



November 18, 2015

The Honorable Paul Ryan
Speaker
U.S. House of Representatives
H-232, The Capitol
Washington, DC 20515

The Honorable Nancy Pelosi
Minority Leader
U.S. House of Representatives
H-204, The Capitol
Washington, DC 20515

Dear Speaker Ryan and Minority Leader Pelosi:

Hydropower is America's largest source of renewable energy, providing millions of Americans with reliable electricity without generating greenhouse gas or other emissions. As the demand for low carbon energy grows and concerns over energy security intensify, hydropower can and must play a significant role in meeting these challenges.

However, the many processes by which we authorize hydropower projects are antiquated; they have not been updated to reflect our new energy realities, nor coordinated to meet modern environmental requirements administered by many federal and state regulatory agencies and Indian tribes. These protracted processes and the uncertainties they create have caused power generators to view hydropower as a risky investment. The regulatory requirements alone are causing investors to favor lower-cost resources with emissions instead of renewable, non-emitting hydropower.

The bipartisan hydropower modernization provisions recently included in legislation passed by the House Committee on Energy and Commerce took some much needed, but modest steps designed to make this clean energy source a more attractive choice. However, hydropower opponents have launched a major campaign to oppose this modest proposal. In a recent widely distributed communication, these opponents of change made some startling assertions that would give any lawmaker pause. We would like to address those claims.

Opponents allege that the measures would:

- “[A]llow power companies that operate hydroelectric dams to avoid compliance with the *Endangered Species Act*”; and
- “[A]llow large utilities to ignore state and tribal requirements under the *Clean Water Act* that their dams meet water quality standards.”

These are troubling allegations. A fair reading of the bill text clearly demonstrates what the measures do and do not authorize and will dispel these concerns.

Here is the context: Under the status quo, state and federal resource agencies often fail to complete their important obligations under federal environmental laws to decide on a needed permit, certification, or other approval within a reasonable timeframe. Although in many cases federal law, and the agencies' own regulations, establish time periods for action, these deadlines are often ignored or evaded. As a result, a proposed project can be rejected simply through an agency's failure to make a decision on a project—either to grant or deny—according to provisions established by law.

The hydropower provisions in the Committee-passed bill reject the status quo. Under these provisions, it will no longer be acceptable for an agency to delay a decision indefinitely. And, contrary to various inaccurate statements and exaggerated claims, **the hydropower provisions would neither repeal nor undercut the timely exercise of authority by any state or federal resource agency or Indian tribe to administer the Endangered Species Act, Clean Water Act, or any other federal environmental law.**

Here is what the bipartisan hydropower measures actually do:

- These measures designate the Federal Energy Regulatory Commission (FERC) as the lead agency for purposes of coordinating the many reviews and approvals required under federal law, and direct FERC and all other agencies to work together from the beginning of the process to identify needed environmental studies and resolve scheduling issues. This would create a plan for study, consultation and submitting applications. It would not limit, shut out, bias, or otherwise prevent any agency or tribe from doing its job.
- Because agencies often cite a lack of resources as a reason for delay, the measures authorize hydropower applicants to supplement agencies' limited budgets to pay for needed studies, and provide adequate resources for agencies to do their jobs, without strings attached.
- Once the FERC licensing application is filed and accepted, and the environmental studies are either completed or well advanced, the measures require FERC to work with other agencies in developing a master schedule for all required reviews and authorizations for the project.
- All regulators and participants—FERC, federal and state agencies, Indian tribes, the applicant, and stakeholders—must abide by the master schedule.
- If, after applying all of these new requirements for coordination and consultation in developing a master schedule, an agency still cannot meet that schedule, it has the right to petition the U.S. courts of appeal for additional time. If the court does not agree that further delay is justified, the project can move forward without further delay.

Thus, these measures promote good government by facilitating early coordination, providing additional resources where needed, and then simply requiring decision makers—for the first time—to do their jobs on schedule. And the measures only impose a timing element; they do not dictate *how* federal, state or tribal regulators should exercise their regulatory responsibilities or *what* they must advocate. *Only* if a regulator fails to collaborate, fails to ask for what it needs in terms of time to complete its job, fails to take advantage of additional financial support, and fails to convince a court that it has good reason for needing more time, can the process move forward without further delay. We think this is a far cry from giving clean energy developers a right to “avoid” or “ignore” environmental laws. We attach a white paper that explains the hydropower provisions of the Committee-passed legislation in more detail.

