2, 2017, following FERC license issuance. After repeatedly requesting a response, USACE Huntington District sent proposed changes to the October 2017 draft on June 20, 2018.

The current license schedule does not require the MOU to be completed until November 28, 2018 - the same day the Physical Hydraulic Modeling Study and the Sediment Transport Modeling Plan are due to be filed with the Commission.

This results in a schedule that is impossible to meet and is illogical at best, particularly given that it took over ten years for AMP to obtain the License but was given only one year from the License issuance to complete all of the major pre-construction requirements.

AMP has requested extensions of time that reflect a more reasonable timeframe for completion but FERC rejected most of AMP's requests and has limited the extensions to November 28, 2018. To be clear, even if AMP had proceeded to undertake the Physical Hydraulic Modeling Study and the Sediment Transport Modeling Plan without USACE's agreement, which would have resulted in a license violation, AMP could not have completed the studies required by November 28, 2018.

The point in describing this post-licensing Catch-22 here is to highlight the importance of continuing the FIPSC process into the USACE permitting phase, particularly for hydropower projects, like RC Byrd. Accordingly, extending the FIPSC process beyond licensing is AMP's first recommendation for process improvement.

Additionally, AMP understands that FAST-41 was designed to improve the timeliness, predictability, and transparency of the federal environmental review and authorization process for covered infrastructure projects and believes from its experience that FAST-41 has largely been successful. Along with other provisions to address the project delivery process and track environmental review and project milestones, the Permitting Dashboard was codified into law to track project timelines, and increase transparency, predictability and accountability. However, participation by agency stakeholders is voluntary and state agencies are currently not participants. Moreover, the Permitting Dashboard timeline may reflect a delay caused by a dispute, as happened on RC Byrd with regard to the EA, without any formal process to resolve the dispute.

Accordingly, to further improve the process, AMP strongly recommends that the FIPSC process be broadened to identify licensee and inter-agency disputes and include some authority to settle disputes.

One avenue for dispute resolution, and a key feature of S. 1460, the Energy and Natural Resources Act of 2017, would be to designate FERC as the lead agency for all license and permit environmental reviews, authorize FERC to set a schedule for all permitting, enable FERC to incentivize additional environmental improvements during the licensing term, and streamline the process for license amendments to enable efficiency improvements and capacity additions at existing projects and, most importantly, empower FERC to serve as the arbiter of disputes between a licensee and conditioning agencies.

Although license articles indicate that FERC will resolve disputes, we have not found that to be the case in practice. Specifically, when AMP disputed an obligation that the USACE Huntington District demanded be included in an MOU for AMP's Willow Island hydropower project regarding dissolved oxygen monitoring that exceeded the license requirements regarding the same, AMP requested that FERC resolve the dispute. FERC was reluctant to direct another federal agency to adhere to the terms of the license. FERC indicated that no other licensee had ever invoked the license dispute resolution provision and FERC did not have a timely process in place. Empowering FERC as the lead agency, requiring FERC to develop an efficient dispute resolution process and providing FERC the authority to actually resolve disputes would be a profound change that will have a direct impact on hydropower infrastructure projects.

This could allow FERC to eliminate duplicative reviews by preventing alternative agencies from formally or informally contributing to the decision-making process that is outside of their authority and expertise. This would provide developers with increased predictability, reduce time, and reduce cost.

Conclusion

In closing, as evidenced in AMP's pursuit of necessary licenses and permits for our multiple hydropower projects, there is room for improvement throughout the process. The FAST-41 effort to increase transparency, predictability and accountability has already made a notable impact on the R.C. Byrd project. AMP strongly supports continuation of the FAST-41 program as well as expanding the process to cover permitting in addition to licensing, designating FERC as the lead agency, and empowering FERC to effectively and efficiently resolve disputes. This would help facilitate hydropower infrastructure development ensuring that new resources of all types can be brought online in an economical and timely manner through streamlining the regulatory process, eliminating redundancies, and providing developers and investors with added certainty.

Thank you again for providing me with the opportunity to appear before you today. I would be happy to respond to any questions.

