

To: The Trump-Vance 2024 Presidential Transition Team  
From: The National Hydropower Association (NHA)  
Re: Policy Recommendations to Advance U.S. Hydropower and Water Power Technologies  
Contact: Michael Purdie, [michael@hydro.org](mailto:michael@hydro.org)  
Date: December 4, 2024

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## **2024 Presidential Transition Team Policy Recommendations to Advance U.S. Hydropower**

Despite the value of hydropower to grid reliability and resilience, the future of the existing fleet of baseload, emission-free hydropower generation is at risk. Not enough has been done to address the challenges that are pushing hydropower operators towards early retirement, jeopardizing approximately 40% of the existing non-federal hydropower fleet. There are also substantial and inefficient barriers to new development that limit the ability for owners and developers to site and construct new water power technologies.

### **Policy Recommendations**

Below, the National Hydropower Association (NHA) outlines a series of actions for the incoming Trump Administration that would greatly improve the regulatory and economic landscape for new and existing hydropower, pumped storage, and marine energy technologies. For further detail, the appendix below provides examples of specific issues, identifies appropriate agencies, and offers citations in support of NHA's policy solutions.

### **In the First 100 Days, the President should issue an Executive Order so that hydropower and pumped storage can help ensure American energy dominance by:**

1. Directing the U.S. Army Corps of Engineers (USACE) and the U.S. Bureau of Reclamation (Reclamation) to become cooperating agencies in non-federal hydropower licensing by the Federal Energy Regulatory Commission (FERC). This would help realize the power potential of non-powered dams, which constitute 97% of dams in the United States.
2. Directing the U.S. Department of Interior (Interior), U.S. Department of Commerce (Commerce), and the U.S. Department of Agriculture (Agriculture) to be more efficient and focused on effects of the specific hydropower project when exercising their mandatory conditioning authorities in a FERC licensing proceeding.
3. Directing the U.S. Fish and Wildlife Service (USFWS), National Marine Fisheries Service (NMFS), U.S. Forest Service (Forest Service), and Environmental Protection Agency (EPA) to improve their coordination and efficiency in non-federal hydropower licensing and development.
4. Clarifying that routine operations and maintenance activities of hydropower facilities do not require a FERC license amendment.

5. Voluntarily remand the final rules implementing Section 401 of the Clean Water Act (CWA) and promulgate new rules. Among other items, the new rules should limit the certification conditions to the discharge, not the activity as a whole.
6. Establishing a federal task force to explore how best to streamline the marine energy regulatory process.

**In the Year 2025, the President should:**

1. Ensure that the Department of Energy disperses all appropriated funds under the Section 242, 243, and 247 programs.
2. Work with Congress to reform the tax code by enacting federal tax support for the existing hydroelectric fleet, in order to support capital investments, as well as dam safety and environmental improvements to existing projects.
3. Work with Congress to modernize the hydropower licensing process at the Federal Energy Regulatory Commission through legislative and regulatory reforms.
4. Budget at least \$225 million for the Department of Energy's (DOE) Water Power Technologies Office (WPTO) for Fiscal Year (FY) 2026, including direction to WPTO to increase the allocation of federal funding awarded to private sector-led marine energy technology advancement and testing.
5. Work with Congress to refill funding under the Bipartisan Infrastructure Law sections 242, 243 and 247 grant programs.
6. Set a national marine energy deployment target of 500 MW by 2030 and 1 GW by 2035.
7. Launch a Marine Energy Demonstration Program within DOE to test and validate mature marine energy technologies
8. Direct the Secretary of Energy to use their existing authority to waive cost-share requirements for marine energy research and development.

**About NHA**

NHA is a non-profit national association dedicated to securing hydropower as a carbon-free and reliable energy source that provides power to an estimated 30 million Americans and employs approximately 70,000 working professionals. Its membership consists of more than 320 organizations, including public and investor-owned utilities, independent power producers, equipment manufacturers, and professional organizations that provide legal, environmental, and engineering services to the water power industry.

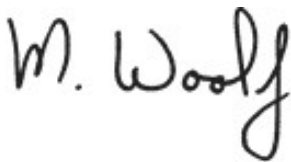
NHA promotes innovation and investment in all water power technologies, including

conventional hydropower, marine and hydrokinetic power systems,<sup>1</sup> and pumped storage hydropower. Water power plays an important role securing our nation's energy grid and increasing American energy independence, as well as integrating other carbon-free power sources, like wind and solar. NHA believes the next Administration has a unique opportunity to leverage both existing executive authorities and the emerging consensus between industry and environmental groups to advance American hydropower in support of U.S. electric infrastructure.

### **Conclusion**

NHA looks forward to working with the next administration to advance hydropower's value proposition to the United States and to encourage further commercialization of marine energy technologies. Please don't hesitate to contact me or my staff with any comments or questions.

Sincerely,



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<sup>1</sup> Section 45(c)(10) of the Internal Revenue Code defines marine and hydrokinetic renewable as energy derived from 1) waves, tides, and currents in oceans, estuaries, and tidal areas, 2) free flowing water in rivers, lakes, and streams, 3) free flowing water in an irrigation system, canal, or other man-made channel, including projects that utilize nonmechanical structures to accelerate the flow of water for electric power production purposes, 4) differentials in ocean temperature (ocean thermal energy conversion), or 5) pressurized water used in a pipeline (or similar man-made water conveyance) which is operated for the distribution of water for agricultural, municipal, or industrial consumption, and not primarily for the generation of electricity.

## **EXECUTIVE SUMMARY**

Hydropower has been the backbone of clean energy since the 1880s, faithfully serving as the single largest generator of renewable electricity in the U.S. for most of its history, while employing approximately 70,000 working professionals. Today, hydropower remains a critical part of the domestic energy landscape and a significant contributor to the supply of our nation’s electricity, accounting for 6.2% of total U.S. generation and 28.7% of renewable generation.<sup>2</sup> In 2022, the conventional hydropower fleet generated enough energy to power 30 million homes. In addition, pumped storage hydropower, a type of long-duration energy storage that moves water between two reservoirs, accounts for 96% of all utility-scale energy storage capability in the U.S.<sup>3</sup> This is because, unlike other technologies, the 22 GW of pumped storage capacity across the country can store 8-12 hours or more of continuous power. Additionally, pumped storage hydropower does not rely on the harvesting of critical minerals from other countries; both conventional hydro and pumped storage are domestically sourced and readily available resources that contribute to our nation’s energy security and independence. Together, these resources represent over 100 GWs of carbon-free, reliable, and resilient capacity.

As the grid changes, so too does the role of water power. Although no longer the largest source of clean energy, hydropower and pumped storage still provide irreplaceable benefits to the U.S. bulk electric system and have a pivotal role to play in the energy transition. For one, water power is the only source of carbon-free energy that offers flexible, baseload power when the sun is not shining or the wind is not blowing. Reservoirs containing clean, dispatchable operating reserves of hydroelectricity keep the lights on when other resources cannot. As a result, hydro is naturally suited to complement the expansion of variable renewables. Hydropower also offers a wide range of grid scalable ancillary services that strengthen the overall reliability of our electric system. Many of these services, like voltage control and frequency response, are made possible by the unique attributes of hydropower not found in other sources of renewable energy. These strengths, particular to water power, serve to protect our electric infrastructure from the everyday operational challenges that most people never see. They are also crucial in the face of extreme adversity. From natural disasters to malicious attacks on electric infrastructure, hydropower has the capability to improve preparedness and mitigate damage. Importantly, hydropower provides 40% of our nation’s “blackstart” capability, meaning it can restore systemwide power after a total blackout. Millions of people across North America depend on hydropower to provide security against these unexpected threats. Without it, the U.S. grid is less reliable, less resilient, and less secure.

Marine energy, which utilizes currents, tides, waves, and other water-based resources to produce carbon-free power, represents a significant opportunity for the United States to meet its carbon reduction targets and enhance energy independence. Current estimates suggest that marine energy could contribute up to 50 GW of capacity by 2050, enough to power millions of homes and generate significant socio-economic benefits. However, U.S. progress lags behind global competitors in Europe and the U.K., which have already advanced early commercial projects.

