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Hydropower: Comparison of Selected Provisions in S. 2012, as Engrossed in the House, and S. 2012, as Engrossed in the Senate

Kelsi Bracmort

Specialist in Agricultural Conservation and Natural Resources Policy

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Summary

In the 114th Congress, the House and Senate have passed energy legislation that addresses hydropower. Both the North American Energy Security and Infrastructure Act of 2016 (S. 2012, as engrossed in the House) and the Energy Policy Modernization Act of 2016 (S. 2012, as engrossed in the Senate) contain provisions that would alter the regulation and development of nonfederal hydropower, among other things. Both bills would establish a formal timeline for nonfederal hydropower project regulation, would appoint the Federal Energy Regulatory Commission (FERC) as the lead agency for nonfederal hydropower regulation, and would require FERC—and other agencies—to maintain and make publicly available more robust hydropower project data.

There are similarities and differences between the bills. Both bills generally seek to modify regulation and development processes for nonfederal hydropower. However, the bills would modify the regulatory process in different ways. For instance, the bills would handle the delay of issuing a hydropower project license due to interagency disputes differently; the House version would resolve such a delay in a federal circuit court, whereas the Senate version would resolve such a delay by referring the issue to the chairman of the Council on Environmental Quality. Further, each bill would address some aspects of hydropower that the other bill would not address. For instance, the House version contains a provision that would address hydropower development at existing, non-powered dams, whereas the Senate version does not contain a similar provision. Lastly, both bills would modify the regulation process for specific projects (e.g., extends the time period to start construction for a specific project).

Both the House and Senate versions contain hydropower provisions that could significantly impact nonfederal hydropower regulation and could be viewed as controversial. For example, both bills would make FERC the lead agency to coordinate the licensing process. This designation could be viewed by some as lessening the contribution of other involved agencies because these agencies would be required to abide by the schedule and decisions set by FERC. It could also be viewed as making the license issuance process timelier because one agency would have leadership authority for the process.

This report provides a comparison of the hydropower provisions in each bill and analysis for certain provisions of the bills.

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Introduction

For years, Congress has expressed interest in hydropower—the generation of electricity from flowing water.¹ In particular, it has focused on the regulation and development of nonfederal hydropower, as well as on the environmental impacts of hydropower.² Additionally, discussions have taken place between Congress, the executive branch, and several stakeholder groups—including industry associations, state governments, and tribes, among others—about various issues with hydropower (e.g., the time to issue a license, resource agency conditions, whether hydropower should be considered renewable). Recently, both chambers of the 114th Congress passed energy bills containing hydropower provisions that could potentially transform hydropower regulation and development to an extent not observed by the industry in some time (e.g., by changing certain parts of the licensing process).

This report analyzes pertinent components of the hydropower provisions in the North American Energy Security and Infrastructure Act of 2016 (S. 2012, as engrossed in the House; referred to herein as the House version) and the Energy Policy Modernization Act of 2016 (S. 2012, as engrossed in the Senate; referred to herein as the Senate version).³ The report briefly describes some of the current statutory requirements related to certain provisions. It does not provide a comprehensive examination of each hydropower provision, nor does it provide a comprehensive examination of how proponents or opponents regard individual provisions.

General Similarities and Differences Between the House and Senate Versions of S. 2012

Both the Senate and the House versions of S. 2012 generally seek to modify regulation and development processes for nonfederal hydropower.⁴ The regulation and development provisions in both bills broadly address three primary objectives: 1) establish a more explicit timeline for the regulation of nonfederal hydropower projects (e.g., issuing a project license or an extension); 2) appoint more definitively the Federal Energy Regulatory Commission (FERC) as the lead agency for nonfederal hydropower facility regulation; and 3) require FERC—and other agencies—to maintain and make publicly available more robust data on hydropower projects. Additionally, both bills direct attention to modifying these processes for specific projects (e.g., extending the time period to start project construction).

Differences in the bills involve how the nonfederal hydropower regulation and development processes would be modified, which are described in later sections of this report, and the specific projects referenced. For instance, Section 3001 of the Senate version would allow a construction

¹ For more information on hydropower, including nonfederal hydropower opportunities and challenges, see CRS Report R42579, *Hydropower: Federal and Nonfederal Investment*.

² Nonfederal hydropower projects can be privately or publicly owned, may or may not be located at a federal site, and are regulated by the Federal Energy Regulatory Commission (FERC).

