



December 18, 2015

Mr. Tim Welch & Mr. Hoyt Battey  
Department of Energy  
1000 Independence Ave., SW  
Washington, D.C. 20585

**Re: NHA Comments on Draft Interagency Agreement on FERC-USACE Concurrent and Coordinated Processes**

Mr. Welch and Mr. Battey:

On November 10, the Department of Energy (DOE), the Federal Energy Regulatory Commission (Commission), and the U.S. Army Corps of Engineers (Corps), released a *Draft Interagency Agreement on FERC-USACE Concurrent and Coordinated Processes* (Draft Proposal) that outlines two options for improving coordination between the Commission and Corps licensing and permitting processes for non-federal hydropower development on Corps infrastructure. The National Hydropower Association (NHA)<sup>1</sup> submits the following comments and recommendations for consideration.

**I. Summary and Overview of Comments**

To assist the reader in navigating NHA's comments we offer the following summary and outline of their structure. Section II provides our analysis and response to the Draft Proposal. Section III discusses recent legislation and Administration initiatives that provide tremendous support for a bolder approach to licensing and permitting hydropower on Corps infrastructure. Section IV provides recommendations for a new approach for conducting a coordinated and concurrent environmental review process – one that would move projects forward in an efficient manner, would protect environmental values and responsibilities, and reduce risk to project developers. Section V provides specific recommendations for improving the Section 408 application process without jeopardizing the Corps' infrastructure, authorized purposes, or safety requirements. Section VI offers additional recommendations for consideration. Finally, Section VII offers our closing remarks.

**II. Analysis of the Draft Proposal**

NHA recognizes and commends the agencies for the time and effort expended to consider the issues and developing the Draft Proposal. We appreciate the opportunity to participate in the December 10 public

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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 over 220 organizations, including consumer-owned utilities, investor-owned utilities, independent power producers, project developers, equipment manufacturers, environmental and engineering consultants, and attorneys.

workshop and to provide these written comments. NHA has worked for many years to improve the licensing and permitting processes for non-federal development on Corps infrastructure, and while we believe some progress has been made, on the whole, much more needs to be done.

In order to conduct reviews in a concurrent and coordinated manner, the Draft Proposal is based upon the 2011 Memorandum of Understanding (MOU)<sup>2</sup> between the Commission and Corps, the Corps 408 Engineering Circular (EC)<sup>3</sup>, and feedback from the hydropower industry. Unfortunately, the Draft Proposal does not make any new commitments and does not adequately address the two most serious issues facing non-federal hydroelectric development at Corps facilities: 1) the length of the combined regulatory processes; and 2) the financial risk that developers assume due to the front-loaded expectations for expensive design details before there is certainty regarding the environmental requirements that can affect both project design and project economics. The current regulatory scheme, as well as the options discussed in the Draft Proposal, act as a significant disincentive to potential site developers. NHA, and our members, believe a greater sense of urgency and willingness to make substantive changes to the licensing process are needed to rectify the fundamental problems that are currently constraining what are some of the lowest impact new hydropower opportunities, adding generation to existing infrastructure where operating regimes will not be affected.

The Draft Proposal accurately states what NHA believes to be the fundamental problem in establishing a coordinated and concurrent regulatory process, “...each agency’s respective processes remain unchanged...”<sup>4</sup> If neither the Corps nor the Commission are willing to make firm commitments or infuse any new or additional flexibility into the process, there is no guarantee that the options provided in the Draft Proposal will result in a more efficient process. Rather, the Draft Proposal is a restatement and reorganization of what the agencies have already committed to do through the MOU and the EC. For example, the Draft Proposal states the document reflects “a commitment by both FERC and USACE to coordinate information and regulatory needs for each of the three processes, to work with the developer, relevant agencies and others to achieve an efficient, concurrent or coordinated set of processes.”<sup>5</sup> Appendix C of the EC states its policy is to “commit to early involvement; participate proactively; share data; communicate informally; attend public meetings; and coordinate on studies of hydropower

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<sup>2</sup> Available at: <http://www.ferc.gov/legal/mou/mou-usace.pdf>

<sup>3</sup> Policy and Procedural Guidance for Processing Requests to Alter US Army Corps of Engineers Civil Works Projects Pursuant to 33 USC 408. No. 1165-2-216, (Engineering Circular) available at: [http://www.publications.usace.army.mil/Portals/76/Publications/EngineerCirculars/EC\\_1165-2-216.pdf](http://www.publications.usace.army.mil/Portals/76/Publications/EngineerCirculars/EC_1165-2-216.pdf)

<sup>4</sup> Draft Interagency Agreement on FERC-USACE Concurrent and Coordinated Processes at 5. (Draft Proposal)

<sup>5</sup> Draft Proposal at 2.

potential.” Finally, the purpose of the MOU is to “establish a framework for early coordination and participation... to ensure the timely review of and action on proposed non-Federal hydropower development applications.”

