FEDERAL HYDROPOWER MODERNIZATION AND IMPROVEMENT: ANALYSIS OF CONCERNS RAISED AGAINST S.2012 AND H.R.8

On July 30, 2015, the U.S. Senate Energy and Natural Resources Committee approved the Energy Policy Modernization Act of 2015, S. 2012 (Report No. 114-130). 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. Both these bills contain 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).

Following approval of these bills, a few parties have raised concerns with the hydropower improvement provisions. These concerns have focused on the effect of these bills on obligations under the Clean Water Act (CWA), Endangered Species Act (ESA), National Environmental Policy Act (NEPA), and other environmental requirements. Parties also have raised concerns regarding the effect of these bills on existing authorities of Federal and State resource agencies and Indian tribes to protect public health and environmental resources.

The hydropower modernization and improvement provisions in both S. 2012 and H.R. 8 are 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 concerns raised by opponents to these hydropower provisions are addressed below.

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1	The bills would weaken and in some cases eliminate the States' authority to impose license conditions under CWA section 401.	The hydropower provisions in both H.R. 8 and S. 2012 were carefully crafted to ensure that all substantive environmental requirements continue to apply to hydropower licensing and regulation. So long as State water quality agencies cooperate in the process and complete their water quality certification decisions in a timely manner (*see* Response to Concern No. 10), nothing in these bills eliminates State authority to issue water quality certification for any Federal license or permit concerning a non-federal hydropower project that may result in a discharge, as CWA section 401 currently requires. Contrary to this concern, a primary purpose of these bills is to establish a more cooperative and coordinated effort among Federal and State regulators to help facilitate and improve all authorizations required under Federal law, including CWA section 401certification. For example: • H.R. 8 section 1203[1] 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 1203 is intended to promote coordinated study, review, and early issue identification. • H.R. 8 section 1203 includes mechanisms for agencies and tribes to raise issues of concern throughout the licensing process, which can

[1] All section numbers of H.R. 8 referenced in this analysis adhere to the Manager's Amendment filed by Chairman Upton.

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		be resolved between FERC and the heads of other agencies through memoranda of understanding, as appropriate. • H.R. 8 section 1203 authorizes 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. Currently, over 1,600 hydropower projects across the U.S. are licensed by FERC under the FPA. For States that cooperate in the process and make timely decisions on water quality certification applications, nothing in H.R. 8 or S. 2012 would weaken States' substantive conditioning authority under CWA section 401 in any manner when these projects require relicensing. With regard to new project development, nothing in H.R. 8 or S. 2012 waives CWA section 401 certification requirements for timely agency action. For three specialized, narrowly defined classes of special-purpose authorizations (i.e., closed-loop pumped storage projects, exemptions at non-powered dams, and fast-track amendments for beneficial project upgrades), H.R. 8 confines the scope of section 401 conditioning authority to address only effects of the proposed undertaking. *See* Response to Concerns No. 18, 19, 25, 26, 28 & 29.
2	The bills would weaken and in some cases eliminate Federal resource agencies' mandatory conditioning authorities under FPA sections 4(e) and 18.	The hydropower provisions in both H.R. 8 and S. 2012 were carefully crafted to ensure that all substantive environmental requirements continue to apply to hydropower licensing and regulation. So long as Federal mandatory conditioning agencies cooperate in the process and timely submit their conditions and prescriptions (*see* Response to Concern No. 10), nothing in these bills eliminates the authority of Federal land management agencies to impose conditions under FPA section 4(e), or the authority of the U.S. Fish and Wildlife Service (USFWS) or National Marine Fisheries Service (NMFS) to prescribe fishways as part of FERC's licensing of hydropower projects. Contrary to this concern, a primary purpose of these bills is to establish a more cooperative and coordinated effort among Federal and State regulators in the hydropower licensing process. *See* Response to Concern No. 1. It is true that S. 2012 section 3001 shifts the venue for trial-type hearings (TTH) on disputed issues of material fact concerning section 4(e) conditions and section 18 prescriptions from the individual Federal resource agencies to FERC administrative law judges (ALJs). However, section 3001 intentionally is limited to fact finding and does not interfere with the conditioning authority of Federal agencies under these statutes. As the Federal resource agencies recently explained when amending their TTH rules: "While the ALJ may determine specific facts, the resource agencies retain the responsibility of determining the weight and significance to be accorded such facts in finalizing mandatory conditions or prescriptions, in light of the resource agencies' objectives for the resources they manage." 61 Fed. Reg. 17,156, at 17,173 (Mar. 31, 2015). Thus, for the relicensing of over 1,600 hydropower projects across the U.S. that are licensed by FERC under the FPA, nothing in H.R.8 or S.2012 would eliminate or weaken the mandatory conditioning authority under FPA sections 4(e) and 18 of Federal agencies that cooperate in the process and make timely decisions. With regard to new project development, nothing in H.R. 8 or S. 2012 waives the exercise of timely mandatory conditioning authority under FPA sections 4(e) and 18.