³ The House passed H.R. 8, the North American Energy Security and Infrastructure Act of 2015, on December 3, 2015, and the Senate passed S. 2012, the Energy Policy Modernization Act of 2016, on April 20, 2016. H.R. 8 was moved into the House version of S. 2012; the hydropower provisions under Division A, Subtitle B are identical to H.R. 8. The House version was passed by the House on May 25, 2016. This report does not discuss the marine hydrokinetic provisions included in each bill.

⁴ For more information on nonfederal hydropower licensing and compliance, see FERC, *Handbook for Hydroelectric Project Licensing and 5 MW Exemptions from Licensing*, April 2004, and FERC, *Compliance Handbook*, December 2015.

start date to be extended for eight years for any project, whereas the House version does not address the extension of a project construction start date. Further, the House version would require licenses and preliminary extensions for pumped storage projects, whereas the Senate version does not include such a requirement. The Senate version and the House version would modify the regulation process for seven specific projects (see **Table 1**).

S. 2012, as Engrossed in the House

The House version of S. 2012 explicitly addresses hydropower in eight sections under Division A, Subtitle B (Hydropower Regulatory Modernization) and in six sections under Division A, Title VIII (Extensions of Time for Various Federal Energy Regulatory Commission Projects). The majority of the sections under Subtitle B, Sections 1201 and 1203-1208, focus on hydropower licensing, regulation, and development. One section under Subtitle B, Section 1202, centers on an extended construction time period for a specific project. The six sections under Title VIII, Sections 8001-8006, focus on the construction timeline for specific projects or stipulate certain license criteria.

This portion of the report summarizes the contents of each section of the House version of S. 2012 that addresses hydropower. Where applicable, it also discusses comparable provisions of the Senate version of S. 2012.

Section 1201

Section 1201 of S. 2012, as engrossed in the House, would modify Section 4(e) of the Federal Power Act of 1935 (FPA; 16 U.S.C. §§791-828c)—which, in part, authorizes the issuance of licenses for hydropower projects.⁵ Section 1201 would add “minimizing infringement of the useful exercise and enjoyment of property rights held by nonlicensees” as a factor to which FERC must give equal consideration when issuing a license. Essentially, when issuing a license, FERC would be instructed to equally consider how the project could balance the use and enjoyment of nonlicensees with property rights, along with existing requirements, including “purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.”⁶

Section 1201 also would modify Section 10 of the FPA, which addresses license conditions, including resource agency recommendations, among other things.⁷ Section 1201 would require FERC to ensure that the comprehensive plan for the project outlined in Section 10(a) of the FPA addresses “minimizing infringement of the useful exercise and enjoyment of property rights held by nonlicensees.” Further, Section 1201 would add a private landownership condition to Section 10 of the FPA. This condition would require the licensee to consider private landownership as a way to encourage and facilitate private investment and increase tourism and recreation if the recreational resources within the project area are developed.

The Senate version of S. 2012 contains no comparable language.

⁵ 16 U.S.C. §797(e).

⁶ *Ibid.*

⁷ 16 U.S.C. §803.

Section 1202

Section 1202 of S. 2012, as engrossed in the House, would modify various aspects of the license for a specific project. See **Table 1** for a synopsis of the section.

This section is comparable to Section 10343 of the Senate version of S. 2012.

Section 1203

Section 1203 of S. 2012, as engrossed in the House, would modify Part I of the FPA—which addresses mainly hydroelectric project licensing and dam safety—by adding a new Section 34, “Hydropower Licensing and Process Improvements,” to the act.⁸ Essentially, Section 1203 would designate FERC as the lead agency to coordinate the nonfederal hydropower project licensing process and to comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. §§4321 et seq.). It also would formalize the license-issuance timeline. As the lead agency, FERC would be required to identify and notify any federal or state agency, local government, or Indian tribe that may participate in the federal authorization of a project. Section 1203 would define *federal authorization* to include any authorization required under federal law pertaining to a license, license amendment, or exemption, among other things.

Section 1203 would establish multiple deadlines for FERC and other involved parties. Further, the section would require that all parties, including the licensee, adhere to the deadlines set forth in the final schedule established by FERC. The section would require that the respective federal or state agency, local government, or Indian tribe identify and share, as early as possible, with FERC any issues of concern that may delay or prevent the granting of a federal authorization or prevent the agency or tribe from adhering to the established schedule. FERC would then be able to move to resolve such issues. Any agency or tribe not able to adhere to the schedule would be able to file for an extension in federal circuit court or the Court of Appeals for the District of Columbia.⁹ Section 1203 would allow an applicant seeking a federal authorization (i.e., a license) to pay a third-party contractor—approved by the agency or tribe—to assist in reviewing their application. FERC would then be able to make a recommendation regarding the scope of the environmental review to federal and state agencies and Indian tribes, and agencies and tribes would be able to defer to FERC’s recommendations. Furthermore, FERC would maintain a complete, consolidated record of all decisions or actions regarding a federal authorization.

