National Hydropower Association
601 New Jersey Ave. NW, Suite 660, Washington, DC 20001 • Tel 202.682.1700 • Fax 202.682.9478 • www.hydro.org

March 11, 2019

Kimberly Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

RE: National Hydropower Association's Comments on Proposed Hydroelectric Licensing Regulations under the America's Water Infrastructure Act of 2018, Docket No. RM19-6-000

I. Background & Introduction

The America's Water Infrastructure Act of 2018 (AWIA)[1] was signed into law on October 23, 2018. As pertinent here, Sections 3003 and 3004 of AWIA add new Federal Power Act (FPA) Sections 34 and 35,[2] to promote the expeditious development of new hydroelectric projects at existing nonpowered dams (NPDs) and closed-loop pumped storage (CLPS) projects through a process designed to result in a final licensing decision within two years of filing of a complete application. These provisions of AWIA direct the Federal Energy Regulatory Commission (Commission) to issue a rule, no later than 180 days from October 23, 2018, establishing an expedited process for issuing and amending licenses for qualifying projects at NPDs and CLPS projects.

The concept of the expedited licensing process originated with the Hydropower Regulatory Efficiency Act of 2013 (HREA).[3] Section 6 of the HREA directed the Commission to investigate the feasibility of issuing licenses for projects at NPDs and CLPS projects "in a two-year period."[4] Pursuant to the HREA, the Commission held a workshop to investigate the

[1] Pub. L. No. 115-270, 132 Stat. 3765 (2018) (AWIA).

[2] *Id.* §§ 3003, 3004, 132 Stat. at 3863-67 (to be codified at 16 U.S.C. §§ 823a and 823f, respectively).

[3] Pub. L. No. 113-23, 127 Stat. 493 (2013).

[4] 16 U.S.C. § 799 (2012), as *amended by the HREA*, Pub. L. No. 113-23, 127 Stat. 493 (2013).

feasibility of issuing a license for such projects within two years, conducted a pilot program, and held a follow-up workshop to assess the effectiveness of the pilot process.[5] The Commission submitted its Report to Congress in May 2017.[6] The Report concluded that it is feasible to complete the licensing process in two years for applications that reflect careful site selection, a well-defined project proposal, thorough pre-filing consultation, and a complete application.

On January 31, 2019, the Commission issued a Notice of Proposed Rulemaking (NOPR) to implement the rulemaking requirements under the AWIA.[7]

[5] The Commission's actions implementing this aspect of the HREA can be viewed on the Commission's e-library in Docket No. AD13-9-000.

[6] Federal Energy Regulatory Commission, Report on the Pilot Two-Year Hydroelectric Licensing Process for Non-Powered Dams and Closed-Loop Pumped Storage Projects and Recommendations Pursuant to Section 6 of the Hydropower Regulatory Efficiency Act of 2013 (submitted to the United States Congress May 26, 2017).

[7] Hydroelectric Licensing Regulations under the America's Water Infrastructure Act of 2018, 84 Fed. Reg. 2469 (Feb. 7, 2019).

The National Hydropower Association[8] (NHA), along with the Edison Electric Institute,[9] the National Rural Electric Cooperative Association,[10] the American Public Power Association,[11] and the Northwest Hydropower Association,[12] are pleased to submit the following comments in response to the NOPR. In addition, AWIA enjoyed overwhelming bi-partisan support throughout the legislative process and was approved overwhelmingly by both chambers of Congress.[13] As such, Congress and the President sent a strong and clear message that the licensing process for new projects at NPDs and CLPS projects can and should be expedited. NHA is committed to working with the Commission, state and federal resource agencies, Indian

[8] NHA is a national non-profit association dedicated exclusively to advancing the interests of the U.S. hydropower industry, including conventional, pumped storage, and new marine and hydrokinetic technologies. NHA's membership consists of 240 organizations, including public power utilities, investor-owned utilities, independent power producers, project developers, equipment manufacturers, environmental and engineering consultants, and attorneys.

[9] The Edison Electric Institute (EEI) is the association that represents all U.S. investor-owned electric companies. EEI's members provide electricity for about 220 million Americans, and operate in all 50 states and the District of Columbia. As a whole, the electric power industry supports more than 7 million jobs in communities across the United States.