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		For three specialized, narrowly defined classes of special-purpose authorizations (i.e., closed-loop pumped storage projects, exemptions at non-powered dams, and fast-track amendments for beneficial project upgrades), H.R. 8 confines the scope of FPA section 4(e) and 18 mandatory conditions to address only effects of the proposed undertaking. *See* Response to Concerns No. 18, 19, 25, 26, 28 & 29.
3	The bills would weaken and in some cases eliminate authorities of NMFS and USFWS under ESA section 7.	The hydropower provisions in both H.R. 8 and S. 2012 were 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 NMFS and USFWS under ESA section 7. So long as NMFS and USFWS cooperate in the process and complete their obligations under section 7 in a timely manner (*see* Response to Concern No. 9), noting in these bills changes current authority of NMFS and USFWS to establish reasonable and prudent alternatives or reasonable and prudent measures as part of such consultation. Contrary to this concern, a primary purpose of these bills is to establish a more cooperative and coordinated effort among Federal and State regulators in the hydropower licensing process. *See* Response to Concern No. 1. Thus, for the relicensing over 1,600 hydropower projects across the U.S. that are licensed by FERC under the FPA, nothing in H.R.8 or S.2012 would eliminate or weaken the timely exercise of authority of NMFS and USFWS under ESA section 7 consultation requirements when these projects require relicensing. With regard to new project development, nothing in H.R.8 or S.2012 waives consultation under ESA section 7, or the authority of NMFS and NMFS to exercise authorities in a timely manner. For two specialized, narrowly defined classes of special-purpose authorizations that could affect ESA-listed species (i.e., closed-loop pumped storage projects and exemptions at non-powered dams), H.R. 8 confines the scope of license conditions to address only effects of the proposed undertaking, which may impact the range of options available to FERC when evaluating reasonable and prudent measures or alternatives submitted by NMFS and USFWS. *See* Response to Concerns No. 18, 19, 28 & 29. Finally, nothing in these bills waives or weakens in any manner protection of species listed as threatened or endangered under the ESA. The take prohibitions of ESA section 9 will continue to apply in full force.
4	By placing FERC as the "lead agency" for hydropower authorizations required under Federal law, the bills would shift to FERC the authorities of other Federal and State agencies under the CWA, FPA, ESA, NEPA, and other statutory programs.	The designation of FERC as the "lead agency" in these bills does not shift to FERC current authorities of resource agencies and Indian tribes under Federal law. Rather, both bills clearly empower FERC with a coordinating role, for the purpose of improving the processes that, following passage of the bills, will continue to occur before various Federal, State and tribal authorities: • H.R. 8 section 1203 designates FERC as the "lead agency for purposes of coordinating all applicable Federal authorizations and for the purposes of complying with [NEPA]." • S. 2012 section 3001(i) designates FERC as the "lead agency for purposes of coordinating all applicable Federal authorizations."
5	The bills would give FERC the exclusive authority to set arbitrary schedules for agencies to meet their obligations in the	Currently, no single agency has control over the sequencing and schedules required for the many different authorizations required for non-federal hydropower under Federal law—e.g., licensing before FERC under the FPA, ESA section 7 consultation, CWA section 401 certification, CWA 404