This section resembles Section 3001(i) of the Senate version of S. 2012, with some differences.¹⁰

Section 1204

Section 1204 of S. 2012, as engrossed in the House, would modify Section 13(b) of the FPA, which addresses the judicial review of a FERC decision.¹¹ Section 1204 would add a section that centers on the delay of a federal authorization. More specifically, it would require any agency or tribe that will not meet the deadline set in the final schedule established by FERC to file for an extension in a federal circuit court where the project is located or in the Court of Appeals for the District of Columbia at least 30 days prior to the deadline. The court may grant an extension only if the agency or tribe shows that it otherwise complied with the necessary requirements, except

⁸ 16 U.S.C. §§792 et seq.

⁹ The process is described in §1204.

¹⁰ See “Section 3001” of this report for a discussion of the differences.

¹¹ 16 U.S.C. §8251(b).

when complying with the schedule would have prevented the agency from complying with federal or state law. If the court grants the extension, the court must set a new schedule and deadline, no longer than 90 days, for the agency to comply. If the court denies the extension—or if the agency or tribe does not file for an extension and does not complete its responsibilities by the deadline—FERC and the applicant can move forward with the proposed action.

The Senate version of S. 2012 contains no comparable language.¹²

Section 1205

Section 1205 of S. 2012, as engrossed in the House, would modify Part I of the FPA—which addresses mainly hydroelectric project licensing and dam safety—by adding a new Section 35, “Licensing Study Improvements,” to the act.¹³ Section 1205 would require FERC, in consultation with other federal and state agencies and interested members of the public, to compile and make available a list of current and accepted best practices, studies, data, and more that would support FERC, the agencies, and the tribes with federal authorization proceedings. Further, the section would require FERC to establish a basin-wide or regional review program that would develop comprehensive plans on a basin-wide or regional scale in instances where there is more than one project or application for a project. FERC, in consultation with the other agencies and tribes, would be authorized to commission such an environmental study if at least two applicants were participating in a given project.

This section is similar to Section 3001(i) of the Senate version of S. 2012, with some differences.¹⁴

Section 1206

Section 1206 of S. 2012, as engrossed in the House, would modify Part I of the FPA—which addresses mainly hydroelectric project licensing and dam safety—by adding a new Section 36, “Closed-Loop Pumped Storage Projects,” to the act.¹⁵ Section 1206 would require FERC to issue and amend licenses and preliminary permits for closed-loop pumped storage projects. FERC would be required to assess the safety of the existing dam and other structures related to the project before issuing a license for such a project. FERC’s authority to place a condition on such a license would be limited to public safety protection and the prevention of the loss of or damage to fish and wildlife resources. Additionally, to facilitate the development of a closed-loop pumped storage project, FERC would be authorized to add entities as joint permittees once a preliminary permit has been issued and would be able to transfer a license to nonmunicipal entities as co-licensees with a municipality.

The first part of this section is similar to Section 3001(i) of the Senate version of S. 2012.¹⁶

¹² S. 2012 (the Senate version) differs in how it addresses the delay of a federal authorization. See Section 3001(i) of S. 2012 (the Senate version), which discusses resolution of interagency disputes and the use of trial-type hearings for certain conditions.

¹³ 16 U.S.C. §§792 et seq.

¹⁴ See “Section 3001” of this report for a discussion of the differences.

¹⁵ 16 U.S.C. §§792 et seq.; A *closed-loop pumped storage project* is defined in the bill as a project in which the upper and lower reservoirs do not impound or directly withdraw water from navigable waters or are not continuously connected to a naturally flowing water feature.

¹⁶ See “Section 3001” of this report for a discussion of the differences.

Section 1207

Section 1207 of S. 2012, as engrossed in the House, would modify Part I of the FPA—which addresses mainly hydroelectric project licensing and dam safety—by adding a new Section 37, “License Amendment Improvements,” to the act.¹⁷ Section 1207 would allow FERC to approve a license amendment for a qualifying project upgrade.¹⁸ FERC would have 15 days to make an initial determination about the proposed change once contacted by the applicant, which would be followed by a 45-day opportunity for public comment. If the proposed license amendment is not contested, FERC would publish a notice stating so. If the amendment is contested, FERC would issue a written determination about whether the license amendment is for a project upgrade. Then, FERC would proceed with soliciting comments from federal, state, and local agencies and tribes about the proposed license amendment. FERC would be authorized to take final action on the application no later than 150 days after the date of the announced initial determination. Any conditions imposed on the license amendment must relate to public safety protection and the prevention of the loss of or damage to fish and wildlife resources. If FERC decided the proposed license amendment was not for a qualifying project upgrade, the procedures mentioned above in this section would not apply.

