



**UNITED STATES OF AMERICA
U.S ARMY CORPS OF ENGINEERS**

**Water Resources Development Act of 2022
Implementation Guidance Update**

Docket No. COE-2023-0002

**COMMENTS OF THE NATIONAL HYDROPOWER ASSOCIATION ON
PROCEDURES TO IMPLEMENT SECTION 408 REVIEW OF FERC LICENSED
HYDROELECTRIC PROJECTS**

In a news release dated January 23, 2023 the Office of the Assistant Secretary for the Army for Civil Works issued a notice to update the public on the status of the implementation of the guidance for the 196 provisions in the Water Resources Development Act of 2022 (WRDA 2022). Section 8123 of this legislation is entitled “Expediting Hydropower at Corps of Engineers Facilities”. The process of incorporating nonfederal hydropower development at U.S. Army Corps of Engineers (USACE) facilities is critical to the goal of carbon reduction in the face of the impacts of climate change. Developing hydropower at nonpowered dams also creates clean energy at existing infrastructure. The national importance of the development of non-carbon generation sources was emphasized by the 2022 passage of the Inflation Reduction Act. The study, “Potential Hydroelectric Development at Existing Federal Facilities”, prepared by the Corps of Engineers in 2007 indicates that there are 58 Corps projects where nonfederal hydropower could be economically developed. This would have an overall capacity increase of 1,230 MW of renewable generation. Of these 58 sites, 29 are currently under active development. As described further below, the addition of hydropower at many Corps facilities has been unnecessarily delayed by the implementation of Section 408 review based upon general requirements that do not reflect the unique regulatory and review process for hydropower development. The process for Section 408 review has varied dramatically from District to District and has resulted in delays due to inconsistent review processes and schedules. The comments below are directed at developing a Corps-wide review process for hydropower additions at Corps projects that recognizes the fact that licensed hydroelectric projects have



previously satisfied National Environmental Policy Act (NEPA) requirements, and that further review should be focused on technical and operational issues.

I. COMMUNICATIONS

Communications regarding these Comments should be directed to the following individuals:

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II. INTRODUCTION AND INTERESTS OF THE NATIONAL HYDROPOWER ASSOCIATION

The National Hydropower Association (NHA) is a non-profit national association dedicated to preserving and expanding clean, renewable and affordable waterpower which meets the electricity needs to an estimated thirty million Americans. NHA represents over 300 member organizations working in the waterpower industry.

NHA appreciates this opportunity to comment on the implementation of the streamlined Section 408 review process of Federal Energy Regulatory Commission (FERC) licensed hydroelectric projects which was passed as law within the Water Resources Development Act (WRDA) of 2022 SEC. 8123. “Expediting Hydropower at Corps of Engineers Facilities.”

The following comments are the product of a collaboration between stakeholders representing waterpower facility owners and developers who have experience working with the USACE on developing hydropower at existing non-powered dams.

III. BACKGROUND AND HISTORY OF NON-FEDERAL HYDROPOWER AT USACE DAMS

The development of nonfederal hydropower generation at USACE facilities has been undertaken at numerous projects for over 100 years. One of the first hydroelectric developments was located at Lock and Dam No.1 located on the Mississippi River in the Twin Cities of Minnesota. Power for the powerhouse and generating facilities at this site were designed under the direction of Henry Ford and provided power for the adjacent Ford assembly plant from 1917 until operation of the plant was terminated in 2017. This 17 MW project is currently in operation and serves to demonstrate the long life of hydroelectric projects compared to other types of generation. Over 60 nonfederal hydropower facilities were constructed at USACE facilities from early in 20th century prior to the promulgation of the current Section 408 review procedures in 2008. The designs of all these projects were reviewed by the individual USACE District technical staff and



were approved at the District level. This process was satisfactory for both the licensee and the Corps while maintaining infrastructure integrity and operational excellence. These success stories illustrate the fact that a USACE approval process for hydroelectric development can be successfully implemented by technical staff at the District level, focusing on technical and operational issues associated with the Hydroelectric development without incorporating the many wide-ranging issues identified in the current Section 408 guidance.

