

162 FERC ¶ 61,235  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Kevin J. McIntyre, Chairman;  
Cheryl A. LaFleur, Neil Chatterjee,  
Robert F. Powelson, and Richard Glick.

FirstLight Hydro Generating Company

Project Nos. 2485-074  
1889-086

ORDER DENYING REHEARING

(Issued March 15, 2018)

1. On February 17, 2017, the Director, Office of Energy Projects (Director), issued a determination on FirstLight Hydro Generating Company's (FirstLight) request for a study plan modification regarding the relicensing proceedings for the 67.7-megawatt Turners Falls Hydroelectric Project No. 1889 (Turners Falls Project) and 1,166.8-megawatt Northfield Mountain Pumped Storage Project No. 2485 (Northfield Mountain Project). On March 20, 2017, FirstLight filed a request for rehearing objecting to the timing and scope of the requirements regarding the Study 3.7.1 Phase IB and Phase II archaeological surveys. As discussed below, we deny FirstLight's request for rehearing.

**I. Background**

2. Turners Falls Dam is located at approximately river mile 122 on the Connecticut River and creates the Turners Falls impoundment, which is approximately 20 miles long and extends upstream to the base of Vernon Dam. Most of the Turners Falls impoundment lies in Massachusetts, with approximately 5.7 miles of the northern portion located in New Hampshire and Vermont.

3. The Turners Falls impoundment serves as the lower reservoir for the Northfield Mountain pumped storage project. The upper reservoir is located atop Northfield Mountain in Erving, Massachusetts. The Northfield Mountain Project's tailrace and intake is located approximately 5.2 miles upstream of Turners Falls Dam.

4. FirstLight initiated the Integrated Licensing Process (ILP) for relicensing the projects pursuant to Part 5 of the Commission's regulations<sup>1</sup> on October 31, 2012, by filing Notices of Intent (NOI) to seek new licenses, and Pre-Application Documents (PAD).<sup>2</sup> As part of the ILP, FirstLight is required to consult with resource agencies, tribes, and other stakeholders to develop and conduct studies that will inform Commission staff's environmental analysis and, ultimately, the Commission's decision on whether to issue new licenses for the projects.<sup>3</sup> The studies also provide information that resource agencies will use to prepare comments, recommendations, and terms and conditions for the projects, and as relevant here, to assist the Commission in complying with the National Historic Preservation Act (NHPA).

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<sup>1</sup> 18 C.F.R. Part 5 (2017).

<sup>2</sup> The licenses for both projects expire on April 30, 2018. On October 31, 2012, TransCanada Hydro Northeast Inc. (TransCanada), the licensee of the Wilder Hydroelectric Project No. 1892, Bellows Falls Hydroelectric Project No. 1855, and the Vernon Hydroelectric Project No. 1904, which are also located on the Connecticut River upstream of the Turners Falls Project, filed NOIs and PADs for its projects. TransCanada subsequently transferred these three projects to a company now named Great River Hydro, LLC. See *TransCanada Hydro Northeast Inc. and TransCanada Hydro Northeast LLC*, 158 FERC ¶ 62,119 (2017); and *TransCanada Hydro Northeast LLC and Great River Hydro, LLC*, 159 FERC ¶ 62,154 (2017). Commission staff's Scoping Document 1, issued on December 21, 2012, indicated its intent to prepare a single environmental impact statement (EIS) for the five combined Great River Hydro and FirstLight projects.

<sup>3</sup> 36 C.F.R. § 800.4 (2017); see also Council on Environmental Quality and Advisory Council on Historic Preservation, *NEPA and NHPA: A Handbook for Integrating NEPA and Section 106*, at 13 (2013) (NHPA Guidebook) ("section 106 requires agencies to identify historic properties within the area of potential effects") (citing 36 C.F.R. § 800.16(d) (2017)); Advisory Council on Historic Preservation, *Meeting the "Reasonable and Good Faith" Identification Standard in Section 106 Review* Guidance Document at 1 (ACHP Identification Standard), available at [http://www.achp.gov/docs/reasonable\\_good\\_faith\\_identification.pdf](http://www.achp.gov/docs/reasonable_good_faith_identification.pdf).

