



June 27, 2013

The Honorable Nancy Sutley  
Chair  
White House Council on Environmental Quality  
1600 Pennsylvania Ave, NW  
Washington, D.C. 20500

**RE: National Hydropower Association's Comments on the Council on Environmental Quality's Principles and Requirements for Federal Investment in Water Resources and Interagency Guidelines**

Dear Chair Sutley:

On March 22, the Council on Environmental Quality (CEQ) released the *Principles and Requirements for Federal Investment in Water Resources* (P&R) and asked for comments on the accompanying draft *Interagency Guidelines* (Draft Guidelines). The National Hydropower Association (NHA)<sup>1</sup> is pleased to submit the following comments.

I. Introduction

As America's leading renewable electricity resource, hydropower provides approximately 8 percent of our nation's total electricity supply and two-thirds of America's total renewable electricity. This results in hundreds of thousands of domestic jobs. NHA's members and hydroelectric facility owners and operators are stewards of the rivers where their facilities are located, and value river resources and a diverse ecosystem. As such, they spend hundreds of millions of dollars every year on environmental conservation, mitigation, and protection and enhancement measures related to water quality and quantity.

Several recent studies have identified tremendous growth potential in the tens of thousands of megawatts of clean, renewable hydropower capacity.<sup>2</sup> The hydropower industry is poised to realize this growth

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<sup>1</sup> NHA is a national non-profit association dedicated exclusively to advancing the interests of the U.S. hydropower industry, including conventional, pumped storage, and new marine and hydrokinetic technologies. NHA's membership consists of more than 180 organizations, including consumer-owned utilities, investor-owned utilities, independent power producers, project developers, equipment manufacturers, environmental and engineering consultants, and attorneys.

<sup>2</sup> See, Bureau of Reclamation, U.S. Dep't of the Interior, *Site Inventory and Hydropower Energy Assessment of Reclamation Owned Conduits* (Mar. 2012), <http://www.usbr.gov/power/CanalReport/FinalReportMarch2012.pdf>; Office of Energy Efficiency and Renewable Energy, Wind and Water Power Program, U.S. Dep't of Energy, *An Assessment of Energy Potential at Non-Powered Dams in the United States* (Apr. 2012), [http://www1.eere.energy.gov/water/pdfs/npd\\_report.pdf](http://www1.eere.energy.gov/water/pdfs/npd_report.pdf); Navigant Consult., *Job Creation Opportunities in Hydropower* (Sept. 20, 2009), [http://www.hydro.org/wp-content/uploads/2010/12/NHA\\_JobsStudy\\_FinalReport.pdf](http://www.hydro.org/wp-content/uploads/2010/12/NHA_JobsStudy_FinalReport.pdf).

potential and meet the growing demand for renewable and emission free electricity. However, in response to the P&R's and Draft Guidelines, NHA points out that the existing process for licensing non-federal hydropower projects under Part I of the Federal Power Act (FPA), and administered by the Federal Energy Regulatory Commission (FERC), is a comprehensive and rigorous process that evaluates and balances the social and public benefits, environmental and ecosystem impacts, nondevelopmental values, and costs associated with development and operations. As an independent agency under the Department of Energy, FERC is not subject to the P&R's; however, the CEQ needs to clearly state that the P&R's are not applicable to agencies acting pursuant to their responsibilities under Part I of the FPA.

At a time when the Administration is focused on improving the performance of federal permitting and review of infrastructure projects, and reducing delay, redundancy and inconsistency in licensing through retrospective regulatory review of existing regulations<sup>3</sup>, these P&R's and Draft Guidelines, without further clarification, have the potential to unnecessarily complicate and further delay the established but cumbersome and difficult regulatory regime for hydropower project approvals. Further, the P&R's and Draft Guidelines could have the unfortunate effect of undercutting the President's clean energy agenda and goal of building a 21<sup>st</sup> Century Infrastructure.<sup>4</sup>

## II. Applicability of P&R's

The P&R's and Draft Guidelines are meant to provide a "common framework for analyzing a diverse range of water resource projects...involving Federal investment", but also provide direction to agencies for the development of agency-specific procedures (ASP) to determine the applicability and implementation of the P&R's. Federal investment is "broad, and is intended to capture the wide array of projects, programs, and plans that the federal government undertakes in the arena of water resources" and is intended to apply to "Federal investments that by purpose, either directly or indirectly, affect water quality and quantity, including ecosystem restoration or land management activities." Hydropower generation is specifically mentioned as falling under the purview of the P&R's.