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<sup>2</sup> There are over 2000 hydro plants across the country, with a total generating capacity of around 80GW. U.S. Department of Energy, Hydropower Market Report (2023), p.2

<sup>3</sup> There are 43 plants totaling 22GW of capacity. Id.

To fully realize the potential of U.S.-based marine energy technologies, federal leadership and investment is urgently needed. By focusing on technology advancement, market development, regulatory reform, and financial incentives, the incoming Administration can enable this vital carbon-free resource to take its place alongside solar, wind and hydropower to increase American energy dominance and grid security.

### **The Risk of Inaction**

Despite the clear value of hydropower and its role in balancing and securing the grid, the future of the existing fleet is at risk. Not enough has been done to address the challenges that push hydropower and pumped storage operators towards early retirement, including an antiquated licensing and relicensing process, lack of federal tax parity, and inadequate compensation in wholesale markets. Inaction on these issues has created an expensive, risky, and generally inhospitable landscape for hydropower compared to other renewables, jeopardizing the existence of 451 FERC-licensed water power facilities totaling 15,700 MW in capacity that are set to expire between 2020-2035.<sup>4</sup> This is approximately 40% of the non-federal fleet. Under the status quo, many of these plants may choose to surrender their licenses, disrupting grid stability and creating a new demand for similarly situated resources. This scenario leads to an increase in both emissions and electricity costs.<sup>5</sup>

Moreover, these inadequacies in federal and market policy have also stifled the expansion of new hydropower by causing major project delays and discouraging private investment. To fully decarbonize the energy sector while ensuring reliable and resilient electricity in the United States, policymakers and market designers must address these challenges in support of hydropower.

It is critical that the incoming Administration include hydropower, pumped storage hydropower, and marine energy in its all-of-the-above energy strategy. These are critical sources of American-made energy that increase the reliability of the power grid, enhance national security, and grow the economy.

## **The First 100 Days**

The incoming Administration has the opportunity to use legal tools already at its disposal to promote and advance the use of hydropower without seeking new authority from Congress. While many of the challenges to hydropower development identified in this document must be addressed through legislation, existing law and legal authorities provide immediate opportunities for improvements to regulatory processes.

This report presents a suite of options that the President could implement **within the first 100 days** to promote new hydropower development and modernize the hydropower licensing process. These options address the following priorities:

### **Recommendation 1: Unlock the Potential of Non-Federal Hydropower at U.S. Corps of Engineers and Bureau of Reclamation Facilities**

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<sup>4</sup> 2023 Hydropower Markets Report Section 1.5

<sup>5</sup> How Today's Hydropower Impacts Tomorrow's Grid: Counterfactual Scenarios Showing Grid Impacts if Hydropower Goes Away Section 6 (2023)

## **Background:**

While hydropower's existing contribution to the nation's energy system is significant, there is tremendous opportunity to increase capacity. One such growth area is at existing federal dams, conduits, and canals under the jurisdiction of the U.S. Army Corps of Engineers (USACE) and Bureau of Reclamation (Reclamation). The vast majority of U.S. dams and water infrastructure were constructed for purposes other than hydropower generation, such as water supply, flood control, irrigation support, and navigation. These dams include structures and impoundments that provide opportunities to install hydropower generation with little or no incremental environmental impact.

A 2012 study by the U.S. Department of Energy (DOE) concluded that the untapped power potential of these dams is anticipated to be upwards of 12 GW, 8 GW of which is concentrated into just 100 dams. Yet, of the top 100 USACE facilities identified with the most hydropower potential, only 6 have been developed in the past decade. This same report identified 268 MW available at existing Reclamation dams. In addition, a 2015 DOE report highlights that an additional 103 MW of capacity could be tapped at existing conduits and irrigation canals on the Reclamation system. In its recent Renewable Energy Update, Reclamation reports even more potential and interest in developing hydropower on its infrastructure and associated reservoirs. Using the findings in the aforementioned studies, capitalizing on existing federal infrastructure to develop hydropower would power a minimum of 3.3 million homes across the U.S.

Additionally, as new projects have demonstrated, adding hydropower to federal facilities can be done in such a way that works in concert with the other Congressionally authorized purposes of the dams. In March 2015, the U.S. Departments of Energy, Interior, and the USACE extended their Memorandum of Understanding (MOU) for Hydropower, originally executed in March 2010, to promote new hydropower development at existing federal facilities and on federal lands. The MOU sets goals to identify opportunities for new hydropower generation at undeveloped federal dams, the addition of new pumped storage facilities, and improvements at existing facilities.

## **Current Barriers:**

For proposed hydropower development at federal dams managed by USACE, project developers report significant resistance from USACE staff across the U.S.—particularly at the district level—in working cooperatively with hydropower developers to license, permit and otherwise authorize these proposed facilities. There is a strong sentiment that installing renewable hydropower at USACE-managed federal facilities is not a priority.

USACE rarely participates in the FERC licensing process for proposed hydropower projects at federal dams under its jurisdiction. Its absence often requires the developer to begin anew, after FERC issues the license, with the conduct of studies and environmental reviews, as USACE completes its environmental review under NEPA and issues permits and authorizations under the CWA and Rivers and Harbors Act (RHA). The sequential nature of these permitting activities adds significant time and expense to the deployment of new



hydropower resources.

All too often, without clear directive or the lack of a strong “champion” in the district, hydropower project work is given low-priority status and is reviewed and processed only as time permits, after “normal” USACE work.

Even though environmental reviews under the National Environmental Policy Act (NEPA) are required for both FERC’s licensing and the various permits and authorizations issued by USACE under the CWA and RHA, most districts do not accept FERC’s invitation to be a cooperating agency with FERC in its NEPA analysis, despite the fact that such cooperation is available under the Council on Environmental Quality’s (CEQ) NEPA regulations and encouraged in the recent Memorandum of Understanding between FERC and USACE and USACE’s Section 408 Engineering Circular. By not participating as a cooperating agency, districts have been reported to impose duplicative study requirements and environmental conditions, as well as conditions that differ from FERC license conditions and environmental analysis, which creates delay and adds uncertainty.

Developers have also observed that some USACE districts are averse to hydropower development and work actively to discourage its development by denying the developer access to data and refusing to share baseline operating information. Some USACE district personnel have refused to even share such information with FERC and have imposed restrictions on data access beyond what is required by USACE Headquarters. Even in instances in which district personnel share baseline data, districts have not always notified developers when they decide to change operations that could affect economics or environmental impacts of the proposed hydropower project, such as changing flow regimes. Such changes fundamentally affect the design, operation, and economics of a project and can cost significant funds and extended time to analyze.

**Proposed Actions:**

*Recommendation 1A Executive Goal Setting:* The President should set a goal to double the economically and environmentally feasible hydropower resources at federal infrastructure administered by USACE and Reclamation. Currently, there is approximately 3,000 MW of non-federal capacity at USACE infrastructure and 500 MW at Reclamation infrastructure. Development would result in new energy production, greater economic development within the region, and the creation of new American jobs.

*Recommendation 1B Federal Permitting Dashboard:* The President should direct all proposed non-federal hydropower projects at USACE and Reclamation facilities to be included on the Federal Permitting Dashboard.

*Recommendation 1C Cooperating Agencies:* For projects requiring licensing by FERC, the President should direct USACE and Reclamation to be cooperating agencies in FERC’s environmental review under NEPA, and to otherwise participate in the FERC licensing process within the timelines established by FERC regulations.

*Recommendation 1D Increased Funding:* The President should commit to significantly increase funding for hydropower operations and maintenance activities at USACE and Reclamation facilities, to increase performance of the federal system.

*Recommendation 1E Concurrent Permit Applications:* The President should direct USACE to amend its regulations and policies to require its personnel to process a CWA Section 404 permit application concurrent with FERC's licensing process.