The hydropower language passed out of Committee is indeed a change from the current inefficient processes that can impede and obstruct our nation's largest and most reliable source of clean, renewable electricity. But it is time to end the inaccurate rhetoric surrounding the hydropower provisions and act responsibly to address the real challenges of climate change and clean air.

Thank you for your leadership.

Sincerely,

Linda Church Ciocci, Executive Director, National Hydropower Association
Susan Kelly, President and CEO, American Public Power Association
Thomas Kuhn, President, Edison Electric Institute
John Di Stasio, President, Large Public Power Council
Jeffrey Connor, Interim CEO, National Rural Electric Cooperative Association

Attachment

cc: Rep. Kevin McCarthy, Majority Leader
Rep. Steve Scalise, Majority Whip
Rep. Steny Hoyer, Minority Whip
Rep. Fred Upton, Chairman, Committee on Energy and Commerce
Rep. Frank Pallone, Ranking Member, Committee on Energy and Commerce

Effect of Hydropower Provisions on Federal Environmental Requirements

On September 30, 2015, the U.S. House of Representatives Committee on Energy and Commerce approved the North American Energy Security and Infrastructure Act of 2015, H.R.8.

Title I, Subtitle C of the bill contains measures to improve the licensing and regulation of non-federal hydropower projects subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC) under the Federal Power Act (FPA). Some of these measures were included in Chairman Upton’s mark up vehicle, called an Amendment in the Nature of a Substitute; most were adopted by voice vote during mark-up in a bipartisan amendment offered by Representatives McMorris Rodgers and McNerney.

Following approval of this bill in Committee, a number of parties have raised concerns with the hydropower title. Most recently, these concerns have focused on the effect of these bills on obligations under the Clean Water Act (CWA) and Endangered Species Act (ESA).

The hydropower title is intended to address long-standing impediments to realizing the vast potential and benefit of protecting existing hydropower resources and promoting responsible new hydropower that is pivotal to combating carbon emissions and meeting our climate goals—and to do so in a manner that preserves the full array of modern environmental laws. The recent concerns raised by opponents to these hydropower provisions are addressed below. Additional information regarding long-standing challenges in hydropower development and the benefits of the hydropower title is available at <http://www.unlockhydro.org/>.

Concern Raised	Analysis
<p>The hydropower title “would allow large utilities to ignore state and tribal requirements under the Clean Water Act that their dams meet water quality standards.”</p>	<p>The hydropower provisions were carefully crafted to ensure that all substantive environmental requirements continue to apply to hydropower licensing and regulation. Nothing in these bills eliminates state or tribal authority to issue water quality certifications for any federal license or permit concerning a non-federal hydropower project that may result in a discharge, as CWA section 401 currently requires.</p> <p>Contrary to this concern, a primary purpose of the hydropower title is to establish a more cooperative and coordinated effort among federal, state and tribal regulators to help facilitate and improve all authorizations required under federal law, including CWA section 401 certification. For example:</p> <ul style="list-style-type: none"> • Section 1304 of the bill (under the new FPA section 34(b)(2)) requires resource agencies and Indian tribes with authorization responsibilities under federal law (e.g., CWA section 401 certification, consultation under ESA section 7, permitting under CWA section 404) to coordinate their efforts from the very beginning of each hydropower licensing process. Far from weakening or eliminating agency and tribal authorities, section 1304 is intended to promote coordinated study, review, and early issue identification. • Section 1304 (under the new FPA sections 34(b)(2)(D) and 34(c)(2)(C)) includes mechanisms for agencies and tribes to raise issues of concern throughout the licensing process, which can be resolved between FERC and the heads of other agencies through memoranda of understanding, as appropriate. • Section 1304 (under the new FPA section 34(f)) authorizes