FERC would be required to issue a rule 180 days after enactment of this section including the given definitions for qualifying project upgrade and qualifying criteria. FERC would also be required to issue a new rule one year after enactment of this section establishing new standards and procedures for license amendment applications. When issuing the new rule, FERC would be obligated to consider whether changes in generation or hydraulic capacity could indicate a potential environmental effect for the proposed amendment, but these factors would not be determinative.

The Senate version of S. 2012 contains no comparable language.

Section 1208

Section 1208 of S. 2012, as engrossed in the House, would modify Part I of the FPA—which addresses mainly hydroelectric project licensing and dam safety—by adding a new Section 38, “Promoting Hydropower Development at Existing Nonpowered Dams,” to the act.¹⁹ This section would allow FERC to issue an exemption for qualifying facilities.²⁰ FERC would consult with agencies and tribes when granting such an exemption. FERC would be able to impose conditions on the exemption related to public safety protection and prevention of the loss of or damage to fish and wildlife resources. An exemption granted under this section would not include a condition or other requirement that would alter the “storage, control, withdrawal, diversion, release, or flow operations of the associated qualifying nonpowered dam.” The environmental review for the proposed exemption would be limited to an environmental assessment, unless FERC determines that the NEPA obligations can be met with a categorical exclusion. Exemptees

¹⁷ 16 U.S.C. §§792 et seq.

¹⁸ A *qualifying project upgrade* is defined as a change to a hydropower project license that meets qualifying criteria as determined by FERC. Qualifying criteria include a project change that would be unlikely to adversely affect threatened and endangered species, would result in insignificant or minimal cumulative adverse environmental effects, would increase capacity, would improve efficiency, would protect the environment, or would improve public recreation at the project, among other things.

¹⁹ 16 U.S.C. §§792 et seq.

²⁰ A *qualifying facility* would have to meet certain qualifying criteria. One such criterion is that the facility was not licensed or exempted from license requirements prior to enactment of the bill.

for facilities located at a nonfederal dam would pay the United States annual charges, with any proceeds paid into the Treasury.

The Senate version of S. 2012 contains no comparable language in S. 2012.

Sections 8001-8006

Sections 8001-8006 of S. 2012, as engrossed in the House, would modify various aspects of the license for specific projects. See **Table 1** for a synopsis of the sections and comparisons to the Senate-engrossed version of the bill.

S. 2012, as Engrossed in the Senate

The Senate version of S. 2012 explicitly addresses hydropower in 11 sections—4 of which are under Title III—Supply, Part I—Hydroelectric; 6 of which are under Title X—Natural Resources, Part V—Hydroelectric Projects; and 1 of which is under Title X—Natural Resources, Part VI—Pumped Storage Hydropower Compensation. Seven of the 11 sections focus on the construction timeline for specific projects or stipulate certain license criteria. Two sections under Title III, Sections 3001 and 3002, focus on hydropower licensing improvements and incentives. One section under Title X, Section 10345, centers on termination of authority for the Secretary of the Interior. Another section under Title X, Section 10351, focuses on compensation for pumped storage hydropower projects.

This portion of the report summarizes the contents of each of the 11 sections in the Senate version of S. 2012 that address hydropower. Where applicable, it also discusses comparable provisions in the House version.

Section 3001

Section 3001 of S. 2012, as engrossed in the Senate, contains several wide-ranging hydropower initiatives, as well as one general renewable electricity initiative.

- Section 3001(a) would convey Congress’s perspective that hydropower is a renewable and essential energy source and that the United States should increase hydropower capacity and generation. The House version of S. 2012 contains no comparable language.
- Section 3001(b)(1) would modify the federal purchase requirement for electricity from renewable sources in the Energy Policy Act of 2005 (EPAAct05; P.L. 109-58) by setting the federal purchase requirement at no less than 15% starting in FY2016 and for each fiscal year thereafter.²¹ With this modification, the Senate version would double the amount of electric energy the federal government would be required to consume from renewable energy during any fiscal year. Although Section 3115 of the House version would address the federal purchase requirement, the House version has no such comparable language stipulating what the purchase requirement would be.
- Section 3001(b)(2) would modify the definition of *renewable energy* in Section 203(b) of EPAAct05 for the federal purchase requirement to mean “energy produced from solar, wind, biomass, landfill gas, ocean (including tidal, wave,

²¹ The statutory requirement is not less than 7.5% in FY2013 and each fiscal year thereafter. 42 U.S.C. §15852.

