

July 26, 2019

Commissioner Judith Judson
Department of Energy Resources
100 Cambridge Street
Boston, MA 02114

Re: Draft Department of Energy Resources regulations to amend 225 CMR 14 and 225 CMR 15

Dear Commissioner Judson,

Thank you for the opportunity to provide comments on the Department of Energy Resources (DOER) draft regulations 225 CMR 14 (Renewable Energy Portfolio Standard – Class I) and 225 CMR 15 (Renewable Energy Portfolio Standards – Class II).

On behalf of the 70 undersigned organizations, we respectfully and strongly urge DOER to remove the proposed addition in eligibility criteria for hydropower under Class I in 225 CMR 14.05 (1)(a)(6), new paragraph h, “A Generation Unit that has received a certification from LIHI and a Statement of Qualification from the Department *shall not be required to obtain a recertification from LIHI in order to retain its Statement of Qualification.*” We are deeply concerned that removing a requirement for recertification would effectively undermine a project operator’s motivation to comply with certification conditions in a timely manner. A qualified project would effectively receive a lifetime qualification regardless of any environmental changes or scientific and technological advances that would prompt updated conditions to minimize and avoid impacts to river systems.

Massachusetts has been a national leader in the responsible adoption of renewable energy since the expansion of the RPS through the Green Communities Act of 2008. Poorly sited, designed and operated hydropower projects can block fish passage, displace wildlife, significantly alter habitat and water quality, and create conditions that leave rivers alternating between unnatural drought and flood-like conditions on a daily basis. These impacts can leave ecological communities greatly impaired and result in severe declines in fish and wildlife abundance, in some cases to the point of local extirpation. In fact, many stakeholders maintain that hydropower should not be eligible for incentives under the MA RPS at all, since it is a mature technology that has successfully competed with traditional fossil fuels for over a century, and because dams have such negative environmental impacts. Yet during the 2007-2008 legislative session, The Nature Conservancy (TNC), Mass Audubon and The Conservation Law Foundation (CLF) provided key support for low-impact hydropower to become eligible for incentives under the MA RPS, pursuant to the Green Communities Act (GCA), provided that the facilities meet certain environmental performance standards. The three organizations carefully worked and came to consensus with representatives of hydropower companies on language regarding low-impact standards that was acceptable to all parties.

The Green Communities Act of 2008 (under M.G.L. c. 25A, § 11F) reflected the consensus among the diverse stakeholders and required RPS-eligible hydropower to meet “appropriate and

site-specific standards that address adequate and healthy river flows, water quality standards, fish passage and protection measures and mitigation and enhancement opportunities in the impacted watershed.”

The Department of Energy Resources (DOER), during its promulgation of the RPS regulations in 2008-2009, recognized that it did not have the in-house resources or ecological science-based expertise to conduct the due diligence necessary to determine the statutory environmental eligibility requirements. TNC, CLF and Mass Audubon worked in collaboration with DOER and encouraged the incorporation into the regulations of an external, independent certification process provided by the Low Impact Hydropower Institute (LIHI) to screen hydropower facilities for eligibility.

Being certified by LIHI means the hydropower facility must pass consistent standards for river flows, water quality, fish passage and protection, watershed protection, threatened and endangered species protection, cultural resource protection and recreation. The undersigned groups favor dam removal and restoration wherever possible and are invested in continually improving the LIHI process over time. However, LIHI offers the nation’s only independent certification and verification program, and it is an essential tool to ensure the lowest possible environmental impact from hydropower projects receiving subsidies from Massachusetts’ electric customers. Voluntary certification is accessible to any existing hydropower project, as well as new projects constructed in conduits and on non-powered dams. DOER has not demonstrated that they have the internal knowledge or capacity to ensure LIHI compliance, should the recertification requirement be removed. Nor do any of the Massachusetts environmental agencies, such as the Departments of Environmental Protection and Fish and Game, have the capacity to provide such support. The proposed change includes no indication of an alternate mechanism to ensure that environmental protection standards, as required by law, would continue to be met.

Notably, several hydropower companies subsequently have “played by the rules,” successfully demonstrating compliance with the standards prior to becoming eligible for incentives under the RPS. The LIHI certification criteria and evaluation process are extensively vetted by both industry and environmental experts and are open for public comment. To meet ongoing standards, LIHI works closely with certificate holders on both certification and recertification, and significant interaction is often required to ensure standards are met and continue to be met. New conditions have been required on 65% of recent recertifications to ensure continued or future compliance with LIHI criteria. For example, recent improvements in recertifications have included installing fish passage years in advance of license requirements and establishing proactive operational changes to improve water quality and aquatic habitat.