Concern Raised	Analysis
	<p>hydropower applicants to provide direct funding to agencies and tribes, for the express purpose of providing supplemental resources to assist agencies and tribes in meeting their obligations under the ESA, CWA, and other statutes.</p> <ul style="list-style-type: none"> • Once an applicant has advanced environmental studies to support its licensing application, and FERC accepts that application, section 1304 (under the new FPA section 34(c)(2)) requires FERC to work collaboratively with resource agencies and tribes in establishing a schedule for the licensing and other approvals of the project required under federal law. This schedule is binding not only on resource agencies and tribes, but also upon the applicant, FERC, and other participants in the licensing process. • In developing this schedule, FERC also is required under section 1304 of the hydropower title (under the new FPA section 34(c)(2)(D)) to adhere to deadlines established under federal law, thus preventing the schedule from shortchanging agencies with time periods already deemed appropriate by Congress. • If, after working with the applicant, FERC, and other agencies since the beginning of the licensing process, an agency or Indian tribe is unable to adhere to the schedule it helped to develop, section 1305 (under the new FPA Section 313(b)(2)) authorizes the U.S. courts of appeal to grant an additional period of up to 90 days—extending, in essence, the period for many applicable agency actions currently provided under federal law. <p>Currently, over 1,600 hydropower projects across the U.S. are licensed by FERC under the FPA. So long as resource agencies and tribes work collaboratively with FERC in identifying environmental study needs, resolving procedural or substantive disputes, establishing the master schedule, and obtaining an extension of time from the U.S. courts of appeal when needed, nothing in the hydropower title would allow the licensees of these projects to ignore CWA requirements when these projects proceed through the relicensing process.</p> <p>With regard to new project development, the same analysis applies, although the hydropower title does provide expedited procedures and/or focused conditioning authority with respect to three narrowly defined classes of special-purpose authorizations (i.e., authorization of new hydropower at existing dams, licensing of closed-loop pumped storage projects, and non-controversial and beneficial license amendments) with more limited environmental effects.</p>
<p>The hydropower title “would allow power companies that operate hydroelectric dams to avoid compliance with the Endangered Species Act.”</p>	<p>The hydropower title was carefully crafted to ensure that all substantive environmental requirements continue to apply to hydropower licensing and regulation. Nothing in these bills eliminates FERC’s responsibility to consult with the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS) under ESA section 7, or the authority of NMFS and USFWS to establish reasonable and prudent alternatives or reasonable and prudent measures as part of such consultation.</p> <p>Contrary to this concern, as explained above, the primary purpose of these bills is to establish a more cooperative and coordinated effort among federal and state regulators in the hydropower licensing process.</p> <p>Thus, for the over 1,600 hydropower projects across the U.S. that are licensed</p>

Concern Raised	Analysis
	<p>by FERC under the FPA, nothing in the hydropower title allows hydropower operators to avoid ESA compliance—so long as NMFS and/or USFWS work collaboratively with FERC in identifying their environmental study needs, resolving procedural or substantive disputes, establishing the master schedule, and obtaining an extension of time from the U.S. courts of appeal if needed.</p> <p>With regard to new project development, the same analysis applies, although the hydropower title does provide expedited procedures and/or focused conditioning authority with respect to three narrowly defined classes of special-purpose authorizations (i.e., authorization of new hydropower at existing dams, licensing of closed-loop pumped storage projects, and non-controversial and beneficial license amendments) with more limited environmental effects.</p>
<p>The hydropower title is a “breathtaking assault” on federal environmental laws and “upends the balance” between “power and non-power values that has existed for almost a century.”</p>	<p>As described above, not only does the hydropower title <i>not</i> repeal or erode agency or tribal authorities under federal environmental laws, the measures are intended to improve and facilitate compliance through enhanced collaboration, information gathering, analysis and early coordination. No federal environmental laws are assaulted.</p> <p>Moreover, contrary to the criticisms that the hydropower title would upset the balance in hydropower licensing between power and non-power values, the hydropower title would provide substantial environmental benefits. For example:</p> <ul style="list-style-type: none"> • Section 1304 of the bill (under the new FPA section 34) promotes development of new hydropower resources at existing dams through a focused and efficient approval process. This commonsense provision facilitates new clean energy development at existing infrastructure—expanding non-emitting generation at an already-developed site. • In exchange for developing new hydropower at existing infrastructure, section 1304 (under the new FPA section 34) requires developers to pay an annual charge that will be used for environmental enhancement projects in the area. • Section 1307 (under the new FPA section 36) promotes development of closed-loop pumped storage projects, which are less impactful to fishery and aquatic resources, and which are essential to integrating intermittent renewables into the electric grid, such as wind and solar. • Section 1308 (under the new FPA Section 37(a)) encourages non-controversial improvements at existing projects—such as efficiency upgrades or expansions resulting in additional generation of clean hydropower—through an expedited review and approval process. Such procedures are available for other project improvements as well, such as environmental protection measures and public recreation enhancements.