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	hydropower licensing process. The bills would give FERC authority to preempt State laws and procedural requirements, dictate unreasonable deadlines, and subordinate State and Federal agencies to FERC's sense of how much time resource agencies should have to do their jobs.	permitting, Coastal Zone Management Act (CZMA) consistency determination, authorization under section 408 of the Rivers and Harbors Act, and permitting under the Federal Land Policy and Management Act. This lack of centralized coordination has led to duplicative environmental reviews, inconsistent and conflicting requirements, and excessive delays. Both H.R. 8 and S. 2012 would improve the current, uncoordinated effort by requiring FERC to develop an overall schedule that would govern the timing and sequencing of all the various requirements for hydropower under Federal law. Recognizing the importance of all Federal authorizations, however, the bills require close coordination and collaboration in developing the schedule; contrary to expressed concerns, this scheduling process is neither "exclusive" nor "arbitrary." For example: • H.R. 8 and S. 2012 both require FERC to consult with resource agencies when preparing the schedule. H.R.8 expressly requires the schedule to include sufficient time for agencies and tribes to fulfill their responsibilities. • H.R. 8 and S. 2012 both require FERC to adhere to deadlines already established under Federal law (e.g., 1 year under CWA section 401, 33 U.S.C. § 1341(a)(1); 6 months under CZMA, 16 U.S.C. § 1456(c)(3)(A); and 90 days to complete ESA section 7 consultation and 45 days to prepare a biological opinion under ESA regulations, 50 C.F.R. § 402.14(e)). • H.R. 8 imposes a dispute resolution requirement related to any matters that arise in the development or implementation of the schedule. • S. 2012 authorizes a referral to the Council on Environmental Quality for disputes related to the licensing schedule (CEQ). Contrary to concerns raised about FERC's establishment of the master schedule, there is no reason to believe that FERC would unilaterally establish unreasonable deadlines. The bills establish clear standards and procedures for setting the schedule that will ensure an appropriate amount of time for agencies to timely complete their responsibilities. Again, under current law, there is *no* mechanism to set and enforce any schedule or deadlines whatsoever.
7	Resource agencies and Indian tribes would have no recourse if FERC unilaterally sets a schedule that is unworkable.	This is not true. H.R. 8 section 1203 expressly provides for dispute resolution between the heads of the relevant State and Federal agencies on issues pertaining to the schedule.
8	By requiring FERC to establish a licensing schedule, the bills would discourage or prevent hydropower licensing parties from taking the time needed to study, analyze and settle complex technical issues. FERC often refuses to require information that agencies need to complete their federal authorizations. This results in major delays, as agencies are forced to request information	These concerns overlook several important aspects of the bills that would actually foster a climate of cooperation, dispute resolution, and settlement much earlier in the process than today: • A primary function of these bills is to establish a more coordinated effort among Federal and State regulators in the hydropower licensing process. *See* Response to Concern No. 1. H.R. 8 requires FERC, resource agencies and Indian tribes to work together—from the beginning of the process—to identify environmental issues and coordinate studies. H.R. 8 also includes dispute resolution mechanisms that apply throughout the process. S. 2012 involves CEQ in the resolution of disputes. • Importantly, H.R. 8 requires FERC to develop the schedule only after a licensing application is filed and FERC determines that the application is complete. By that time, the licensing process will

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	they need from licensees later in the process. H.R. 8 does nothing to assure that resource agencies and Indian tribes with statutory responsibilities have the information they need to set legally defensible conditions supported by substantial evidence.	have been ongoing for up to 3 years for environmental studies, application preparation, and other activities. The pre-filing phase offers ample time and opportunity for parties to reach settlement. • Placing parties on a schedule promotes discipline and can be a helpful motivator to resolve disagreements.
9	FERC's scheduling responsibilities under the bills do not account for State environmental review requirements under State law.	H.R. 8 section 1203 expressly requires FERC to develop a schedule for all "Federal authorizations," which includes State water quality certification under CWA section 401 (and any accompanying environmental review requirement). In addition, section 1203 requires that the schedule "facilitates completion of Federal and State agency studies, reviews, and other procedures required prior to, or concurrent with, the preparation of the Commission's [NEPA] document . . . ." S.2012 section 3001(i) also expressly requires FERC to develop a schedule for all "Federal authorizations." *See* Response to Concern No. 5 (describing the collaborative process for establishing the overall licensing schedule).
10	FERC's scheduling responsibilities under the bills fail to account for studies and reviews required by NMFS and USFWS under ESA section 7.	Both H.R. 8 and S. 2012 expressly require FERC to develop a schedule for all "Federal authorizations," which includes consultation under ESA section 7. H.R. 8 section 1203 also requires the schedule to "facilitate[] completion of Federal and State agency studies, reviews, and other procedures required prior to, or concurrent with, the preparation of the Commission's [NEPA] document . . . ." *See* Response to Concern No. 5 (describing the collaborative process for establishing the overall licensing schedule).
11	By allowing FERC and the applicant to move forward in the event a Federal or State resource agency misses the schedule deadline, H.R. 8 is tantamount to stripping resource agencies of their statutory responsibilities.	This concern overlooks the numerous safeguards in H.R. 8 to ensure that resource agencies and Indian tribes have sufficient time and resources to timely fulfill their statutory obligations: • From the very beginning of the licensing process—long before FERC establishes a schedule—section 1203 requires FERC, resource agencies, and Indian tribes to consult and resolve disputes related to issue identification, and coordinate their environmental studies and reviews, and to cooperate in the process. *See* Response to Concern No. 1. • Section 1203 authorizes 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 statutory obligations under the ESA, CWA, and other programs. • Section 1203 requires FERC's establishment of a schedule only after the applicant files its license application, and after FERC determines such application to be complete. At this point in the process, most or all environmental studies will be complete, and the applicant will have consulted with agencies, tribes, and stakeholders in developing a project proposal, including identification of potential effects and

