

**TESTIMONY OF DAVID MONTAGNE,  
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THE SABINE RIVER AUTHORITY OF TEXAS**

**BEFORE THE SUBCOMMITTEE ON WATER, POWER AND OCEANS  
OF THE U.S. HOUSE OF REPRESENTATIVES  
COMMITTEE ON NATURAL RESOURCES**

**OVERSIGHT HEARING ON THE CHALLENGES OF KEEPING  
HYDROPOWER AFFORDABLE AND OPPORTUNITIES FOR  
NEW DEVELOPMENT**

**May 3, 2017**

Chairman Lamborn, Ranking Member Huffman, and Members of the Subcommittee on Water, Power and Oceans, thank you for the opportunity to appear before you today to discuss the challenges of keeping hydropower affordable and opportunities for new development. I am submitting this testimony as Executive Vice President and General Manager of the Sabine River Authority of Texas (SRA-Texas). SRA-Texas, established by the Texas State Legislature in 1949, is an official agency of the State of Texas that provides an essential public function on behalf of the citizens of Texas, which it serves. We were created as a conservation and reclamation district with responsibilities to control, store, preserve and distribute the waters of the Sabine River and its tributary streams for multiple public purposes, including domestic use, agricultural production, manufacturing and other industrial and commercial purposes, hydroelectric power production, navigation, recreation and tourism. SRA-Texas's operations extend to all or part of 21 counties (Orange, Newton, Jasper, Sabine, San Augustine, Shelby, Rusk, Panola, Harrison, Gregg, Smith, Upshur, Wood, Van Zandt, Kaufman, Rains, Rockwall, Collin, Hunt, Hopkins, and Franklin), which lie within the watershed of the Sabine River and its tributaries.

We supply water to municipal, industrial and agricultural users throughout the Sabine River Basin. This is accomplished through the John W. Simmons Gulf Coast Canal System in Orange County, the Toledo Bend Reservoir, the Lake Tawakoni Reservoir, and Lake Fork Reservoir. Our largest municipal clients include the Cities of Dallas, Longview and Greenville. We also have industrial clients, which include DuPont, International Paper, Texas Eastman, and three power plants (Entergy, NRG, and Tenaska).

SRA-Texas is governed by a nine-member Board of Directors appointed by the Governor of Texas to serve six-year terms. Board members are vested with the management and control of the affairs of SRA-Texas, which receives no appropriations from the State and is not empowered to levy or collect any kind of taxes. Operating funds are primarily derived from the sale of raw water, hydroelectric power, water quality services, and recreational and land use permit fees. Currently we have 104 full-time employees and operate within a budget of approximately \$29.39 million.

My testimony today will include a description of the Toledo Bend Project (Project) and describe our experiences in the recent Federal Energy Regulatory Commission (FERC) relicensing. Specifically, I will explain the four biggest challenges in our relicensing and under the new project license, including:

- ) Negotiation of a fishway prescription and fishway requirements for American eel under the license, pursuant to Section 18 of the Federal Power Act (FPA);
- ) Mandatory requirements imposed under FPA Section 4(e) because the Project occupies federal lands within the Sabine National Forest;
- ) Onerous regulatory requirements and heavy oversight under the new license that challenge our ability to operate the Project for its primary purpose of water supply; and
- ) A FERC relicensing process that was unduly burdensome, time consuming, costly, and increased Project operating costs unnecessarily—which is why all license terms, particularly for publicly owned projects, should be for a term of 50 years.

### **Overview of Toledo Bend Project**

One of SRA-Texas's most significant assets is the Toledo Bend Project, located on the main stem of the Sabine River in the counties of Panola, Shelby, Sabine and Newton, and in the parishes of De Soto, Sabine, and Vernon in Louisiana. SRA-Texas owns and operates the Project with its co-licensee, the Sabine River Authority, State of Louisiana (SRA-Louisiana, and together with SRA-Texas, the Authorities). Like SRA-Texas, SRA-Louisiana is a self-sustaining entity that has no taxing authority and does not receive appropriated funds from the State of Louisiana. SRA-Louisiana has 64 employees and an annual operating budget of \$9.8 million. The Project is the only hydropower facility in the United States that is co-licensed by FERC to two states through governmental units of those states. Consistent with the statutory purposes of both SRA-Texas and SRA-Louisiana, the Project was conceived, licensed, and developed primarily as a water supply facility. A map of the Project and a photo of the Toledo Bend Dam/Spillway are included as Figures 1 and 2 of this testimony.