*Recommendation 1F CWA Permits Pre-RHA:* The President should direct USACE to amend its regulations and policies, such that it will issue CWA 404 permits prior to any required authorization under RHA section 14 (33 U.S.C. § 408).

*Recommendation 1G Technical Focus:* The President should direct USACE to address all environmental issues associated with a project at a USACE-managed federal dam in the FERC licensing process and any permit required under CWA 404 (including any RHA section 10 authorization), and to focus the authorization required under RHA section 14 (33 U.S.C. § 408) solely on technical and engineering issues related to the hydropower project's use of the federal dam. Moreover, RHA section 14 authorizations should be processed concurrently with FERC's pre-construction review, such that dual review by both agencies does not delay the commencement of construction.

*Recommendation 1H State Water Quality Certification:* The President should direct USACE to accept a state's water quality certification, issued pursuant to CWA section 401 in the context of the FERC licensing, as satisfying the water quality certification requirement in any permit issued by USACE in furtherance of the project, such as CWA section 404, or section 10 or 14 of RHA. This approach is expressly authorized under CWA section 401(a)(3) (33U.S.C. § 1341(a)(3)).

*Recommendation 1I Senior Executive for Hydropower Projects:* The President should direct USACE to designate a Senior Executive Service official within its headquarters, and who has direct supervisory authority over staff at the local/district level involved in processing proposed hydropower projects, to assume responsibility and accountability for the timely and consistent decisions on proposed non-federal hydropower projects throughout the agency. This official should be empowered to: (1) resolve disputes between the agency and the developer; (2) be a resource for agency personnel, developers, resource agencies and stakeholders relating to hydropower development with the agency's jurisdiction; (3) ensure that the agency engages with other federal and state agencies effectively, and in a manner that minimizes duplication of effort and other inefficiencies; (4) coordinate with FERC on licensing matters; and (5) otherwise facilitate timely action on all aspects of federal permitting required for hydropower development.

*Recommendation 1J Project Delivery Team:* The President should direct USACE to designate a "Project Delivery Team" for each proposed project, consisting of USACE personnel within the district, division, and at headquarters. The Team should be accountable to the Senior Executive Service official, described above, who has overall responsibility for non-federal



hydropower development within USACE. Each Project Delivery Team will be responsible for working with the developer, coordinating with other federal and state resource agencies, and otherwise directly processing proposals to develop hydropower on USACE dams.

*Recommendation 1K Early Developer Coordination:* The President should direct that each USACE Project Delivery Team work with the developer early in the process, including review of a developer’s preliminary design documents and providing preliminary feedback to the developer on the project design, as well as direction on permits and measures necessary for USACE to authorize all components of the project, including engineering designs and measures under RHA section 14 (33 U.S.C. § 408).

<b>Unlock Potential of Non-Federal Hydropower at U.S. Corps of Engineers and Bureau of Reclamation Facilities</b>	
<b>Agency (s)</b>	U.S. Corps of Engineers (USACE) Bureau of Reclamation (Reclamation)
<b>Program</b>	Federal Energy Regulatory Commission (FERC) licensing under the Federal Power Act (FPA) USACE permitting under the Clean Water Act (CWA) and Rivers and Harbors Act (RHA) Reclamation issuance of leases of power privilege
<b>Authority</b>	CWA sections 401 & 404 (33 U.S.C. §§ 1341, 1344) FPA (16 U.S.C. § 791a <i>et seq.</i> ) National Environmental Policy Act (NEPA) (42 U.S.C. § 4321 <i>et seq.</i> ) Town Sites and Power Development Act of 1906 (43 U.S.C. § 522) Reclamation Project Act of 1939 (43 U.S.C. § 485 <i>et seq.</i> ) RHA, 33 U.S.C. §§ 403, 408 Water Resources Reform and Development Act of 2014, 33 U.S.C. §§ 408a and 2321b) Reclamation Small Conduit Hydropower Development and Rural Jobs Act (43 U.S.C. 485k note) Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 § 3087 (amending 16 U.S.C. 590z-7) Council on Environmental Quality (CEQ) NEPA regulations, 40 C.F.R. §§ 1501.6 and 1508.5. USACE NEPA regulations, 33 C.F.R. § 230

**Recommendation 2: Directing U.S. Departments of Interior, Commerce, and Agriculture to be More Efficient and Focused on Effects of the Specific Hydropower Project when Exercising their Mandatory Conditioning Authorities in a FERC Licensing Proceeding.**

## **Background:**

Under section 4(e) of the FPA, federal land management agencies are authorized to submit conditions for the adequate protection and utilization of federal reservations occupied by a hydropower project. Under FPA section 18, the U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) are authorized to prescribe fishways. Conditions submitted under these authorities are considered “mandatory” because the U.S. Supreme Court has held that FERC cannot reject or modify these conditions and prescriptions and must incorporate them into the FERC license for the project. *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765 (1984). In *City of Tacoma v. FERC*, 460 F.3d 53, 131 (D.C. Cir. 2006), the U.S. Court of Appeals for the D.C. Circuit held, among other things, that Section 4(e) is not limited only to those portions of the federal reservation that are occupied by the hydropower project. Instead, the conditions can be imposed to protect areas of the reservation that are well downstream of the project, or otherwise not proximate to the project. The court in *City of Tacoma* clarified, however, that mandatory conditions submitted under Section 4(e) must address project-related effects.

In 2005, under the Energy Policy Act of 2005 (EPAAct 2005), Congress amended sections 4(e) and 18 to provide that, where mandatory conditions and prescriptions are disputed with respect to issues of material fact (e.g., disputes over study results, data, or scientific questions), licensing parties to the FERC proceeding are entitled to a determination of the issue on the record after an evidentiary trial-type hearing (TTH), including discovery and cross-examination. The TTH allows for resolution of factual issues administratively prior to the licensing decision, rather than relying on expensive and time-consuming litigation in the court of appeals after a license is issued by FERC. In addition, EPAAct 2005 added section 33 to the FPA, which authorizes hydropower licensing parties to submit alternatives to mandatory conditions. Section 33 directs the Secretary concerned to adopt an alternative in lieu of its own condition, if the alternative at least as protective as the Secretary’s original condition but does so at a lower cost or results in improved project operations.

EPAAct 2005 also requires an agency to document that it gave “equal consideration” to the effects of the conditions adopted (and alternatives rejected) on energy supply, distribution, cost, flood control, navigation, water supply, air quality and other aspects of environmental quality. The goal of this provision is to ensure that a hydropower project’s many benefits are preserved as fully as possible during the licensing process while at the same time providing for the appropriate and necessary level of environmental impact mitigation. In November 2005, the Departments of the Interior, Commerce, and Agriculture jointly issued interim final rules establishing procedures to implement these provisions of EPAAct 2005. The Departments updated these regulations in March 2015.

## **Current Barriers:**

The Secretaries’ implementation of mandatory conditioning authority under the FPA presents significant procedural challenges to new hydropower development and reauthorization of existing projects.

### *“Equal Consideration” Requirement*

The plain language of FPA section 33 requires the Secretaries to submit into the public record, with any 4(e) condition or section 18 prescription, a written statement demonstrating that the Secretary gave equal consideration to the effects of the conditions adopted and alternatives rejected on energy supply, distribution, cost, flood control, navigation, water supply, air quality and other aspects of environmental quality. Since EAct 2005's passage, however, the Secretaries repeatedly and consistently have declined to give "equal consideration" when submitting "any" mandatory condition, as required by the statute. Instead, the Secretaries have narrowly interpreted this requirement to apply only when a party submits an alternative condition.

For example, shortly after the Secretaries adopted their initial rule implementing EAct 2005, a licensee filed a motion to reject a fishway prescription, on the basis that the Secretary had not included an equal consideration statement. In response, the Secretary indicated that it is under no obligation to apply the "equal consideration" standard to mandatory conditions unless an alternative is submitted under FPA section 33. In their recent revisions to the interim final rules, the Secretaries continued to maintain this position.