To achieve either Option A or B the Draft Proposal places additional requirements on the developer without any corresponding assurances or commitments from the agencies that a more predictable process will result. The burden is on the developer to provide more detailed information earlier in the process in order to achieve an efficient, concurrent or coordinated set of processes, without any recognition of the additional financial risk the developer would be taking on. Even if the developer did follow Option A or B and provides more detailed information up front in the process, the Draft Proposal provides no certainty that decision making will be made in a more timely fashion. Instead, the Draft Proposal states that reduced review timelines or increased efficiencies “may”, “can”, or “could” result. The absence of any additional certainty provides no incentive for an applicant to pursue either option provided in the Draft Proposal. However, the industry is willing to invest more upfront if developers have confidence that the Commission and the Corps will meet their commitments to timely decision making and approvals.

As such, NHA does not believe either Option A or B, as proposed, are viable options. Much more needs to be done to ensure increased coordination and that reviews are conducted concurrently. This is critical to effectively incentivize hydropower development on existing Corps infrastructure. NHA’s examples and recommendations below, if implemented, would lay the foundation for a new era of hydropower development on Corps infrastructure, and would maintain both the Commission’s and the Corps’ respective missions and statutory responsibilities.

### **III. Recent Legislation and Administration Initiatives Encourage a Bolder Proposal**

Unlocking hydropower’s potential across the country is crucial to meet the Administration’s climate and renewable energy goals and a coordinated and concurrent process is perhaps the single most important step that can be taken to harness private capital and create the opportunity for new, clean and renewable hydropower generation on Corps infrastructure. Recent legislation and on-going Administration initiatives provide tremendous support for developing innovative approaches for coordinated and concurrent processes that include clear and binding commitments for the development of hydropower on Corps infrastructure.

A. Water Resources Reform and Development Act of 2014

With the passage of the Water Resources Reform and Development Act of 2014 (WRRDA), Congress, in an overwhelmingly bipartisan fashion, directed the Corps to make non-federal hydropower development a priority and work to address delays and inefficiencies in the Corps' approval process for proposed non-federal hydropower development on their infrastructure. Specifically, Section 1008 of WRRDA states "the development of non-Federal hydroelectric power at Corps of Engineers civil works projects, including locks and dams, shall be given *priority*" and that "approval of non-Federal hydroelectric power at Corps of Engineers civil works projects, including permitting required under section 14 of the Act of March 3, 1899 (33 U.S.C. 408), shall be completed by the Corps of Engineers in a *timely and consistent manner*" (emphasis added).

It was the industry's hope that the implementation of Congress' direction in WRRDA would begin to usher in a new era of hydropower development on Corps infrastructure. However, over a year later, NHA believes the lack of action and implementation of any defined changes to the regulatory process for non-federal development of hydropower on Corps infrastructure remains one of the greatest impediments to realizing the full potential of these projects.

The Corps' recently issued Implementation Guidance related to Section 1008 contains only three paragraphs describing actions the Corps will take in response. At its core, the Guidance merely assigns a FERC Coordinator at each district to be the point of contact for all FERC hydropower related activities and to coordinate with the district 408 coordinator. While helpful, this does not go far enough. The Section 1008 Guidance provides no direction on how non-federal hydropower development will be given priority, or how 408 applications will be completed in a timely and consistent manner. The answers to these questions have a direct impact on how the Corps will also coordinate with the Commission and on the efficiency of the overall regulatory process for these projects. As such, NHA recommends the Corps to issue a much more detailed plan on how they will implement the directives of Section 1008.