The Sabine River Compact (Compact), signed by representatives from Louisiana, Texas, and the United States in 1953 and approved by Congress, apportions the waters of the Sabine River Basin below the state line equally between the States of Texas and Louisiana. The Compact grants the States of Louisiana and Texas authority to manage and utilize the water resources of the Sabine River basin, including Toledo Bend Reservoir, for the benefit of the public in their states. In 1959, the two states arranged for the financing of \$30 million in revenue bonds for the Project. They opted to install hydropower capability at the Project to generate electricity to pay for the revenue bonds. Prior to its construction, the Federal Power Commission (FPC), predecessor agency to the

FERC, granted a 50-year license to the Authorities in 1963. The Authorities completed construction and commenced operations of the Project in 1969. The Project is the nation's only major public water conservation and hydroelectric power project to be undertaken without federal participation in its permanent financing.

Today, Toledo Bend Reservoir provides water supply for local municipalities and industries, as well as supports jobs and businesses throughout the lower Sabine River Basin through the provision of a dependable water supply. For example, both Authorities operate diversion canal systems for the purpose of transporting and delivering water from the Sabine River to supply agricultural, municipal, and industrial water needs in Southwest Louisiana and Southeast Texas. The Project also has the capacity to produce approximately 240,000 megawatt hours of clean, renewable energy annually—enough to power about 16,000 homes. In terms of both surface area (approximately 185,000 acres) and storage capacity (approximately 4.5 million acre feet), Toledo Bend Reservoir is one of the largest water bodies in the United States, and is the largest reservoir in the nation (in terms of storage capacity) that is not owned and operated by the federal government. In fact, Toledo Bend is the largest unallocated supply of fresh water in Texas, and the reservoir is considered crucial to meeting future water demands in the region, which are expected to increase in Texas alone by 92 percent over the decades between 2010 and 2060. Finally, Toledo Bend supports a world-class bass fishery, which supports economic development in the region through the numerous recreational opportunities provided by the Project. Toledo Bend Reservoir, which was ranked the #1 bass lake in the nation for the last two years by *Bassmaster Magazine*, also was selected as the location for the Bassmaster Elite Series Tournament in 2011, 2012, 2014, 2016 and 2017. A picture from the event is attached as Figure 3.

### **Project Area**

The Toledo Bend shoreline is approximately 1,200 miles in length—longer than the entire West Coast of the continental United States. In Texas, the shoreline offers numerous public recreation facilities, commercially owned marinas and other businesses, private docks and boat houses on lands leased to adjacent landowners, and undeveloped lands. It also includes approximately 4,000 acres of federal lands administered by the U.S. Forest Service (USFS) as part of the Sabine National Forest, as well as the Indian Mounds Wilderness Area (IMWA). IMWA was congressionally designated in 1984—more than 20 years after the original Project licensing and 15 years after Project construction. No Project structures, facilities or works occupy lands within IMWA.

### **FERC Relicensing Process**

The Project recently completed the FERC relicensing process. It was issued a new 50-year license by FERC on August 29, 2014. The Authorities developed the license application through an 8-year process that included many years of scientific studies and collaborating with all relevant federal and state agencies and the interested public both before and after the application for a new license was filed with FERC.

Several federal agencies had mandatory conditioning authority in the Project relicensing. The National Marine Fisheries Service (NMFS) (through the Secretary of Commerce) and the U.S. Fish and Wildlife Service (USFWS) (through the Secretary of the Interior) both sought to require the Authorities to construct, maintain, and operate “fishways” at the Project under FPA Section 18. Because the Project occupies approximately 3,797 acres of Sabine National Forest, the USFWS sought to broadly impose mandatory conditions on the Authorities’ new license under FPA Section 4(e).

Given the extensive authorities of federal agencies involved in the relicensing and what they were demanding in relicensing discussions, the Authorities had no choice but to reach relicensing settlement agreements with the agencies. However, the significant challenges experienced with the federal agencies’ extensive authorities under the FPA during the relicensing are further detailed below.

This onerous relicensing process has come at considerable cost to the Authorities, as follows:

- ) The relicensing process costs (e.g., environmental and engineering consultant fees, environmental studies, legal expenses, document preparation, and other related expenses) alone totaled over \$11 million, including a request for rehearing of FERC’s new license order.
- ) Capital costs associated with implementing new license measures are estimated at \$3.6 million (not including the capital costs of a proposed, new small generating facility at the spillway).
- ) Annual costs associated with operation and maintenance of new protection, mitigation, and enhancement measures (including measures in the relicensing settlement agreement) are estimated at \$3.7 million.
- ) In addition, the Authorities estimate that they lose \$2.6 million in revenue each year as a result of license conditions that restrict normal hydropower production to periods when Toledo Bend Reservoir is above 168 feet mean sea level (msl) (even though the Project was designed to draw reservoir levels down to elevation 162 feet msl for power generation).