#### *Alternative Mandatory Conditions*

EAct 2005 provides that if a party develops an alternative condition or prescription that meets the level of protection required for the resource, but at a lower cost or with an improved operation of the project, the Secretaries must adopt the alternative in lieu of their own condition. In practice, however, Secretaries have not implemented this requirement. A 2010 Government Accountability Office (GAO) Report on Hydropower Relicensing found that instead of accepting an alternative, the Secretary concerned frequently develops a modified condition not submitted by any party. The Secretaries' decision to forgo this analysis mandated under EAct 2005 is important, because the whole purpose is to require all parties to develop the most effective and economic solution. By ignoring this statutory directive, this accountability is lost, along with any discipline to develop those solutions. In fact, the 2010 GAO Report found that, after five years of EAct 2005 implementation, no Secretary had ever adopted any alternative submitted by a licensing participant.

#### *Accessibility and Fairness of Trial-Type Hearings*

EAct 2005 was intended to afford licensing participants an opportunity to obtain a TTH to ensure that the most crucial facts—supporting what typically are the most costly and extensive environmental protection measures in a license—are scrutinized and confirmed through a hearing process. In practice, however, the Secretaries have crafted a TTH process that is biased against parties challenging mandatory conditions and extraordinarily burdensome. In the years since enactment of EAct 2005, only 3 TTHs have proceeded through final disposition by an administrative law judge (ALJ). Among the problems experienced in the TTH process:

- The Secretaries have required the party requesting the TTH to bear the burden of proof to demonstrate, by a preponderance of the evidence, a lack of factual support for the Secretary's condition. As the proponents of the submitted mandatory condition, standard trial practice would require the Secretaries to carry the burden of proof.

- The Secretaries' TTH regulations do not permit the resolution of key factual disputes related to the criteria for alternative conditions (e.g., disputes related to costs or effectiveness of alternative measures).
- The Secretaries have characterized factual issues ripe for a TTH as “policy” matters to evade a hearing on the issue.
- The TTH procedures do not require the Secretaries to consolidate TTHs when issues are raised in response to multiple agencies' conditions, forcing the licensee to concurrently litigate duplicative issues in two separate hearings, before two separate ALJs, in two separate venues—at times at opposite ends of the U.S.
- The Secretaries' procedures embody an extremely narrow interpretation of the 90-day hearing requirement under EAct 2005, imposing unreasonable and unworkable time constraints on participants.

#### *Avoidance of TTHs and Alternative Mandatory Conditions*

Agencies have used their separate authorities under the Endangered Species Act (ESA), CWA, the Federal Land Policy Management Act (FLPMA), and other federal programs, to avoid TTHs and alternative mandatory conditions. For example, at a small project in California, NMFS imposed expensive fish passage requirements in its biological opinion issued under ESA section 7, and avoided using its FPA section 18 fishway authority, thereby stripping the licensee of the protections of a TTH and alternatives afforded under EAct 2005.

In addition, because the Secretaries' TTH rules provide that a party must seek a TTH request within 30 days after the Secretaries submit their preliminary conditions, they can avoid a TTH by waiting until after this deadline passes to submit entirely new conditions. In the relicensing of a California project, for example, the USFWS submitted modified FPA section 4(e) conditions after the deadline for requesting a TTH. USFWS included in its modified conditions several new, significant measures—including a requirement to implement project ramping rates, which significantly changed and devalued project operations. In response, the licensee requested a TTH, which USFWS rejected on the basis that the TTH process is only available for preliminary conditions.

#### *Overreaching Mandatory Conditions*

Although the D.C. Circuit in the City of Tacoma case confirmed that mandatory conditions must address effects of the hydropower project, in many instances agencies have not followed this constriction—and instead have leveraged the “mandatory” nature of these conditions to impose unreasonable obligations upon hydropower licensees. In fact, FERC has concluded many times that submitted conditions are unwarranted (although, of course, FERC has no statutory authority to reject or modify these conditions). For example:

- At a project in Washington, NMFS issued a “no jeopardy” opinion, agreeing with FERC's conclusion that the project would not jeopardize the continued existence of steelhead trout, but nonetheless imposed, as a condition of its incidental take

statement, a requirement to construct expensive upstream fish passage facilities. FERC found that the condition rendered the project uneconomic, and therefore rescinded the license.

- At a small project in California, NMFS imposed expensive fish passage requirements, despite FERC's conclusion that providing fish passage around the dam was not justified given: (1) the small number of adult steelhead observed passing the downstream dam; (2) the engineering challenges; and (3) the high cost.
- At a project in Washington, the licensee and state water quality agency reached agreement on water quality conditions, which were included in the CWA section 401 certification under the CWA. Nonetheless, USFWS imposed a mandatory condition requiring complex water quality monitoring at an annualized cost of \$151,000, even though FERC found that such monitoring would be of little value.
- At a small project in Wisconsin, both federal and state agencies required seasonal upstream and downstream fish passage, despite FERC's decision in the NEPA document not to recommend fish passage because it found that the fisheries above and below the project were healthy and diverse.
- At a project on the Texas-Louisiana border, federal fish agencies pressed the licensees to install upstream and downstream American eel passage facilities, despite the project's location well outside the primary range for eels, the presence of thousands of miles of habitat downstream of the project, and the fact that relicensing studies captured only 17 eels downstream of the project during a two-year fish sampling study.
- At a project in Wisconsin, the Secretary of the Interior imposed a section 4(e) condition requiring the licensee to lower the project reservoir by nine inches (and contribute \$200,000 toward planting and monitoring wild rice) to reverse the depletion of wild rice at the reservoir, even though it would cause a significant impact upon the entire project, and the federal reservation covered only a minute portion of the project shoreline area.
- At a Project in California, USFWS imposed a section 4(e) condition requiring the licensee to install a portable bridge on Lake Isabella (owned by the USACE and not part of the project) and to conduct flow measurements and fish monitoring in areas outside the project boundary.
- At a project in Washington, the Secretary of the Interior required the licensee to mitigate for the loss of wildlife habitat on reservation lands, despite a prior settlement under which the licensee had already purchased and managed over 700 acres of wildlife lands to address habitat losses from the reservoir's inundation of lands within the project boundary, including those on the reservation, and FERC's conclusion in its NEPA document that no further wildlife enhancement was needed.

**Proposed Actions:**

The President should direct the Secretaries of Agriculture, Commerce, and Interior (collectively, Secretaries), to:

*Recommendation 2A Equal Consideration:* Adhere to the “equal consideration” requirement under EPAct 2005 (codified at 16 U.S.C. 823d) for every mandatory condition submitted to FERC under FPA section 4(e) or 18—and not only when a party submits an alternative condition.

*Recommendation 2B Alternative Mandatory Conditions:* Properly implement the requirement under EPAct 2005 (codified at 16 U.S.C. 823d) to adopt—without modification—an alternative mandatory condition that meets the statutory criteria, and to cease their practice of developing a revised modified condition in response to a proffered alternative.

*Recommendation 2C Trial Type Hearings:* Amend their EPAct 2005 implementation regulations:

- I. To consolidate all TTHs in each licensing proceeding to occur before a single ALJ, chosen at random;
- II. To provide that the proponent of a challenged mandatory condition or alternative (including the Secretary concerned) bears the burden of proof for such condition or alternative;
- III. To allow additional time in the TTH process, recognizing that the 90-day hearing requirement under EPAct 2005 can be reasonably interpreted as the hearing itself, and not pre- or post- hearing procedures and decision making by the ALJ; and
- IV. To allow a licensing participant an opportunity to submit an alternative or obtain a TTH whenever the Secretary modifies or imposes a new mandatory condition.

*Recommendation 2D Cease Evasive Practices:* Cease their practice of using other statutory authorities to evade the rights granted to licensing parties under EPAct 2005 to obtain a TTH and submit alternative conditions. For any permit or measure imposed by the Secretaries under any other statutory authority (e.g., CWA, ESA, or FLPMA) that is within the scope of mandatory conditioning authority under the FPA, the Administration should require such measure to be submitted under FPA section 4(e) or 18, as appropriate.