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**A. National Historic Preservation Act Requirements**

5. Under section 106 of the NHPA,<sup>4</sup> and its implementing regulations,<sup>5</sup> agencies are required to undertake a “reasonable and good faith effort” to identify historic properties within the “area of potential effects” (APE) that may be affected by their undertakings. Under the regulations that implement section 106, the agency first sets the scope of identification efforts in consultation with the State Historic Preservation Officer(s) (SHPO) and Tribal Historic Preservation Officer(s) (THPO), by determining the APE.<sup>6</sup> The APE is “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties.”<sup>7</sup> Next, the agency, in consultation with the SHPO/THPO, “shall make a reasonable and good faith effort to identify historic properties within the APE.”<sup>8</sup>

6. The “reasonable and good faith effort” qualifier provides the agency some discretion on the scope of the identification efforts. The Advisory Council on Historic Preservation’s (ACHP) guidance on the “reasonable and good faith effort” standard makes clear that the regulations implementing the NHPA do not require identification of all historic properties within the APE.<sup>9</sup> Nor do the section 106 implementing regulations require ground verification of the entire APE because “in many cases, areas can be considered to have a certain probability of containing historic properties based on current knowledge, which can be used to justify where within the APE most identification efforts will or should be targeted.”<sup>10</sup>

7. Under the section 106 implementing regulations, the agency may also phase the identification of historic properties under the follow circumstances: (1) if the project’s

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<sup>4</sup> 54 U.S.C. § 306108 (2012).

<sup>5</sup> 36 C.F.R. Part 800.

<sup>6</sup> 36 C.F.R. § 800.4(a) (2017).

<sup>7</sup> *Id.* § 800.16(d).

<sup>8</sup> *Id.* § 800.4(b).

<sup>9</sup> ACHP Identification Standard at 3.

<sup>10</sup> *Id.*

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alternatives consist of large land areas; (2) where there is restricted access to the properties; or (3) if agreed to in a programmatic agreement with the SHPO.<sup>11</sup>

8. Once historic properties have been identified, the agency evaluates the properties' historic significance to determine if each property is eligible to be listed on the National Register of Historic Places (National Register) for section 106 purposes.<sup>12</sup> Next, for any property that is eligible for listing on the National Register, the agency considers whether that property "may be affected by the undertaking."<sup>13</sup> If there are no historic properties or none are affected by the undertaking, the section 106 review essentially ends (after notification and an opportunity for review by the SHPO/THPO).<sup>14</sup> If the agency finds that the historic property may be affected, the agency must assess, in consultation with the SHPO/THPO, whether the project will have an adverse effect on the identified historic properties.<sup>15</sup> Adverse effects occur when the project "may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register. . . ."<sup>16</sup>

### **B. Commission Regulation Governing Study Plans**

9. In Order No. 2002, the Commission enacted regulations creating the ILP, including regulations governing pre-licensing development and implementation of study plans.<sup>17</sup> The study plan development process, which includes a dispute resolution process, is governed by sections 5.9 through 5.14 of the Commission's regulations.<sup>18</sup> Section 5.9 governs identification of and requests for studies.<sup>19</sup> Any request for a

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<sup>11</sup> 36 C.F.R. § 800.4(b)(2) (2017).

<sup>12</sup> *Id.* § 800.4(c).

<sup>13</sup> *Id.* § 800.4(d).

<sup>14</sup> *Id.* § 800.4(d)(1).

<sup>15</sup> *Id.* § 800.5(a).

<sup>16</sup> *Id.* § 800.5(a)(1).

<sup>17</sup> *Hydroelectric Licensing under the Federal Power Act*, 104 FERC ¶ 61,109 (2003) (Final Rule).