Additionally, Section 1007 of WRRDA directed the Corps to establish a process for the review and approval of Section 408 applications "in a timely and consistent manner." At a minimum, Congress required the Corps to include benchmark goals related to the amount of time it takes for the Secretary to determine whether Section 408 applications are complete and the amount of time required to approve or disapprove an application, among other requirements. The Corps has yet to issue Section 1007 Guidance, which,

depending on its language, NHA believes could significantly benefit coordination with the Commission and resolve common issues experienced with Section 408 applications.<sup>6</sup>

#### B. Hydropower Regulatory Efficiency Act of 2013

The Hydropower Regulatory Efficiency Act of 2013 (HREA) also recognized the need to “improve the regulatory process and reduce delays and costs for hydropower development at nonpowered dams...” and directed the Commission to investigate the feasibility of issuing a license at nonpowered dams in a two-year period, including prefiling licensing processes. Currently, one project is navigating its way through the Commission established criteria for a two-year process and we encourage the Commission to share any lessons learned or best practices from this experience, as soon as practicable.

During the public workshop related to designing a two-year process under HREA, the Commission provided examples of 26 projects that received licenses in periods ranging from 1.2 to 5.2 years. These projects may not all be on Corps infrastructure and some of them may represent relicensings, but this demonstrates that a substantially expedited process is feasible. NHA recommends the Commission analyze these 26 projects to identify best practices and lessons learned that could be applied for non-federal hydropower development on Corps infrastructure.

#### C. Administration & Agency Examples

Numerous Administration initiatives and recent agency actions also support stronger and improved processes for development of hydropower on Corps infrastructure. The Administration and federal and state agencies are taking steps to improve the permitting processes for renewable energy development and infrastructure projects on federal lands, developing new methods of gathering large amounts of data, and better coordinating and integrating inter-agency and state reviews.<sup>7</sup> These initiatives reflect the desire of

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<sup>6</sup> For additional information on the implementation of WRRDA 2014, see NHA’s Statement for the Record on the U.S. House of Representatives Transportation and Infrastructure Subcommittee on Water Resources and Environment, *One Year Anniversary After Enactment: Implementation of the Water Resources Reform and Development Act of 2014*. Available at: <http://www.hydro.org/wp-content/uploads/2015/12/NHA-Statement-for-the-Record-One-Year-Anniversary-After-Enactment-Implementation-of-the-Water-Resources-Reform-and-Development-Act-of-2014-Submitted-.pdf> (June 10, 2015).

<sup>7</sup> See generally, Department of the Interior Order No. 3330 *Improving Mitigation Policies and Practices of the Department of the Interior* (Oct. 31, 2013) available at: <http://www.doi.gov/news/loader.cfm?csModule=security/getfile&pageid=380602>; A 2009 Memorandum of Understanding between DOI and California on Renewable Energy, available at: [http://www.energy.ca.gov/33by2020/mou/2009-10-12\\_DOI\\_CA\\_MOU.PDF](http://www.energy.ca.gov/33by2020/mou/2009-10-12_DOI_CA_MOU.PDF); the Solar Programmatic Environmental Impact Statement developed between the Bureau of Land Management, DOI, and the Department of Energy’s Energy Efficiency and Renewable Energy Office, available at: <http://solareis.anl.gov/>; and the Desert Renewable Energy Conservation Plan entered into between BLM, the U.S. Fish and Wildlife Service, and the state of California, available at: <http://www.drecp.org/>.

agencies with multiple responsibilities to expedite permitting while protecting our environmental, cultural, and other resources. NHA recommends the Commission and the Corps apply the approaches taken in these initiatives, as appropriate, in order to develop more practical approaches to concurrent and coordinated permitting that will reduce redundancies or eliminate disincentives to investment in hydroelectric projects that exist under the current permitting regime.

i. *EPA's Clean Power Plan*

In the Environmental Protection Agency's Clean Power Plan (CPP) final rule, EPA relied on hydropower potential, among other renewables, to establish the Best System of Emission Reduction (BSER), and recognized new hydropower generating capacity installed after 2012 as a compliance option for states in meeting their emission goals. The recognition of hydropower in the CPP will create even more interest in developing hydropower on Corps infrastructure, demanding greater coordination and concurrent reviews.

ii. *The President's Climate Action Plan*

One of the President's goals in the Climate Action Plan<sup>8</sup> is to double renewable electricity generation by 2020, and one way to achieve this is through the acceleration of clean energy permitting. In fact, the President recognized the importance of hydropower in meeting this goal and committed to encouraging the development of hydropower at existing dams.