[10] The National Rural Electric Cooperative Association (NRECA) is the national service organization for America's electric cooperatives. It represents and advocates for over 900 consumer-owned, not-for-profit electric cooperatives, public power districts, and public utility districts in the United States that provide electric service to approximately 42 million customers across 47 states. NRECA's member cooperatives include 63 generation and transmission ("G&T") cooperatives and 834 distribution cooperatives. In addition to purchasing hydropower from federal dams, electric cooperatives have developed approximately 692 megawatts of hydropower resources, mostly small hydro and run-of-the-river projects.

[11] The American Public Power Association is the voice of not-for-profit, community-owned utilities that power 2,000 towns and cities nationwide. APPA represents public power before the federal government to protect the interests of the more than 49 million people that public power utilities serve, and the 93,000 people they employ.

[12] Northwest Hydropower Association (NWHA) is a non-profit trade association that represents and advocates on behalf of the Northwest hydroelectric industry. NWHA has over 130 member companies from all segments of the industry. NWHA is dedicated to the promotion of the Northwest region's waterpower resources as a clean, efficient and cost-effective source of energy while maintaining fundamental environmental protections.

[13] The House passed AWIA by a voice vote. The Senate passed the House-version of the bill 99-1.

tribes, and other stakeholders to develop an expedited licensing process for these classes of projects in an environmentally and economically responsible manner.

II. NHA Comments

A. The Overall Approach

Sections 3003 and 3004 of the AWIA require the Commission to establish an expedited licensing process for qualifying projects "that will result in a final decision on an application for a license by not later than 2 years after receipt of a completed application for the license."[14] The proposed rule is designed to meet this goal, but is unlikely to result in any material reduction in the overall time required to obtain a hydroelectric license because it does not address the 3-5 year pre-filing process.[15] Unless measures are also taken to reduce the time required for the pre-filing process, license applicants for AWIA-qualified projects will continue to face a 5-7 year or longer licensing process.

Under the proposed rule, the Commission's decision on whether to grant a request to use the expedited licensing process (ELP) would not be made until it issues the Ready for Environmental Analysis (REA) Notice, well after the application is filed with the Commission and several years into the overall licensing process.[16] The REA Notice would include a schedule for completing the process within two years.[17] Commission staff's flowchart entitled "2-year

[14] AWIA §§ 3003 and 3004. NHA notes that the two-year expedited process for this limited class of projects, because it begins counting when the application is determined by the Commission to be complete, may be longer than the post-license application process under the existing Integrated Licensing Process (ILP) regulations, which contemplate issuance of a license within two years from the filing of the license application.

[15] See NOPR ¶ 7 ("the prefiling process is not included in the two-year time frame governed by the expedited process.")

[16] See proposed section 7.5, which states that a request to use the expedited licensing process will be approved when the Commission has determined that the license application meets all of the application content requirements, all the requirements of new Part 7, and that no other additional information is needed. That is the same point at which the Commission would issue the REA Notice. See Proposed Section 7.6.

[17] Proposed Section 7.6.

Expedited Post-filing Process for Qualifying Hydropower Projects" includes only minor timing adjustments to the post-application process by shortening several deadlines for stakeholders and agencies.[18] Moreover, the Commission's existing ILP regulations, applicable to all projects, anticipate that even a license for a project requiring an Environmental Impact Statement (EIS) will be issued within two years from filing of the application.[19] In sum, under the proposed rule, the expedited process offers minimal advantage over the existing regulations, and may even take longer than the existing process.[20] That would be a result which does not realize the intent of the legislation that these low impact projects should receive expedited processing.

B. Recommended Process Reforms

NHA is disappointed that the proposed rule fails to take any meaningful steps to streamline the overall 5-7 year process for obtaining a license for AWIA-qualified projects by excluding any consideration of reforms to the pre-filing process. It is in the spirit of the legislation to promote these types of projects, and certainly within the Commission's authority to streamline the pre-filing process for such projects. NHA therefore renews its comments and recommendations filed in 2013[21] and 2014[22] in the administrative docket for implementation of the HREA for streamlining the pre-filing process, subject to the modifications described below.

