

November 20, 2015

Dear Representative,

Recently, you received a letter signed by several trade associations representing some of the largest power companies and electric utilities in the nation. In that letter, those companies allege that conservation groups are mischaracterizing the hydropower provisions in H.R. 8, or exaggerating their effects on natural resources. Those are extremely serious allegations. They are also completely untrue. We are writing now to correct the record.

It is a fact that H.R. 8 would allow hydropower operators to avoid compliance with the Endangered Species Act and the Clean Water Act. As we explain below, several provisions of the bill create new loopholes that would allow hydropower operators to avoid complying with those and other environmental laws.

First, Sections 1307 and 1309 of H.R. 8 limit the Federal Energy Regulatory Commission's (FERC's) authority to impose license conditions at certain types of new hydropower projects¹ to those "that are necessary to protect public safety; or reasonable, economically feasible, and essential to prevent loss of or damage to, or to mitigate adverse effects on, fish and wildlife resources directly caused by the construction or operation of the project." These new limits ***expressly forbid FERC from including license conditions that protect water quality***, as well as conditions that protect recreation, navigation, water supply, public lands, or other non-power public values. Currently, Section 401 of the Clean Water Act requires FERC to incorporate all conditions of a State's water quality certification into its hydropower licenses. If H.R. 8 were to pass, ***FERC would be required to reject conditions that states impose to protect water quality*** at these hydropower projects. Therefore, H.R. 8 unquestionably waives the Clean Water Act. FERC would also be required to reject conditions intended to protect public lands, recreation, national parks, water supply, and tribal trust obligations. Therefore, H.R. 8 weakens the authorities of those federal and state agencies – including FERC – that have been entrusted with protecting those important public resources.

Second, Sections 1307 and 1309 of the bill would give FERC the ability to override conditions placed on licenses by other state and federal agencies to protect fish and wildlife from the impacts of these same types of hydropower projects. A variety of federal and state agencies have authorities under the Endangered Species Act, the Clean Water Act, and the Federal Power Act to place conditions on FERC licenses requiring fish passage and protecting endangered species and other fish and wildlife. Under current law, FERC may not reject or modify these conditions. If H.R. 8 were to pass, FERC would gain the discretion to reject any condition for fish and wildlife protection that it determines is not "reasonable, economically feasible, and essential." Therefore, H.R. 8 weakens the Clean Water Act, the Endangered Species Act, and federal

¹ Closed-loop pumped storage projects and conventional hydropower projects that involve adding hydropower to non-powered dams.

agencies' fish passage authority by allowing FERC to substitute its own judgment for the judgment of the agencies tasked with implementing those laws.

Third, Sections 1304, 1305, and 1306 of H.R. 8, which apply to all FERC-regulated hydropower projects, further weaken States' authority under the Clean Water Act (CWA) and federal agencies' authority under the Endangered Species Act (ESA). These provisions direct the Federal Energy Regulatory Commission (FERC) to set a binding schedule for completing all federal authorizations (including the CWA and the ESA) associated with a hydropower license. If FERC's deadline is not met, ***FERC and the license applicant may simply proceed with the proposed action and the authorization is waived.*** There are no similar remedies or penalties if FERC or the license applicant fails to meet a deadline, or if FERC or the license applicant are responsible for a delay (e.g. failing to complete a necessary study on time) that results in an agency missing a deadline.

Our attached analysis of the hydropower provisions of H.R. 8 explains in detail why we believe that these provisions would seriously undermine laws like the Clean Water Act and the Endangered Species Act. Industry argues that the provisions are intended only to encourage "schedule discipline," and that FERC is required to "consult" and "coordinate" with other agencies. We emphatically disagree. These sections are designed to create new process maneuvers that will allow hydropower license applicants and FERC to bully states, tribes, and federal resource agencies into giving them the outcomes that they want. For instance, after the required "consultation and coordination" take place, FERC unilaterally sets the schedule, and agencies have no meaningful recourse if the schedule FERC sets is unworkable.²

While limiting the time that they have to act, these sections do nothing to assure that the agencies that are responsible for implementing the mandates of the Clean Water Act and the Endangered Species Act get the information they need to set legally defensible conditions supported by reliable science and substantial evidence. Indeed, section 1306 of the bill directs FERC to limit new studies to inform hydropower licensings. Furthermore, FERC has a long history of refusing to require hydropower license applicants to provide information to support these other federal authorizations. FERC's current interpretation of the Clean Water Act dates to 1986, when it modified its interpretation of the Clean Water Act's statutory time clock to begin not when the certifying State determined that the application was complete, but rather on the date when the State received an application, regardless of whether or not it was complete.³ With this procedural order, FERC deprived 32 states of their authority to protect water quality at more than 225 hydropower projects.