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		protection, mitigation and enhancement measures. • In developing the schedule, FERC is required to consult with agencies and Indian tribes, ensure sufficient time for all Federal authorizations, and adhere to any deadlines already provided under Federal law. *See* Response to Concern No. 5 (identifying several statutory and regulatory deadlines already established under Federal law). In other words, FERC's scheduling task must adhere to deadlines already established by Congress or the agencies. • Although the schedule must adhere to deadlines established under Federal law, nothing in H.R.8 prohibits FERC from making other adjustments to the licensing schedule, as needed. Thus, the purpose of the schedule under H.R. 8 is not to strip agencies of authority, but rather to create an environment in which such authorities can be exercised in a coordinated, collaborative and efficient manner. If, despite all of these safeguards, an agency or tribe still cannot agree to the schedule it helped to develop, H.R. 8 allows an agency to seek an extension of time of up to 90 days before the U.S. courts of appeal. In effect, this opportunity to seek an extension under H.R. 8 actually provides more time for agencies to complete their Federal authorizations than what is currently required under Federal law. If the court finds that the extension is not justified, or if the agency or tribe still cannot meet its obligations with an additional 90 days, FERC and the applicant can move forward with approving, developing, and operating the project. Such structure is a reasonable mechanism for accountability that is intended to focus attention on the process and discipline to achieve timeliness—which are critical to attracting investment in this renewable resource.
12	Forcing resource agencies and Indian tribes to go to the U.S. courts of appeal to obtain an extension of time stretches limited agency resources, adds unnecessary workload to the court, and imposes a high bar for an agency to demonstrate the need for additional time.	The request for an extension of time under H.R. 8 section 1204 is intended to be an efficient, straight-forward process that would not burden the court system or stretch agency resources. To qualify for an extension, the agency or Indian tribe only has to demonstrate that it "complied with the requirements of [the coordination procedures under the new FPA section 34] and that complying with the schedule set by [FERC] would have prevented the agency or tribe from complying with applicable Federal or State law." This is not a high bar, and would certainly be met if an agency were to demonstrate that an applicant failed to complete a needed study, or that FERC failed to require such a study.
13	By allowing FERC and the applicant to move forward in the event a Federal or State resource agency misses the schedule deadline, H.R. 8 allows projects to be constructed and operated without adequate public health and environmental protections.	It is incorrect to conclude that, in the absence of a federal authorization from a resource agency or Indian tribe, a hydropower project will lack adequate public health and environmental protections. Agencies and tribes that do not meet deadlines on the schedule have opportunities to submit recommended license conditions, which FERC can adopt under FPA sections 10(a) or 10(j). More importantly, beyond any responsibility of any other agency or Indian tribe, FERC itself has a statutory obligation under the FPA to ensure that the license adopted addresses environmental effects and is balanced in the public interest, considering the full range of fish and wildlife resources, water quality, recreation, renewable energy, water supply, irrigation, flood control and other uses of the public resource. In fact, since passage of the Electric Consumers Protection Act of 1986, FERC has been statutorily required to "equally consider" developmental and non-developmental values when issuing its licenses. Studies have demonstrated that in implementing this obligation, FERC adopts recommendations of resource agencies more than 90