RC Byrd Timeline

Apr. 24, 2007	Preliminary Permit Application (PPA) filed by the Wadsworth, Ohio (AMP member)
May 30, 2007	FERC notices Wadsworth PPA and competing PPAs.
Apr. 11, 2008	FERC issues Preliminary Permit (PP) to Wadsworth
Jun. 17, 2009	AMP files Notice of Intent and Preliminary Application Document (PAD) with FERC
Aug. 7, 2009	FERC notice of commencement of proceeding and grants AMP use of the Traditional Licensing Process
Oct. 1, 2009	AMP holds Joint Agency and Public Meeting on Project
Feb. 19, 2010	AMP holds consultation meeting with ODNR at their offices
Mar. 12, 2010	EA Engineering, Science and Technology submits "Freshwater Mussel Survey of the Ohio River at RC Byrd Lock and Dam" report to ODNR
Jun. 22, 2010	Meeting to discuss Project studies and Baseline Fish & Water Quality Surveys (attendees included: WVDNR, ODNR, USACE, USFWS, AMP, MWH Global, and EA Engineering)
Jul. 15, 2010	USFWS responds w/ comments to Freshwater Mussel Survey Report; recommend Best Management Practices used during construction and operation activities associated with Project
Jul. 17, 2010	EA Engineering responds to USFWS and requests further information regarding endangered species within Project vicinity
Aug. 17, 2010	USFWS issues letter regarding endangered species in vicinity of Project
Oct. 12, 2010	Bat species inventory is submitted to ODNR Bat species inventory is submitted to USFWS (OH)
Oct. 21, 2010	Bat species inventory is submitted to USFWS (WV) Bat species inventory is submitted to WVDNR
Nov. 5, 2010	AMP files Draft FERC License Application for RC Byrd
Nov. 10, 2010	USFWS responds with comments on Bat Species Inventory at Project – No Further Action (NFA) necessary
Feb. 11, 2011	Public meeting with Landowners
Feb. 11, 2011	Meeting to discuss comments on Draft License Application (attendees included: WVDNR, ODNR, USACE, USFWS, AMP, MWH Global, EA Engineering, Ohio Power Siting Board)
Mar. 28, 2011	AMP files Final License Application with FERC
Apr. 11, 2011	FERC Notices Application and solicits additional study requests
May 4, 2011	USFWS issues letter to FERC regarding response to Notice of Tendering of Application; Additional Study Requests for the Project
Jul. 19, 2011	AMP submits 401 application to WVDEP
Nov. 17, 2011	AMP files all additional information requested by FERC

Dec. 12, 2011	AMP submits 401 application to OEPA
Jan. 4, 2012	OEPA states that 401 application is incomplete and requests additional information
Feb. 7, 2012	FERC issues acceptance of application
Feb. 27, 2012	FERC issues Scoping Document
Mar. 5, 2012	AMP submits letter to USFWS (WV) regarding FERC information request – raptor habitat in vicinity of proposed transmission line
Mar. 27, 2012	USFWS (WV) responds to AMP’s letter requesting information regarding raptor habitat – letter states USFWS does not have any data on bald eagle/other raptor species within proposed Project area
Mar. 28, 2012	FERC Public Scoping meeting
July 11, 2012	Meeting with ODOT on State Route 7 relocation
Aug. 9, 2012	AMP submits additional information to OEPA re: 401 application
Aug. 20, 2012	FERC issues Revised Scoping Document
Oct. 15, 2012	FERC issues Ready for Environmental Analysis (REA) Notice and requests comments
Oct. 18, 2012	AMP responds to ODNR regarding 401 certification
Oct. 23, 2012	AMP reapplies to WVDEP for 401 certification
Nov. 30, 2012	AMP submits proof of requests for Ohio and WV 401 certification to FERC
Dec. 12, 2012	WVDNR submits preliminary terms & conditions in accordance with 10(j)
Dec. 17, 2012	ODNR comments on License Application in accordance with 10(j)
Dec 21, 2012	AMP responds to WVDNR and OEPA 10(j) comments
Feb. 28, 2013	AMP forwards FERC letter acknowledging OEPA waiver of 401 certification
Nov. 21, 2013	AMP informs FERC that WVDEP has waived 401 certification
Jul. 8, 2014	FERC Issues Draft Environmental Assessment for comment
Jul. 11, 2014	FERC asks for USFWS concurrence on Draft Environmental Assessment
Jul. 24, 2014	FERC provides AMP with Programmatic Agreement with Corps
	US Department of Interior (USDO I) responds to FERC regarding Draft Environmental Assessment with recommendations for Best Management Practices
Aug. 6, 2014	AMP files comments to the Draft Environmental Assessment
	WVDNR comments on Draft Environmental Assessment
Aug. 7, 2014	USACE submits comments to Draft Environmental Assessment
	ODNR issues comments to Draft Environmental Assessment
	USFWS (WV) issues comments to Draft Environmental Assessment regarding endangered species

