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June 29, 2009

Mr. Fred Ayer, Executive Director
Low Impact Hydropower Institute
34 Providence Street
Portland, ME 04103

Dear Mr. Ayer:

This letter represents comments from the National Hydropower Association (NHA) in regards to proposed revisions to Low Impact Hydropower Institute (LIHI) certification criteria. NHA applauds LIHI for a number of important considerations (emphasis added) conveyed in your letter:

1. "The Task Force considered a number of policy questions, including recent changes in *energy markets, new renewable energy policies, changes in the way that hydropower is regulated, and climate change.*"
2. "From the perspective of our Task Force and Board, the most important step in this criteria review is your feedback; it is *critical that these criteria have the support of the industry*, the environmental community, and the state and Federal resource agencies that participate in the regulation of hydropower."
3. "The Institute *strongly encourages your comments and suggestions concerning these proposed revisions*, and also welcomes any *additional thoughts or suggestions you may have about the program.*"

NHA concurs with LIHI that the criteria must consider the changing shape of the energy industry and that they will be more effective if a broad range of industry participants concurs with the substance of the criteria. Specific revision comments are presented in the same order in which they are presented in the application documentation, followed by general comments on the LIHI certification program.

Specific Revisions:

General Instructions:

Multiple facilities: We would appreciate clarity on how additional information requested on multiple facilities in a single watershed, whether owned by the applicant or not, would be evaluated and might affect the certification of a particular project. In particular it is not clear what it means to "consider the Cumulative Impacts of multiple hydropower operations under common ownership" in the context of a single facility application.

Definitions:

Compliance: NHA suggests that the use of Notices of Violations (NOVs) as an indication of compliance be limited only to NOVs that have the potential for environmental effects. NHA agrees with and appreciates the opportunity to explain a violation that an applicant does not think is material.

Diversion: NHA recommends adding a definition for “diversion” that makes it clear that new turbines, powerhouse additions, new powerhouses and fish passage related structures are excluded from the definition. In certain regulatory arenas, such facilities can qualify as diversions and we do not believe LIHI intends for such categorization in its use of the word.

Facility: In the second sentence, NHA recommends replacing the term, “power source” with simply “powerhouse” to correspond more closely with subsequently mentioned examples.

Hydrologically and Operationally Connected: The definition should focus on the operational or physical relationship between developments, and not ownership. Ownership should not be the determining factor.

Incremental Hydropower: The proposed new definition of Incremental Hydropower specifies additional hydropower at existing hydro to be incremental hydropower added to an existing powerhouse (e.g. via *additional* or upgraded turbines"). Most “*additional* turbines” would require some type of expansion of an existing powerhouse or construction of a new powerhouse to accommodate the new units. NHA suggests defining incremental hydropower consistent with the broadly supported definition forged between NHA and the environmental community and represented in: 1) Incremental hydropower production wording associated with Section 1301 of the Energy Policy Act of 2005 which amends Code Section 45 to apply the credit to incremental production gains from *efficiency improvements or capacity additions to existing hydroelectric facilities* and 2) “qualified hydropower” found in current House Bill 2454 National Renewable Energy Standard legislation under consideration in the present 111th Congress in which incremental hydropower is described as “energy produced from *increased efficiency achieved, or additions of capacity made* on or after January 1, 1988, *at a hydroelectric facility*. This could be accomplished as easy as altering the definition by replacing the word “powerhouse” with “facility”.

Resource Agency: A typical definition of resource agency does not include Native American tribes or US Bureau of Indian Affairs. NHA notes that Tribes are not treated as resource agencies for purposes of section 10(j) of the Federal Power Act. In light of the heavy reliance of the LIHI criteria on agency recommendations provided in FERC licensing processes, NHA urges the adoption of consistent definitions to avoid confusion.

Resource Agency Recommendation: NHA understands that LIHI Certification relies heavily on agency recommendations and thus a clear definition is necessary. The revised definition seems extremely complicated. It is difficult to discern if Paragraphs a-d are intended to be four independent sub-definitions for specific references in the criteria or

additive in some manner. It is unclear, for example, if a more environmentally stringent resource recommendation made by qualified agency in a licensing proceeding (i.e. State Fishery agency) who was invited to participate in Settlement Agreement negotiations, but ultimately declined - and whose resource interests were represented by another Settlement Agreement agency (i.e. USFWS) - somehow becomes the critical recommendation for the purposes of LIHI. The definition seems very confusing and could warrant clarity and possibly simplification.