To demonstrate the potential for improved permitting procedures for such projects, the President designated the Red Rock project to participate on the Infrastructure Permitting Dashboard. Although the Corps offers the Red Rock project as a success story, and placement on the permitting dashboard expedited the latter stages of approvals, ultimately the entire process took 10 years to complete. NHA recommends the Corps develop a Red Rock case study that can be used as a model for other developers to follow, including any modifications of the Corps' permitting practices or information demonstrating that permitting was expedited compared to other projects and the circumstances that allowed for this to occur.

iii. *Executive Actions Related to Federal Permitting and Review of Infrastructure Projects*

The President has issued a number of Executive Orders (EO) and Presidential Memorandums in recent years related to regulatory review, identifying and reducing regulatory burdens, and improving the performance

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<sup>8</sup> The President's Climate Action Plan, *available at*: <http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf>.

of federal permitting and review of infrastructure projects.<sup>9</sup> Executive Order 13604 in particular set aggressive timelines for agencies to develop a list of infrastructure projects of national or regional significance and also created the Federal Permitting Dashboard mentioned above. Implementation of the EO is on-going,<sup>10</sup> including multiple federal implementation plans, but most recently an Office of Management and Budget (OMB) and Council on Environmental Quality (CEQ) memorandum titled *Guidance Establishing Metrics for the Permitting and Environmental Review of Infrastructure Projects*.<sup>11</sup> This Guidance, among other items, directed the expansion and institutionalization of the Federal Permitting Dashboard in order to “establish metrics and provide clarity for reporting and tracking permit and environmental review timelines...”<sup>12</sup>

It would be beneficial to know what steps the Corps is taking to implement the EO 13604, the federal implementation plans, and the recent OMB and CEQ Guidance. NHA recommends that the Corps fully utilize the Federal Permitting Dashboard by adding all pending and future hydropower applications, and associated information. Further, we believe a commitment by the Corps to implement other aspects of the EO would greatly increase consistency internally and coordination with the Commission.

#### iv. *Commencement of Assessment of Annual Charges*

With the issuance of Order 815, the Commission modified the time frame for assessing annual charges for non-municipal licensees and exemptees for unconstructed projects and new capacity. The commencement of assessment of annual charges for these licensees and exemptees now tracks the start of construction deadline for any license or exemption authorizing an unconstructed project. If a project receives an extension of the start of construction deadline, the annual charges will then be assessed based on the extension. However, in no case would assessment of annual charges commence later than four years after the issuance of a license or exemption authorizing an unconstructed project.

Since the commencement of construction deadline for hydropower projects on Corps infrastructure is often extended beyond four years from license issuance because of the need to obtain Section 404 permits and Section 408 permits, the need for more timely Corps action is increased in order to minimize the incidence of non-municipal licensees paying annual charges on projects that have not yet begun construction or

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<sup>9</sup> See, Exec. Order No. 13563, 14 Fed. Reg. 3821 (January 18, 2011) *Improving Regulation and Regulatory Review*; Exec. Order 13610, 93 Fed. Reg. 28469 (May 14, 2012) *Identifying and Reducing Regulatory Burdens*; Exec. Order No. 13604, 60 Fed. Reg. 18887 (March 22, 2012) *Improving Performance of Federal Permitting and Review of Infrastructure Projects*.

<sup>10</sup> See generally <https://www.permits.performance.gov/>

<sup>11</sup> Available at <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2015/m-15-20.pdf>

<sup>12</sup> *Id.* at 4.

generation of power and revenue. Both the Commission and the Corps should use Order 815 as motivation to create a process that, at a maximum, will result in the commencement of construction within four years.

#### **IV. Concurrent and Coordinated Environmental Review**

To fulfill the intent and purpose of recent legislation and Administration initiatives, NHA believes the Commission and the Corps must significantly improve the timeliness and consistency of the environmental review aspect of their permitting processes, which can be achieved without undermining environmental protections or statutory responsibilities. A substantial portion of the December 10 workshop was devoted to discussion of completing all environmental reviews first by establishing all the required environmental protection measures in the Commission license and the Corps Section 404 permit, with a reasonable amount of engineering design of 10%, as has been the Commission's practice for many decades. This amount of engineering design is supported by the Corps issuance of Section 404 permits for projects not located on Corps infrastructure, which are issued based on 10% engineering designs. After the developer and agencies reach agreement on all environmental requirements, the Section 408 requirements and other dam safety requirements would be completed. NHA believes this two-step approach would benefit both the developer and the agencies. It would provide greater process certainty to developers and more appropriately spread their financial risk throughout the entire process, and it would reduce the amount of time the Corps and Commission expend conducting technical reviews on projects that do not move past licensing. This concept is more fully developed in comments submitted by Nelson Energy and we direct you to those comments for a detailed analysis. Although NHA is not necessarily endorsing the specific proposal in Nelson Energy's comments, we agree that it is an excellent starting point for discussion and we offer the following recommendations to support and supplement this concept.