The addition of 225 CMR 14.05 (1)(a)(6) paragraph h would have significant consequences for the future of rivers and hydropower in the region. Requiring LIHI Certification at only one point in time fails to appreciate the importance of ongoing reviews, or the nature of a changing climate and corresponding changes in the ecosystem. Rivers and hydropower operations are equally dynamic as they respond to daily, seasonal and/or longer-term changes, like fish migration patterns, flood or drought conditions, or the upstream and downstream operations of third-party factors, like other dams. For these reasons, LIHI mandates an annual review to ensure ongoing

compliance and requires a comprehensive recertification every 5 to 10 years. This ongoing review was a well-known expectation during the enactment of the Green Communities Act and promulgation of 225 CMR.

We believe that the proposed language, if adopted, will disincentivize recertifications and may also lead hydropower operators to withdraw from LIHI immediately after showing proof of certification to DOER, thus avoiding *any* annual reviews since they would have no reason to demonstrate ongoing compliance. If the proposal is adopted, conceivably, DOER would be allowing hydropower to benefit from RPS incentives for years, even decades, without ensuring that the environmental standards clearly promulgated in the RPS regulations and in statute, as often required through LIHI certification conditions, are ever met. And for projects that meet statutory requirements upon certification, DOER would allow projects to benefit from renewable energy credits without ever affirming they continue to comply.

It appears that the motivations for the proposed change are concerns around LIHI costs and redundancy with the mandated FERC licensing of hydropower. For the three following reasons, we do not see the necessity for the proposed change:

1. Regarding costs, the annual cost to LIHI certificate holders *represents less than one half of one percent of annual Massachusetts REC sales*. The cost of obtaining LIHI certification does not, by itself, present a barrier to participating in the RPS. The cost of applying for and maintaining a LIHI certificate is extremely low relative to the economic benefits derived from the certification. The LIHI fee structure was recently revised and carefully designed, with extensive stakeholder outreach and acceptance, to cover program costs while staying reasonable to the applicant and responsive to regional green energy market values.
2. Regarding attainability, it is clear from available statistics that LIHI certification is not an insurmountable barrier for Massachusetts hydropower operators, as 29 LIHI certificates encompassing 52 facilities have already been awarded as of May 20, 2019.
3. Regarding redundancies with FERC and other agencies, LIHI is not a permitting agency. No hydropower project requires LIHI certification to operate. One of the most significant differences between LIHI certification and FERC licensing is the different objectives of the two processes. LIHI's certification process is intended to protect multiple ecosystem values, including river flows, water quality, fish and wildlife, and other environmental indicators of a healthy ecosystem around hydropower facilities, as well as meeting recreation and cultural preservation needs. The Federal Power Act, on the other hand, requires FERC to issue licenses that balance, or trade off, the power and non-power uses of water. To do that, FERC actively encourages negotiated settlements as the basis for most of its licenses, making the actual outcome for environmental protections less predictable and fully dependent on the parties that intervene. FERC issues licenses for up to 50 years in length, meaning that some older projects were last reviewed in the 1980's with licenses that do not reflect an understanding of current social and ecological conditions. FERC also permanently exempts many small projects from licensing, meaning that these projects receive minimal environmental impact review. In

Massachusetts, of the 29 LIHI certifications, 18 are exempt from FERC licensing or non-jurisdictional.

Massachusetts has made significant investments over the past several decades in restoring our region's rivers, including improvements in water quality, aquatic habitat, and flow regimes that protect the ecological functions and associated economic benefits of healthy rivers. The current process by which hydropower projects are reviewed for site-specific environmental standards is an appropriate means to ensure that hydropower is incentivized by the RPS in a manner consistent with the long-term direction, investment, and commitments in the Commonwealth for river protection.

We ask DOER to remove the proposed 225 CMR 14.05 (1)(a)(6) paragraph h which would incentivize hydropower operators to pursue only a one-time demonstration of LIHI certification. Working together LIHI and DOER have become a national model for hydropower's inclusion in green power programs. Other states, like Oregon, have replicated the model and others are sure to follow. We implore DOER to leave the language as it is currently written.

Thank you for your time and consideration. If you have any questions or need additional information, please do not hesitate to contact Gabby Queenan of the Massachusetts Rivers Alliance at gabbyqueenan@massriversalliance.org or 617-714-4272.

Sincerely,

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