Committee on Natural Resources
Rob Bishop Chairman
Mark-Up Memorandum

April 6, 2018

To: All Natural Resources Committee Members

From: Majority Committee Staff
Subcommittee on Water, Power and Oceans (x58331)

Mark-Up: **H.R. 3144 (Rep. Cathy McMorris Rodgers, R-WA),** To provide for operations of the Federal Columbia River Power System pursuant to a certain operation plan for a specified period of time, and for other purposes.
Wednesday, April 11, 2018; 1324 Longworth HOB

Summary of the Bill

To provide certainty over the reliable management of the Federal Columbia River Power System (FCRPS or System), H.R. 3144 (Rep. McMorris Rodgers, R-WA) requires federal agencies to operate the System in a manner that is consistent with the current operations plan, while also protecting existing hydropower resources in the Pacific Northwest.

Cosponsors

7 Cosponsors

Background

Hydropower accounts for 7% of all domestic (overall renewable and non-renewable) electricity generation, divided equally between federal and non-federal output, and about 48% of all renewable generation.[1] For generations, it has provided millions of Americans with clean and low-cost energy and has formed the backbone of regional economies. In Washington State , hydropower accounts for almost 70% of electricity generation, almost 60% each for the states of Oregon and Washington, and more than one-third for Montana.[2] The Columbia Basin in the Pacific Northwest encompasses an area approxmately the size of France, with 31 multi-purpose federally-owned dams along the Columbia and Snake Rivers.

[1] https://www.ferc.gov/legal/staff-reports/2017/hydropower-primer.pdf
[2] http://www.hydro.org/why-hydro/available/hydro-in-the-states/west/

Under the Bureau of Reclamation's policy, hydropower generated from its dams is first used to provide electricity to operate irrigation pumps. Any remaining Reclamation hydropower is then primarily sold by either of two federal agencies, the Bonneville Power Administration (Bonneville) or the Western Area Power Administration, to wholesale customers. The wholesale electricity rates are designed to repay the federal capital investment – plus interest – in federal electricity generation and transmission facilities, annual operation and maintenance costs of such facilities, and federal staffing.[3]

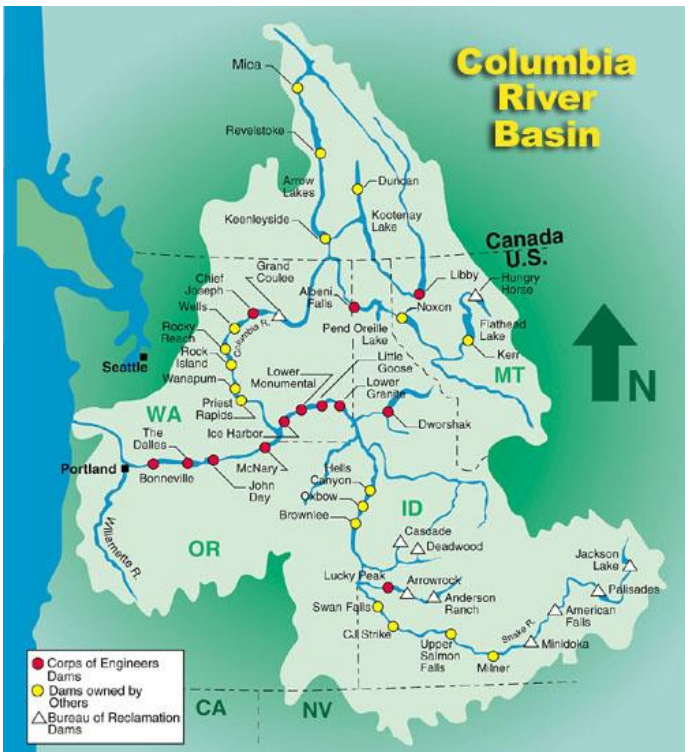

Image 1: Dams on Columbia and Snake Rivers Source: Army Corps of Engineers

Compliance with environmental mandates and replacement power services resulting from environmental regulation and litigation are also reflected in federal power rates. Federal court-mandated "spills" – an operation when water is bypassed around a hydropower-producing turbine to aid fish passage – have led to significant lost hydropower generation and associated replacement power purchases of mainly fossil-based, higher cost energy. At a Water, Power and Oceans Subcommittee hearing in 2016, Mr. Christopher Downen, Senior Policy Analyst at the Public Power Council, which represents consumer-owned utilities in the Pacific Northwest, testified "[a]t $757 million last year alone, this single category of costs accounted for about **30 percent** of Bonneville's costs charged in rates."[4]

