



April 6, 2018

James C. Dalton  
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441 G Street NW  
Washington, DC 20314-1000

ATTN: CECW-CE/3E62

**RE: National Hydropower Association Comment on Engineering Circular 1165-2-220, Policy and Procedural Guidance for Processing Requests to Alter US Army Corps of Engineers Civil Works Projects Pursuant to 33 USC 408. Docket Number: COE-2018-0003.**

Mr. Dalton:

On Monday, February 5, the United States Army Corps of Engineers (USACE) posted in the Federal Register a notice entitled *Policy and Procedural Guidance for Processing Requests to Alter U.S. Army Corps of Engineers Civil Works Projects Pursuant to Section 408*, which proposes to “update processes related to how USACE will review certain requests by others to alter a USACE civil works project.” The policy and procedural guidance will be implemented through a new Engineering Circular 1165-2-220, which will supersede all previous Section 408 Engineering Circulars and guidance documents. On February 26, USACE extended the comment period by 30 days, establishing a new comment deadline of April 6, 2018. Hereinafter, the National Hydropower Association’s (NHA) comments will refer to Engineering Circular 1165-2-220 as the “Draft 408 EC”.

NHA is a national non-profit association dedicated 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 240 organizations, including consumer-owned utilities, investor-owned utilities, independent power producers, project developers, equipment manufacturers, environmental and engineering consultants, and attorneys. NHA appreciate the opportunity to submit these comments and recommendations for USACE’s consideration.

## **I. General Overview**

A consistent and coordinated Section 408 process that leverages existing information and avoids the duplication of effort is critical to unlocking new hydropower capacity across the United States. In fact, one area of substantial growth for the industry is through the addition of non-federal hydropower capacity on and near USACE non-powered dams and other infrastructure. A 2012 Department of Energy non-powered dam report identified 12,000 MWs of new hydropower capacity across the United States. The majority of that potential, 7,200 MWs, resides at USACE non-powered dams across 19 districts.<sup>1</sup> As such, the Draft 408 EC represents a significant opportunity to

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<sup>1</sup> An assessment of Energy Potential at Non-Powered Dams in the United States (April 2012), Available at: [https://www.energy.gov/sites/prod/files/2013/12/f5/npd\\_report\\_0.pdf](https://www.energy.gov/sites/prod/files/2013/12/f5/npd_report_0.pdf)

establish a more efficient and consistent process for non-federal hydropower development. One that recognizes the existing regulatory and legal framework governing the hydropower industry, while continuing to maintain protections necessary for USACE civil works projects and the public.

NHA appreciates and understands that the Draft 408 EC reflects USACE's interest in providing a consistent approach for many types of development activity that alter and improve an existing USCACE project, but also ensures civil works projects continue to deliver the public benefits intended. We support the main process objectives of the Draft 408 EC including balancing efficiency with well-documented and defensible decisions, having the general process be consistent, having information requirements be scalable, for reviews to be led by the USACE district offices, leveraging existing information and eliminating duplication of effort, and continuing to adapt, learn and improve.

We also support a number of governance, transparency, and accountability improvements. These include designation of a Division Sector 408 Coordinator, annual 408 audits to review decisions, consistency, and compliance, and a 408 tracking database. NHA believes these improvements will assist with the larger 408 program efficiency objective.

However, with regard to non-federal hydropower development, the Draft 408 EC has created inconsistencies related to the 2016 *Memorandum of Understanding Between the United States Army Corps of Engineers and the Federal Energy Regulatory Commission on Non-Federal Hydropower Projects* (FERC/USACE MOU) and Attachment A to the MOU.<sup>2</sup> Thus, NHA's comments and recommendations below describe additional clarifications required in order to achieve the desired consistency and certainty needed for non-federal hydropower development.

## **II. Draft 408 EC Appendix F and the FERC/USACE MOU Should Govern Non-Federal Hydropower Development on USACE Infrastructure**

The development of non-federal hydropower at USACE facilities is a unique type of activity due to both the potential physical changes at USACE infrastructure that might be required and the fact that such development is under the jurisdiction of the Federal Energy Regulatory Commission (FERC). We appreciate this recognition by the USACE and that a separate Appendix F, *Non-Federal Hydropower Development at USACE Facilities*, is included in the Draft 408 EC to provide guidance to USACE personnel for addressing such proposals, and more specifically, reference to the FERC/USACE MOU and Attachment A which established a synchronized two-phased process for non-federal hydropower development.