Together, these costs will increase the Project’s total operating costs by more than \$7 million each year over a 50-year license term. These relicensing costs substantially increase the Project’s total operating costs by nearly 44% annually, even under a new license with a statutory maximum license term of 50 years. Had FERC issued a license with a lesser term, these financial impacts would be even greater.

### **FPA Section 18 Fishway Prescription**

Negotiation of a Section 18 fishway prescription was one of the most significant challenges in the Project relicensing. Section 18 of the FPA directs FERC to require

licensees to construct, maintain, and operate any “fishways” that may be prescribed by NMFS or USFWS. “Fishways” can include requirements such as upstream and downstream fish passage, installation of fish screens, and changes to Project operations, including minimum flow requirements, to facilitate fish passage.

Section 18 was an issue in this relicensing due to the American eel. While American eel is not listed as threatened or endangered under the Endangered Species Act (ESA), USFWS and NMFS have pressed for fishways for American eel at hydropower projects in the East and Southeast for many years. American eel is a highly adaptable species with some of the broadest diversity of habitats of any fish species in the world. The USFWS has thoroughly investigated the status of the American eel twice in the last several years and in both instances found that the species is stable and ESA protection is not warranted. The western Gulf of Mexico, where our Project is located, is at the extreme outer range of American eel distribution. Because the Toledo Bend Project is located approximately 157 miles upstream of the Gulf of Mexico, there are literally thousands of miles of available habitat downstream of Toledo Bend Dam in the mainstem and tributaries that adequately support the few individual eels in the Sabine River basin and allows them to complete their lifecycles.

During early relicensing negotiations with USFWS and NMFS, the agencies indicated that its policies require upstream and downstream eel passage at the Project as a condition of the new license. As a result, the Authorities designed and implemented robust and specialized sampling procedures to study American eel during the relicensing. The Authorities even adjusted its study methods after six months of eel sampling to accommodate the agencies’ requests. After nearly two years of fish sampling, the Authorities captured only 61 eels at the Project: 44 by electrofishing, and 17 in traps.

Despite these low numbers, it soon became evident that USFWS and NMFS were predisposed to require eel passage at the Project. **They insisted that eel passage was necessary if only one eel was present at the project.** As such, the Authorities had little choice but to reach agreement with the agencies on eel passage. After over a year of negotiations with NMFS and USFWS, the Authorities reached agreement on upstream and downstream passage of American eel at Toledo Bend Dam. Under the agreement, the Authorities operate two ramp traps at the downstream end of the tailrace and four traps in the spillway structure. Eels captured in the traps are transported upstream of the dam and released. The Authorities may ask NMFS and USFWS to allow the Authorities to discontinue the passage program if fewer than an average of 150 eels per year are passed in years three through five of the program, and revert to a reservation of authority to prescribe fishways later in the license term. While the Authorities were successful in negotiating a potential off-ramp for eel passage requirements for the duration of the license, these obligations are still a significant expense under the new license, and there is still a possibility that downstream eel passage will be required.

While providing upstream passage for American eel is not challenging, downstream passage presents significant challenges and costs. In fact, the only technically feasible way to provide downstream passage for the species is to turn off hydropower generators

and release water from the spillway or additional infrastructure. Should downstream passage be required and the Authorities are required to cease generation and release water from the spillway or other means for the benefit of a very small number of eels, they will incur significant costs and risk. It will result in lost power production and inhibit the Authorities' ability to meet its water supply obligations, which is not in the public interest.

### **FPA Section 4(e) Conditions**

The presence of 3,797 acres of federal lands within the Project also provided the USFS with significant authority in the relicensing process. Because the USFS lands occupied by the Project are considered a federal reservation, Section 4(e) of the FPA enables the Secretary of the department that manages the federal reservation—in this case, the Secretary of Agriculture, acting through the USFS—to impose any conditions in the FERC license it deems necessary for the “adequate protection and utilization of the reservation,” and the Supreme Court has held that FERC has no discretion to reject or modify conditions filed with FERC by the Secretary under FPA Section 4(e). In addition, the U.S. Court of Appeals has held that a Section 4(e) condition is not limited to only that portion of the Project occupying the federal reservation. Rather, a Section 4(e) condition can extend to an entire project—in this case, to the more than 200,000 acres of land owned in fee by the Authorities at one of the largest reservoirs in the United States.