In 1945, Congress authorized the U.S. Army Corps of Engineers to construct four large dams along the lower Snake River – Ice Harbor, Lower Monumental, Little Goose and Lower Granite – as part of the FCRPS to provide a number of benefits, including hydropower.[5] Built in the 1960s and 1970s, the four dams on average produce enough energy to power a city the size of Seattle every year, with a total output capable of producing over 3,000 MW, enough energy to power 1.8 million homes.[6] It would take two nuclear, three coal-fired, or six gas-fired power plants to replace the average annual power produced by the four lower Snake River dams.[7]

[3] Id at 2
[4] Testimony of Mr. Christopher Downen, Senior Policy Analyst, Public Power Council, before the House Water, Power and Oceans Subcommittee, April 20, 2016.
[5] Flood Control Act of 1945, P.L. 79-14.
[6] http://nwriverpartners.org/value-of-snake-river-dams
[7] Id at 6

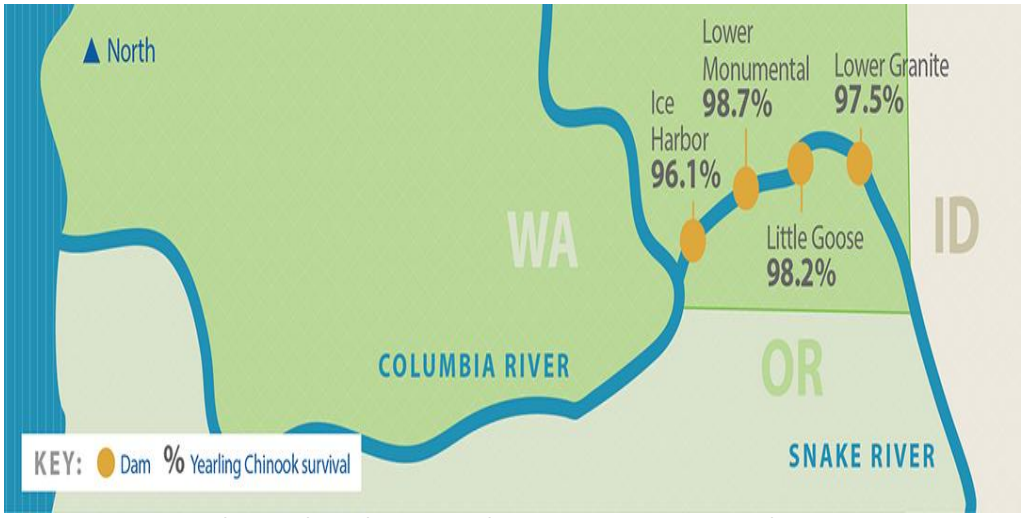

Image 2: Survival Rates Through Lower Snake River Dams Source: Northwest RiverPartners

Hydropower not only provides power for baseload (full-time) needs and peak times, but also serves as a backup generation source for intermittent wind and solar power.[8] It is generally low-cost compared to other generation sources.[9] While some believe hydropower projects can have negative impacts on migratory fish, wildlife and their habitats as well as water quality,[10] others point out that the survival rate of species that migrate through the four Snake River dams is 99.5 percent for certain species, with an average of 97 percent (See image above).[11] In addition, the Snake River dams make possible an efficient transportation link that is one of the leading trade gateways in the United States, moving more than 50 tons of cargo.[12]

Despite these benefits, some litigious groups have focused on removing these four dams. According to Bonneville, replacing the dams would increase power costs by $274 million to $372 million per year.[13] In addition, replacing this power with natural gas generation would still increase the region's carbon dioxide emissions by 2.0 to 2.6 million metric tons annually and force transportation of agriculture and other commodities through much less environmentally-friendly modes, such as diesel trucks.[14] Conservatively, this would be the equivalent of adding 421,000 passenger cars to the region's roads each year[15]

Federal Columbia River Power System Litigation

[8] https://www.vox.com/2015/6/19/8808545/wind-solar-grid-integration
[9] http://www.hydro.org/why-hydro/affordable/
[10] https://www.nwcouncil.org/history/DamsImpacts
[11] http://nwriverpartners.org/value-of-snake-river-dams
[12] http://www.pnwa.net/factsheets/Corps-ELC-Accomplishments.pdf
[13] https://www.bpa.gov/news/pubs/FactSheets/fs-201603-A-Northwest-energy-solution-Regional-power-benefits-of-the-lower-Snake-River-dams.pdf
[14] Id at 12
[15] Id at 12

For decades, there has been uncertainty over the operations of existing hydropower in the Pacific Northwest due to federal regulations, court orders and other administrative decisions. Long-standing litigation surrounding the FCRPS has caused major uncertainty concerning future power generation, rates, and reliability in the region. The litigation alone has cost taxpayers and Northwest ratepayers millions of dollars.