Current practice and procedure suggest that FERC's indifference to other agencies' information needs has not changed. See, for instance, a June 18, 2015 order in which FERC denied an agency's study request on the grounds that "it is up to the Commission to determine whether a particular study is necessary for the Commission to fully understand the effects of licensing or

² State and federal agencies tasked with completing these authorizations may petition a federal court for a deadline extension, but that extension is limited to 90 days regardless of the circumstances, and if the court denies the deadline extension, their authority is waived.

³ Order No. 464, February 11, 1987, FERC Docket No. RM85-6-000.

relicensing a project, and we are not obligated to require a study to support another agency's decision making."⁴

We therefore have serious concerns that FERC and hydropower license applicants will use the new authority granted by H.R. 8 to force states, tribes, and federal agencies to choose between waiving their authority or issuing an authorization that may not be legally defensible. The end result of these provisions will be that states and tribes may be forced to deny these authorizations for new projects in order to avoid potential legal liability.

American Rivers is not alone in our analysis of this legislation. The State of California, one of several states opposed to H.R. 8, notes that the bill "would seriously impact and in some cases eliminate the mandatory conditioning authority of the State Water Board under Section 401 of the Clean Water Act."⁵ California goes on to say that it opposes H.R. 8 "because it would result in harm to California's water quality and associated beneficial uses, public lands, and fish and wildlife by removing key state and federal authorities designed to protect the environment."⁶

Likewise, the National Congress of American Indians recently called on Congress to oppose any legislation that would:

(a) weaken the current protections Indian tribes have through the Mandatory Conditions requirements under Section 4(e) of that Act; (b) overturn the watershed case of *City of Tacoma, Washington v. F.E.R.C.*, 460 F.3d 53 (D.C. Cir. 2006), which affirmed the authority of federal agencies to address the impacts of water diversion taking place off reservation lands after decades of hard-fought litigation; (c) roll back efforts to restore fish populations through the requirement of fishways; and (d) unnecessarily limit the available time and scientific information available to federal agencies in deciding what Mandatory Conditions should be included with a license;⁷

As we explain above and in our attached analysis, H.R. 8 would have all of these effects.

In the Energy and Commerce Committee's dissenting views on H.R. 8, Representatives Pallone and Rush note that:

[I]n the name of 'reform' the provisions included in H.R. 8 give preferential treatment to electric utilities at the expense of other legitimate parties to licensing proceedings including states, Indian tribes, conservationists, irrigators, ranchers, and sportsmen.⁸

⁴ Order Denying Rehearing. 151 FERC ¶ 61,240, p. 9.

⁵ Letter to Congress Dated October 15, 2015 from Felicia Marcus, Chair, California State Water Resources Control Board (CA Letter).

⁶ CA Letter.

⁷ The National Congress of American Indians Resolution #SD-15-009.

⁸ House Report 114-347, Committee on Energy and Commerce, Dissenting Views of the Hon. Frank Pallone and the Hon. Bobby Rush on H.R. 8. (Dissenting Views).

Perhaps this is why a coalition of electric utilities has written to you urging you to ignore the concerns raised by these groups. Representatives Pallone and Rush go on to note that:

The 21-page amendment offered by Ms. McMorris-Rodgers which formed the basis for the bulk of Subtitle C, wasn't made public until after the markup formally commenced. Within those 21 pages are significant changes to provisions of hydroelectric statute and case law that have developed and endured over the course of nearly a century and effectively constitute an unprecedented undermining of federal, state and tribal authorities and many of our nation's critical environmental laws. Yet, despite the massive scope and impact of these provisions on existing law and policy, not one of these changes had been subject to a hearing or review by the Committee prior to inclusion in H.R. 8. As such, Members were left with a matter of minutes to attempt to discern the impact of these changes on literally decades of policy touching on everything from state authority under the Clean Water Act to Native American tribal rights to fish, wildlife and water resource management, to the Endangered Species Act and the National Environmental Policy Act.⁹

It is unfortunate that no hearings were held on these provisions. As a result, stakeholders are forced to argue before Congress through an exchange of letters rather than in a formal hearing where Members would have the opportunity to ask about how this bill would affect their constituents.