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		percent of the time.
14	It is impracticable to require FERC to establish a schedule for all Federal authorizations, as agencies and Indian tribes are unable to anticipate all the variables that could create delays in the schedule. Establishing any hard, inflexible deadline is unreasonable.	It is true that, at the beginning of the licensing process, there are too many variables and uncertainties and that developing an overall licensing schedule at that time would be impracticable and unreasonable. This is precisely why H.R. 8 directs FERC to develop the overall licensing schedule much later in the process—after the applicant, FERC, resource agencies, Indian tribes, and other stakeholders have collaborated and worked together for a number of years; after the majority (if not all) of the environmental studies are complete; after the applicant has prepared the FERC application; and after FERC has determined that the application is complete. At that advanced stage, there are fewer variables to consider, making it much more practicable and realistic to cooperatively develop a schedule. *See* Response to Concern No. 5 (describing the collaborative process for establishing the overall licensing schedule). As explained above, far from imposing any hard, inflexible schedule, H.R. 8 establishes numerous safeguards to help resource agencies and Indian tribes meet their statutory obligations, through consultation to develop the schedule, procedures to resolve disputes regarding the schedule, and adherence to deadlines already established under Federal law. Within these parameters, there is nothing in H.R. 8 that precludes FERC from adjusting the schedule, where needed. With these safeguards in place, it is both reasonable and good public policy to expect these obligations to be completed in a timely manner. *See* Response to Concern No. 10.
15	While H.R. 8 effectively waives statutory authorities of State and Federal agencies as a result of untimely action, there is no comparable result to untimely action by FERC or the applicant.	Contrary to this concern, H.R.8 section 1203 expressly requires both FERC and the applicant to adhere to the licensing schedule developed in each proceeding. If the applicant fails to meet deadlines, FERC's current regulations already provide that FERC may dismiss the application with prejudice—and there are instances in which this has happened under the current regulatory regime. Moreover, the FPA already establishes a deadline of two years prior to license expiration for licensees to file their relicensing applications. FERC's regulations provide that a licensee failing to meet this deadline cannot seek a new license for the project. With regard to FERC's adherence to the overall schedule, while it would be inappropriate to penalize the applicant and ratepayers by dismissing an application based on a delayed FERC action, the bills provide accountability to help ensure timely FERC action. S.2012 includes a sense of Congress that all licensing actions should be complete within 3 years of application. S.2012 also requires FERC to prepare an annual report to Congress documenting its progress in issuing licenses and permits under the FPA.
16	By requiring federal courts to review State actions under the CWA, H.R. 8 is inconsistent with State sovereign immunity under the Eleventh Amendment.	The CWA is a federal statute that delegates certain obligations to the States. In *City of Tacoma v. FERC*, 460 F.3d 53 (D.C. Cir. 2006), the U.S. Court of Appeals for the D.C. Circuit upheld the propriety of Federal review of State procedural requirements governing CWA section 401 certification. H.R.8 presents no inconsistency with Eleventh Amendment immunity. Moreover, review and appeals of States' decisions on water quality certification applications will continue to be heard through State administrative and judicial processes.
	H.R. 8 would give FERC power to limit the scope of other agencies' environmental review.	This concern is not supported by the language of the bill. Section 1204 requires FERC to "consult with *and make a recommendation* to agencies and Indian tribes" (emphasis added) regarding the scope of these entities' environmental review for their Federal authorizations. Far from giving FERC power to limit the scope of environmental review by other agencies and

