



April 10, 2020

Mr. Kenneth Hogan  
Supervisor, New England Field Office  
US Fish and Wildlife Service  
70 Commercial Street, Suite 300  
Concord, NH 03301

Via email: [kenneth\\_hogan@fws.gov](mailto:kenneth_hogan@fws.gov)

**RE: Request to Appeal LIHI Recertification Decision – Penacook Upper Project, LIHI No. 52**

Dear Mr. Hogan,

I have received and reviewed the US Fish and Wildlife Service's April 3, 2020 request for appeal of the LIHI decision to recertify the Penacook Upper Project (FERC License No. 6689, LIHI Certificate No. 52). The letter was timely received within the 30-day appeal period and has been posted on the project page of our website <https://lowimpacthydro.org/lihi-certificate-52-penacook-upper-hydroelectric-project-ferc-6689/>). The agency's original recertification application comment letter (email) dated January 10, 2020 is also posted on that webpage.

As you may know, the Penacook Upper Project was first LIHI Certified® in 2010 and was recertified in 2015. In November 2019, Briar Hydro Associates filed an application to be recertified again under the newer LIHI 2<sup>nd</sup> Edition Handbook, and this application is the subject of your appeal request. Once initially certified, a project must demonstrate its ongoing compliance to the LIHI criteria in subsequent recertification applications and must include a discussion of any non-compliance with LIHI criteria and related regulatory obligations, as well as any material changes in facilities or project operations that may impact the LIHI criteria. Recertification reviews typically only look back at the project's record during the prior certification term, in this case from 2015 to present. The information provided in the recertification application, along with supplemental information, public comments received, and publicly available documents such as those filed on the FERC eLibrary are verified by the independent application reviewer. The review results in a final report posted on the project webpage that includes recommendations on whether the project should be recertified along with any necessary conditions attached to the Certificate.

The Penacook Upper project recertification recommendation included two conditions:

**Condition 1:** 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.

The Service's appeal request notes the ongoing collaboration on fish passage between the project owner and resource agencies. The request states that Condition 1 does not specify any metrics that would support LIHI's evaluation of whether to modify conditions and/or reassess Certification in light of new agency recommendations or a new FERC license. The request implies that the Condition does not provide for input from resource agencies during this evaluation, and specifically requests modifying the condition language to require the owner to file in annual compliance reports to LIHI certain FERC relicensing documents including draft and final study plans, study reports and resource agency recommendations, and the final license application.

Condition 1 as written is a standard condition we use for projects in or approaching FERC relicensing. In practice, it requires the owner to provide a brief annual summary to LIHI of the project's relicensing status. Since all relicensing documents are available on the FERC elibrary and can be reviewed by LIHI staff during annual compliance reviews, it is unnecessary in most cases to require the owner to provide copies of those documents directly to LIHI. FERC approved use of the Traditional Licensing Process (TLP) for the Penacook Upper project which provides for significant agency consultation, comment and dispute under 18 CFR 16.8 that should also be incorporated and addressed in the owner's draft and final study plans, study reports and license application, as well as in FERC's draft environmental assessment. It would be redundant for LIHI to require submittal of these relicensing documents.

It is important to note that LIHI staff closely follow a project's relicensing progress and pay particular attention to resource agency comments submitted under the project's relicensing docket. We do this to ensure that agency and stakeholder interests are considered in LIHI compliance and recertification reviews, regardless of FERC's ultimate decisions.

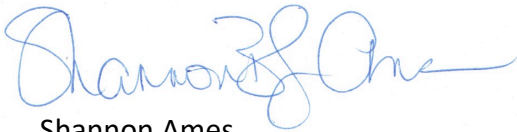
The Service submitted recertification application comments on January 10, 2020 requesting upstream and downstream passage for American eel within two years of recertification. LIHI recognizes, and the Service's appeal request appears to agree that it would be premature to require eel passage before studies are developed and completed. Condition 2 is optional for that reason and is intended to reward the owner for early implementation of eel passage if it

can be designed and installed in consultation with and approval of resource agencies prior to issuance of a new license. Condition 2 does not contain language regarding consultation and approval, but it is implied and understood, particularly given the ongoing nature of the collaboration between the owner and agencies on fish passage issues.

In accordance with the provisions in Section 4.3 of the 2<sup>nd</sup> Edition LIHI Handbook, my role as LIHI's Executive Director is to evaluate appeal requests to determine if there is a basis for appeal. LIHI staff and I have reviewed and considered your appeal request and conclude that it does not contain sufficient new information to warrant additional review by a separate independent Appeals Panel. I also believe that the conditions as written are sufficient for our purposes in evaluating ongoing compliance with the project's Certification and that they are consistent with the intention of your request.

Thank you for your comments and your interest in Low Impact Hydropower.

Sincerely,



Shannon Ames  
Executive Director