The Endangered Species Act (ESA) requires the Army Corps of Engineers, the Bureau of Reclamation, and Bonneville – the federal operators of the FCRPS (Action Agencies) – to consult with the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service on how project operations may impact ESA-protected species. Following this consultation, NMFS issues a biological opinion (BiOp) specifying with either a jeopardy or no-jeopardy finding for the 13 separate species of salmon and steelhead that NMFS lists for protection under the ESA beginning in 1991.[16] A finding of jeopardy requires NMFS to develop Reasonable and Prudent Alternatives (RPAs) to the proposed action.

NMFS issued the first of three "no jeopardy" BiOps for FCRPS beginning in April 1992. The District Court of Oregon in *Idaho Department of Fish and Game v. National Marine Fisheries Service*[17] found the 1993 and 1994 BiOps to be flawed, and ordered NMFS and the Action Agencies to revise the 1994 BiOp. In 1995, NMFS issued the first BiOp which concluded that FCRPS operations jeopardized the continued existence of ESA-listed species, and proposed RPAs to avoid this finding.

NMFS issued a new BiOp in December 2000, which again found that the operations of the FCRPS dams were likely to jeopardize the existence of certain ESA-listed species, and proposed RPAs to mitigate these impacts. It was determined that jeopardy would not be avoided even after implementing the RPAs. Eventually, the cumulative effect of the RPA, coupled with off-site measures including hatchery and habitat initiatives, was determined to be sufficient to warrant a "no-jeopardy" opinion.[18]

In 2001, the National Wildlife Federation and others sued the federal government, challenging whether the 2000 BiOp complied with the ESA.[19] In 2003, then-Judge James A. Redden ruled that the 2000 BiOp failed to provide reasonable certainty that the off-site mitigation measures were not reasonably certain to occur, and ordered NMFS to issue a new BiOp by 2004.[20] In addition, the district court required the modification of the FCRPS dam operations during the spring and summer of 2006, requiring certain dams to bypass hydroelectric turbines and spill water during this period. Environmental organizations and others believe that spills aid in fish passage,

[16] http://www.westcoast.fisheries.noaa.gov/protected_species/salmon_steelhead/recovery_planning_and_implementation/
[17] 850 F. Supp. 886 (D. OR. 1994).
[18] *National Wildlife Federation v. NMFS*
[19] National Wildlife Federation v. NMFS, 254 F. Supp. 2d 1196
[20] National Wildlife Federation v. NMFS, 254 F. Supp. 2d at 1216

while others including water and power users counter that spills, costing tens of millions of dollars, decrease hydropower production and provide little benefit to these few salmon that may be in the Columbia River system during these months (the hottest months of the year).

Judge Redden would eventually go on to reject the 2004, 2008 and the 2010 Supplemental BiOps issued by NMFS.[21] In a 2011 decision, Judge Redden wrote

> No later than January 1, 2014, NOAA Fisheries shall produce a new biological opinion that reevaluates the efficacy of the RPAs in avoiding jeopardy… and considers whether more aggressive actions, such as dam removal and/or additional flow augmentation and reservoir modifications are necessary to avoid jeopardy.[22]

In addition, Judge Redden ordered the spills at the dams to continue during the spring and summer months, consistent with the court's annual spill orders. After Judge Redden retired in late 2011, the case was assigned to Judge Michael Simon who found the 2014 Supplemental BiOp flawed, but allowed it to stay in place until a new BiOp can be completed. The 2014 Supplemental BiOp supplements, without replacing, the 2008 and 2010 BiOps.

In addition, the court found that the Action Agencies had relied on an environmental impact statement (EIS) required under the National Environmental Policy Act of 1969 that was "too stale" or too "narrowly focused," and the Action Agencies were granted an extension to complete a new EIS by March 26, 2021.[23] As part of this order, though not specifically mandating dam breaching, the Judge charged that the federal government had avoided taking a "hard look" at breaching, bypassing and removal of the dams.[24] This is contrary to the more than $22 million spent for extensive studies by the Army Corps in 1999 and again in 2010 on the impacts of removing dams in the Snake River.[25]

Following arguments on environmental plaintiffs' motions for temporary injunctive relief to block capital and maintenance expenditures at the dams and force substantially more spills, Judge Simon on March 27, 2017, ordered "tailored injunctive relief" including additional spills, but ordered the federal agencies to test the impacts of these spills before deciding how much would be mandated at each dam in 2018. In addition, the Judge ordered the federal agencies to disclose planned projects at the Snake River dams to the environmental plaintiffs in a "reasonable process and schedule."