*Recommendation 2E Project Related Effects:* Submit mandatory conditions that are within the scope of their authority under FPA sections 4(e) and 18—and particularly conditions that address project-related effects. Should FERC conclude that a submitted mandatory condition is unnecessary to address project effects, the President should direct the Secretary to conduct additional review at headquarters, to reevaluate the need for the submitted condition in light of FERC’s conclusions.



Recommendation 2: References	
<b>Agency</b>	U.S. Department of the Interior U.S. Department of Commerce U.S. Department of Agriculture
<b>Program</b>	FERC licensing under the FPA
<b>Authority</b>	FPA section 4(e) (16 U.S.C. § 797(e)) (as amended by section 241 of the Energy Policy Act of 2005 (EPAAct 2005)) FPA section 18 (16 U.S.C. § 811 (as amended EPAAct 2005 section 241)) 43 C.F.R. Part 45 (Interior EPAAct 2005 rules) 7 C.F.R. Part 1 (Agriculture EPAAct 2005 rules) 50 C.F.R. Part 221 (Commerce EPAAct 2005 rules)
<b>References</b>	<i>Hydropower Relicensing: Stakeholders’ Views on the Energy Policy Act Varied, but More Consistent Information Needed</i> , GAO-10-770, August 2010. <a href="http://www.gao.gov/new.items/d10770.pdf">http://www.gao.gov/new.items/d10770.pdf</a> <i>Resource Agency Hearings and Alternatives Development Procedures in Hydropower Licenses</i> , Revised Interim Final Rule, March 31, 2015. <a href="https://www.federalregister.gov/articles/2015/03/31/2015-06280/resource-agency-hearings-and-alternatives-development-procedures-in-hydropower-licenses">https://www.federalregister.gov/articles/2015/03/31/2015-06280/resource-agency-hearings-and-alternatives-development-procedures-in-hydropower-licenses</a> National Hydropower Association’s Comments on Revised Interim Final Rules (June 2015), available at: <a href="http://www.hydro.org/wp-content/uploads/2015/06/NHA-Comments-on-Revised-Interim-Final-Rules-Trail-Type-Hearings-and-Alternative-Conditions.pdf">http://www.hydro.org/wp-content/uploads/2015/06/NHA-Comments-on-Revised-Interim-Final-Rules-Trail-Type-Hearings-and-Alternative-Conditions.pdf</a>

### Recommendation 3: Improved Coordination and Efficiency of Other Federal Authorizations Applicable to Hydropower Licensing and Development

**Background:**

FERC’s issuance of a hydropower license is a complex and lengthy process, as FERC’s action triggers authorities held by other federal and state resource agencies. Statutes like the ESA and CWA, for example, provide substantive authorities to the states and federal resource agencies to review and approve proposed new projects, as well as the reauthorization of existing projects. These agencies’ statutory responsibilities are an important part of the project review process and for resource protection. However, there is no mechanism to coordinate all agencies’ programs to reduce duplication of effort, encourage concurrent review and collaboration, and ensure timely action. Rather, each of these individual authorizations under federal law largely occurs in a disjointed, separate, and often sequential manner. The current regulatory landscape causes significant delays, increases costs, creates inconsistent agency directives, and stifles new project development.

In the Energy Act of 2000, Congress directed FERC to investigate ways to reduce the cost and time of the hydropower licensing process. Upon completing a comprehensive investigation of impediments in the licensing process—reviewing data as far back as the 1980s—FERC concluded that CWA water quality certification, as well as other factors, cause significant delay. In response to Congress’s direction to provide recommendations to address the delays, FERC (among other things) encouraged more centralized management of the approval process and better coordination among agencies involved.

More recently, a FERC Commissioner testified in Congress that continued delays in receiving the multiple federal and state agency approvals required before FERC can issue a license are significantly impeding the relicensing of existing facilities and suppressing new hydropower project proposals—in some cases for several years:

“It is a fact that the licensing process of hydropower projects (and the re-licensing of existing projects) is an expensive and multi-year process. However, most of the cost and time involved in this process can be traced to the requirements of the federal hydropower licensing law. This existing law emphasizes both extensive environmental reviews of a project’s impacts and a role for federal and state resource agencies. There are no consequences to these agencies if they miss deadlines that are part of the Commission’s licensing process or of the laws and regulations they must comply with before the Commission can issue a license, such as the Endangered Species Act and the Clean Water Act. For those members interested in promoting hydropower development, an examination of this and related laws and specifically the roles and responsibilities of resource agencies could help streamline the licensing process and allow greater certainty for those seeking to develop this abundant renewable resource.” FERC Commissioner Philip Moeller, 2011 (emphasis added).

### **Current Barriers:**

The lack of centralized coordination and schedule discipline in the hydropower approval process causes excessive delays and unnecessary duplication of effort. For example:

- Although ESA regulations require formal consultation to conclude with a biological opinion within 135 days, USFWS and NMFS routinely fail to meet this regulatory deadline—in some cases by an inordinate amount of time. In several hydropower licensings in the Southeast, biological opinions on shortnose and Atlantic sturgeon were delayed for many years.
- At a hydropower project in California, a biological opinion on green sturgeon has delayed, for over 6 years, the implementation of a ground-breaking, comprehensive relicensing settlement—agreed to by over 50 agencies and stakeholders, including USFWS and NMFS—which would provide approximately \$1 billion in numerous environmental, recreational, and other public benefits.

- Similar delays in biological opinions persist at other hydropower projects located in Idaho, Oregon, California, Washington, Ohio, and West Virginia.
- Applicants are routinely required to withdraw their application for a state CWA section 401 water quality certificate because the states cannot act upon it within the one-year timeframe (for action or waiver) established under federal law (the alternative to which is denial of certification) 33 U.S.C. § 1341(a). Illustrating this issue, FERC stated in an order that of the 43 then-pending license applications for which FERC staff had completed environmental analysis, 29 (67 percent) were awaiting state water quality certification. Thirteen of these projects are in California. Since that FERC order (issued in late 2014), FERC was finally able to move forward and issue licenses for some of these projects—but only for two California projects, which had been waiting for 7 years for the state to issue water quality certification.
- For new project development on certain federal lands, a hydropower operator must obtain a special use permit under FLPMA. Often, the FLPMA permitting agency does not participate as a cooperating agency in FERC's preparation of the NEPA document, requiring the agency to undertake a separate NEPA analysis. Because this occurs after the FERC licensing, the sequential processing of the FLPMA permitting causes additional delays.

### **Proposed Actions:**

To address these challenges, the President should:

*Recommendation 3A Expedite Biological Opinions:* Direct NMFS and USFWS to expeditiously complete any biological opinion required in the licensing or relicensing of a hydropower project that has been pending for more than one year.

*Recommendation 3B Identify Studies Early:* Require all federal departments, agencies and bureaus to engage in the FERC licensing effort from the very beginning of the process—in accordance with FERC's regulations—to identify studies and other information needed to complete their authorizations under federal law and collaborate with FERC during the licensing process to encourage concurrent rather than sequential action.

*Recommendation 3C State Best Practices:* Direct EPA to conduct a study with recommendations on best practices for states to complete water quality certification decisions within the one-year deadline provided under CWA section 401, and in a manner that minimizes delays.

*Recommendation 3D Involve Staff Early:* Direct USFWS and NMFS to involve all decisional staff for each ESA section 7 consultation to be involved from the beginning of the licensing process, and throughout the entire process, to avoid delays, new issues raised by new staff on a project, and inconsistent decisions later in the process.

*Recommendation 3E Federal Permitting Dashboard:* Direct that all hydropower projects,

including those in relicensing, be included on the Federal Permitting Dashboard.

*Recommendation 3F Efficiency Task Forces and Reports:* Direct the newly created regulatory reform task forces within the resource agencies to review existing practices within their agency relative to their authorities on hydropower permitting, including relicensing, and develop an annual report to the White House on delays of any federal action relative to the permitting or relicensing of a hydropower project awaiting decision. The report shall include the reason for such delay and a schedule for completion of the expected action. Such reports shall be published and made available to the public in an effort to create greater transparency and accountability for agency decision making.