##### **A. NEPA & Cooperating Agency Status**

NHA believes that to achieve a true concurrent or coordinated environmental review process the Corps and all its districts need to follow through on prior commitments to participate as a cooperating agency under the National Environmental Policy Act (NEPA), which has not consistently occurred to date despite the MOU and EC. In fact, the Draft Proposal appears to be a step backward in this regard. For example, Step 3 in the Draft Proposal states only that "USACE 408 and USACE Regulatory 404 staff will coordinate to determine if USACE should be a cooperating agency..." under NEPA.



In contrast, the EC states “For hydropower alterations, USACE and FERC have entered into an MOU for meeting NEPA requirements.”<sup>13</sup> The Purpose section of the MOU outlines the agencies’ agreement, stating the “MOU signatories anticipate that *the Corps will act as a cooperating agency in most circumstances.*”<sup>14</sup> Similarly, Appendix C of the EC (Non-Federal Hydropower Development at USACE Facilities), states: “in most cases where a requester requests approval for alteration of a USACE civil works structure for the purpose of adding hydroelectric generating facilities, *USACE typically acts a cooperating agency to a lead agency, FERC.*”<sup>15</sup> Unfortunately, these commitments are rarely implemented. For example, in 2013 a developer requested the Pittsburg district to participate as a cooperating agency on a project and the district’s response was that “as a matter of practice, we decline requests for formal NEPA cooperating agency status unless an Environmental Impact Statement (EIS) is involved.”

Further, even when the Corps is not acting as a cooperating agency, the EC provides direction on the appropriate scope of review: “...the scope and analysis for the NEPA and environmental compliance evaluations for the Section 408 review should be limited to the area of the alteration and those adjacent areas that are directly or indirectly affected by the alteration.”<sup>16</sup> This is followed by additional direction that the Corps rely on existing data when fulfilling its NEPA obligations: “The district should use, to the extent possible, any NEPA documentation that may already exist for the federal project. In some cases NEPA documentation has already been completed through an existing or ongoing civil works study. The districts should use the information to the extent feasible and supplement the existing information as needed.”<sup>17</sup>

Despite these statements and guidance to the districts, instances of the Corps participating as a cooperating agency are rare, and even when it does, there is no guarantee that a single NEPA document will result. Cooperating agency status would guarantee the Corps early involvement in the process, which all concerned entities appear to agree would be highly beneficial. Additionally, under this approach the Corps would be required to include all study and information needs under the 404 permit during study plan determinations (ILP) or comments on PAD and Joint Meeting study discussions (TLP) so that both agencies’ study needs for environmental protection and other public interest considerations are put forward to the applicant at the same time to help assure concurrent processing of approvals.

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<sup>13</sup> Engineering Circular at 12 (ix).

<sup>14</sup> Memorandum of Understanding at 1 (emphasis added).

<sup>15</sup> Engineering Circular, Appendix C, C-2 (emphasis added).

<sup>16</sup> Engineering Circular at 10 (iv).

<sup>17</sup> Engineering Circular at 12 (viii).

NHA therefore recommends that the Corps follow through on prior commitments by making it a Corps' policy from headquarters to be a cooperating agency for Commission hydropower license applications for projects on Corps infrastructure and issue clear guidance that cooperating agency status will result in a single NEPA document. In instances where the Corps decides not to act as a cooperating agency it should provide a public document explaining how doing so would impair the Corps ability to meet its statutory obligations.

