



January 23, 2010

Frances E. Francis, Esq.  
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1333 New Hampshire Avenue, NW  
Washington, DC 20036

**Subject: School Street, Request for LIHI Certification**

Dear Frances:

Thank you for the helpful comments you filed with the Low Impact Hydropower Institute (LIHI) on January 14, 2010 on behalf of your client, Green Island Power Authority (GIPA) regarding the application for low impact certification filed by Erie Boulevard (Erie) for its School Street facility (facility). By this letter, I am (1) advising you of the action that LIHI will take in light of your letter and explaining the reasons for these actions, and (2) encouraging GIPA to file comments with LIHI by close of business on Friday, February 26, 2010. As explained below, the public comment period has been extended from January 20, 2010 to February 26<sup>th</sup> to allow GIPA to file substantive comments on the School Street application, should it so choose.

Upon receiving Erie's School Street application on November 18, 2009, and prior to receiving your letter, LIHI had investigated and became aware of the procedural status of the Erie's School Street FERC license, meaning LIHI understands that the 2007 license has been vacated by the Second Circuit, and further understands that this means that neither the implementing terms contained in the 2007 license nor the conditions contained in the water quality certification from the State of New York are legally binding on Erie in its current operation of the facility. LIHI also understands from detailed discussions with both the facility's project manager and a representative from the US Fish and Wildlife Service that Erie has implemented at the facility, with FERC and resource agency approvals, all of those environmental, recreational and cultural terms required in the 2007 FERC license and the 2006 New York certification on which it is basing its application for LIHI certification (*e.g.*, bypass and minimum flows), and that Erie is voluntarily continuing to operate under those terms notwithstanding the vacating of the license.<sup>1</sup>

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<sup>1</sup> Regarding the downstream fishway effectiveness studies required post-installation of the downstream fish passage measures, LIHI understands that the study plan for these post-installation studies has been approved by FERC and the natural resource agencies, that studies are ongoing, and that preliminary results are due in Summer, 2010.

Please further understand that LIHI will shortly be requiring of Erie in writing the following formal representations, if Erie desires for LIHI to process its application under these circumstances:

- (1) That until Erie either receives a license from FERC legally requiring adherence to the terms under which Erie is now voluntarily operating, it will continue to voluntarily operate the facility fully in compliance with the terms contained in the vacated license, at least insofar as they are terms that are relevant to LIHI's criteria for certification;
- (2) That as a condition of certification Erie is prepared to subject itself to LIHI-controlled periodic compliance inspections/audits during the 5-year term of the certification, to ensure that the operation of the facility is consistent with the representations made to LIHI during the application process regarding how the facility is and will be operated, and that Erie is further prepared to pay LIHI for the cost of said LIHI inspections/audits;
- (3) That should FERC award a new license to GIPA instead of Erie during the 5-year term of the LIHI certification (should such certification be granted by LIHI), then the LIHI certification will be immediately terminated; and
- (4) That should FERC award a new license to Erie but change license terms that are relevant to the basis on which LIHI granted certification (should such certification be granted by LIHI), then the LIHI certification will be immediately suspended, pending analysis by LIHI as to whether the revised license terms are consistent with LIHI certification.

With this background and assuming that Erie makes the above-stated representations, LIHI will process Erie's application to LIHI. Please note that it is not a requirement of certification under LIHI's criteria that LIHI may only process certification applications in which the applicant's operations on which it is basing its request for certification are in place due to a license or other third-party enforced legal instrument. In fact, LIHI has granted certifications in which an applicant has based, in part, its request for certification on operating conditions that are totally voluntary on the part of the applicant.

Please further note that this application will be processed under LIHI's existing criteria, as no "new regulations" that you refer to in your letter (Comment 2) have not been adopted by LIHI's Board, and because Erie's application was filed during the pendency of LIHI's existing criteria.

There are two final points that I wish to stress. First, LIHI has not and does not "take sides" on competing license applications; LIHI simply certifies or denies certification to operating facilities (or those just on the verge of operating) if they meet LIHI's criteria. Thus, while GIPA may or may not be proposing a facility that "better" meets LIHI's criteria, LIHI will not deny certification to an existing, legally-operating project if the operations of that project meets LIHI's criteria. Second, LIHI very much welcomes written comments from GIPA regarding why GIPA does not believe that the School Street facility meets LIHI's criteria, and will fully weigh those comments in its review of Erie's application. This substantive critique is what I believe you were alluding to in Comment 3 and Comment 4 in your letter. To facilitate GIPA's ability to provide LIHI with all relevant information as to why GIPA believes that the School Street facility is not operating in accordance

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with LIHI's criteria, we have extended the comment period for 30 days to allow GIPA to file such information with LIHI.

Thank you again for GIPA's participation in this process, and please contact me should you have additional questions.

Sincerely

A handwritten signature in black ink, appearing to read 'Fred Ayer', with a large, stylized initial 'F'.

Fred Ayer  
Executive Director

cc: Sean Faulds, Erie Boulevard/Brookfield  
Shannon Ames, Brookfield  
Julie Smith-Galvin, Brookfield  
Timothy Lukas, Erie Boulevard/Brookfield  
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