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		Indian tribes, section 1204 only requires agencies and tribes to "give *due consideration and may give deference to the Commission's recommendations, to the extent appropriate under Federal law*." (emphasis added)
17	The closed-loop pumped storage licensing process under H.R. 8 section 1206 establishes an inappropriate environmental baseline (i.e., existing at the time of FERC's environmental review) and is inadequate because it does not address ongoing impacts caused by the existence of these projects.	By way of context, H.R. 8 section 1206 is needed to facilitate the development of closed-loop pumped storage projects—facilities that are essential to stabilizing the electric grid by integrating intermittent renewable resources (e.g., solar and wind). Pumped storage is the only utility-scale energy storage option, and closed-loop pumped storage projects generally offer the additional benefit of having lower impacts on fish and aquatic resources, as they have no continuous connection to navigable waters. These are ideal facilities to help combat climate change in an environmentally responsible manner. The concern regarding the proper environmental baseline for these projects is misplaced. H.R. 8 section 1206 facilitates the development of new closed-loop pumped storage projects. Thus, the environmental baseline for environmental analysis will be the existing environment—i.e., prior to project construction and operation.
18	By limiting environmental conditions of closed-loop pumped storage projects to "direct" effects of the project, H.R. 8 section 1206 precludes addressing significant indirect effects that could be caused by these projects. The limited scope of conditioning authority for closed-loop pumped storage projects under H.R.8 section 1206 expressly forbids FERC from adopting license conditions that protect water quality or species listed under the ESA.	Grid managers and renewable energy advocates all recognized that energy storage is critical to integrating more intermittent resources onto the grid. Pumped storage is our largest and most cost effective way to do this. And "closed loop" means that because these projects do not have a permanent connection to a navigable waterway, they do not influence such river flows. H.R. 8 section 1206 authorizes FERC licenses and other required Federal authorizations for closed-loop pumped storage projects to include conditions that are: (1) "necessary to protect public safety"; or (2) "reasonable, economically feasible, and essential to prevent loss of or damage to, or mitigate adverse effects on, fish and wildlife resource directly caused by the construction and operation of the project . . . ." The focused conditioning authority provided in section 1206 recognizes the specialized purpose of closed-loop pumped storage projects, and is similar in scope to the conditioning authority of resource agencies for conduit facilities under FPA section 30. Unlike conventional hydropower projects, these facilities are not conducive to supporting public recreation. Because they have no continuous connection to navigable waters, they do not present a fish passage barrier, affect water quality, or impact the riverine environment. This does not mean, however, that the conditioning authority under section 1206 is so confined as to foreclose conditions to protect water quality or address adverse environmental effects associated with the construction and operation of these facilities can be properly mitigated. The requirement to ensure that conditions are "reasonable" and "economically feasible" address the breadth of conditions that can be imposed. As a practical matter, regulators have many options when addressing an identified environmental effect. This language strikes an appropriate balance between ensuring that adverse effects are appropriately mitigated, but doing so through practical means and without expansively authorizing FERC and other agencies to address peripheral or unrelated issues.
19	H.R. 8 section 1206 inappropriately eliminates Federal resource agencies' mandatory conditioning authority under FPA section 4(e) in the licensing of closed-	Section 1206 only confines the authority of "*the Commission* to impose conditions on a license under section 4(e)" (emphasis added). It does not eliminate or confine the authority of Federal land management agencies under FPA section 4(e) to condition the license for the adequate protection and utilization of any reservation occupied by the project, so long as such conditions meet the mitigation requirement of section 1206. *See* Response to

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	loop pumped storage projects, which will allow adverse effects to federal reservations to be unaddressed in the licensing of these projects.	Concern No. 18.
20	For closed-loop pumped storage projects, H.R.8 section 1206 would shift mandatory conditioning authority from resource agencies to FERC.	This concern is not supported by the plain language of the bill. Section 1206 provides that, for closed-loop pumped storage projects, "the authority of *the Commission* to impose conditions on a license under sections 4(e), 10(a), 10(g), and 10(j) shall not apply" (emphasis added), and then provides that "any condition included in or applicable to a closed-loop pumped storage project licensed under this section" must meet the public safety and environmental mitigation standards noted above. So, while section 1206 limits FERC's broad conditioning authority under other provisions of the FPA, it does not prevent other agencies from exercising their authorities under FPA sections 4(e) and 18, nor does prevent measures for protecting listed species under the ESA or water quality under the CWA. But again, these "closed loop" projects lack any permanent connection to a navigable waterway, and therefore do not influence such river flows *See* Response to Concern No. 18 & 19.
21	H.R. 8 section 1206 would allow a municipal applicant to claim priority status over other competitors, even if the municipality ultimately will not construct or operate the project.	Section 1206 does end FERC's rigid application of municipal preference with respect to closed-loop pumped storage projects. These are projects that cost hundreds of millions of dollars to develop—and sometimes more. At the very early stages of development when a preliminary permit is needed to secure the site, a developer of a project of this magnitude never knows the number or identity of utilities, power providers, and investors that ultimately will be needed to successfully develop a project. For this reason, section 1206 relaxes the municipal preference requirements to help facilitate cooperative development of expensive closed-loop pumped storage projects.
22	The arbitrary deadlines in the fast-track amendment procedures under H.R. 8 section 1207 allow insufficient time for resource agencies to fulfill their responsibilities under the CWA, ESA, and other statutory programs. The fast-track amendment procedures would override statutory deadlines for review under the CWA and ESA.	Today, the existing licensing process discourages investments in existing projects that would get more clean energy from existing projects. Replacing old turbines with modern more fish friendly alternatives, for example, could improve environmental performance and get us more clean power. In fact, H.R. 8 section 1207 is not intended to apply to all FERC license amendment proceedings. To the contrary, section 1207 by its terms only applies to amendments that: (1) propose environmental mitigation or enhancement measures, public recreation, or additional renewable energy; and (2) meet a set of rigid criteria demonstrating that the project would have minimal environmental effects. Section 1207 is intended to provide a fast-track approval process for non-controversial and beneficial measures. As such, amendments that would adversely affect ESA-listed species, water quality, or result in any other significant adverse environmental effect would not qualify for the section 1207 fast-track procedures. For this reason, the deadlines set forth in section 1207 for FERC's approval and completion of any other required Federal authorization are appropriate. These are non-controversial enhancements to licensed hydropower projects that would result in a public benefit without significant environmental effects. Expedited review and approval under these circumstances is not only feasible, but is warranted and represents good public policy.
23	The fast-track amendment process under H.R. 8 section 1207 establishes an inappropriate environmental baseline (i.e., existing at the	This concern raises an issue that was settled nearly 25 years ago in *U.S. Department of the Interior v. FERC*, 952 F.2d 538 (D.C. Cir. 1992), in which the D.C. Circuit upheld FERC's determination that the environmental baseline for purposes of NEPA review is the existing environment at the time of its licensing action.