Aug. 19, 2014	USACE Huntington issues letter withdrawing comments to Environmental Assessment
Aug. 22, 2014	USACE issues letter on programmatic agreements to FERC
Sept. 3, 2014	USEPA comments on Environmental Assessment
Nov. 23, 2014	WVDNR states intent to issue 401 certification during 404 process
Jan. 13, 2015	USACE Huntington issues letter stating Environmental Assessment did not address all of its concerns and says the concerns will have to be addressed during their 404/408 permitting
Jan. 22, 2015	USACE issues letter on Draft Environmental Assessment
Jan. 23, 2015	FERC issues Final Environmental Assessment
Jan. 28, 2015	FERC asks for concurrence from USFWS on Final Environmental Assessment
Feb. 26, 2015	USFWS responds to FERC on Final Environmental Assessment
Mar. 11, 2015	FERC requests formal consultation with the USFWS regarding mussels
Apr. 9, 2015	USFWS states they will not begin formal consultation process until more information is received
Jun. 3, 2015	FERC holds conference call with all parties
Jun. 23, 2015	AMP files Mussel and Bat study information with FERC and agencies
Jul. 31, 2015	USFWS responds to draft Mussel and Bat conservation plans
Jul. 17, 2015	Ohio State Historic Preservation Office (OSHPO) forwards signed Programmatic Agreement to FERC
Apr. 28, 2016	FERC holds conference call with all parties
May 11, 2016	FERC requests recent information from WVDNR on presence of listed bat species in vicinity of project; WVDNR responds saying there are no known records for the species at proposed Project site
May 13, 2016	FERC provides summary of teleconference call of April 28, 2016
Jun. 16, 2016	USFWS issues letter to FERC regarding status of endangered species consultation and additional information needs
Jun. 24, 2016	USDOJ/USFWS motions for late intervention before FERC
Jun. 27, 2016	USFWS issues letter to FERC – Request of USFWS to reserve Federal Power Act Section 18 Authority to Prescribe Fishways
Jul. 12, 2016	AMP request FERC take action that data provided is sufficient and FERC should not allow its proceedings to be indefinitely delayed
Aug. 9, 2016	FERC issues notice granting late intervention to USFWS
Sept. 20, 2016	FERC holds another conference call with all parties
Sept. 27, 2016	Corps provides data regarding known areas of effect on mussels
Oct. 17, 2016	AMP provides bat study data to agencies and FERC
Nov. 4, 2015	FERC-CRO provides inspection report

Nov. 17, 2016 FERC requests additional data

Nov. 22, 2016 USFWS issues additional letter on Bats and Mussels

Dec 1, 2016 FERC Issues letter asking for AMP's response to USFWS letter of November 22, 2016

Dec. 2, 2016 AMP responds with data regarding mussels

Dec. 29, 2016 AMP provides responses to FERC and USFWS letters

Feb. 3, 2017 FERC issues letter to USFWS requesting concurrence with endangered species determinations stating *"we conclude that issuing an original license for the proposed project, with our recommended measures, would not be likely to adversely affect the endangered Indiana bat. Therefore, we do not believe that formal consultation is required."*

Mar. 3, 2017 USFWS disagrees with FERC assessment regarding mussels stating *"...federally listed mussels. Therefore, the Service does not concur with your determination that the project is not likely to adversely affect federally listed mussels and we agree that the project should proceed through the formal consultation process."*

Mar. 16, 2017 FERC Issues letter to USFWS stating its Environmental Assessment addressed USFWS comments. FERC asks for concurrence by April 19, 2017 in regard to the Northern Long Eared Bat

Jun. 1, 2017 USFWS issues a Draft Biological Opinion to the FERC and the USACE and concluded:
"After reviewing the current status of the species, the environmental baseline for the action area, the effects of the proposed actions, and the cumulative effects, it is our biological opinion that the R.C. Byrd Hydroelectric Project and the Corps' Navigation Channel Dredging Maintenance Project, as proposed, are not likely to jeopardize the continued existence of the fanshell, pink mucket pearly mussel, sheepsnose, and snuffbox. No critical habitat has been designated for these species; therefore, none will be affected."

Jun. 9, 2017 AMP issues a response to the USFWS Biological Opinion and agrees with most but objects to perpetual water monitoring including dissolved oxygen, temperature and total dissolved gases.

Jun. 14, 2017 FERC comments on USFWS Draft Biological Opinion

Jun. 19, 2017 USFWS issues Final Biological Opinion

Aug. 23, 2017 FERC issues the signed copies of the executed programmatic agreement for Archaeological compliance with the Historic Preservation Act

Aug. 30, 2017 FERC issues a license after 10 years and 131 days from the PAD submission.

Oct. 2, 2017 AMP Submits draft MOU to the USACE.

Oct. 3, 2017 AMP files requests for extension of time for Articles 305, 306, 308, 310 with FERC.

Oct. 13, 2017 AMP submits Exhibit F Drawings with FERC.

Nov. 28, 2017 AMP files Exhibit G drawings with FERC.

Feb. 26, 2018 AMP files requests for extensions of time with FERC for near term License articles.

Mar. 15, 2018 AMP files supplemental information with FERC regarding license extensions.

Mar. 15, 2018 AMP Staff meets with FERC Staff for a License Transition Meeting.

June 25, 2018

Apr. 19, 2018 FERC Order grants and denies certain requests for extension of time.

May 31, 2018 Following a 30-day consultation period with state and federal agencies, AMP submits revised extension request for Articles 403 and 408.

Jun. 20, 2018 The USACE Huntington provides comments to the draft MOU.

Jun. 21, 2018 FERC Order approving revised Exhibit G drawings.