- current, and thermal), geothermal, municipal solid waste, or hydropower.”²² This new definition would broaden the statutory definition to include all hydropower. Section 3115 of the House version also would modify the definition of renewable energy in Section 203(b) of EPAAct05, but the modification would address thermal energy, not hydropower.²³
- Section 3001(c) would modify Section 4(e) of the FPA to allow FERC to determine what would be necessary or useful regarding investigations and data collection.²⁴ The House version of S. 2012 contains no comparable language.
 - Section 3001(d) would modify Section 5 of the FPA—which addresses preliminary permits—by allowing FERC to issue a preliminary permit for up to four years and to extend the preliminary permit period once for no more than four additional years. Further, it would allow FERC to issue an additional permit to the permittee after an extension if there are extraordinary circumstances that warrant such.²⁵ The House version of S. 2012 contains no comparable language.
 - Section 3001(e) would modify Section 13 of the FPA—which addresses the time period to construct a project, extensions for the construction start date, and license terminations—to extend the start of project construction for up to eight years.²⁶ The House version of S. 2012 contains no comparable language.
 - Section 3001(f) would modify Section 15(e) of the FPA—which addresses the term of a license—to require FERC to consider, when determining the term of the license, project-related investments that could lead to new development, efficiency improvements, and more, over the term of the existing license.²⁷ The House version of S. 2012 contains no comparable language.
 - Section 3001(g) would modify Section 18 of the FPA—which addresses the operations of navigation facilities in connection to hydropower projects—by eliminating the applicant’s ability to request a determination on the record following a trial-type hearing for any disputes related to fishways.²⁸ The House version of S. 2012 contains no comparable language.
 - Section 3001(h) would modify Section 33 of the FPA—which addresses alternative conditions and prescriptions for hydropower licenses—by eliminating

²² The statutory definition of *renewable energy* is as follows: “The term ‘renewable energy’ means electric energy generated from solar, wind, biomass, landfill gas, ocean (including tidal, wave, current, and thermal), geothermal, municipal solid waste, or new hydroelectric generation capacity achieved from increased efficiency or additions of new capacity at an existing hydroelectric project.” 42 U.S.C. §15852.

²³ §3115 of S. 2012 (the House version) says “The term ‘renewable energy’ means electric energy, or thermal energy if resulting from a thermal energy project placed in service after December 31, 2014, generated from, or avoided by, solar, wind, biomass, landfill gas, ocean (including tidal, wave, current, and thermal), geothermal, municipal solid waste (in accordance with subsection (e)), qualified waste heat resource, or new hydroelectric generation capacity achieved from increased efficiency or additions of new capacity at an existing hydroelectric project.”

²⁴ The statutory language states “to the extent the Commission [FERC] may deem necessary.” 16 U.S.C. §797.

²⁵ The statute allows FERC to issue a preliminary permit for a period of up to three years and to extend the permit for an additional two years. 16 U.S.C. §798.

²⁶ The statute allows FERC to extend the start of project construction once for two years. 16 U.S.C. §806.

²⁷ 16 U.S.C. §808e.

²⁸ 16 U.S.C. §811. A *trial-type hearing* is generally defined as a proceeding before an administrative law judge. S. 2012 (the Senate version), §3001(i), adds a new Section 36, Trial-Type Hearings, which would further address trial-type hearings.

the respective Secretary’s (e.g., Secretary of the Interior) ability to submit to FERC, for both alternative conditions and alternative prescriptions, a written statement about a condition for a license including equal consideration, among other things. In addition, it would eliminate dispute resolution between FERC and the Secretary about the condition.²⁹ It also would modify the section to apply to any further conditions or prescriptions proposed or imposed pursuant to Sections 4(e), 6, and 18 of the FPA. The House version of S. 2012 contains no comparable language.