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	time of FERC's environmental review) and is inadequate because it does not address ongoing impacts caused by the existence of these projects.	
24	By limiting environmental conditions in the fast-track amendment process to "direct" effects of the proposed amendment, H.R. 8 section 1207 precludes addressing significant indirect effects that could be caused by these projects.	H.R. 8 section 1207 authorizes FERC licenses and other required Federal authorizations for fast-track license amendments to include conditions that are: (1) "necessary to protect public safety"; or (2) "reasonable, economically feasible, and essential to prevent loss of or damage to, or mitigate adverse effects on, fish and wildlife resources, water supply, and water quality that are directly caused by the construction and operation of the project upgrade . . . ." The focused conditioning authority provided in section 1207 recognizes that the fast-track amendment procedures apply only to non-controversial proposals with minimal environmental effects, and the conditioning authority is similar in scope to conduit facilities under FPA section 30. *See* Response to Concern No. 22. In these situations, it is appropriate to focus agency conditioning authority. While even non-controversial, beneficial amendments must protect public safety and mitigate their minimal environmental effects, it is good public policy to ensure that the threat of imposing broad, expensive conditions—addressing unrelated or peripheral issues—does not create a significant disincentive to project improvements that benefit public resources, recreation, and the climate. It is not good public policy to subject clean energy developers to paying to rectify issues entirely unrelated to their project. This does not mean, however, that the conditioning authority under section 1207 is so confined as to foreclose conditions to address the effects of the proposed undertaking. The requirement to ensure that conditions are "reasonable" and "economically feasible" address the breadth of conditions that can be imposed. As a practical matter, regulators have many options when addressing an identified environmental effect. This language strikes an appropriate balance between ensuring that adverse effects are appropriately mitigated, but without expansively authorizing FERC and other agencies to address peripheral or unrelated issues.
25	For fast-track amendments, H.R. 8 section 1207 would shift mandatory conditioning authority from resource agencies to FERC.	This concern is not supported by the plain language of the bill. Section 1206 expressly provides for ESA section 7 consultation and CWA section 401 certification. With regard to conditioning authority, section 1206 does not require FERC to determine whether another agency's conditions meet the public safety and environmental mitigation standards noted above. *See* Response to Concern No. 24. Rather, the language merely requires that "[a]ny condition included in or applicable to a license amendment approved" under the fast-track procedures, "including any condition or other requirement *of a Federal authorization*" (emphasis added) to meet this standard. Thus, while conditions under the fast-track amendment procedures must be limited to those that address public safety and mitigation of effects, section 1207 contemplates that Federal and State resource agencies and Indian tribes will meet this standard when developing their mandatory conditions.
26	The procedures for exemptions at non-powered dams under H.R. 8 section 1208 inappropriately exclude State water quality agencies from the consultation process.	The consultation requirements under section 1208 are modeled after similar requirements under FPA sections 10(j) and 30(c). State water quality agencies will be part of the consultation process as required under the process and schedule requirements under H.R. 8 section 1203.