Settlement Agreement: This definition should recognize all agreements among stakeholders, regardless of form, and the test of legally-binding should be eliminated, because LIHI is not in position to determine such. Similarly, the definition should be kept simple, as there are numerous qualifying associations (i.e. resource agency recommendations) in the criteria document.

Criterion A General Eligibility:

General Eligibility Overview statement: The second sentence should be revised to address two issues. One, change the words “existing powerhouse” to “existing hydropower development” to address the similar question raised under the definition of incremental hydro. Secondly, “significantly” or “materially” should be added to the second sentence as shown in italics: “...so long as it achieves non-polluting power benefits without *significantly* [or *materially*] contributing to additional environmental impacts or extending existing ones.”

A.1.d. General Eligibility Threshold Questions: Ensure term diversion is correctly defined by adding a definition for diversion such that a new turbine, powerhouse addition or new powerhouse and fish passage related structure is excluded.

A.2. General Eligibility: Incremental Hydropower: This entire section appears to be for the purpose of distinguishing incremental hydropower from that which isn't. Its purpose is unclear unless A.2. is intended to provide the means for LIHI certification of incremental projects.

A.2.c. NHA recommends that this criterion should rely only on Resource Agency recommendations with regard to dam removal.

A.2.e and f. NHA seeks clarity as to whether this section was intended to apply to both new hydropower at non-power dams AND incremental hydropower at hydropower facilities (i.e. capacity additions and efficiency improvements). In other forums, the language relating to water surface elevations contained in these sections has only been applied to hydro development at nonpowered dams. If LIHI intends to apply this language to capacity additions and efficiency improvements at existing hydro plants, NHA would note that there are a number of instances where the additional capacity or upgrade might result in slight changes to flow or reservoir levels that resource agencies approve of, but are not “*solely to improve the environmental quality of the affected waterway*”. As such, NHA recommends clarifying that A.2.e and f apply only to development at non-powered dams.

Criterion B Settlement Agreements:

While NHA welcomes additional clarity concerning Settlement Agreements and how the LIHI Board intends to judge them, the section appears to over emphasize and analyze processes associated with licensing procedures (PAD, Study development, dispute resolution). Under some circumstances, for example, exempt hydropower projects seeking LIHI certification may reach a Settlement Agreement outside the FERC licensing process.

NHA suggests a more simplified assessment of whether or not the four Settlement Agreement Attributes (Inclusiveness, Transparency, Governance-Education-Funding and Study Requests - Plans - Contractor Selection) were achieved.

In the second paragraph on LIHI Guidance on Settlement Agreements, it states, “LIHI wants to *encourage* – and ensure that the public portion of the licensing process that led to the Settlement Agreement is one that reflects the principals of openness, transparency, and public participation.” However, NHA is concerned that these criteria may be applied to existing Settlement Agreements. To fulfill LIHI’s goal of encouraging certain settlement practices, we recommend that this guidance only apply to settlement agreements reached after the effective date of the criteria.

With that in mind, NHA recommends:

- Only settlement agreements reached after Criterion B is adopted should be held to the four standards or attributes outlined.
- Criterion B.1. through B.3. be revised by eliminating references to specific FERC licensing processes and focus on how the four standards or attributes were accounted for through stakeholder outreach and consultation-associated with licensing or within stand-alone Settlement Agreements that were established outside a formal licensing process.

Criterion C Flows

C.2. Flows: True Run of River Operations: It is unclear as to how a single facility application that is affected by upstream project operations under the same ownership will be evaluated. Additional information is required for those upstream project(s) as well as an explanation as to why certification is not sought for them (reference General Instructions). NHA would suggest the questionnaire ask for only the information that is required to determine certification and avoid questions that do not appear to affect a certification determination.

C.3. Flows: Regulated Flows – Quantitative Approach: see below

C.4. Flows: Regulated Flows – Qualitative Approach

NHA recommends LIHI consider simplifying these criteria by eliminating both and replacing them with Question C.2., followed by Question C.4.b as amended below. Replace existing C.4.b. with, “Is the Facility in compliance with Resource Agency Recommendations issued after January 1, 1990 regarding flows that FERC has included as a condition in a license or are embodied in a Settlement Agreement?”

Regarding LIHI's intent to replace the ABF and Montana-Tennant methods with a new quantitative method, NHA suggests that industry representation be included in the hands-on process of developing a method rather than simply be provided an opportunity to provide input. NHA does not support adoption of any one method in the LIHI criteria and encourages LIHI to accept a "methodology, consistent with generally accepted practice in the scientific community" as used in FERC's ILP study plan criteria (be it quantitative or qualitative). If the participants in a license proceeding (and FERC) have agreed to a given methodology it should be acceptable to LIHI.