- Section 3001(i) would modify Part I of the FPA—which addresses mainly hydroelectric project licensing and dam safety—by adding a new Section 34, “Licensing Process Improvements,” to the act.³⁰ This section is similar to Section 1205 of the House version, except the Senate bill text emphasizes that any biological opinion to form the basis for a prescription prepared by the National Marine Fisheries Service would be done concurrently rather than sequentially and that water quality certification deadlines would take effect only if the certifying agency were to request one. Unlike the House version, the Senate version does not discuss a basin-wide or regional review program that would develop comprehensive plans on a regional or basin-wide scale.³¹
- Section 3001(i) would modify Part I of the FPA by adding a new Section 35, “Licensing Process Coordination,” to the act.³² This section resembles Section 1203 of the House version, except the Senate bill would note that it is the “sense of Congress” that all federal authorizations—including a license or exemption—should be issued within three years after the date FERC considers an application to be complete. In addition, the Senate version would stipulate that interagency disputes regarding failure to adhere to the schedule established by FERC and issues associated with alternative conditions and prescriptions should be referred to the chairman of the Council on Environmental Quality.³³
- Section 3001(i) would modify Part I of the FPA by adding a new Section 36, “Trial-Type Hearings,” to the act.³⁴ This section would allow for the license applicant to receive a determination on the record about covered measures (e.g., conditions and fishways) following a trial-type hearing that is to last no longer than 120 days. The decision by the FERC administrative law judge for the case would be final and not subject to further administrative review. No later than 60 days following the judge’s decision, the Secretary associated with the condition or prescription being challenged would have to make a determination to adopt, modify, or withdraw the condition or prescription. If FERC disagrees with the Secretary’s determination, the matter could be referred to the chairman of the

²⁹ 16 U.S.C. §823d. S. 2012 (the Senate version), §3001(i)—which adds a new Section 35, “Licensing Process Coordination,” would further address the equal consideration requirement.

³⁰ 16 U.S.C. §§792 et seq.

³¹ §3001 of S. 2012 (the Senate version) does contain a pilot program for region-wide, or basin-wide, studies in its addition of a §38 to the Federal Power Act of 1935 (FPA; 16 U.S.C. §§791-828c).

³² 16 U.S.C. §§792 et seq.

³³ §1204 of the House version of S. 2012 addresses the delay of a federal authorization, due in part to an interagency dispute.

³⁴ *Ibid.*

- Council on Environmental Quality. The House version of S. 2012 contains no comparable language.
- Section 3001(i) would modify Part I of the FPA by adding a new Section 37, “Pumped Storage Projects,” to the act.³⁵ This section is similar to the first part of Section 1206 of the House version. However, the Senate text addresses only what FERC should consider to be a closed-loop pumped storage project for Section 6(a) of the Hydropower Regulatory Efficiency Act of 2013 (P.L. 113-23);³⁶ it does not address closed-loop pumped storage project license issuance, dam safety, conditions, and transfers.
 - Section 3001(i) would modify Part I of the FPA by adding a new Section 38, “Annual Reports,” to the act.³⁷ This section would require FERC to submit to the Senate Committee on Energy and Natural Resources and the House Committee on Energy and Commerce an annual report about the various criteria for project license and preliminary permit issuance, renewals, the quantity of energy and capacity for new and reauthorized projects, and more. FERC would be required to establish and maintain a publicly available website with the required information. Further, resource agencies would be required to submit to the two committees a report that describes all of the terms, conditions, and more that the agencies issued during the year and specifies whether those terms, conditions, or other requirements would lead to a loss of energy, capacity, or ancillary services at the project, among other things.³⁸ The resource agencies would be required to establish and maintain a publicly available website with the required information. The House version of S. 2012 contains no comparable language.
 - Section 3001(j) would require FERC to establish a voluntary pilot program for hydropower focused on covering at least one region with a set of region-wide studies that could inform subsequent project-level studies within the region. This section is similar to Section 1205 of the House version.

Section 3002

Section 3002 of S. 2012, as engrossed in the Senate, would modify Section 242 of EPAAct05—which addresses hydroelectric production incentives—to expand the eligibility period for the hydroelectric production incentive program to 2025. Section 3002 also would establish the sunset date for the program at 2035 and would reauthorize appropriations for the program at \$10 million annually for FY2016 to FY2025.³⁹ In addition, this section would modify Section 243 of

³⁵ 16 U.S.C. §§792 et seq.

³⁶ §6(a) of P.L. 113-23 requires FERC to investigate the feasibility of issuing a license for hydropower projects at non-powered dams and closed-loop pumped storage projects within a two-year period.

³⁷ 16 U.S.C. §§792 et seq.