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27	By limiting FERC's jurisdiction at non-powered dams to the powerhouse and transmission line, and excluding features such as the dam, impoundment, shoreline, and access roads, H.R. 8 section 1208 limits the extent of environmental review and confines agency environmental conditions, to the potential detriment of public health and environmental resources.	The exemption program under H.R. 8 section 1208 for hydropower facilities at non-powered dams is a significant win-win provision and is a preeminent measure in the bill addressing climate change. Section 1208 creates a favorable regulatory climate for hydropower development at existing infrastructure—but in a manner that carefully and intentionally does not interfere with the existing uses of that infrastructure. This is an essential feature of this program, as owners and operators of existing dams cannot reasonably be expected to allow hydropower development, if doing so would threaten the existing use. For this reason, the non-powered dams program under section 1208 intentionally confines FERC's jurisdiction to the hydropower facility itself, together with any associated transmission line. This approach is wholly consistent with Congress's decision under FPA section 30 regarding conduit facilities, as well as FERC's licensing policies for non-federal hydropower facilities located at Federal dams. This exemption program merely extends that program to non-federal dams as well—but only for proposals that would not seek to change the existing flow regime at the existing non-powered dam.
28	For exemptions at non-powered dams, H.R.8 section 1208 would shift mandatory conditioning authority from resource agencies to FERC.	Perhaps the single greatest untapped potential for clean energy in this country is to add hydropower to existing dams that are there for other reasons and that will not be going away. It is true that all conditions applicable to an exemption issued under section 1208 must be determined by FERC to be: (1) "necessary to protect public safety"; or (2) "reasonable, economically feasible, and essential to prevent loss of or damage to, or mitigate adverse effects on, fish and wildlife resources directly caused by the construction and operation of the project . . . ." The purpose for centralizing conditioning authority with FERC advances the strong public policy of ensuring that hydropower development at existing infrastructure does not interfere with the primary purposes for which the dam was constructed and is operated. *See* Response to Concern No. 27. This does not mean, however, that environmental effects associated with these hydropower facilities cannot be addressed. Such conditioning authority, which was modeled after conditioning authority for conduit facilities under FPA section 30, will ensure that effects associated with the facility are appropriately mitigated. This structure also does not mean that Federal and State resource agencies and Indian tribes will not be involved in developing those conditions, as section 1208 expressly requires FERC to consult with all interested entities. Beyond any direct effects of these projects, the non-powered dams program under section 1208 includes a special mechanism to address environmental conditions throughout the basin—recognizing that these projects are the result of changes to the natural environment implemented by the existing dam and other infrastructure. Section 1208 imposes a special annual charge on the owner/operators of these facilities at non-federal dams that will be available to fund environmental enhancement projects in watersheds in which these projects are located. Such charges will allow these facilities to participate in addressing broader-scale environmental enhancements, while preserving the economic certainty required to promote renewable energy development.
29	For exemptions at non-powered dams, H.R. 8 section 1208 would disallow FERC and other agencies from imposing	This concern exemplifies the reason why the safeguards in section 1208 to protect the existing uses of the dam are so essential. For owners and operators of existing dams to accommodate proposed development of hydropower at their facilities, the regulatory requirements must not interfere

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	flow conditions that are necessary to address natural resource impacts of the new powerhouse and existing dam.	with or threaten the underlying purposes for which the dam is operating. This is the same approach as FERC's current approach for licensing non-federal hydropower projects at Federal dams, in which the same and impoundment are not part of the FERC license, and where the hydropower facility is subservient to the authorized purposes of the Federal dam. *See* Response to Concern No. 27 & 28. The scope of the exemption program for projects at existing non-powered dams must be limited to addressing environmental effects of the proposed hydropower facility itself—and not of the underlying dam and impoundment. Otherwise, dam operators will not be willing to accommodate hydropower at existing infrastructure. As a result, the dam operations will continue, but without the benefit of capturing the clean, renewable energy potential at the site. In other words, these existing dams will continue to operate and release flows to meet the purposes for which they were constructed—regardless of whether hydropower is installed at the site. Thus, good public policy warrants that federal oversight of hydropower should avoid disincentives that would force the dam owner to choose between protecting the ongoing use of the dam and developing non-emitting, renewable hydropower.
30	H.R. 8 section 1208 authorizes FERC to grant exemptions for new project developments at non-powered dams with minimal environmental review.	Section 1208 requires FERC to complete its NEPA review through an environmental assessment (EA), unless it determines that granting an exemption to a proposed facility at a non-powered dam should be subject to a categorical exclusion. This requirement reflects the fact that the existing dam and associated impoundment are already part of the existing environment. That does not mean, however, that FERC's environmental review would be "minimal." Regardless of the title of its environmental document, FERC is required to conduct a thorough and detailed review of environmental resources associated with a proposed project.
31	Because FERC would not assume jurisdiction of the associated dam as part of the exemption, H.R. 8 section 1208 would establish an unfunded mandate for State agencies to provide for the physical safety of small hydropower dams.	This concern loses sight of the fact that States already have jurisdiction of all non-federal dams that would be subject to a non-powered dam exemption under H.R. 8 section 1208. This new exemption program would not increase States' regulatory burden at all.