The linchpin for eligibility for expedited processing should be early identification of information needs and the sufficiency of existing information. A Commission decision on

[18] Summary of Interagency Task Force Activities at 10, Docket No. RM19-6-000 (issued Jan. 10, 2019).

[19] *See* Process for Hydropower Licenses, Integrated Licensing Process (ILP), https://www.ferc.gov/resources/processes/flow/hydro-6.asp?csrt=7839433867378251742 (last visited Feb. 11, 2019).

[20] See Attachment A, a table comparing the Commission's proposed timeline for the post-application ELP with the timeline for the Integrated Licensing Process under the current regulations. It shows that the final EIS would be issued later in the post-application process under the ELP than under the ILP, and the ELP schedule includes no timeline for issuance of the license order.

[21] National Hydropower Association's Comments on Achieving a Two-Year Licensing Process for Non-Powered Dams and Closed Loop Pumped Storage Projects, Docket No. AD13-9-000 (filed Nov. 21, 2013).

[22] National Hydropower Association's Comments on the Effectiveness of the Tested Two-Year Process for Licensing Non-Powered Dams and Closed-Loop Pumped Storage Projects, Docket No. AD13-9-000 (filed Apr. 14, 2017).

eligibility for expedited processing can, if the applicant acts with due diligence, be made early in the pre-filing process, rather than three to five years later when the application is deemed complete and ready for environmental analysis, and the benefits of expedition are thereby diminished. A streamlined pre-filing process with more certain timelines is essential to attract investment in these types of projects. Thus, NHA recommends that the final rule incorporate a two-step process that will enable the Commission to determine early in the pre-filing process whether expedited processing is warranted.

The first step is for the Commission to determine whether a proposed project satisfies the statutory qualifications for the ELP. This determination should be made at the conclusion of environmental scoping shortly after the applicant files its Notice of Intent (NOI) and Pre-Application Document (PAD). The PAD should provide sufficient information to determine whether the proposed project meets the statutory qualifications for new projects at NPDs set forth in Section 34(e)(1)[23] and for CLPS projects in Section 35(g).[24]

If the project satisfies the statutory criteria, the second step would be for the Commission to determine whether to approve the request to use the ELP. To reach that decision, the Commission would proceed to issue Scoping Document 1 (SD1) and hold a public scoping meeting to give participants an opportunity to demonstrate, using the Commission's established ILP study criteria,[25] any additional information needs. Following SD1 and public scoping, the Commission would determine whether sufficient information exists or can be timely developed to warrant eligibility for the ELP. If so, the Commission would approve the request to use the ELP. The approval would include a preliminary approval of draft study plans included with the PAD and commented on in National Environmental Policy Act (NEPA) scoping,

[23] These statutory qualifications include that the project is not already licensed or exempted, the project will be associated with a qualifying nonpowered dam (i.e., a dam operated for nonpower purposes and not used to generate electricity), and the project will be constructed and operated to generate electricity using, and not materially changing, the storage, release, or flow operations of the associated nonpowered dam.

[24] These statutory qualifications include little or no change to existing surface and groundwater flows and uses and unlikely to adversely affect federally listed threatened or endangered species.

[25] See 18 C.F.R. § 5.9(b).

as described below. The same document can also establish the milestones and schedule for the remainder of the licensing process.

A request to use the ELP should be approved if the PAD includes these elements indicating the project meets the statutory and Commission qualifying criteria:

- A clear description of the proposed project's operations, anticipated affected resources, and anticipated studies required to address data gaps.
- An explanation and analysis demonstrating the extent to which resource(s) will or will not be adversely affected or changed from existing conditions, supported by existing scientific information.
- Documentation of early consultation with federal and state resource agencies, including, but not limited to, early information exchange, early identification of issues to be addressed, and agency response to any existing information that will be included in the PAD. Areas of agreement could be outlined as well as needs for additional information or unresolved issues.
- Proposed study plans to allow for expedited review and approval of the project study efforts. At a minimum, a study plan would: (1) identify any data gaps stemming from the existing information provided; and (2) demonstrate how any additional and necessary studies will be timely completed.[26]

The final rule should not preclude an applicant whose request for expedited treatment is denied from renewing its request for expedited processing later in the pre-filing process.