<sup>18</sup> 18 C.F.R. §§ 5.9-5.14 (2017).

<sup>19</sup> *Id.* § 5.9(a).

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particular study must address seven criteria designed to ensure that the requested study is “not [] frivolous and would add some appreciable evidentiary value to the record.”<sup>20</sup>

10. The license applicant files a proposed study plan.<sup>21</sup> After a comment period,<sup>22</sup> the applicant files a revised study plan for the Commission’s approval.<sup>23</sup> The Director of the Office of Energy Projects (OEP) will issue a Study Plan Determination that includes any modifications the Director determined necessary.<sup>24</sup> Certain federal agencies may challenge the study plan determination through a formal dispute resolution process.<sup>25</sup> The applicant could challenge a study plan determination by seeking rehearing.<sup>26</sup>

11. Once the Commission has approved a study plan, the applicant must conduct the studies as required by the study plan determination.<sup>27</sup> Any request to modify an approved, on-going study is subject to section 5.15 of the Commission’s regulations and “must be accompanied by a showing of good cause why the proposal should be approved.”<sup>28</sup>

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<sup>20</sup> See *id.* § 5.9(b); see also Order No. 2002, 68 Fed. Reg. 51,070, at P 87 (Aug. 25, 2003) (discussing the purpose of the study criteria) (citing Notice of Proposed Rulemaking, Hydroelectric Licensing Under the Federal Power Act, 68 Fed. Reg. 13,988, at 13,995 (Feb. 21, 2003)).

<sup>21</sup> 18 C.F.R. § 5.11(a) (2017).

<sup>22</sup> *Id.* § 5.12.

<sup>23</sup> *Id.* § 5.13.

<sup>24</sup> *Id.* § 5.13(c).

<sup>25</sup> *Id.* § 5.14.

<sup>26</sup> See 18 C.F.R. § 385.713 (2017) (providing for rehearing of any final Commission decision); see e.g. *TransCanada Hydro Northeast, Inc.*, 151 FERC ¶ 61,116 (2015) (granting license applicant’s request for rehearing of a study plan determination); *Exelon Generation Company, LLC*, 131 FERC ¶ 61,248 (2010) (denying license applicant’s request for rehearing of a study plan determination).

<sup>27</sup> 18 C.F.R. §§ 5.13(d); 5.15(a) (2017).

<sup>28</sup> *Id.* § 5.15(d).

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C. **FirstLight's Study Plans for Compliance with the National Historic Preservation Act**

12. On April 15, 2013, FirstLight filed its proposed study plan pursuant to section 5.11(a) of the Commission's regulations, in support of its intent to relicense the projects.<sup>29</sup> On August 14, 2013, FirstLight filed a revised study plan that contained 38 proposed studies including, as relevant here, Study 3.7.1, *Phase IA Archaeological Survey*, a cultural resource study intended to "assist FERC in meeting its compliance requirements under Section 106 of the [National Historic Preservation Act of 1966] . . . ." <sup>30</sup>

13. FirstLight's proposed Study 3.7.1, *Phase IA Archaeological Survey*, was designed to identify areas where there is a high potential for archaeological sites (i.e. historic properties) to exist within the Turners Falls and Northfield Mountain Projects' APE that may be eligible for inclusion in the National Register.<sup>31</sup> The study proposal utilized the Commission-defined project APE which includes: (i) all land within the projects' boundaries and (ii) lands outside of the projects' boundaries where project construction, operation, or project-related recreational development or other enhancements may cause changes in the character or use of historic properties.<sup>32</sup> The proposed Phase IA survey included: (1) consultation with the Massachusetts, Vermont, and New Hampshire SHPOs; (2) background research on the archaeological and cultural history of the APEs; (3) development of a sensitivity model to identify areas within the APE that are likely to contain archaeological resources; (4) archaeological field reconnaissance of the APEs; and (5) a report containing a record of consultation with the SHPOs, a summary of background research, pre-contact and historic-period contexts for the APEs, a description of the sensitivity model, the methods and results of the field reconnaissance, maps of the APEs, and recommendations to conduct additional investigations.<sup>33</sup> Further, FirstLight proposed a phased approach under which it would conduct the Phase IB survey

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<sup>29</sup> *Id.* § 5.11(a).