Finally, we would like to address the hydropower industry's assertion that this legislation is necessary to fight climate change. As a conservation organization, we are deeply concerned about the impacts of climate change, and we acknowledge that hydropower plays and will continue to play a significant role in America's clean energy future. That is why we have consistently supported the expansion and renewal of Production Tax Credits for responsibly sited hydropower, and it is why we worked with industry to pass the bipartisan Hydropower Regulatory Efficiency Act in 2013. It is why we have supported dozens of settlement agreements promoting the continued operation of thousands of megawatts of hydropower facilities that have modernized their operations and addressed their legacy environmental impacts.

However, we emphatically do not see the need to weaken bedrock environmental laws and the authorities of states and tribes in order to facilitate the further development of what Representatives Pallone and Rush describe as "a 100 year old technology, which has ironically become less reliable due to the impact of climate change and will increase its negative impacts on the environment as a result of this legislation."¹⁰

The laws and regulations governing hydropower have been in place for decades, during which time nearly all of the nation's hydropower capacity has been relicensed in an orderly fashion. Permitting costs have not resulted in projects being "shuttered," and with more than 26,000

⁹ Dissenting Views.

¹⁰ Dissenting Views.

MW of proposed new capacity having received preliminary permits from FERC — the most in many years — there are plenty of new hydropower proposals in the pipeline.

We find it ironic that the National Hydropower Association, which counts among its members some of the largest coal burning utilities in the nation, is arguing that we need to roll back environmental protections to fight climate change. It is even more ironic that another signatory of the industry's letter, the National Rural Electric Cooperative Association, sent a letter to Congress urging action on H.R. 8 to fight climate change only hours after congratulating the Senate for passing a resolution overturning the President's Clean Power Plan.¹¹

Despite its protestations to the contrary, the hydropower industry is pushing this legislation not because of concerns about climate change, but rather because it will reduce dam owners' obligations to comply with laws like the Endangered Species Act and the Clean Water Act. In a recent article in HydroWorld about the industry's current legislative effort, the National Hydropower Association described the following "problems faced by hydropower applicants during the licensing process:"

- *Mandatory consultations with the U.S. Fish and Wildlife Service and/or the National Marine Fisheries Service to determine whether FERC's licensing action would adversely impact any species listed as threatened or endangered under the Endangered Species Act.*
- *FERC's licensing action also triggers state water quality certification under Section 401 of the Clean Water Act. The statute requires the process to take no more than one year, though some states circumvent the deadline by requiring applicants to withdraw and refile certification applications.¹²*

While American Rivers has always maintained that responsible power generation can be consistent with environmental laws and modern standards of environmental performance, we are disappointed that the hydropower industry does not share our point of view.

The choice before you is clear. More than 200 environmental, recreation, and conservation groups oppose H.R. 8 because it is bad for the environment, recreation, and public lands. Native American Tribes oppose H.R. 8 because it is an attack on their sovereignty as well as treaty and trust obligations. States oppose H.R. 8 because it undermines their authority to protect their state waters. The Ranking Members of the House Committee on Energy and Commerce and its Subcommittee on Energy and Power, respectively, oppose H.R. 8 because it "presents a vision of energy policy that is narrow, outdated, economically and environmentally unsustainable and myopically focused on producers at the expense of consumers."

¹¹ <http://www.nreca.coop/nreca-applauds-senates-bipartisan-passage-of-resolutions-to-overturn-the-clean-power-plan/>.

¹² <http://www.hydroworld.com/articles/2015/10/nha-launches-unlockhydro-initiative.html>.

The only supporters of this legislation are the power companies that would benefit from not having to comply with modern environmental laws. I urge you to oppose it as well. Vote NO on H.R. 8.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Bradley". The signature is written in a cursive style with a large initial "J" and "B".

Jim Bradley,
Vice President for Policy and Government Relations