In 2003, in anticipation of the relicensing process, SRA-Texas agreed to take over management, operations, and maintenance of six USFS recreation sites, which the USFS otherwise intended to close for lack of use and funds to maintain. At USFS's request, the Authorities undertook this significant obligation not only to be a good neighbor, but to build trust and goodwill with the USFS going into the relicensing process.

It proved to be unsuccessful. The USFS possessed considerable authority under FPA Section 4(e) to broadly impose mandatory conditions upon the Authorities' new license, and USFS leveraged this authority during relicensing settlement negotiations with the Authorities. The USFS initially requested that the Authorities undertake efforts to eradicate the presence of the invasive plant species, Chinese tallow, along the reservoir and *within the entire Sabine National Forest*, which occupies 160,000 acres, most of which is not proximate to Toledo Bend Reservoir. The Authorities completed studies on the invasive plant species during the relicensing which confirmed that the species is prevalent throughout the region (and, indeed the entire Southeast U.S.), but that the Project is not causing its spread. Nevertheless, with USFS's unreasonable position, and recognizing that the alternative could result in unfathomable costs and uncertainties, the Authorities opted to enter into an agreement with the USFS. Under the agreement:

- ) Despite the fact that studies proved that the Project is not causing the spread of Chinese tallow, the Authorities must provide \$20,000 annually (in 2013 dollars, adjusted for inflation) to the USFS for treatment of the species on project lands within the Sabine National Forest.

- ) Even though studies showed that the USFS campgrounds are infrequently used, the Authorities must operate, maintain, and improve the six recreation areas within Sabine National Forest, including capital improvements to each site.
- ) Even though erosion is a natural process caused by non-Project factors like wind, the Authorities must implement an Erosion Monitoring and Management Plan that could require significant and expensive mitigation to address erosion along many miles of shoreline.

### **Regulatory Approvals Needed to Meet Water Supply Obligations**

The Authorities also face a multitude of regulatory requirements and heavy oversight under the new license that challenges their ability to operate the Project for its primary purpose of water supply. For example, while the relicensing agreements proposed no such measure, FERC unilaterally imposed a minimum reservoir level elevation of 162.2 feet msl in the new license. This restriction inhibits the Authorities from meeting their state mandates for water supply. The Authorities have authorized and administered a number of water supply contracts for entities that rely on water from the reservoir, and the Authorities are legally bound to fulfill these contracts. For several of these customers, the Toledo Bend Reservoir serves as their only water source. In dry years, FERC's minimum reservoir level requirement will test the Authorities' ability to operate in compliance with its license while meeting its water supply obligations.

The new license also requires the Authorities to provide changes to the generation schedule and increased flow releases—not for purposes of mitigating any effects of the Project—but rather only to “enhance” aquatic habitat and water quality downstream of the Project. The agencies insisted on these measures even though the Authorities' relicensing studies demonstrated that fishery resources in the lower Sabine River are diverse and healthy. Provision of these flow releases results in the loss of water that otherwise would be available for public, commercial, or agricultural water supply and the resulting economic benefits.

Lastly, the new license requires the Authorities to seek FERC approval of any water supply proposal to extract more than one million gallons per day (mgd) of water from the reservoir. With a dependable firm yield of 2,086,000 acre-feet of water per year, water withdrawals of this magnitude from the reservoir have a negligible effect on reservoir levels. Nonetheless, those exceeding one mgd must still be pre-approved by FERC on an individual basis. To obtain FERC's approval, the Authorities, in coordination with the water supply customer, must consult with federal and state agencies, obtain necessary permits, submit an application to FERC, allow a public comment period, and wait for FERC approval before executing any new water supply obligation exceeding one mgd. This requirement already has proven to be onerous for the Authorities.

For example, the Authorities have a pending application before FERC to authorize a new water withdrawal of 6.3 mgd on the Louisiana side of the reservoir, to provide freshwater needed for hydraulic fracturing and natural gas development. This withdrawal will

account for less than 0.2 percent of the mean annual inflow to the Project, would be imperceptible on the reservoir, and will not affect the Authorities' ability to meet its license requirements in any way. Nonetheless, the Authorities were required to submit an application for approval, respond to a significant additional information request from FERC, and are still waiting for FERC's approval, while the developer's plans are at a standstill.

The Authorities understand the need for environmental stewardship and regulation of hydropower, but federal agency oversight of small, insignificant activities such as water withdrawals at the Project requires too much investment of time and resources to get approval. This micromanagement increases Project costs, stifles development, and is completely unnecessary.