<sup>30</sup> FirstLight August 14, 2013 Revised Study Plan at 3-400.

<sup>31</sup> Phase IA surveys typically involve background research and general reconnaissance. Phase IB studies involve more intensive, systematic field-testing of areas identified as archaeologically sensitive during Phase IA. Phase II studies involve more extensive excavations of archaeological sites located during Phase IB to evaluate their significance related to eligibility for inclusion in the National Register.

<sup>32</sup> FirstLight August 14, 2013 Revised Study Plan at 3-400.

<sup>33</sup> FirstLight August 14, 2013 Revised Study Plan at 3-401 – 3-403.

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and Phase II site evaluations after it reviewed the results of the Phase IA survey with the SHPOs and the Narragansett THPO.<sup>34</sup>

#### **D. Study Plan Determinations**

14. On September 13, 2013, the Director issued a study plan determination (2013 Determination) on FirstLight's revised study plan.<sup>35</sup> Study 3.7.1 was approved with modifications.<sup>36</sup> The 2013 Determination noted that the Vermont SHPO requested that FirstLight conduct (1) a Phase IB site identification survey (involving sub-surface testing) in all archaeologically sensitive areas that are experiencing active erosion within the project's APE and (2) Phase II site evaluations (archaeological excavations) on any actively eroding archaeological site identified within the project's APE.<sup>37</sup> The 2013 Determination rejected FirstLight's proposal to conduct a Phase IB archaeological survey only in archaeologically sensitive areas within the APE where project-induced erosion has been occurring.<sup>38</sup> Instead, OEP ordered Phase IB studies to be conducted "[i]n areas of active erosion or other identified project-related impacts," with Phase II site evaluations to be conducted as needed.<sup>39</sup> The 2013 Determination also rejected FirstLight's phased approach, and instructed FirstLight to "conduct a full archaeological

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<sup>34</sup> *See id.* at 3-403.

<sup>35</sup> *FirstLight Hydro Generating Co., Study Plan Determination for the Turners Falls Hydroelectric Project and the Northfield Mountain Pumped Storage Project, Project Nos. 2485-063 and 1889-081 (Sept. 13, 2013).*

<sup>36</sup> *Id.* at A-3.

<sup>37</sup> *Id.* at B-45.

<sup>38</sup> *Id.* at B-46.

<sup>39</sup> *Id.* at B-49 (Phase IB surveys to be conducted "in areas of active erosion or other identified project-related impacts"); B-50 ("Phase IB identification surveys will be conducted in archaeologically sensitive area where active erosion is occurring"); B-51 (requiring Phase II testing of archaeological deposits identified during the "Phase IB investigations in areas of active erosion or other project impacts"). *C.f. id.* at B-50 ("Phase IB survey will be conducted in archaeological site and sensitive areas where direct project impacts are occurring").

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inventory of the APE during the 2014 field season that includes Phase IB and II investigations.”<sup>40</sup>

15. FirstLight did not seek rehearing of the 2013 Determination, nor did any agency initiate the dispute resolution proceedings. Thus, Study 3.7.1 as modified by the Commission became final on October 13, 2013.