NHA notes that the success of the ELP depends on all parties in the process – the applicant, the Commission and other agencies. As such, NHA believes it is critical that the other federal and state agencies re-examine their policies and regulations to align with the new expedited

[26] NHA anticipates that in most instances it will be possible to gather any necessary additional information in a single study season, but approval should not be precluded merely because some information will require more time to acquire.

process. An interagency Memorandum of Understanding may be an appropriate vehicle to ensure this coordination and achieve successful outcomes.

The NHA-proposed ELP has several elements. These elements include, but are not limited to:

- Early NEPA scoping following the NOI and PAD, with the Commission making a determination at the end of NEPA scoping whether to approve the request for ELP.
- Limit NEPA scoping documentation to a single Scoping Document that is issued in a timely manner prior to the applicant initiating its studies and further investigations.
- Early study plan approval in conjunction with NEPA scoping, based on rigorous application of the ILP study request criteria.[27]
- An explicit presumption in the regulations that an applicant can rely on existing studies and data in the absence of a demonstration by agencies or other consulted entities that the data is no longer reliable.
- Waiver of the draft license application requirement.
- Development of a single, final NEPA document, which in most instances should be a final Environmental Assessment (EA), possibly issued concurrently with the license order. In the case of projects at existing NPDs, the NEPA review would be limited to impacts of the proposed project facilities and operations, e.g., impacts to water quality, effects on listed species, etc., since by definition the project cannot materially change the current operation of the dam.
- Reduction of review and comment periods. The post-application schedule should be expedited to the maximum extent possible, with reduced time periods applicable to all participants, including the Commission.
- Development of standard license articles and, to the extent possible, standard mitigation measures for projects at NPDs and CLPS projects, to reduce disagreements over potential study and mitigation requirements.

[27] See 18 C.F.R. § 5.9(b).

Early NEPA scoping will clearly assist the applicant and the consulted entities to identify any issues and study requirements in connection with satisfying the applicant's and Commission's responsibilities under the Clean Water Act (CWA),[28] Endangered Species Act (ESA),[29] and National Historic Preservation Act (NHPA),[30] thereby increasing the likelihood that the expedited process is successful.

As noted above, the draft license application (or preliminary licensing proposal) should be waived for these projects. Under existing regulations, an applicant must obtain a waiver, which requires agency concurrence, in order to eliminate this step.[31] However, if a proposed project meets the statutory qualifications for expedited processing, there is a presumption that it will have minimal environmental issues, so circulation of a draft application is unnecessary. The license applicant is the only entity at risk from elimination of this step; that is, if its license application is deficient or requires significant additional information, the Commission can end expedited processing and transition to the appropriate non-expedited process.[32]

If the Commission adopts the pre-filing process reforms NHA recommends, NHA does not oppose the additional application requirements pertaining to the CWA, ESA, and NHPA. However, as discussed further below, NHA believes linking eligibility for the expedited licensing process to dam owner consent to the project should be limited to non-federal dams.

C. Statutory Eligibility Criteria

1. Nonpowered Dams

The proposed rule requires an applicant for authorization to use the ELP to demonstrate that its proposed project meets the statutory eligibility criteria of FPA Section 34(e), including

[28] 33 U.S.C. § 1251-137

[29] 16 U.S.C. §§ 1531-43

[30] *Id*. § 470-470w-6

[31] See 18 C.F.R. §§ 4.38(e) and 5.16(f).

[32] Applicants should also be able to ensure the adequacy of a license application by informally consulting with Commission staff before the application is filed.

that operation of the project "will not result in any material change to the storage, release, or flow operations of the associated qualifying nonpowered dam."[33]

NHA requests that the Commission define the phrase "not result in any material change." NHA is aware that what constitutes a material change is a judgment that must be made in light of the specific project proposal. However, the Commission should provide a definition in the final rule so that applicants preparing their NOI and PAD will be able to address this statutory requirement. That would help ensure that the term is not interpreted so narrowly as to preclude eligibility for projects which have only minor effects on existing dam operations and reduce the potential for confusion and the opportunity for participants to manufacture issues in an effort to delay proceedings. NHA proposes the following definition of "material" in this context: "A material change is one which would: (1) significantly modify the pre-license storage, release, or flow operations of the associated qualifying nonpowered dam, or (2) would impair the ability of the dam owner to control operation of the dam."