³⁸ Resource agencies generally refer to those agencies at federal departments (e.g., Department of the Interior, Department of Agriculture) that may develop conditions or prescriptions for inclusion in a hydropower license issued by FERC. There has been some discussion about resource agency involvement in the hydropower licensing process. For more information on resource agency involvement when a dispute arises, see Department of Agriculture, Department of the Interior, and Department of Commerce, “Resource Agency Hearings and Alternatives Development Procedures in Hydropower Licenses; Interim Rule,” 80 *Federal Register* 17156-17220, March 31, 2015.

³⁹ 42 U.S.C. §15881.

EPAct05—which addresses hydroelectric efficiency improvements—to reauthorize appropriations for the program for FY2016 to FY2025.⁴⁰

The House version of S. 2012 contains no comparable language.

Sections 3003, 3004, 10341, 10342, 10343, 10344, and 10346

Sections 3003-3004, 10341-10344, and 10346 of S. 2012, as engrossed in the Senate, would modify various aspects of the license for specific projects. See **Table 1** for a synopsis of the sections and comparisons to the House version of the bill.

Section 10345

Section 10345 of S. 2012, as engrossed in the Senate, would modify Section 10(h) of P.L. 86-787—which centers on the Equus Beds aquifer recharge and recovery.⁴¹ This section would allow the Secretary of the Interior to carry out any provision under the act for 20 years from the date on which the law was enacted.⁴²

The House version of S. 2012 contains no comparable language.

Section 10351

Section 10351 of S. 2012, as engrossed in the Senate, would require FERC to identify and determine mechanisms that would encourage development of and allow for compensation for pumped storage hydropower assets.

The House version of S. 2012 contains no comparable language.

Potential Issues

The Senate and House versions of S. 2012 contain provisions that would significantly impact nonfederal hydropower. Chief among these provisions is the one that would make FERC the lead agency for federal authorizations—and the lead agency for issuing a hydropower license.⁴³ With this provision, Congress would be signaling that it wants FERC to play a more prominent role and to be the gatekeeper for the licensing process. It could be argued that FERC could misuse this leadership authority if the commission does not fully cooperate with the other involved agencies. On the other hand, having FERC as the lead agency could shorten the licensing process by facilitating cooperation among the stakeholders. Further, both bills set timeframes for steps within the licensing process, perhaps as an attempt to make issuing a license timelier.

Additionally, both bills have provisions that could be viewed as controversial.⁴⁴ In particular, those provisions pertaining to mandatory conditioning authority and the new hydropower

⁴⁰ 42 U.S.C. §15882.

⁴¹ P.L. 86-787; 74 Stat. 1026; 120 Stat. 1474; An Act to Provide for the Construction of the Cheney Division, Wichita Federal Reclamation Project, Kansas, and for Other Purposes.

⁴² The statute gives the Secretary of the Interior the authority to carry out any provision under the act for 10 years from the date on which the law was enacted.

⁴³ §1203 of S. 2012 (House version); §3001(i) of S. 2012 (Senate version).

⁴⁴ Several stakeholders have expressed their views to Congress on both bills—including the National Hydropower Association, American Rivers, the California State Water Resources Control Board, Maryland Department of the

licensing schedule have invited debate.⁴⁵ For instance, some states and environmental groups are concerned that the bills provide FERC with a unique authority to set the schedule for issuing a hydropower license. Some contend that a schedule set by FERC could make the other involved parties unable to contribute to the hydropower licensing process as they have in the past and could potentially weaken their contribution to the environmental review process of such projects.⁴⁶ However, the National Hydropower Association argues that the bills would make the licensing process more coherent and collaborative and would require regulators to make more timely decisions “without narrowing the authorities of federal and state resources agencies and Indian tribes under existing federal environmental laws.”⁴⁷

Another controversial provision could be Section 3001(b)(2) of S. 2012, as engrossed in the Senate, which significantly broadens the statutory definition for renewable energy for the federal purchase requirement to include all hydropower. Some could argue that there should be limits to what type of hydropower qualifies for the purchase requirement. Others could contend that hydropower itself is sufficient to qualify for the federal purchase requirement without any relation to new capacity.⁴⁸

Environment, Karuk Tribe, Puyallup Tribe, and others.

⁴⁵ Mandatory conditioning authority allows certain agencies to impose conditions on relicensed projects to ensure that the projects comply with certain laws, such as the Clean Water Act and the Endangered Species Act. This authority is granted to the Department of the Interior and the Department of Agriculture/Forest Service under §4(e) of the FPA and to the Departments of Commerce and the Interior under §18 of the FPA for fishways.