<b>Recommendation 3: References</b>	
<b>Agency</b>	U.S. Fish and Wildlife Service (USFWS) National Marine Fisheries Service (NMFS) U.S. Forest Service (USFS) U.S. Environmental Protection Agency (EPA)
<b>Program</b>	FERC licensing under the FPA Endangered Species Act (ESA) section 7 consultation State water quality certification under CWA Section 401 permit Federal Land Policy and Management Act (FLPMA) permitting
<b>Authority</b>	CWA section 401 (33 U.S.C. § 1341) ESA section 7 (16 U.S.C. § 1536) FLPMA (43 U.S.C. §§ 1701 <i>et seq.</i> ) FPA (16 U.S.C. § 791a <i>et seq.</i> ) Joint Regulations; Endangered Species Committee Regulations (50 C.F.R. Pt. 200-599)
<b>References</b>	<p>Testimony of FERC Commissioner Philip Moeller before the Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, July 7, 2011, P. 5-6.  <a href="http://www.ferc.gov/EventCalendar/Files/20110707120333-Commissioner%20Moeller's%20Testimony.pdf">http://www.ferc.gov/EventCalendar/Files/20110707120333-Commissioner%20Moeller's%20Testimony.pdf</a></p> <p>Report on Hydroelectric Licensing Policies, Procedures, and Regulations; Comprehensive Review and Recommendations Pursuant to Section 603 of the Energy Act of 2000 (2001), available at: <a href="https://www.ferc.gov/legal/maj-ord-reg/land-docs/ortc_final.pdf">https://www.ferc.gov/legal/maj-ord-reg/land-docs/ortc_final.pdf</a>.</p> <p>Exec. Order No. 13563, 14 Fed. Reg. 3821 (January 18, 2011) <i>Improving Regulation and Regulatory Review</i>, available at: <a href="https://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf">https://www.gpo.gov/fdsys/pkg/FR-2011-01-21/pdf/2011-1385.pdf</a>.</p> <p>Exec. Order No. 13610, 93 Fed. Reg. 28469 (May 14, 2012) <i>Identifying and Reducing Regulatory Burdens</i>, available at: <a href="https://www.whitehouse.gov/sites/default/files/docs/microsites/omb/eo_13610_identifying_and_reducing_regulatory_burdens.pdf">https://www.whitehouse.gov/sites/default/files/docs/microsites/omb/eo_13610_identifying_and_reducing_regulatory_burdens.pdf</a>.</p>

	<p>Exec. Order No. 13604, 60 Fed. Reg. 18887 (March 22, 2012) <i>Improving Performance of Federal Permitting and Review of Infrastructure Projects</i>, available at: <a href="https://www.whitehouse.gov/the-press-office/2012/03/22/executive-order-improving-performance-federal-permitting-and-review-infr">https://www.whitehouse.gov/the-press-office/2012/03/22/executive-order-improving-performance-federal-permitting-and-review-infr</a>.</p> <p><i>PacifiCorp</i>, 149 FERC ¶ 61,038, at P 13, n.15 (2014) (FERC order quantifying pending water quality certifications), available at: <a href="https://www.ferc.gov/whats-new/comm-meet/2014/101614/H-3.pdf">https://www.ferc.gov/whats-new/comm-meet/2014/101614/H-3.pdf</a>.</p> <p><i>Permitting Dashboard</i> - <a href="https://www.permits.performance.gov/">https://www.permits.performance.gov/</a></p>
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## Recommendation 4: Clarify that Routine Operations and Maintenance Activities at Hydropower Facilities Do Not Require a FERC License Amendment

### Background:

Over the last several years, an increasing number of NHA members have come forward with anecdotal evidence suggesting an increase in required non-capacity amendments (under 18 CFR 4.201). Yet, there has been no explicit change in federal policy associated with this reported change in agency behavior. The Commission did not institute a rulemaking process, nor did Congress pass any laws modifying the language of Articles 2-4 of Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters of the United States (Form L-1).

The current version of Form L-1 was originally promulgated in 1975. These articles establish that FERC review and approval is required only by a "substantial change" in the FERC-approved "maps, plans, specifications, and statements described and designated as exhibits and approved by the Commission in its order as art of the license." (Article 2). These articles contemplate that if the licensee makes "minor changes" without FERC's prior approval, FERC may require alterations. (Article 3). While these articles provide that project operations, maintenance, "and any work incidental to additions or alterations authorized by the Commission" are subject to the inspection and supervision of FERC's regional engineers, the regional engineers' prior approval is only required with respect to "alterations" – not maintenance. (Article 4).

Historically, FERC's orders established a high bar for activities that constituted a "substantial change" under these Standard Articles – creating a regulatory climate in which licensees could quickly and effectively operate and maintain their facilities as circumstances required, without needing FERC review/approval (which would otherwise initiate a new "federal action" that would trigger obligations under NEPA, ESA, CWA, NHPA, and other statutes).

### **Current Barriers:**

Although FERC has not formally acknowledged a top-down change in agency interpretation of what constitutes “substantial,” the fact remains that hydropower owners are experiencing otherwise. This could be due to a variety of causal factors, including a consistent change in Commission practice. To determine whether these member experiences are isolated, project-specific incidents or if they are illustrative of a broader trend, further analysis was required. NHA’s analysis of eLibrary data has found the following trends:

- There is a statistically significant upward trend in the number of non-capacity license amendments submitted to FERC from 2000-2023.
- There has been a 165% increase in the number of non-capacity amendments between 2019-2023 as compared to 2000-2019, suggesting a sudden causal change during that time. This data does not support the hypothesis held by FERC that aging infrastructure or evolving state policy is the cause for the increase in amendments. If FERC was correct, the data would show a gradual increase from 2000-2023 without a sudden step-change post 2019.
- The average time it takes to complete a non-capacity license amendment from first submittal by licensee to final issuance by FERC has nearly doubled since 2019, taking approximately 500 days compared to just 253 days prior to 2019. This trend coincides with the increase in non-capacity amendments during that same period, suggesting that, as agency workload increases, the time it takes for FERC to complete amendments is growing longer.

These trends support evidence collected from NHA members in a qualitative survey, which found that there has been a notable change in the Commission’s interpretation of “substantial changes” to project works, resulting in an increase in lengthy and burdensome non-capacity license amendments. This includes work such as: expanding an existing parking lot within project boundaries, replacing flashboards, temporarily altering reservoir levels for routine maintenance, etc.

### **Proposed Actions**

*Recommendation 4A Routine Maintenance:* Congress should amend the Federal Power Act to clarify that routine operations and maintenance activities at hydropower facilities do not require a FERC license amendment.

*Recommendation 4B License Amendments Threshold:* The President should remind the FERC that license amendments are only for those activities that alter the project substantially.



Recommendation 4: References	
<b>Agency</b>	Federal Energy Regulatory Commission
<b>Program</b>	FERC Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters of the United States 18 CFR Subpart L – Application for Amendment of License
<b>Authority</b>	FPA Sections 9 and 10
<b>References</b>	“How the Upward Trend in Non-Capacity Amendments Delays Hydropower Modernization” dated September 9, 2024 - National Hydropower Association at <a href="https://www.hydro.org/powerhouse/article/how-an-upward-trend-in-non-capacity-amendments-delays-hydro-projects/">https://www.hydro.org/powerhouse/article/how-an-upward-trend-in-non-capacity-amendments-delays-hydro-projects/</a> Hydropower eLibrary at <a href="https://hydropowerelibrary.pnnl.gov/">https://hydropowerelibrary.pnnl.gov/</a>

## Recommendation 5: Voluntarily Remand the Final Rules Implementing Section 401 of the Clean Water Act (“CWA”) and Promulgate New Rules. Among Other Items, the New Rules Should Limit the Certification Conditions to the Discharge, Not the Activity as a Whole.