#### B. Corps 404 Permit

The Draft Proposal states: "No USACE Regulatory 404 permit will be issued before the USACE 408 determination."<sup>18</sup> Similarly, the EC states "the decision on a Department of the Army permit application pursuant to Section 10/404/103 cannot and will not be rendered prior to the decision on the Section 408 request."<sup>19</sup>

This policy eliminates any ability on the part of the Corps to provide certainty or even assurance with regard to the environmental requirements that will be placed on the non-federal project until the project is at the 100% design phase. As noted above, the Commission has been issuing licenses for several decades, at Corps and non-Corps infrastructure, that establish the environmental requirements before final engineering design, with no ill effect. At the December 10 workshop it was suggested that the Corps' policy rests on the premise that no non-federal infrastructure can be authorized under any permit until the Corps has determined that the non-federal works will not compromise the integrity of the Corps' infrastructure. However, a Section 404 permit can easily be written to prohibit commencement of construction until the Section 408 permit is issued. Moreover, standard articles in the Commission license require the licensee to complete site access and operating MOUs with the Corps, plus Corps approval of the detailed design plans and specifications before construction can commence.

NHA recognizes that a Section 408 permit is a separate federal action requiring compliance with NEPA, but submits that it is highly unlikely that finalizing the facility design approved in the Commission license and reviewed in a Corps Section 404 process would result in substantial changes in environmental conditions or bring to light federal interests in the Corps facility not fully considered in the Section 404 proceeding. Only in unusual circumstances should it not be possible for the Corps to adopt for the Section 408 permit the environmental analysis developed for the Section 404 proceeding.

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<sup>18</sup> Draft Proposal at 14, 19.

<sup>19</sup> Engineering Circular at 5.

Therefore, NHA recommends the Corps revise its 404 and 408 sequencing policies as it relates to hydropower development on Corps infrastructure and we commit to working with the Corps on developing a process that allows for a Section 404 permit to precede a Section 408 permit.

**V. Improving the Section 408 Authorization**

Completing the Section 408 permitting process is the most difficult part of the overall licensing process, and NHA's members often describe the 408 permit as a "second licensing." This is troublesome and unnecessary. Among the issues and problems our members consistently report are: (1) not understanding or being told about the application requirements leading to Corps notices of incomplete applications; (2) district and division leadership turnover mid-authorization; (3) lack of recognition by Division and Headquarters staff that the modifications to the Corps facilities have already been scrutinized by the Corps in the Commission licensing process; and (4) multiple layers of review where new requirements or questions can be introduced requiring the applicant to undertake additional work after the application has been accepted at the district level, among others. In addition, our members report that many aspects of the 408 process are duplicative and redundant to the Commission licensing process and can result in conflicting conditions, especially as they relate to environmental requirements, leading to unnecessary delays and expense. For these reasons, and to further the goal of increased coordination and concurrent reviews NHA strongly recommends that all of the Corps' environmental reviews be conducted in the Section 404 permit proceeding, as described above, followed by a Section 408 process that focuses on the technical, engineering and safety aspects of the project.

The Corps issues Section 408 permits for many activities and for some of these activities the Section 408 permit is the only authorization required. In these cases it may make sense for the 408 to include a fully developed environmental review and analysis. However, for hydropower, the comprehensive Commission licensing process, the MOU, the EC and Appendix C, the Section 404 permit, and the state 401 water quality certification provide a full consideration of environmental issues and mitigation measures that can be adopted in the Section 408 proceeding. NHA recommends the Corps update Appendix C, the MOU, and any other necessary documents to achieve this result.

With the understanding that the Section 408 application will focus on engineering, technical design, and dam safety, NHA recommends the Corps evaluate consolidation of the current district, division, and headquarters review processes to occur concurrently. Consolidation of 408 application reviews would create efficiencies, consistency, and improve coordination within the Corps, resulting in less delays and faster decision-making. For example, this could be accomplished through the creation of a Section 408

Hydropower Center of Expertise that would be responsible for determining the necessary levels of review and approval for all hydropower 408 applications and ensuring appropriate resources are committed. Support for consolidating the Section 408 review process is found through analysis of the DOE’s non-powered dam report. In the top 100 sites identified in the DOE report, 77 are located on Corps infrastructure across 19 districts representing over 7,200 MWs. This number only grows larger when the remainder of the Corps potential capacity is considered. What is the Corps doing to prepare for the filing of an unprecedented number of hydropower 408 applications across numerous districts, especially when there are current examples of the Corps taking over two years to review and approve 408 applications?