The final rule could also provide additional guidance by identifying operational regimes that are deemed to satisfy this qualification. For instance, the final rule could state that a project proposed to operate in "run-of-river"[34] or "run-of-release"[35] mode such that project outflow approximates inflow, and/or which includes measures to minimize reservoir fluctuations or maintain them within a narrow band, qualifies. If the proposed project description is clear in this regard, it should not be necessary for the exact specifications to be settled in order for the Commission to conclude that the project will not result in a material change in operation of the nonpowered dam.

2. CLPS Projects

[33] Proposed Section 7.2(b)(5).

[34] *See, e.g., Clean River Power MR-1, LLC*, 154 FERC ¶ 62,206 at PP 15, 70, and Article 402 (2016).

[35] *See, e.g.*, *FFP Missouri 13, LLC*, 160 FERC ¶ 62,137, Article 403 at p. 64348 (2017).

The proposed rule[36] requires an applicant for authorization to use the expedited licensing process to demonstrate that its proposed project meets the statutory eligibility criteria of FPA Section 35(g)(2); *i.e.*, the project: (i) "will cause little to no change to existing surface and groundwater flows and uses," and (ii) "is not likely to adversely affect" federally listed threatened or endangered species or their "designated critical habitat" under the ESA.[37] The proposed rule should be modified to ensure that the Commission does not construe these requirements so narrowly as to disqualify most, if not all, closed loop pumped storage projects.

a. Changes to Surface and Groundwater Flows and Uses

If "cause little to no change" to surface and groundwater flows is narrowly interpreted, the Commission would exclude from qualification most or possibly all closed loop pumped storage projects, as most projects must obtain initial fill and makeup water from surface or groundwater. Even a project that obtained water from an existing reservoir, abandoned coal mine, or a canal serving municipal, industrial, or agricultural purposes could be disqualified as such features involve surface water flows. On the face of the statute, the only clearly qualified project as to the acquisition of water would be one that obtains its entire water supply from an existing enclosed water supply pipeline. The only clearly qualified project as to groundwater flows would be one with reservoirs so completely isolated from groundwater as to have no connection at all. NHA is not aware that any such project exists. Such a result would not comport with Congress' intent.

The Commission should interpret "little or no change" in a practical and reasonable manner which recognizes that pumped storage projects do not exist in complete isolation from surface and groundwater flows. Projects which affect surface water flows only because they draw their initial fill and periodic makeup water from surface water should be categorically determined to cause little change to surface water flows because the diversion of surface waters to the project will be a short-term, temporary event. In addition, such diversions can be

[36] Proposed Section 7.2(b)(2).

[37] AWIA § 3004, 132 Stat. at 3863-65.

deemed to cause little change because the Commission, state water quality certification, and/or federal land managing agencies are certain to make such diversions subject to restrictions on timing and amounts necessary to protect aquatic resources.

Also, a project that is continuously hydraulically connected to flowing surface waters should not for that reason alone deemed to be unqualified. A pumped storage project may have substantial impacts on flowing water; for instance, by using an impoundment created by a dam as its lower reservoir. On the other hand, a project at which the upper or lower reservoir receives water from a small stream which is returned to the stream a short distance downstream could reasonably be found to cause little change to the surface water flow.

A project should also not be disqualified merely because it obtains initial fill and makeup water from groundwater. Even the initial fill of a large project may have little or no measurable impact on groundwater flows because of the short-term nature of the action, the size of the groundwater resource relative to the reservoir, and/or the natural rate at which groundwater is replenished by precipitation or surface water flows. Periodic replenishment of losses due to evaporation are less likely to have any discernible effect on groundwater flows. If an applicant seeking approval for the expedited licensing process can make a prima facie case that groundwater impacts will be short-term and/or local, the project should be deemed to meet the standard.