16. FirstLight conducted the Phase IA reconnaissance-level survey on 119,466 meters of shoreline within the APE,<sup>41</sup> which identified 24,425 meters of shoreline (all within the Turners Falls Project APE) as archaeologically sensitive and actively eroding.<sup>42</sup> On April 29, 2016, FirstLight reported these findings in a draft historic properties management plan (HPMP), which it filed with its license application, and stated that “based on the results of the [Phase IA surveys] and the observed erosion, 24,425 meters of shoreline in the Project APE are recommended for future Phase IB survey in the event that it is determined that the observed erosion is Project-induced, or that there are other Project-related effects.”<sup>43</sup>

17. On December 28, 2016, FirstLight filed a letter with the Commission proposing to modify the scope of its proposed Phase IB archaeological investigations to cover approximately 1,000 of the previously identified 24,425 meters of shoreline.<sup>44</sup> FirstLight states that the 1,000 meters are the portion of the shoreline where FirstLight’s erosion causation study (Study 3.1.2) indicates project operations contribute to (but are not the primary cause of) erosion and which the Phase IA archaeological study identified as

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<sup>40</sup> *Id.* at B-46.

<sup>41</sup> See Relicensing Study 3.7.1 Phase IA, Results of Archaeological Reconnaissance Fieldwork Report at Table 9-1 (Massachusetts report) and Table 7-1 (Vermont and New Hampshire reports) (December 2017) (tables listing the location and length of individual segments surveyed during the Phase IA archaeological reconnaissance) filed as non-public documents by FirstLight.

<sup>42</sup> FirstLight Rehearing Request at 4-5, note 17, (citing Phase IA Results of Archaeological Reconnaissance Fieldwork Reports provided to the Commission between December 2014 and May 2015 and the *Draft Historic Properties Management Plan*, filed with FirstLight’s final license application on April 29, 2016. FirstLight filed the reports as well as the Draft HPMP as non-public documents.

<sup>43</sup> FirstLight April 29, 2016 License Application at E-357.

<sup>44</sup> *FirstLight Hydro Generating Co.*, Project Nos. 1889 and 2485, Filing of Two Second Year Study Reports at 1-2 (Dec. 28, 2016).

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having high sensitivity for archaeological resources; i.e. the 1,000 meters is a subset of the 24,425 meters.

18. On February 17, 2017, the Director issued a study plan modification determination (2017 Modification Determination). Regarding the ongoing Study 3.7.1 (archaeological study), the Director determined that, consistent with the 2013 Determination, FirstLight should conduct Phase IB investigations along all legally-accessible portions of the 24,425 meters of shoreline identified in the draft HPMP as actively eroding and archaeologically sensitive.<sup>45</sup> The Director explained that because these areas are within the APE, they should be surveyed to the extent possible, to identify all historic sites potentially eligible for listing in the National Register. The Director further required FirstLight to conduct Phase II archaeological investigations in all areas that the Phase IB surveys identified as archaeologically significant, and to file the results of the Phase IB and Phase II investigations by March 1, 2018.<sup>46</sup>

19. On March 20, 2017, FirstLight filed a timely request for rehearing of the Director's 2017 Modification Determination.

#### **E. Rehearing Request**

20. On rehearing, FirstLight argues that it is unreasonable to require Phase IB and Phase II investigations on all 24,425 meters of shoreline absent evidence of project-caused erosion on the entire 24,425 meters. FirstLight also argues that the studies are not required by, or consistent with the NHPA,<sup>47</sup> the National Environmental Policy Act of 1969 (NEPA),<sup>48</sup> the Joint Guidance issued by the Commission and the ACHP on the

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<sup>45</sup> 2017 Study Plan Modification Determination, Appendix D.

<sup>46</sup> *Id.*

<sup>47</sup> 54 U.S.C. § 300101 *et seq.* (2012) (NHPA). *See also* 36 C.F.R. Part 800 (2017) (regulations implementing NHPA).

<sup>48</sup> 42 U.S.C. §§ 4321 *et seq.* (2012). *See also* 18 C.F.R. pt. 380 (2017) (Commission's regulations implementing NEPA).