### **Conclusion**

Thank you, Chairman Lamborn, Ranking Member Huffman, and Members of the Subcommittee for this opportunity to comment on the challenges faced by the Authorities in working with the agencies to relicense the Toledo Bend Project. We appreciate your leadership in Congress to address issues that will enable this important state asset to achieve its full potential as a water supply facility, electricity producer, and an engine of economic development for Eastern Texas and Western Louisiana.

**ATTACHMENTS TO**

**Written Testimony of  
David Montagne  
Executive Vice President and General Manager,  
Sabine River Authority of Texas**

Figure 1. Map of Toledo Bend Project

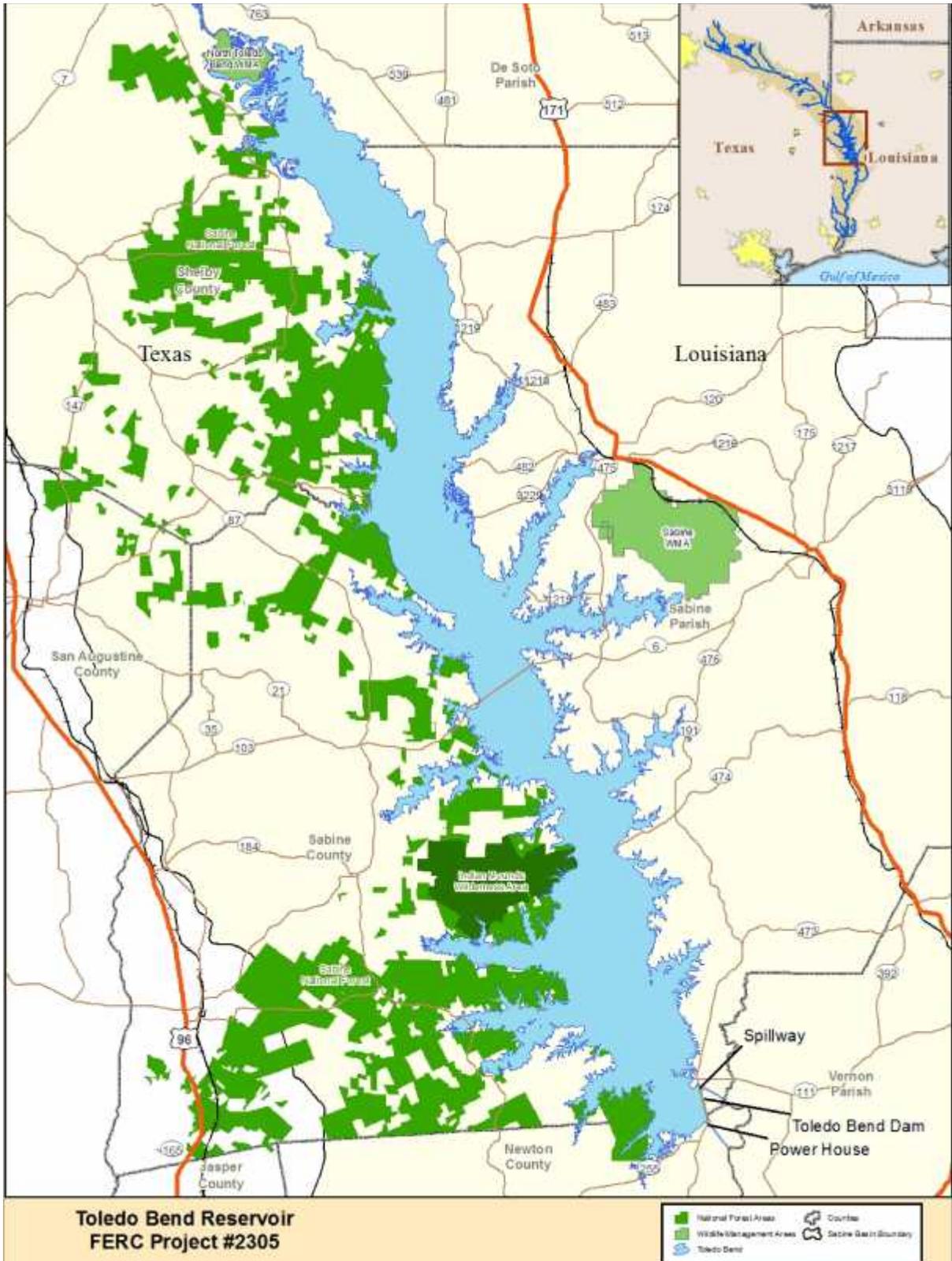


Figure 2. Toledo Bend Spillway



Figure 3. Picture from Bassmaster Elite Series Tournament