Similarly, every pumped storage project is connected to groundwater by its upper and/or lower reservoir, so the mere connection should not be a basis to disqualify any pumped storage project. The extent to which a proposed project is likely to affect groundwater flows is a matter that can be addressed in the PAD. If the information is sufficient to make a reasonable inference that construction and operation of the project will have minor impacts on groundwater flows, and if reasonable mitigation measures are proposed, the Commission should make a determination at the outset that the project qualifies for the expedited process.

b. Not Likely to Adversely Affect Listed Species or Critical Habitat

Under FPA Section 35(g)(2)(B),[38] a CLPS project qualifies for expedited processing if it is "unlikely to adversely affect" ESA-listed species. The proposed rule would also require a qualifying project to meet the same standard for critical habitat for listed species.[39] NHA does not object to this requirement because it assumes as a practical matter that if an application requires a Biological Opinion, it is highly unlikely a request for expedited processing will be made. However, consistent with its comments above, NHA submits that the Commission's proposal to make this determination at the REA Notice stage comes far too late in the process. If a potential license applicant is able to accompany the NOI and PAD with a no effect determination, concurrence from the U.S. Fish and Wildlife Service (FWS) and/or the National Marine Fisheries Service (NMFS) on a not likely to adversely affect determination, or a draft Biological Assessment which includes documentation of consultation with these agencies (which might include draft mitigation measures), and also satisfies the statutory standard regarding changes to surface water and groundwater flows, its request for expedited processing should be approved at that point. Similarly, if a potential license applicant, based on pre-PAD investigations, is able to determine that there are no federally listed species in the proposed project area that could be affected by the project, it should be deemed to have met the statutory criterion.

D. Definition of a CLPS Project

The AWIA directs the Commission to establish eligibility criteria for a CLPS project.[40] The Commission has proposed to define CLPS projects as pumped storage projects that are "not continuously connected to a naturally-flowing water feature."[41] The Commission's intention may be that an applicant has made the required demonstration of "little to no change" to surface or groundwater flows if its project meets this proposed definition. However, as discussed above, circumstances where a pumped storage project has no continuous connection

[38] AWIA § 3004, 132 Stat. at 3863-65.

[39] NOPR ¶ 20-23.

[40] AWIA § 3004.

[41] NOPR ¶ 41; Proposed Section 7.1(c)(3).

at all to naturally flowing surface water or groundwater, however minor, will be very rare to nonexistent, rendering the proposed rule unworkable.

To address this, the Commission should clarify or modify the meaning of "not continuously connected." If this standard is adopted, the term "connection" in the context of initial fill and makeup should refer to the act of obtaining water, not to the physical connection between the water resource via a diversion structure, wells, or any other physical works. Thus, a project that draws water from a naturally flowing source only for its initial fill, which thereafter is periodically replenished with makeup water for evaporation and seepage to groundwater, should be deemed to be not continuously connected. Otherwise, no such pumped storage project will meet the definition of a CLPS project.

The projects identified in the NOPR as projects that "could" [42] be considered to be a CLPS project are illustrative. Of those seven projects, four rely on groundwater,[43] which would be a disqualifier if mere physical connection is deemed to be a continuous connection. Although the other three identified projects would obtain initial fill and makeup water from an existing canal or reservoir, which presumably is not a "naturally flowing" water resource, it is likely that the upper and/or lower reservoirs would have some effect, however minimal, on groundwater flows in the immediate vicinity of the project and could thereby be deemed to be continuously connected.

To address these concerns, NHA recommends that the Commission adopt a more broad definition of a CLPS project that is based on the reality of how such projects are constructed and operated. NHA suggests the following modified definition:

[42] NOPR ¶ 39.

[43] Eagle Mountain Project No. 13123; Mount Hope Project Nos. 8598, 9105 and 9401; Mineville Project No. 12635; and Swan Lake Project No. 13318.

> *Closed-loop pumped storage project* means a pumped storage project that: (1) does not obtain its principal[44] water supply from a naturally-flowing water feature; (2) obtains its water from a naturally flowing surface water feature only for the purpose of initial fill and periodic replenishment, or (3) is not located on a navigable waterway. Minor and local effects on surface water or groundwater flows from construction or operation of the project works, taking into account any applicant-proposed mitigation measures, shall not disqualify a project which meets criterion (1), (2), or (3).