<b>Corps Districts, Number of Projects, and Potential Capacity in the Top 100 Sites</b>		
<b>District</b>	<b># of Projects</b>	<b>Potential Capacity (MWs)</b>
CELRH	3	97
CEURL	6	1747
CELRP	10	478
CEMVK	9	846
CEMVP	6	209
CEMVR	13	834
CEMVS	3	593
CENAE	1	30
CENWO	1	29
CENWS	1	26
CESAM	8	937
CESAS	1	25
CESAW	1	24
CESPA	1	79
CESWF	1	27
CESWL	7	949
CESWT	3	216
DAEN NCR (Corps of Engineers)	1	69
DAEN NCS (Corps of Engineers)	1	34

In addition, other existing mechanisms should be utilized to create a more efficient Section 408 process.

- The EC recommends the use of “Vertical Teaming” between the district, division, and headquarters to promote “early coordination of potential alterations that may have Congressional interest or policy implications” or when there is “doubt as to the appropriate course of action related to the application” of the EC.<sup>20</sup> NHA recommends the Corps develop a policy directing the use of vertical teaming for all non-federal hydropower applications, which could be a fundamental tenant of a Center of Expertise. We believe vertical teaming would increase communications within the Corps and reduce timelines and delays related to reviewing and approving applications under the current district, division, and headquarters review process. Vertical teaming is justified because all non-federal hydropower applications on Corps infrastructure carry Congressional interest or policy implications based on Section 1008 of WRRDA 2014 and the numerous Administrative initiatives related to infrastructure permitting and renewable energy goals outlined above. Additionally, for projects that don’t begin construction within four years, project applicants must seek Congressional action for an extension of time, resulting in additional Congressional interest.
- The EC contains a provision related to “Categorical Permissions” for Section 408 permits that “would cover potential alterations that are similar in nature and that have similar impacts.” In developing the categorical permissions, the Corps needs to “determine that the impact of activities covered by the categorical permission are permissible and that environmental compliance for those activities have been met.” NHA is not suggesting that categorical permissions be used for the dam safety, technical or engineering aspects of the 408. Rather, categorical permissions could be used to carry out NHA’s recommendation that environmental review requirements be removed from the Section 408 permit process because environmental reviews are thoroughly vetted through the Commission-led NEPA process, the Section 404 permit, and the state 401 water quality certificate.
- Develop a Section 408 checklist or standard form to ensure consistency and avoid incomplete applications.
- Create an ombudsman to resolve Section 408 disputes. The minimum requirements of the ombudsman are that he/she is not involved in the review of any Section 408 applications and he/she is located at Corps headquarters. The primary role and responsibilities of the ombudsman are to ensure the timely and consistent review of Section 408 applications, resolve disputes within Corps and between applicants and Corps, and to be available as a resource to applicants in navigating Corps processes.

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<sup>20</sup> Engineering Circular at 20.

**VI. Additional Recommendation for Consideration**

NHA recommends that the Corps and Commission consult with the Bureau of Reclamation (Reclamation) regarding its Lease of Power Privilege (LOPP) process for hydropower development on Reclamation infrastructure. Many Reclamation facilities were built with similar authorized purposes as Corps facilities and Reclamation is no less concerned than the Corps about ensuring that non-federal hydropower development does not compromise the integrity of their infrastructure. NHA members report positive experiences with Reclamation’s LOPP, so it is reasonable to believe that aspects of Reclamation’s process could be incorporated into the Corps and Commission’s processes.

**VII. Conclusion**

After reviewing NHA’s and other industry comments on the Draft Proposal we urge the Corps, Commission and DOE develop a new Option C that incorporates our recommendations, followed by a second round of stakeholder feedback, and once finalized, solicit pilot projects to test the process. NHA would welcome the opportunity to assist you in developing this new Option C.

Improving the Corps and Commission processes for non-federal hydropower development on Corps infrastructure is long overdue. In order to fulfill the intent of the recent legislative and policy changes designed to promote these very projects, the industry must have a process that significantly reduces the overall time frame for project approval and takes into account the realities of high upfront developer cost and risk. The current process is delaying environmentally-preferred hydropower development at Corps facilities, and resulting in lost opportunities as development interest and capital turns elsewhere.

Congress was explicit when they directed the Corps to treat hydropower as a priority. We hear from the Corps that hydropower is a priority. It should not take ten years or more to navigate the process and gain the necessary approvals and without meaningful change thousands of megawatts of clean, renewable, hydropower are at risk of never being developed.

Respectfully submitted,



Linda Church Ciocci, Executive Director