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development of HPMPs (HPMP Guidance),<sup>49</sup> and the Commission's study plan regulations.<sup>50</sup>

21. FirstLight requests that the Commission grant rehearing and approve its proposal to conduct Phase IB and Phase II investigations only on the 1,000 meters of archaeologically sensitive shoreline where FirstLight believes, based on its erosion study,<sup>51</sup> that the projects' operations contribute to erosion. FirstLight further requests that the Commission allow it to defer any additional Phase IB and any Phase II archaeological investigations (beyond the 1,000 meters) until the Commission determines, through its environmental review, that the projects cause erosion on any additional areas within the 24,425 meters of archaeologically sensitive shoreline.<sup>52</sup>

22. In the alternative, FirstLight requests that, if required to complete the Phase IB survey on the entire 24,425 meters of shoreline, it be allowed to defer any Phase II evaluations until after the licenses are issued, in accordance with procedures that would be set forth in the HPMP for the projects.<sup>53</sup>

23. In addition, FirstLight appears to seek clarification that the Commission would allow the HPMP to govern the treatment and management of archaeological resources potentially affected by unanticipated project activities that may occur post-licensing.<sup>54</sup>

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<sup>49</sup> Guidelines for the Development of Historic Properties Management Plans for FERC Hydroelectric Projects, May 20, 2002 available at <https://www.ferc.gov/industries/hydropower/gen-info/guidelines/hpmp.pdf> (HPMP Guidance).

<sup>50</sup> 18 C.F.R. § 4.51 (2017).

<sup>51</sup> FirstLight's Study 3.1.2, *Northfield Mountain/Turners Falls Operations Impact on Existing Erosion and Potential Bank Instability*, under which FirstLight evaluated the causes of erosion in the Turners Falls impoundment and determined the extent to which they are related to project operation. FirstLight August 14, 2013 Revised Study Plan at 3-25.

<sup>52</sup> FirstLight Rehearing Request at 2, 19.

<sup>53</sup> *Id.*

<sup>54</sup> FirstLight Rehearing Request at 19.

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## II. Discussion

24. We find FirstLight's arguments are an untimely prohibited collateral attack on the 2013 Determination. FirstLight seeks through both its December 28, 2016 letter and its request for rehearing to revise its study plan to limit the area in which it must conduct the Phase IB and Phase II studies to archaeologically sensitive areas within the APE where it believes project-induced erosion has been occurring (i.e. the 1,000 meters identified through its erosion study). This is the same request that the Commission rejected in the 2013 Determination.<sup>55</sup> FirstLight did not seek rehearing of the 2013 Determination, and therefore, is precluded from challenging the 2013 Determination now.

25. In the alternative, assuming FirstLight could properly seek a modification to its study plan that was previously rejected by the Commission, we find FirstLight's arguments meritless. As discussed below, the Director's 2017 Modification Determination is consistent with the requirements of the NHPA, NEPA, HPMP Guidance, and the Commission's study plan regulations.

### A. Determination Consistent with NHPA and NEPA Requirements

26. FirstLight asserts that there is no evidence that the projects are contributing to erosion beyond the 1,000 meters of shoreline identified in its erosion study, Study 3.1.2.<sup>56</sup> The company argues that unless it is established that project operation adversely affects archaeologically sensitive areas beyond the 1,000 meters of shoreline, it is not reasonable or necessary under NEPA or the NHPA for it to conduct Phase IB or Phase II investigations in any other area within the APE.<sup>57</sup> FirstLight states that when it completes its investigation of the 1,000 meters of shoreline, the Commission will have sufficient information to prepare its NEPA document and comply with the NHPA.<sup>58</sup>

27. FirstLight misinterprets the NHPA. Contrary to FirstLight's arguments, section 106 of the NHPA and its implementing regulations require an agency to identify more than merely the potentially historic properties within areas where the project has a direct effect, such as operationally-caused erosion (e.g. erosion from reservoir level fluctuations such as draw-downs). Rather section 106 of the NHPA requires an agency to take the steps necessary to identify historic properties within the APE, which is defined as the

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<sup>55</sup> See *supra* at P 13 (citing the 2013 Determination at B-46).