IV. UNIQUE ASPECTS OF SECTION 408 EVALUATION OF HYDROPOWER DEVELOPMENTS

The most recent guidance in regard to Section 408 is contained in the Engineering Circular (EC) 1165-2-216. The stated purpose of this guidance for the review under section 408 is as follows:

“Purpose: The purpose of this Engineering Circular (EC) is to provide policy and procedural guidance for the processing request by private, public, tribal, or other federal entities to make alterations to, or temporary early or permanently, occupy or use, any US Army Corps of Engineers, federally authorized civil, works project under 33 USC 408 Section 408. Proposed alterations must not be injurious to the public interest or impair the usefulness of the USACE project.”

The 90-page guidance provided in this EC delineates a process for Section 408 review of projects which have **not** had any previous USACE involvement and have **not** proceeded through a NEPA evaluation. The current guidance contains many provisions that do not relate to FERC license hydroelectric projects. Only 3 pages of the 90-page guidance document specifically focus on hydroelectric projects. The guidance provided in these 3 pages largely refers to provisions contained in other documents, rather than providing specific procedures for the Section 408 review of licensed hydroelectric projects. The lack of guidance specifically focused on hydropower has caused an inconsistent implementation of Section 408 review for hydroelectric projects among the various USACE Districts, which have chosen to interpret the provisions of the EC in various differing ways. For example, some Districts will provide the applicant with a



checklist for an application submittal, while other Districts withhold their checklists or have no checklist at all. Furthermore, there is no consistent checklist for the content of a Section 408 application throughout the USACE.

It is very important that the development of a streamlined procedure for Section 408 review of hydroelectric developments be based on a guidance document focused specifically on the unique aspects of hydroelectric projects as compared to applicants for other types of modifications at USACE structures. The development of one specific guidance document with a standard checklist and Review Plan for Section 408 review of licensed hydroelectric projects should be applicable to all USACE Districts, in order to provide a consistent and predictable procedure to move projects from licensing to construction.

V. REQUIREMENTS FOR INDEPENDENT EXTERNAL PEER (IEPR) REVIEW

Legislation in 2007 (WRDA 2007 Sec 2034(i)) required the USACE to provide independent peer review for all projects at various stages of development. The official website of the Corps states that:

*“The purpose of the Independent External Peer Review (IEPR) panels is to provide the Chief of Engineers with **an independent assessment** of the project or work product, including the panel's assessment of the adequacy and acceptability of the economic, engineering, and environmental methods, models, data, and analyses used as well as the range of alternatives, and the adequacy of risk and uncertainty analyses.”*

For a Section 408 review, some Districts require the appointment of an IEPR panel to review hydroelectric project designs. Under the terms of a license issued by the FERC, the project designs will be reviewed independently by the FERC prior to issuance of an order allowing construction. This provision is required for all hydroelectric projects. As the USACE conducts a technical review of the Section 408 process, the FERC technical staff simultaneously performs a



parallel technical review of the project design. The requirements for an IEPR review are therefore satisfied by the independent review afforded by the FERC. It should be noted that for some more complex design and construction projects, the FERC can appoint an Independent Board of Consultants. The appointment of such a board to provide additional technical review and guidance should be at the discretion of the FERC for specific projects.

VI. RECOMMENDATIONS

NHA has the following specific set of recommendations:

1. An Engineering Circular should be developed which outlines and identifies a specific process for Section 408 review of licensed hydroelectric projects. Guidance should provide checklists and review plans for items required for application submittal consistent with the level of detail available and applicable at that point in the development process. Timelines for reviews and scheduling of USACE resources should provide transparency and coordination with the developer. Checklists and Review Plans may be added to or modified for specific unique project features or operations.
2. The guidance provided above should be implemented uniformly by all Districts within the USACE and authority for approval should be delegated to the respective District Engineer.
3. USACE HQ staff individual should be appointed at the Chief of Engineers level with the responsibility and authority to require that Section 408 review for hydroelectric projects be performed in accordance with the published guidance.
4. IEPR panels should not be required for additional third-party review unless the FERC determines that the project is complex enough to require a separate independent board of consultants to supplement USACE and FERC review.



Respectfully submitted,

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