However, NHA is concerned that the process and benefits outlined in the FERC/USACE MOU and Attachment A could be lost unless the Draft 408 EC unambiguously states that Appendix F and the FERC/USACE MOU govern the non-federal hydropower development process. For example, some of the provisions contained in the Draft 408 EC conflict with the timing and procedures outlined in the MOU and Attachment A. This creates an inconsistency regarding whether the FERC licensing and

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<sup>2</sup> Available at: <https://www.ferc.gov/legal/mou/2016/07-21-16.pdf>

the USACE Section 408 process for adding non-federal hydropower to USACE infrastructure are governed by the provisions contained in the Draft 408 EC or in the two-phase approach outlined in the FERC/USACE MOU and Attachment A, or which provisions take precedent. This is likely to generate questions among district and division personnel as well as FERC staff and non-federal hydropower developers regarding which specific provisions govern. Previous experience with different districts within the USACE indicate that it is likely that conflicts between the requirements contained in the Draft 408 EC and those contained in the FERC/USACE MOU will be interpreted in different ways by different districts, counter to the stated objectives of the Draft 408 EC.

To avoid confusion and inconsistency, NHA respectfully submits the following clarifications and recommendations to improve Appendix F of the Draft 408 EC:

- As mentioned above, one of the most important changes that can be made in the Draft 408 EC is to modify the “Purpose” section of Appendix F to clearly state that when a 408 permit is required for non-federal hydropower development on USACE infrastructure, then Appendix F and the FERC/USACE MOU govern the review process. Currently, Appendix F states “the purpose of this appendix is to provide supplemental guidance to be used in conjunction with guidance in the main EC...”
- NHA recommends including the entire FERC/USACE MOU, including Attachment A, in Appendix F, versus only referencing the FERC/USACE MOU in the References section. We believe this would aid both districts and divisions in their review of 408 applications for non-federal hydropower development.
- NHA recommends that the FERC/USACE MOU two-phased process be clearly identified as being the default process for new projects, and that a developer would need to opt out if they decide the two-phased approach is not beneficial. This new language would replace the current language in Appendix F, section F-3(1) that implies a developer must request the two-phased process outlined in the FERC/USACE MOU, “...to the extent the hydropower developer is willing to participate.” For existing projects (i.e. those pursuing or have already obtained a FERC license), the project proponent should be able to elect to utilize the FERC/USACE MOU processes to the greatest extent possible.
- Appendix F states the appendix is applicable to requests received from non-federal entities which have been granted a “preliminary permit or license” by FERC. For new projects, we believe a FERC preliminary permit should be required to enter Phase 1 of the MOU, and a license is required to enter Phase 2 of the MOU. However, as noted above, for existing projects already working their way through the licensing or 408 processes, we believe the project proponent should be able to elect to utilize the FERC/USACE MOU processes to the greatest extent possible.
- Appendix F briefly explains the difference between conventional and non-conventional hydropower, but it appears Appendix F and the Draft 408 EC apply equally to both. NHA recommends that Appendix F include the potential for a streamlined review process for non-conventional hydropower proposals (e.g., hydrokinetic, or other non-conventional waterpower

technologies) that would not require substantial modifications to existing USACE infrastructure. Similarly, NHA encourages USACE to utilize Draft 408 EC Appendix C, *Categorical Permissions*, for non-conventional hydropower projects. We appreciate that sufficient experience may not currently exist to make these determinations, and if not, we recommend close monitoring and data gathering of non-conventional hydropower applications to determine whether a streamlined review process or categorical permissions are appropriate in the future.

- The preamble of Appendix F should make clear that the National Environmental Policy Act (NEPA) requirements as part of FERC licensing would be followed under the FERC/USACE MOU and take precedent over the NEPA provisions in Appendix D of the Draft 408 EC, *NEPA and Other Environmental Compliance*. This will ensure FERC is the lead NEPA agency and USACE is the cooperating agency resulting in early coordination and communication, reduced duplication of effort, and greater efficiencies.

Environmental compliance is addressed in the Draft 408 EC, Paragraph 10 (d)(4), which appears to be consistent with the FERC/USACE MOU intent that FERC will be the lead NEPA agency for non-federal hydropower development, and USACE will be the cooperating agency to the maximum extent practicable. NHA believes that it is vitally important that the USACE engage fully in the FERC NEPA process as a cooperating agency and urge that this clarity be maintained in the final EC.

- In the future, NHA recommends aligning the review and modification of the 408 EC (every 2 years) with review and modification of the FERC/USACE MOU. Updating both documents concurrently would help reduce inconsistencies and confusion and increase efficiency.
- Under the FERC/USACE MOU and Attachment A, the developer must develop a Memorandum of Agreements (MOA) with USACE 408 in order to start construction and prior to the start of operation of the facility. NHA recommends, to the greatest extent possible, that required MOAs focus exclusively on construction and operational activities, and not be used to reopen decisions made during the 408 review and approval process.