The P&R's and the Draft Guidelines are vague and imprecise regarding their applicability to non-federal hydropower development. NHA recommends that the P&R's and Draft Guidelines clarify that FERC's licensing and administration of non-federal hydropower projects under Part I of the FPA are excluded from

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<sup>3</sup> See, Exec. Order No. 13604, 60 Fed. Reg. 18887 (Mar. 22, 2012); *Federal Plan for Implementing Executive Order 13604* (Jun. 15, 2012); Exec. Order No. 13610, 93 Fed. Reg. 28469 (May 14, 2012); Exec. Order No. 13563, 14 Fed. Reg. 3821 (January 18, 2011).

<sup>4</sup> *Federal Plan for Implementing Executive Order 13604*, p. 1 (Jun. 15, 2012).

P&R review and analysis. As mentioned above, non-federal hydropower development is regulated through a comprehensive statutory licensing regime. While FERC acts as the licensing agency, the process involves many federal and state agencies (U.S. Forest Service, U.S. Fish & Wildlife Service, National Marine Fisheries Service, U.S. Army Corps of Engineers, Bureau of Reclamation, and state resource agencies, among others) and includes multiple opportunities for public engagement in the review of non-federal hydropower project applications.

In addition to the U.S. Army Corps of Engineers (Corps), the Bureau of Reclamation (Reclamation) and the Tennessee Valley Authority, the updated P&R's now also apply to the resource agencies (through the Departments of the Interior, Agriculture and Commerce) that are key participants, and have an established role in, the FERC non-federal hydropower licensing process. Further, many of NHA's members work closely with the Corps and Reclamation on developing non-federal hydropower on federal infrastructure, many of which are subject to FERC's jurisdiction. Therefore, it is crucial that the CEQ clearly state that the P&Rs are not applicable to agencies acting pursuant to their responsibilities under Part I of the FPA.

Each FERC hydropower application requires a serious commitment of time and resources by FERC, agency staff, and stakeholders in order to complete the required processes. For example, licensing a hydropower project consists of at least 5 to 5 ½ years for agency consultation, studying project effects, preparation of FERC application documents, and environmental review under NEPA before issuance of a license.

Additionally, in 1986, Congress passed the Electric Consumers Protection Act (ECPA), which amended the FPA and required FERC to balance electricity needs with environmental and nondevelopmental values when deciding whether to issue a non-federal hydropower license. FERC's required balancing, or "equal consideration" of nondevelopmental values, includes environmental, recreational, cultural, and economic impacts. The ECPA requirement seems to satisfy the CEQ's interest in considering the social and public benefit with costs of an action.

These processes are intended to provide sufficient time and information for FERC, the agencies, the licensee and stakeholders to reach a decision on all issues associated with a hydropower project. Because of the substantive review of non-federal hydropower development under Part I of the FPA, the issues and concerns expressed in the P&R's and Draft Guidelines are already being adequately analyzed and managed, and have been for some time.

### III. Specific Questions & Recommendations

#### A. Exclusions & Exemptions

- The P&R's and Draft Guidelines contain exclusions and specifically exempt regulatory actions. Along with other regulatory actions specifically mentioned, NHA recommends that non-federal hydropower licensing under Part I of the FPA be listed under Section 2 (a) of the Draft Guidelines (Page 3):
  - Regulatory actions are those that restrict private behavior and include, but are not limited to: permits under section 402 and 404 of the Clean Water Act, Endangered Species Act Consultations, *hydropower licensing and administration under Part I of the Federal Power Act*, and requirements under the Safe Drinking Water Act.