---

[21] https://www.salmonrecovery.gov/BiologicalOpinions/FCRPSBiOp.aspx
[22] National Wildlife Federation v. NMFS, 839 F. Supp. 2d 1117, 1131.
[23] Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., No. 3:01-cv-00640, 2016 U.S. Dist. LEXIS 59195, at *24-25, *235-36
[24] http://earthjustice.org/sites/default/files/files/1404%202065%20Opinion%20and%20Order.pdf
[25] http://www.nww.usace.army.mil/portals/28/docs/environmental/drew/social.pdf. From 1999 to 2002, the Army Corps spent $20.69 million on the impacts of alternatives relating to breaching the Snake River dams. In 2010, the Army Corps spent $274,254 on a study regarding lower Snake River dam breaching.

In response to the court's order, four Members of Congress sent a bipartisan letter to Secretary of the Interior Ryan Zinke raising concerns over the impacts that additional spill requirements in the spring of 2018 would cause, including increased power costs and actual harm to endangered fish species. Under the Obama administration, the Action Agencies concluded, "the 2008 BiOp biologically and legally sound, is based on the best scientific information, and satisfies the ESA jeopardy standard."[26] Furthermore, the letter states that the 2008 BiOp "achieved consensus on a plan that has demonstrated for several years that it is working to improve salmon recovery while still allowing operation of the federal dams."[27] The current biological opinion was defended in court, not just by the federal agencies, but also the States of Idaho, Montana, and Washington, several major utility customers of Bonneville, inland port associations, irrigation districts, as well as several Northwest tribes.

Despite this, a court-ordered spill in the FCRPS began on April 3, 2018, after the Ninth U.S. Circuit Court of Appeals rejected an appeal by the defendants to halt the order.[28] This action will continue to drastically increase power rates for rate payers across the Pacific Northwest, while failing to provide the additional benefits of safe fish passage argued by the plaintiffs. Federal agencies estimate the spill will cost rate payers in the Northwest $40 million in higher rates in 2018 alone.[29]

To that end, H.R. 3144 brings certainty to the operations of the FCRPS by requiring the system to be operated according to the 2014 Supplemental BiOp issued by NMFS until 2022, or until certain conditions are met. In addition, the bill prohibits any structural modification or removal of the FCRPS hydropower dams, unless specifically and expressly authorized by an Act of Congress.

H.R. 3144 is supported by: The Washington Farm Bureau, United Power Trades Organization, PNGC Power, Public Power Council, National Rural Electric Co-Op Association, Northwest RiverPartners, Inland Ports and Navigation Group, Cowlitz Power Utility District, Association of Washington Businesses, Tri-City Development Council, Port of Clarkston, Washington, Washington Power Utility Districts Association, Port of Morrow, Clatskanie People's Utility District, Blachly-Lane Electric Co-Op.

The Subcommittee on Water, Power and Oceans held a legislative hearing on the bill on October 12, 2017.

Major Provisions/Analysis of H.R. 3144

[26] Obama Administration Review and Guidance for the FCRPS BiOp, September 11, 2009. Link: https://www.salmonrecovery.gov/Files/BiologicalOpinions/Appendix%201_09_10_09%20.pdf
[27] Letter from Rep. McMorris Rodgers to Interior Secretary Ryan Zinke, May 2, 2017
[28] http://www.tri-cityherald.com/news/local/article207769934.html
[29] https://newhouse.house.gov/media-center/press-releases/newhouse-secures-support-energy-secretary-perry-work-together-safeguard

Section 2 requires the Action Agencies to operate the FCRPS consistent with the RPA set forth in the 2014 Supplemental Opinion issued by NMFS until the later of the following dates: 2022, or until a subsequent final BiOp for the FCRPS operations is issued after completion of the final EIS for FCRPS operations and is in effect with no pending further judicial review.

Section 4 prohibits any structural modification, action, study, or engineering plan that restricts hydroelectric generation at any FCRPS dam, or limits navigation on the Snake River unless specifically and expressly authorized by Congress.

Cost

The Congressional Budget Office has not completed a cost estimate of this bill.

Administration Position

Supports.[30] [31]

Anticipated Amendments

None anticipated.

Effect on Current Law (Ramseyer)

N/A

[30] https://newhouse.house.gov/media-center/press-releases/newhouse-secures-support-energy-secretary-perry-work-together-safeguard

[31] Official testimony of Alan Mikkelsen, then-Acting Commissioner of the Bureau of Reclamation, U.S. Department of the Interior, on H.R. 3144 to the House Committee on Natural Resources, October 12, 2017