Criterion D Water Quality:

D.2.b. Water Quality: Impaired Waters: NHA suggests adding the word "significant" before the word "cause". As written, even an insignificant contribution to diminished water quality would categorically exclude an otherwise qualifying project.

Criterion E Reservoir Levels:

E.1. Incremental Hydropower: We are unclear as to the purpose of this section of the questionnaire unless LIHI intends to Certify Incremental Hydropower projects independent of the facilities with which they are associated. If incremental hydropower is added to an existing hydropower facility and it meets Criteria E.1.a and b, is it the intent of this section to then move onward to Criterion F Fish Passage? NHA seeks clarification on this and as to the overall purpose of this section.

Criterion F Fish Passage and Fish Protection:

F.1.b. NHA suggests the question be stated in a manner that does not require an applicant to prove a negative – particularly the "or part" portion of the question. We suggest language more along the lines of asking the Applicant to state whether or not the subject project was the primary cause for extirpation of a species of migratory fish.

F.2.b. We would like clarification on the rationale for the date of January 1, 1990 with respect to agency recommendation for fish passage. The assumption is this date is tied to the enactment of post-ECPA licenses. However, in the case of exempt licenses, such a post-ECPA date has little or no significance. Standard Article 2 for exempt projects requires the project to comply with any terms and conditions that State and Federal fish and wildlife agencies determine are appropriate. Mandatory fish passage requirements existed prior to 1990.

F.2.c. NHA recognizes this question is intended to provide an opportunity for facilities that do not have a recommendation for fish passage to avoid seeking a letter from a Resource Agency confirming adequate passage. However, 100% passage is an unrealistic metric; one that agencies would rarely if ever expect a project to meet. NHA would encourage LIHI to adopt a high standard of "low impact" such as 95% and require proof as opposed to 100%; as this would represent "no impact".

F.3.b. NHA recommends this should be revised to clarify that the technological infeasibility must result from the physical nature of the Facility and not from some other cause such as a natural barrier in close proximity to a Facility.

F.3.c.: NHA recommends this should be revised to include a standard for degree of contribution, such as *primarily* due to the Facility.

Criterion G Watershed Protection:

Overview: NHA seeks clarification on the fundamental basis of this criterion, which ultimately requires an approved shoreline management plan arising from FERC license requirements and/or a Settlement Agreement to pass this criterion. FERC does not require shoreline management plans. Many FERC projects, often low head and run-of-river have limited fee ownership within the project boundary, and therefore would not have a shoreline management plan.

G.3 and G.4. Shoreland Management: NHA suggests passing these criteria would also award a bonus year or alternatively the G4 criterion should reflect a broader application of shoreline related stewardship and not specify a formal document associated with FERC approval.

Criterion H Threatened and Endangered Species:

NHA suggests assessing impacts on T/E species on the basis of whether or not species are present and whether or not the species is affected by project operations. Many licenses have large undeveloped acreage surrounding reservoirs within or immediately outside of the project boundary which could have T/E species, yet no management or operational activities affect it. In such cases there would be no Recovery Plan or Biological Opinion.

H.1. Listed Species: NHA recommends revising the criteria, by replacing, “in the Facility Area and/or downstream reach” with “within the Project Boundary or outside the project boundary if materially impacted by project operations”.

H.3. Incidental Take: NHA suggests a revision to this criteria by adding, "and authorized take is not exceeded." after "species". If a licensee has an authorized take and if the authorized take is not exceeded, it is still in compliance with the Incidental Take Permit and therefore, the ESA.

H.4. Biological Opinion: NHA seeks clarity on the reasoning behind this criteria or question. The Standard and therefore the question needs to focus on compliance with the Reasonable and Prudent Measures (RPMs), Terms and Conditions, and authorized take included in the Incidental Take Permit (ITP) of the BiOp, not that the BiOp was issued to be a "permanent solution."

Criterion I Energy Efficiency:

I.1 Turbine Efficiency: NHA supports the addition of a year to LIHI certification for upgrades to turbine runners under this section of the criteria. It is unclear if this is a one-time “bonus year” unless one continually upgrades its turbines prior to the next recertification review. NHA believes the criteria should be expanded to similarly qualify generator efficiency upgrades designed to produce more energy with the same water.

I.2. Efficiency and Fish Passage: NHA supports the addition of a year to LIHI certification for upgrades to so-called “fish friendly” turbine runners under this section of the criteria. We recommend this section clarify whether or not this is another one-time “bonus year” added to the previously awarded turbine runner upgrade, thus resulting in a net gain of two additional years over the standard five year certification for installation of a fish friendly turbine.