In addition, the CEQ should clarify that other regulatory permits required for non-federal hydropower development on federal infrastructure, or under the Clean Water Act, are also exempt. For example, regulatory actions related to:

- The issuance of a Lease of Power Privilege (LOPP) for the construction of non-federal hydropower on Bureau of Reclamation infrastructure.
  - The issuance of a Section 408 (Section 14 of the Rivers and Harbors Act of 1899) permit in conjunction with building non-federal hydropower on the U.S. Army Corps of Engineers infrastructure.
  - The issuance of a Section 401 Clean Water Act Water Quality Certification issued by the states, delegated to them by the Environmental Protection Agency.
- The Draft Guidelines state that agencies, through their ASP's, have the discretion to "deem specific processes, planning requirements, or types of analysis as compliant with the... P&R's... and exempt them from further requirements."

NHA recommends that each agency ASP include a statement that work conducted under Part I of the FPA is exempt from P&R review and analysis. NHA notes that Reclamation's LOPP process includes a Categorical Exclusion (CE). If the LOPP process is not considered a regulatory action, NHA believes the

LOPP CE is an example of an existing process or requirement that would be compliant with the P&R's and exempt from review.

#### B. Comparing Social and Public Benefits with Costs

The Draft Guidelines mention the importance of considering the social and public benefits against the costs of an action. The impacts of climate change on our rivers, oceans, and aquatic species are a top concern and priority. Hydropower is a clean and renewable energy resource avoiding millions of metric tons of carbon emissions every year. NHA recommends that when agencies are comparing the social and public benefits and costs of an investment in the federal hydropower system they should recognize hydropower's climate benefit, as well as the system's ability to mitigate the effects of extreme storms and floods, among others. Of note, the President's recent *Climate Action Plan* recognizes hydropower's role in slowing the effects of climate change, and should be used as guidance by the agencies in their social and public benefits versus cost analysis.<sup>5</sup>

#### C. Grant Programs & Federal Financing

Grant programs are listed as Federal activities subject to the P&R's. The applicability of the P&R's to programs of interest to the hydropower industry, such as the Production Tax Credit, the Investment Tax Credit, the Rural Energy for America Program (REAP), and the Department of Energy ARPA-E grants and loan guarantees is unclear. It is also unclear whether ASP's will retroactively evaluate grants in process or if they will only consider grants on a prospective basis. As an example, the Department of Energy could fund a demonstration project that requires a FERC license and the involvement of many of the federal agencies. NHA seeks clarification on whether and how the P&R's may apply.

#### IV. Conclusion

NHA works to ensure that any additional agency reviews and procedures, such as these P&R's and Draft Guidelines, take into full account the existing non-federal hydropower licensing process, and do not subject the industry to conflicting, redundant or unnecessary requirements, which could lead to additional delays and uncertainty in the deployment of new hydropower resources.

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<sup>5</sup> *President Obama's Plan to Cut Carbon Pollution Fact Sheet*, Exec. Office of the President (Jun. 25, 2013); *The President's Climate Action Plan*, Exec. Office of the President (Jun. 25, 2013), <http://www.whitehouse.gov/the-press-office/2013/06/25/fact-sheet-president-obama-s-climate-action-plan>.

NHA is concerned that these P&R's and Draft Guidelines potentially weaken the Administration's desire and efforts to increase renewable energy development and improve the permitting and licensing processes. The P&R's and Draft Guidelines will only be meaningful if their applicability is clearly defined. Moreover, ASP's should be subject to public review and comment to ensure the opportunity to provide input and identify unintended consequences.

NHA appreciates the opportunity to submit comments on the Draft Guidelines, and we commit to working with the CEQ and other stakeholders to provide perspective on hydropower issues.

Respectfully submitted,

A handwritten signature in cursive script that reads "Linda Church Ciocci".

Linda Church Ciocci  
Executive Director  
National Hydropower Association