### **Background:**

When a federal agency is considering whether to issue a license or a permit, it cannot do so until a Section 401 water quality certification (WQC) is issued, or certification is waived. States and authorized tribes, where the discharge originates, are responsible for issuing the WQC. Section 401 of the CWA also requires certifying authorities to grant or deny within one year after receipt of the request. The EPA finalized new regulations on September 14, 2023, which replaced rules finalized in June 2020.

### **Current Barriers:**

As discussed above, the FPA provides FERC with the exclusive authority to license non-federal hydropower projects. However, as hydropower projects have discharges into the navigable waters of the United States, there is a requirement to receive certification from a certifying authority. Therefore, FERC’s issuance of a license is almost always subject to Section 401. As there are other permits or licenses that could result in a discharge, there are instances during the license term where additional WQCs are required. For example, as FERC is now requiring more license amendments for routine operations and maintenance work, this could

trigger additional WQC requests. Alternatively, if there's a need to modify the project works by which a Section 404 permit from the USACE is required, this would also be subject to certification under Section 401.

There are numerous instances where certifying authorities leverage the Section 401 certification process to require additional conditions which are far outside the bounds Congress intended when it passed the CWA. Below are examples from implementation of the 1970s era rule which is very similar to the 2023 Rule. For example:

- Support a feral hog task force and allow state access to the project area to trap and kill feral hogs.
- Construct and enhance public recreational facilities, including biking and hiking trails, parking, signage, boat access, portage routes, sanitary facilities, and trash receptacles.
- Donate or lease to the certifying state parcels of undeveloped, non-project land bordering a river and place restrictive covenants on non-project lands.
- Provide fish samples to the certifying state for testing of contaminants unrelated to the project.

The hydropower industry has significant history of certifying authorities working to circumvent the one-year certification requirement to issue or deny a WQC. Prior to the 2020 Rule being adopted, there were 17 license applications delayed at the FERC due to the failure of the certifying authority to issue the WQC. Eight of those applications had been delayed for at least a decade. Below are examples of instances where a certifying authority has attempted to circumvent the one-year requirement:

- A certifying authority would deem a certification request to be incomplete in order to prevent the one-year clock from starting.
- Requesting an applicant withdraw and resubmit the WQC request to start a new one-year period.
- Requiring a state regulatory process that takes longer than one year.
- Requiring a draft request for certification at least one year before the final license application is submitted to the FERC.
- Denying a WQC request without prejudice in order to force resubmittal.

### **Proposed Actions:**

*Recommendation 5A: Voluntarily Remand the 2023 CWA Section 401 final rule:* NHA is actively participating with a number of other litigants (including states) against the EPA regarding the

Section 401 Final Rule in the Western District of Louisiana. The Administration should voluntarily remand the Section 401 final rule and reissue a new rule.

*Recommendation 5B: Issue a new CWA Section 401 rule:* The EPA should issue a new rule implementing Section 401 of the Clean Water Act that limits the certification request to the discharge, not the activity as a whole, and ensures that certifying authorities issue a WQC within one year of the request.

<b>Recommendation 6: References</b>	
<b>Agency</b>	U.S. Environmental Protection Agency
<b>Program</b>	State water quality certification under CWA Section 401 permit
<b>Authority</b>	CWA section 401 (33 U.S.C. § 1341)
<b>References</b>	<p>40 CFR Parts 121, 122, and 124            2023 Final Rule at 88 FR 66558            2020 Final Rule at 85 FR 42210            1971 Final Rule at 36 FR 8563  <i>Ameren Missouri</i>, 148 FERC ¶ 62,059 (July 17, 2014).  <i>W. Penn Power Co.</i>, 69 FERC ¶ 62,253 (Dec 27, 1994)  <i>FPL Energy Maine Hydro, LLC</i>, 106 FERC ¶ 62,021 (Jan 14, 2004).  <i>Thunder Bay Power Co.</i>, 85 FERC ¶ 62,160 (Dec 11, 1998) and <i>Thunder Bay Power Co.</i>, 93 FERC ¶ 62,225 (Dec 22, 2000).  <i>N.Y. State Dep't of Env't Conservation v. FERC</i>, 884 F.3d 450, 455-56 (2d Cir. 2018)  <i>Hoopa Valley Tribe v. FERC</i>, 913 F.3d 1099, 1104 (D.C. Cir. 2019)  <i>Yuba Cnty. Water Agency</i>, 171 FERC ¶ 61139 at P 62001 (May 21, 2020)            FERC Project Nos. 2086 (Vermilion Valley), 2105 (Upper N. Fork Feather River), 2174 (Portal), 1971 (Hells Canyon), 67 (Big Creek Project 2A), 120 (Big Creek Project 3), 2085 (Mammoth Pool), 2175 (Big Creek Project 1 &amp; 2), 2088 (South Feather), 2106 (McCloud-Pit), 2615 (Brassua), 2079 (Mid-Fork American), 2179 (Merced River), 2467 (Merced Falls), 848 (Trout Creek), 12532 (Pine Creek Mine), 2337 (Prospect Number 3); <i>see also Hearing on Legislation Addressing Pipeline and Infrastructure Modernization Before the H. Comm. on Energy &amp; Commerce Subcomm. on Energy &amp; Power</i>, at 8 (May 3, 2017) (testimony of John Katz, FERC Deputy Associate General Counsel (“Over a third of all pending hydropower re-license applications . . . are awaiting these approvals [CWA Section 401 certifications and ESA biological opinions] from other agencies.”)), <a href="https://docs.house.gov/meetings/IF/IF03/20170503/105916/HHR-G-115-IF03-Wstate-KatzJ-20170503.pdf">https://docs.house.gov/meetings/IF/IF03/20170503/105916/HHR-G-115-IF03-Wstate-KatzJ-20170503.pdf</a></p>

## Recommendation 6: Establish a Federal Task Force to Explore How Best to Streamline the Marine Energy Regulatory Process.

Form a task force involving key federal agencies (FERC, BOEM, USACE, NMFS, etc.) to explore how the federal government can simplify the permitting and licensing processes for marine energy projects. Reducing regulatory delays will shorten project timelines, encouraging more deployment of marine energy technologies. Leading scientists within the International Energy Agency’s (IEA) Ocean Energy Systems (OES) Environmental group have worked on reports and tools for regulators and stakeholders to use when marine energy technologies go through permitting their projects. Canada established a federal task force in June 2023 to explore the key regulatory issues and challenges associated with deployment of tidal energy projects in Nova Scotia’s Bay of Fundy. During the first 100 days, the administration should direct DOE to convene a similar task force with appropriate federal and state agencies and services. The task force should develop a report with public input on any regulatory barriers to license and deploy marine energy projects and provide recommendations to improve and significantly shorten these processes.

<b>Recommendation 7: References</b>	
<b>Agency</b>	Department of Energy
<b>Program</b>	Water Power Technologies Office
<b>Authority</b>	Energy Act of 2020 (134 U.S.C. 2418)
<b>References</b>	WPTO Multi-Year Program Plan “Task Force on Sustainable Tidal Energy Development in the Bay of Fundy Final Report” Fisheries and Oceans Canada. 2024. At <a href="https://waves-vagues.dfo-mpo.gc.ca/library-bibliotheque/41229940.pdf">https://waves-vagues.dfo-mpo.gc.ca/library-bibliotheque/41229940.pdf</a> .

# THE YEAR 2025

## **Recommendation 1: Ensure that the Department of Energy disperses all appropriated funds under the Section 242, 243, and 247 programs**

The Bipartisan Infrastructure Law appropriated over \$750 million to the DOE under the Section 242, 243, and 247 programs. These programs incentivize new generation (\$125M to the Section 242 program), improved efficiency (\$75 million to the Section 243 program), grid resiliency incentives, dam safety improvements, and environmental/recreational investments (\$553.6 million under the Section 247 program). The Section 242 program is capped at \$1M per year and is tied to the amount of incremental generation produced at an existing hydropower facility. The Section 243 and 247 programs are capped at \$5M per project per year and up to 30% of the cost of the facility (thereby buying down the capex cost). These are hugely consequential programs that ensure hydropower will be well suited to ensure American energy dominance.