⁴⁶ Letter from California State Water Resources Control Board to Representatives Upton and Pallone, Jr., Comments in opposition to provisions of House of Representatives Bill 8—North American Energy Security and Infrastructure Act of 2015, October 15, 2015; Letter from Puyallup Tribe of Indians to Senators Murray and Cantwell, Amendments to the Federal Power Act in S. 2012, January 26, 2016.

⁴⁷ National Hydropower Association, “House Passes Bill to Bring Hydropower Licensing Process into the 21st Century,” press release, December 3, 2015.

⁴⁸ For more information on modifying the renewable energy definition for the federal purchase requirement, see the section titled “Section 3001” in this report.

Table I. House- and Senate-Engrossed Versions of S. 2012 for Specific Hydropower Projects

Bill and Section No.	FERC Project No.	Project Name	State	Authorized Capacity (KW)	Synopsis of Bill Requirement ^a	Comparable Provision in the Other Bill
<i>S. 2012, as Engrossed in the House</i>						
Section 8003	12715	Jennings Randolph	WV	14,000	<ul style="list-style-type: none"> • Would extend the time period to start construction for no more than 3 consecutive 2-year periods • Would allow FERC to reinstate the license if the period to begin construction expires prior to enactment of the bill 	No comparable provision in the Senate version
<i>S. 2012, as Engrossed in the Senate</i>						
Section 3003	12429	Clark Canyon Dam	MT	4,700	<ul style="list-style-type: none"> • Would allow FERC to reinstate the license • Would extend the time period to start construction to be within 3 years of the enactment date of the bill 	Section 8001 of the House version
Section 3004	12478-003	Gibson Dam	MT	15,000	<ul style="list-style-type: none"> • Would extend the time period to start construction to be within 6 years of the expiration date of the extension issued by FERC • Would allow FERC to reinstate the license if the time period to start project construction lapses before enactment of the bill 	Section 8002 of the House version; the House version does not address reinstatement of the license
Section 10341	2743	Terror Lake	AK	36,000	<ul style="list-style-type: none"> • Would require that no more than 20 acres of federal land be allotted for the construction, operation, and maintenance of the Upper Hidden Basin Diversion Expansion of the project 	No comparable provision in the House version

Bill and Section No.	FERC Project No.	Project Name	State	Authorized Capacity (KW)	Synopsis of Bill Requirement ^a	Comparable Provision in the Other Bill
Section 10342	11393	Mahoney Lake	AK	9,600	<ul style="list-style-type: none"> • Would allow FERC to continue the stay of the license or to lift the stay (within a 10 year period from enactment of the bill), making the license effective on the date the stay is lifted, and grant extensions to start construction of the project for no more than 3 consecutive 2-year periods 	No comparable provision in the House version
Section 10343	12642	W. Kerr Scott	NC	4,000	<ul style="list-style-type: none"> • Would extend the time period to start construction for no more than 3 consecutive 2-year periods • Would allow FERC to reinstate the license if the period to begin construction expires prior to enactment of the bill 	Section 1202 of the House version
Section 10344	12737; 12740	Gathright; Flannagan	VA; VA	3,700; 1,800	<ul style="list-style-type: none"> • Would extend the time period to start construction for no more than 3 consecutive 2-year periods from the expiration date contained in the original extension • Would allow FERC to reinstate the license if the period to start construction expires prior to enactment of the bill 	Sections 8005 and 8006 of the House version
Section 10346	13287	Cannonsville	NY	14,080	<ul style="list-style-type: none"> • Would extend the time period to start construction for up to 4 consecutive 2-year periods • Would allow FERC to reinstate the license if the period to start construction expires prior to enactment of the bill 	Section 8004 of the House version

Sources: House- and Senate-engrossed versions of S. 2012.

Notes: Bill requirements for each specific project are brief summaries of the more pertinent bill requirements. See the respective bill for the complete requirement. FERC = Federal Energy Regulatory Commission. KW = kilowatts.

- a. For those projects in which the construction start period is extended, the legislation modifies §13 of the FPA, which requires licensees to commence project construction within two years of a given date and to finish construction and start project operation by a given date. Further, §13 allows for the construction start

date to be extended once for a two-year period and allows FERC to extend the completion period given certain conditions. If the licensee has not begun project construction within the given time frame, FERC may terminate the license. If project construction began but was not finished within the given time frame, a resolution is decided by the district court where any part of the project is situated. 16 U.S.C. §806.

Author Contact Information

Kelsi Bracmort
Specialist in Agricultural Conservation and Natural
Resources Policy
[redacted]@crs.loc.gov , 7-....

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