NHA submits that under the third criterion, location of a project on non-navigable waters such as small creeks or streams which do not contain or affect significant environmental resources should not disqualify the project from the ELP.

E. Additional Commission-Imposed Qualifiers

The Commission also proposes that, in order to qualify for expedited processing, a license applicant must make certain showings regarding: (1) the status of water quality certification under the CWA; (2) effects on federally listed species under ESA; (3) initiation of consultation with the relevant State Historic Preservation Officer (SHPO) and affected Indian tribes under the NHPA; (4) documentation that the owner of an existing federal or non-federal dam is not opposed to the project; and (5) documentation that the entity managing a state or local park, recreation area, or wildlife refuge is not opposed to the project.[45]

If the Commission agrees with NHA that an ELP eligibility determination can be made at the PAD/NOI stage, then these additional qualifiers which would apply at the license application stage would not be appropriate. At most, a potential applicant should be required to include with the NOI and PAD documentation that it has exercised due diligence with regard to these

[44] This qualifier is intended to address a situation where the upper or lower reservoir receives a small part of its water supply from a naturally flowing surface water feature, such as an intermittent or small creek.

[45] NOPR ¶ 14-26.

matters in developing the PAD and that it has initiated early consultation with the state water quality agency, FWS and/or NMFS, as appropriate, the SHPO and affected Indian tribes, and the entity managing a state or local park, recreation area, or wildlife refuge. If it has done so, the Commission should be in a position to determine if the statutory qualifiers are met when the NOI and PAD are filed and, following the early NEPA scoping described above, whether it is likely that the license application will raise issues that are likely to delay processing. If not, then the ELP request should be approved. If, at the application filing stage, these matters are not sufficiently addressed, the Commission can find that the ELP no longer applies.

NHA opposes the inclusion of a requirement regarding dam owner or agency assent to the project as it would apply to a federal dam. First, whether or not non-federal development under the FPA is permissible at a federal dam is a legal question. If, for instance, the law permits the Commission to issue a license for a project at a dam operated by the U.S. Army Corps of Engineers (Corps), whether Corps staff opposes issuance of a Commission license is not determinative. Moreover, if the federal agency is opposed to the project notwithstanding the issuance of a Commission license, it can prevent the project from going forward by denying applications for approval under its independent authorities, assuming there is an evidentiary basis for doing so. That is the case whether the license is the result of an expedited licensing process or an application processed in the ordinary course. Any concerns a federal dam owner has about a proposed project should be addressed by the federal agency and the license applicant independently of the Commission's licensing process. If the federal agency opposes the project, it is extremely unlikely an application will ever be filed. If the Commission chooses to have a disqualifier for projects at federal dams, it should be that the federal agency has shown that non-federal development at the dam is legally precluded.

F. Other Matters

1. Applicability of the Expedited Licensing Process to New or Subsequent Licenses

The Commission requested comments on whether the expedited licensing process should apply to an application for a new or subsequent license for a project originally licensed

under the expedited licensing process.[46] The first such new or subsequent license applications presumably would be filed in about forty years, when the statutory, regulatory, and environmental conditions are unknown.[47] If the regulatory landscape at that time is roughly the same as it is today, there should be no reason a new license for a project originally licensed using the expedited licensing process (or, indeed, for any license issued under the current statutory and regulatory regime) could not be issued within two years.[48] The project would have qualified for the expedited licensing process at original licensing because, if it was at an NPD, its operation did not materially change the operation of the dam or, if a CLPS project, because it had no material effect on surface or groundwater flows and no adverse impacts on ESA-listed species or their habitat.

Far more important, however, is that the original license would be subject to the comprehensive licensing regime established by the FPA, CWA, ESA, NHPA, other statutes, and the implementing regulations thereunder. Each license will include a full suite of operational conditions and resource management plans subject to periodic reporting and updating requirements, mandatory fishway prescriptions, mandatory conditions to protect federal and state-listed rare, threatened, and endangered species, and, in most cases, a comprehensive state water quality certification. Projects located on federal lands would also have been subjected to mandatory conditions under FPA Section 4(e). All of these requirements are now also subject to reopener provisions during the license term. Thus, absent a dramatic change of environmental protection laws, or the eleventh hour emergence of a substantial new issue during the original license term that goes unaddressed, it is highly unlikely that future new

[46] NOPR ¶ 7.