<sup>56</sup> FirstLight Rehearing Request at 8.

<sup>57</sup> FirstLight Rehearing Request at 11.

<sup>58</sup> *Id.*

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area “within which an undertaking *may* directly or *indirectly* cause alterations in the character or use of historic properties.”<sup>59</sup> Consistent with this requirement, the 2013 Determination defined the projects’ APE to include “all lands within its project boundary and lands outside its project boundary where historic properties *could be affected* by the projects.”<sup>60</sup> FirstLight completed its Phase IA surveys, and based on those surveys, identified 24,425 meters of shoreline in the projects’ APE – 20 percent of the surveyed shoreline – that are archaeologically sensitive and actively eroding,<sup>61</sup> At that time FirstLight recommended conducting Phase IB surveys on the portion of the 24,425 meters where it is determined that the “observed erosion is Project-induced, or that there are other Project-related effects.” Now, FirstLight wants to complete the archaeological surveys – the Phase IB and Phase II surveys, which are more intensive surveys to identify potential historic properties – on an even smaller subsection of the APE, the approximately 1,000 of the previously-identified 24,425 meters of shoreline where FirstLight believes the projects’ operations directly contribute to erosion.

28. The Commission finds that the section 106 “reasonable and good faith effort” standard requires completion of the Phase IB surveys on the 24,425 meters and Phase II investigation on the portion of the 24,425 meters that Phase IB identifies as archaeologically significant. The regulation governing the identification stage in the section 106 process, 36 C.F.R. § 800.4, does not require identification of all historic properties within the APE or ground verification (i.e. Phase II type surveys) of the entire APE. Rather, the regulation provides that agencies, such as the Commission, should focus – as it did here – on targeting the identification efforts on areas “considered to have a certain probability of containing historic properties based on current knowledge. . . .”<sup>62</sup> Here, the Commission reasonably limited the scope of the more intensive field surveys (Phase IB surveys) to areas within the APE with a high likelihood for archaeological sites

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<sup>59</sup> 36 C.F.R. § 800.16 (d) and § 800.4 (b) (2017).

<sup>60</sup> 2013 Determination at B-46 (noting that FirstLight agreed to this definition of the APE).

<sup>61</sup> See FirstLight April 29, 2016 License Application at E-357. The scope of the identification efforts was additionally limited to shoreline that is actively eroding because erosion – whatever the cause – may expose the archaeological sites, making any historic properties or cultural resources more vulnerable to an adverse project effect such as recreation-related impacts.

<sup>62</sup> See ACHP Identification Standard at 3.

to exist (as determined by the Phase IA study), as requested by the Vermont SHPO.<sup>63</sup> Applying this limiting criteria, only 20 percent of the shoreline within the APE needs to be studied under Phase IB. Consistent with the NHPA, the area for the Phase IB surveys were further limited to “legally-accessible portions” of the 24,425 meters of shoreline (i.e. not requiring FirstLight to survey “restricted areas”).<sup>64</sup>

29. FirstLight’s argument – that it should only be required to survey the 1,000 meters where the projects’ operation directly contributes to erosion – appears to conflate the first step under section 106, identifying historic properties (36 C.F.R. § 800.4(b)), with the later step of assessing the projects’ adverse effects on the identified historic properties (*id.* § 800.5).<sup>65</sup> We find, based on the facts in this case, that FirstLight’s proposal to limit the scope of the historic properties identification efforts to portions of the shoreline are directly impacted by erosion caused by project operations is too narrow and inconsistent with the level of effort required under section 800.4 of the regulations implementing the NHPA.<sup>66</sup>

30. Regarding NEPA, the Commission’s cultural resource analysis is informed by the information gathered from the NHPA process. Without knowing the extent of cultural resources in the APE, the Commission cannot assess the projects’ impact on these resources. Before completing its environmental review process and acting on a relicense proposal, the Commission needs sufficient information on a proposal’s impacts on cultural resources. Relevant agency guidance provides for the section 106 process to be completed prior to issuing a license.<sup>67</sup> It is FirstLight’s proposal that would be inconsistent with NEPA, not the Commission’s.