### **III. Additional Draft 408 EC Recommendations, Clarifications and Improvements**

While we strongly recommend that Appendix F and the FERC/USACE MOU govern the review and processing of non-federal hydropower proposals, there are provisions in the main text of Draft 408 EC that would benefit the development of non-federal hydropower at USACE facilities. These provisions could be modified and clarified in the main text of the Draft 408 EC to apply to hydropower, or incorporated into Appendix F. These include:

- Review and Decision Timelines: We believe that the review and decision timelines in the Draft 408 EC, such as completeness determinations and review and decision phases, should be incorporated into Appendix F and take precedent over the FERC/USACE MOU and Attachment A. The Draft 408 EC requires a completeness determination within 30 days of receipt of 408 basic requirements, and then a review and decision within 90 days from the completeness determination. If 90 days cannot be met, then USACE will provide written notification to the applicant of why, and if a review and decision phase will exceed 120 days, the USACE is required to report these delays to Congress.

These review and decision timelines are superior to the FERC/USACE MOU and Attachment A, and should apply to non-federal hydropower development. They provide specificity and encourage concurrent review by the division offices and headquarters.

However, NHA is concerned about project proponents getting stuck in a never-ending completeness determination cycle, and we encourage USACE to develop a mechanism for project proponents to seek review of extended or multiple completeness determinations at the next higher level.

- Delegated Authority: NHA appreciates the USACE's objective to delegate 408 authority to district office's. However, we believe additional clarification is needed regarding district, division, and headquarters roles and responsibilities for non-federal hydropower development. The Draft 408 EC, Paragraph 13(c)(2), states that for non-federal hydropower development, "coordination and concurrence with the division Dam Safety Officer and the division Hydropower Coordinator is required prior to the final Section 408 decision." Further explanation of the coordination between the district and division and how their involvement fits within the stated review and approval timeframes would be helpful and appreciated.
- Public Notice Requirements: Public notice requirements are described for all types of 408 requests. NHA recommends that the public notice requirements for non-federal hydropower 408 processes be closely coordinated with FERC's public notice requirements for the licensing process.
- Existing Data: The Draft 408 EC discusses reliance on existing data for NEPA and avoiding duplication of effort/studies. As FERC is the NEPA lead agency for non-federal hydropower development Paragraph 10(d)(4) should be clarified that districts *shall* adopt or incorporate by reference FERC's Environmental Assessment (EA) and Environmental Impact States (EIS), unless the district finds substantial doubt as to the technical or procedural adequacy or omission of factors important to the Section 408 permission decision. Effective participation as a cooperating agency in the FERC NEPA process should obviate the need for additional environmental information in all but the most unusual cases where changes in project design after the FERC NEPA review is completed would result in potential for new, previously unevaluated environmental impacts.

However, if USACE does not adopt or incorporate by reference FERC's EA and EIS, NHA notes that Paragraphs 10(d)(3) and 10(d)(5) are inconsistent. The first strongly encourages districts to adopt and incorporate by reference existing NEPA documentation that exists for the project, while the second encourages the development of new NEPA documentation. At a minimum, the Draft 408 EC should describe how the adequacy of existing information versus the need for new information is determined.

- Technical Analysis and Design Requirements: The Draft 408 EC removes the 60% minimum design requirement and gives the district the authority to determine design levels on a case-by case-basis. Completion of phase I of the FERC/USACE MOU requires 30% design. To remove uncertainty related to what a percentage requirement means, and to remove inconsistent application of percent design requirements, NHA recommends that, pursuant to Phase I of the FERC/USACE MOU, the information contained in the FERC required Exhibit F satisfies the Phase I

design requirements, as Exhibit F provides a sufficient amount of design during the environmental review process. NHA recognizes that Phase II of the FERC/USACE MOU would require applicants to complete additional USACE's design requirements.

- **408 Waivers:** NHA recommends that, where the FERC license provides provisions that are duplicative to the issuance of a Section 408 permit, like the design review and approval, those portions of the Section 408 permit be waived to reduce unnecessary duplication and streamline the process. Typically, FERC licenses require coordination of design review and approval by the USACE prior to a FERC licensee starting construction. Once the design review is approved by the USACE, the licensee must provide the USACE's written design approval to the FERC before it will grant the start of construction. If the design review requirements for modifying a USACE structure are also part of the 408, the process is duplicative and subjects licensees to an inefficient, iterative review process between the FERC and the USACE that may produce different outcomes that the licensee must then reconcile. The Draft 408 EC should be revised to provide for a single design review and approval process that allows licensees to provide a substantive design that satisfies the USACE and FERC concurrently. This could be accomplished by a waiver by USACE of the need for a Section 408 approval if the FERC license requires the USACE to review and approve the design prior to a start of construction.
- **Multi-Phased 408 Review:** NHA believes the language included in Phase II of the FERC/USACE MOU and the description of activities and examples provided, provide sufficient flexibility for an applicant to file either a single 408 or utilize USACE's new multi-phased 408 process.

#### **IV. Conclusion**

NHA understands that some of our member companies are also submitting comments on the Draft 408 EC and proposing additional and significant revisions. We direct you to those comments for additional recommendations for consideration.

NHA appreciates the opportunity to provide these comments and recommendations on the Draft 408 EC. We are committed to working with USACE on the successful implementation of the Final 408 EC and look forward to continuing to grow our partnership in the future.

Sincerely,

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