## **Recommendation 2: Reform the Tax Code by Enacting Federal Tax Support for the Existing Hydroelectric Fleet to Support Capital Investments in Grid Reliability, Dam Safety, and Environmental Improvements to Existing Projects.**

The *Maintaining and Enhancing Hydroelectricity and River Restoration Act* is a bicameral, bipartisan piece of legislation that would provide a 30% investment tax credit for qualified dam safety and environmental upgrades at existing hydropower facilities that are necessary for compliance with a project's FERC hydropower license. The bill is scored at under \$1 billion and is widely supported by the hydropower industry, dam safety community, unions, and river restoration and conservation communities. The hydropower investment tax credit would spur significant investments in our nation's dam infrastructure and would create thousands of high-skilled jobs across the United States. Therefore, NHA recommends that:

*Recommendation 2A:* The next administration should work with Congress to enact the *Maintaining and Enhancing Hydroelectricity and River Restoration Act* as part of any tax negotiation making its way to the President's desk.

## **Recommendation 3: Work with Congress to Enact Legislation that Would Modernize and Streamline the Process for Licensing and Relicensing Hydropower Facilities with the Federal Energy Regulatory Commission.**

There are serious obstacles to the preservation and expansion of hydropower in the United States today. One of the biggest challenges is the licensing and relicensing process. We are currently approaching a wave of hydropower and pumped storage license expirations across

the country, with 451 active FERC licenses totaling 15,700 MW in capacity set to expire between 2020-2035.<sup>6</sup> Facing license expiration, a third of polled owner/operators have said they are considering license surrender and decommission.<sup>7</sup> In fact, many have already done so, shuttering the operation of 68 facilities with a combined capacity of 322 MW from 2010-2022 alone, citing economic infeasibility and risk of relicensing.<sup>8</sup> This is part of a broader upward trend in license surrenders since 2004 that coincides with the rising wave of expirations, suggesting that, unless something changes, hydropower operators may continue to surrender their licenses when faced with renewal.<sup>9</sup>

The upward trend in surrenders is, in large part, the result of a cumbersome licensing process. Relicensing takes on average seven to ten years to complete and can cost millions of dollars, depending on factors like project size, environmental complexity, and stakeholder negotiations.<sup>10</sup> The Federal Power Act (FPA) requires FERC to balance energy and non-energy values alike when assessing stakeholder needs throughout the licensing process. This widens the scope of analysis for a project and requires additional research and paperwork, like environmental assessments and impact statements, well before developers can break ground. Progress at this stage is partially dependent upon agency bandwidth, which can bottleneck the development process if the government agency is understaffed or has new personnel. Furthermore, statutory requirements from laws like the Endangered Species Act, National Environmental Policy Act, and Clean Water Act exacerbate these challenges by introducing additional actors like state governments and municipalities into the decision-making process. Coordination between local, state, and federal agencies across several policy areas is complex, and ultimately, elongates the licensing and relicensing process. Therefore, NHA recommends the following:

*Recommendation 3A:* Clarifying that mandatory conditions relate only to project effects, rather than unrelated requirements.

*Recommendation 3B:* Improving interagency coordination and process discipline at the federal and state levels, including the development of a consolidated schedule, joint study plans, and a process to resolve inconsistent licensing conditions.

*Recommendation 3C:* Expediting the timeline for licensing new generation at existing non-powered dams and closed-loop pumped storage facilities

## **Recommendation 4: Refill Funding under the Bipartisan Infrastructure Law Sections 242, 243 and 247 Grant Programs.**

Under the Bipartisan Infrastructure Law, Congress provided one-time appropriations under the Energy Policy Act of 2005 for the Sections 242 and 243 incentives programs, as well as the creation of the new 247 incentive program. The hydropower industry has taken

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<sup>6</sup> [FERC Complete List of Active Licenses](#) Updated 8/13/2024

<sup>7</sup> Kleinschmidt Group, [Far to the River Survey](#) (2022)

<sup>8</sup> U.S. Department of Energy, U.S. Hydropower Market Report (2023), Section 1.5

<sup>9</sup> Oak Ridge National Laboratory, Hydropower Relicensing and License Surrender dataset (2024). Regression analysis using Python: (P-value= 0.0027, Standard Error = 2.04, R<sup>2</sup>= 0.40)

<sup>10</sup> National Renewable Energy Laboratory, Oak Ridge National Laboratory, An Examination of the Hydropower Licensing and Federal Authorization Process (2021), Executive Summary



advantage of these funds for the various eligible activities, which include facility modernization, capacity building, grid reliability, dam safety, environmental improvements, security, and recreation upgrades at existing hydropower facilities. Given the value of these programs, NHA recommends the following:

*Recommendation 4A:* Congress should appropriate additional funds to each of the three incentives programs, which help support existing hydropower fleet operations.

### **Recommendation 5: Increase Budget Funding Request for the Department of Energy's (DOE) Water Power Technologies Office (WPTO) for Fiscal Year (FY) 2026, Including Direction to WPTO to Increase the Allocation of Federal Funding Awarded to Private Sector-led Marine Energy Technology Advancement and Testing.**

The DOE's WPTO carries out critical research and development functions for the conventional hydropower industry as well as new technologies like the marine and hydrokinetic energy industries. WPTO must be a priority for any administration, as the funding is utilized to support energy technologies that help provide 24/7 reliability for our nations grid, including critical grid support services. WPTO also handles critical analysis of the hydropower industry and various sector trends across licensing, supply chains, environmental impacts, capacity growth opportunities and hydropower industry jobs. Therefore, NHA recommends that:

*Recommendation 5A:* The next Administration work with Congress to ensure continued, robust funding for the Department of Energy's Water Power Technologies Office.

### **Recommendation 6: Set a National Marine Energy Deployment Target of 500 MW by 2030 and 1 GW by 2035.**

Deployment targets have been a tool used to commercialize other renewable energy technologies like wind and solar. Clear targets create market signals that drive investment and development, while aligning with broader clean energy goals. Deployment targets set by the Administration can have a ripple effect, resulting in the market pulling marine energy technologies to further commercialize. Ensuring marine energy has a pathway to commercialization will help small communities save money on retail electricity sales and supplement certain coastal infrastructure electricity needs such as at ports and military bases.

*Recommendation 6A:* The next Administration should set a marine energy deployment target of 500 MWs by 2030 and 1 GW by 2035.

### **Recommendation 7: Launch a Marine Energy Demonstration Program Within DOE to Fund the Testing, Validation and Scaling-up of Mature Marine Energy Technologies.**

Establishing a Marine Energy Demonstration Program, which includes a clear continuum of funding among multiple DOE offices, will push marine energy technologies to rapidly advance. The established program should direct a commercial liftoff report for the marine energy sector to be created and establish an aligned strategy and continuum of funding and incentives between the WPTO, the Office of Clean Energy Demonstrations (OCED), and the Loan Programs Office (LPO) for private sector-led marine energy technology and project development, demonstration, and deployment. This report would create a robust commercialization roadmap for realizing the full economic potential of the marine energy sector.

*Recommendation 7A:* As there are a myriad of DOE offices engaged in marine energy, the next Administration should establish a Marine Energy Demonstration Program to streamline funding of marine energy so that marine energy can be scaled-up to help secure American energy dominance.

### **Recommendation 8: Direct the Secretary of Energy to Use Their Existing Authority to Waive Cost-Share Requirements for Marine Energy Research and Development.**

The Administration has existing authority to waive cost-share requirements for marine energy research and development activities. The authority was given to the Secretary of Energy by Congress under Section 988 of EPAct 2005 to waive marine energy cost-share requirements for both applied research and development activities along with demonstration and commercial application activities. Reducing financial barriers will allow companies to accelerate the commercialization of technologies in development, positioning the U.S. as a leader in marine energy.

*Recommendation 8A:* The next Administration should waive cost-share requirements for marine energy research and development activities.