[47] In 2017, the Commission issued a policy statement which adopted a 40-year default license term for original and new licenses for projects at non-federal dams, subject to certain exceptions. Policy Statement on Establishing License Terms for Hydroelectric Projects, 161 FERC ¶ 61,078 at P 14. New licenses for projects at U.S. Army Corps of Engineers dams would not be filed for 50 years.

[48] Strictly speaking, the new license application would not qualify for the expedited licensing process, because it would not satisfy the requirement of Section 34(e)(1)(A) mandating that the project not already be licensed.

license applications for qualified projects at NPDs and CLPS projects will present any issue that impairs the Commission's ability to expedite processing of a new license application.

2. Applicability of the Expedited Licensing Process to License Amendments

The Commission also has requested comments on whether it should apply the expedited licensing process to amendments to licenses for projects at NPDs and CLPS projects which qualified for the expedited process at original licensing.[49] These licenses, like all other licenses, will be subject to the comprehensive regulatory scheme discussed above. Thus, once a project is licensed, there appears to be no reason why amendments to licenses issued based on an expedited licensing process should receive more favorable treatment than applications to amend other licenses. The only potential exception might be during the initial construction stage. Expediting amendments at that stage would be consistent with the goal of bringing online additional renewable energy from such projects.

3. Applicability of the Expedited Licensing Process to Applications Which Require an EIS

The Commission has requested comments on whether the expedited process should be available to qualifying projects that require an EIS[50] in light of the Commission signing a federal interagency Memorandum of Understanding implementing Executive Order 13807,[51] in which the signing agencies undertake to complete authorization decisions for "major infrastructure projects," within two years from issuance of a Notice of Intent to prepare an EIS. This is a not a determination that can be made in the abstract. Rather, in the context of each application for a qualified NPD or CLPS project that requires an EIS, the Commission can determine at the close of pre-filing NEPA scoping if the facts warrant approval of the expedited process.

[49] ¶ 44.

[50] ¶ 45-46.

[51] Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, Exec. Order No. 13,807, 82 FR 40,463 (Aug. 15, 2017).

4. Exceptions from Other Requirements

The NOPR makes no mention of FPA Section 35(c), which states that in issuing or amending a license for a CLPS project pursuant to the expedited licensing process:

> the Commission may grant an exception from any other requirement of this part [i.e., FPA Part 1] with respect to any part of the closed-loop pumped storage project (not including any dam or other impoundment),

Such exceptions are subject to mandatory conditions issued by FWS, NMFS, and state fish and wildlife agencies to protect fish and wildlife resources, and such terms and conditions as the Commission deems appropriate to ensure compliance with the mandatory conditions.

Section 35(c) is an opportunity for the Commission to ease the burden of license conditions for qualifying CLPS projects. It could, for instance, make an exception to its practice of requiring recreation improvements as a condition of licensing pumped-storage projects, including such requirements only if agencies can demonstrate that the project would cause a substantial diminution of local recreational opportunities. The Commission might also ease monitoring and reporting requirements that are not related to dam and project safety. NHA requests that the Commission provide guidance regarding the kinds of exceptions to FPA Part I requirements it will adopt or consider.

IV. Conclusion

The expedited licensing provisions of AWIA for projects at existing NPDs and CLPS projects are welcome, but the Commission's proposal to implement these provisions without addressing the lengthy pre-filing process does not promise to result in any material reduction in the total amount of time needed to obtain a license for such projects. NHA submits that its proposed modifications will help to remove redundancy, expedite timeliness, and ensure that the expedited licensing process has a logical scope and nexus to likely impacts. NHA's approach is therefore more likely to comport with Congress' intent to promote and expedite licensing of these projects. Such a result is consistent with the Administration's goals for timely processing of applications for major infrastructure projects and to promote renewal of hydroelectric power, as well as provide critical benefits and ancillary services required to ensure grid reliability and support the increasing generation from intermittent renewable energy resources.

Respectfully submitted,

Linda Church Ciocci
President and CEO
National Hydropower Association