



United States Department of the Interior



FISH AND WILDLIFE SERVICE

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April 3, 2020

Shannon Ames, Executive Director
Low Impact Hydropower Institute
329 Massachusetts Ave., Suite 6
Lexington, MA 02420

Re: Briar Hydro Associates
Penacook Upper Falls Project (FERC No. 6689)
APPEAL OF CONDITION 1

Dear Ms. Ames:

The U.S. Fish and Wildlife Service (Service) supports the Low Impact Hydropower Institute's (LIHI) (re)certification (Certification) of the Penacook Upper Falls Project (Project), located on the Contoocook River in Merrimack County, New Hampshire. However, the Service is appealing Condition 1 of LIHI's (re)certification (Certification) to encourage Briar Hydro Associates (BHA; Licensee) continued collaboration with the natural resource agencies while also providing LIHI with specific metrics to evaluate the need for modification of the Certification's conditions and/or its reassessment.

BACKGROUND

The Project was licensed by the Federal Energy Regulatory Commission (FERC) with a 40-year-term on December 5, 1984. LIHI issued its first Certification for the Project on September 25, 2009, and the second Certification on September 25, 2014. BHA applied for the Project's third Certification on October 30, 2019.¹

On November 26, 2019, LIHI solicited public comment on BHA's Certification application (application). The Service provided comments on January 9, 2020, noting that (1) American eel (*Anguilla rostrata*) are present upstream and downstream of the Project; and (2) the Service installed an experimental eel ladder, which passes an estimated 3,000 to 4,000 eel per year, for the

¹ LIHI Certifications are typically issued for a 5-year term. The most recent five-year term expired on September 25, 2019 and was extended to February 28, 2020 and again to April 15, 2020 to accommodate the current certification process.

Licensee in 2017. Subsequently, the Service recommended that any LIHI Certification issued for the Penacook Upper Falls Project require BHA to implement permanent upstream and downstream eel passage within two years of the Certification.

On March 5, 2020, LIHI issued a preliminary approval of the Project's Certification and provided a 30-day appeal window. Concurrently, LIHI provided us with its reviewer's report (Report), which summarizes the findings of LIHI's application review and responds to our comments on the application. The preliminary approval recommends LIHI Certification for the Project with the following mandatory and optional conditions.

- Condition 1 (mandatory): Since the Project is in relicensing and is likely to receive a new FERC license during the new LIHI Certification term, the Facility Owner shall provide to LIHI as part of the annual compliance reports, a brief status summary of the FERC licensing progress listing significant agency interactions that have occurred in the past year that are relevant to any LIHI criteria, the results of any relicensing studies, and highlighting major topics of agreement or disagreement. LIHI reserves the right to modify conditions and/or reassess Certification in light of new agency recommendations or if a new license changes Project operations or facilities related to the LIHI criteria.
- Condition 2 (optional): If at any time prior to six months before the expiration of the Certification term the Facility Owner has implemented upstream eel passage at the Project in advance of a new FERC license, LIHI will review that information and determine whether or not to award a PLUS standard and extend the Certificate term for three additional years.

We have reviewed the LIHI's preliminary approval, conditions, and the reviewer's report (Report), and provide the following discussion and recommendation for your consideration.

DISCUSSION AND REQUESTED MODIFICATION

In response to our recommendation for eel passage, the Report finds that requiring eel passage at the Project before studies are developed and completed would be premature, because (1) BHA is working collaboratively with the resource agencies on upstream and downstream fish passage facilities; and (2) the Service may seek fish passage studies for anadromous species and/or American eel through the FERC licensing process.

The Service may seek upstream and downstream fish passage studies to inform continued improvements for safe, timely, and effective passage of migratory fish at the Project. Continued collaboration between BHA and the resource agencies during the licensing process would support the timely collection of data needed to evaluate and improve fish passage at the Project and support recommendations to ensure the Project is operated in a manner that is compatible with environmental resources.

Condition 1 recognizes that BHA has worked collaboratively with the resource agencies and includes a provision to monitor that relationship during the Certification's term through the filing

of the annual compliance reports. However, while Condition 1 reserves LIHI's right to modify conditions and/or reassess the Project's Certification, it does not specify any metrics that could support this evaluation and does not seek input from the Service or the other resource agencies. As such, we request LIHI revise Condition 1 to include key documents/milestones with the annual compliance report that would support and inform a reassessment of the Project's Certification worthiness and/or need to modify the Certification's conditions based on collaboration between BHA and the resource agencies when developing and implementing studies and its licensing proposal.

Specifically, we ask that Condition 1 be modified to require BHA's annual compliance report include the following documents, as they become available:

- draft study plan;
- final study plan;
- study reports and resource agency comments; and
- final license application.

Draft Study Plan

The draft study plan (DSP) should include (1) a detailed description of each of the proposed studies and the methodologies to be implemented; (2) a schedule for conducting and providing a report for each of the studies in the DSP; and (3) if an agency requested study or agency recommended study methodology was not adopted, an explanation of why the request/methodology was not adopted, including a statement why any alternate proposed methodology is consistent with generally accepted practice in the scientific community, and would provide the information needed to assess the Project's effects on environmental resources. The DSP should be provided to the resource agencies for a 30 day comment period.

Final Study Plan

The final study plan (FSP) should include (1) a detailed description of each of the proposed studies and the methodologies to be implemented; (2) a schedule for conducting and providing a report for each of the studies in the FSP; and (3) the comments BHA received on the DSP and a description of the efforts made to resolve differences over study requests and recommended study methodology. If BHA does not adopt a requested study, it should explain why the request and/or recommended methodology was not adopted.

Study Reports

The study reports should describe BHA's implementation of the study, including schedule and the data collected; identify any variance from the FSP study plan and schedule; and an assessment of whether resource agency goals and objectives for a requested study were met in light of any variance.

Final License Application

Consistent with FERC's regulations, the final license application (FLA) should include BHA's reasons for not adopting a preliminary environmental measure proposed by a resource agency in their comments on the draft license application (DLA). BHA should concurrently provide a copy of the resource agencies' comments on the DLA when submitting the FLA to LIHI.

Including these documents in the annual compliance report, with the content described above, would (1) support a balanced, metrics-based assessment, of BHA's collaborative efforts during the licensing process; (2) support an assessment of BHA's efforts to develop and implement studies that provide the information needed to inform a licensing proposal that is compatible with environmental resources; and (3) inform LIHI's reassessment of the Project's Certification and/or need to modify the Certification's conditions.

Thank you for this opportunity to comment, and we appreciate your consideration of our recommended modifications. If you have any questions regarding these comments, please contact Ken Hogan of this office at kenneth_hogan@fws.gov.

Sincerely yours,

Thomas R. Chapman
Supervisor
New England Field Office

Shannon Ames
April 3, 2020

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cc: CNEFRO, Mike Bailey (via email)
CNEFRO, Doug Smithwood (via email)
RO/Fisheries, Bryan Sojkowski (via email)
NHFGD, Matt Carpenter
NHFGD, Carol Henderson
NHDES, Gregg Comstock
FERC- Div. of Hydropower Administration and Compliance
Reading file

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ATTACHMENT A