Criterion J Cultural Resources: No comments

Criterion K Recreation:

NHA believes that the three criteria regarding Reservoir and Flow Information, Access to Project waters and Mitigation and Enhancement are typically covered in a License required Recreation Plan, Exhibit R or as an obligation in a Settlement Agreement. Therefore, to avoid a subjective assessment of “*relevant, accessible and up-to-date information*”, “*reasonable access*”, and “*adequately mitigate for or enhance relevant...resources*”, we recommend an initial question that asks whether or not the facility is in compliance with a FERC approved Recreation Plan, Exhibit R or Recreation Provision under a Settlement Agreement. If the answer is “yes”, then the applicant would bypass the current three questions.

K.1. Levels and Flow Information: Requiring this as a condition of LIHI certification implies providing up-to date (real-time or up-to-the-minute) flow and reservoir information is essential at all facilities. The requirement ignores circumstances where it is not necessary due to other informational sources, is duplicative or technologically difficult to do so accurately. We recommend dropping this as a certification requirement.

General LIHI Program Comments

NHA is aware that the LIHI mission is to reduce impacts of hydropower through market incentives using its Certification “label” to help energy consumers choose the energy and hydropower practices they want to support. Your letter acknowledges the [criteria revision] Task Force considered a number of policy questions, including recent changes in *energy markets, new renewable energy policies, changes in the way that hydropower is regulated, and climate change*. Currently, there are State Renewable Portfolio Standards (RPS) programs tied to LIHI Certification and calls to expand this role in additional states and at the federal level.

On the federal level, NHA supports the recognition of hydropower resources as qualifying renewable resources under the federal RES. The Association also has recognized the benefit to segments of the industry by including a category of qualified renewable resources that recognizes low impact-certification for hydropower projects.

While supporting the inclusion of low impact-certification as an additional compliance mechanism, NHA has not endorsed any specific individual certifying program, but has outlined criteria to guide such a program’s development. However, NHA appreciates the opportunity to provide in-depth input on the changes to the LIHI certification process.

In addition to the detailed comments on the proposed changes listed above, NHA poses the following general comments and questions on the LIHI certification process.

It is unclear whether LIHI intends to apply the new criteria to existing LIHI certified facilities at subsequent re-certification evaluations and thus the potential for de-certification exists. It is our understanding that under LIHI Certification Procedures, an Applicant who chooses to renew or seek recertification at the end of the certification period would be required to fill out the revised criteria questionnaire and supply supporting documentation. Then the Administrator would review the package and renew the certification according to the process for the initial certification. NHA requests LIHI clarify its intent to 1.) **Not de-certify** existing certified facilities based upon the criteria changes (grandfather existing facilities with respect to criteria revisions); or conversely 2.) **Apply the revised criteria** to all existing certified facilities and retain the possibility of de-certification on the basis of not meeting revised criteria.

Again from the current certification procedure documentation, NHA understands the Appeals Panel entertains appeals, by either an Applicant or commenter, of a preliminary certification decision made by the Governing Board. It is also our understanding that the Appeals Panel functions independently of the Governing Board and makes an independent decision about whether a facility should be certified. The Appeals Panel is supposed to consist of three representatives selected by the Governing Board from a pool of qualified candidates. Appeals Panel members are selected based on their *expertise with hydropower* and natural resource issues and their ability to objectively evaluate cases concerning the Certification Program. NHA seeks additional information as to whether or not there is a hydropower industry representative on the Appeals Panel. NHA seeks confirmation that the current appeal process (which requires the Appeals Panel to reach a decision and which would go back to the Board for final approval), will continue unchanged.

NHA appreciates the opportunity to comment on the revised criteria. As your letter indicated, “the most important step in this criteria review is your feedback; it is **critical that these criteria have the support of the industry...**” Recognizing that comments on the revised criteria have already been posted on the LIHI website, we anticipate NHA’s comments will be as well. We appreciate the openness of this process. However, it is unclear how NHA’s comments - and those of other commenters - will be considered. Will LIHI respond to comments directly or through some type of published format on the website that outside viewers can review? Transparency in this regard would enhance the credibility of the LIHI program and strengthen its outreach to industry and other interested parties.

Thank you again for extending this opportunity to comment. Please reach out to NHA, if we can assist with clarification of our comments or provide assistance with additional criteria or program revisions.

Sincerely,



Linda Church Ciocci
Executive Director