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<sup>63</sup> September 13, 2013 Study Plan Determination at B-45. *See also* 36 C.F.R. § 800.4(b) (2017) (requiring identification efforts to be made in consultation with SHPOs).

<sup>64</sup> *See* 36 C.F.R. § 800.4(b)(2) (2017) (allowing for phased identification of areas where access to properties is restricted).

<sup>65</sup> Similarly, FirstLight’s focus on project-induced erosion ignores that the projects could adversely affect historic properties in ways other than erosion (e.g. project-related effects such as recreation impacts).

<sup>66</sup> 36 C.F.R. § 800.4(b)(1) (2017).

<sup>67</sup> As described in the CEQ and NHPA Handbook: “The initiation of Section 106 should occur early in project planning and in advance of an agency making binding decisions regard the location, design, and siting of a project. By statute, the Section 106 requirements must be met prior to ... issuance of a license, permit, or approval needed by (*continued ...*)

## B. HPMP Guidance

31. FirstLight also asserts that the 2017 Modification Determination was inconsistent with the HPMP Guidance.<sup>68</sup> FirstLight emphasizes that Principal 3 in the HPMP Guidance states that although it is not good practice to defer all identification of historic properties until after a license is issued, identification of every historic property within the APE before licensing is unnecessary, especially with large complex projects. FirstLight states that the HPMP Guidance provides flexibility regarding the timing of archaeological investigations and cites five other relicensing proceedings as examples of where a phased approach was taken.

32. We agree that the HPMP Guidance provides for a degree of flexibility based on the size and complexity of a given project. Indeed, the Commission has already accommodated FirstLight by not requiring it to conduct Phase IB and Phase II studies on the entire shoreline, and by allowing a phased approach by deferring the Phase IB and Phase II studies to over three years after the completion of the Phase IA study.<sup>69</sup> Moreover, the HPMP Guidance does not mandate a phased approach, nor are phased approaches appropriate in every circumstance. The regulations implementing NHPA provide that an “agency official may use a phased process” when alternatives under consideration consist of corridors or large land areas, or where access to properties is restricted, and the nature of the undertaking and its potential scope and effect have therefore not yet been completely defined.<sup>70</sup> None of these three criteria are present in this case. A phased approach can also be adopted as part of a Programmatic Agreement or an HPMP for licensing a project, if the SHPO (and the ACHP, if participating in the consultation) agrees with the deferral.<sup>71</sup> However, a Programmatic Agreement is typically developed later in the process, after pre-filing studies have been completed and a license application has been filed, and, in this case, would not be appropriate.

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the undertaking. Further an agency must complete the NEPA and Section 106 reviews before signing a decision document.” Handbook at 35.

<sup>68</sup> FirstLight Rehearing Request at 12.

<sup>69</sup> Compare 2013 Determination at B-46 (denying FirstLight’s proposed phased approach and requiring completion of all three phases during the 2014 field season) *with* 2017 Modification Determination (setting March 1, 2018 as deadline for the Phase IB and Phase II reports).

<sup>70</sup> 36 C.F.R. § 800.4(b)(2) (2017).

<sup>71</sup> See 36 C.F.R. §800.14(b) (2017).

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33. The relicensing proceedings cited by FirstLight<sup>72</sup> demonstrate this flexibility, but each involved unique circumstances, which supported using a phased approach. The Toledo Bend Project has a reservoir shoreline that is more than 1,100 miles long, compared to the 74 miles (119,466 meters) of shoreline within the projects' APE.<sup>73</sup> The Green Island Hydroelectric Project had a very low probability of locating archaeological sites within the project area,<sup>74</sup> whereas here, the Phase IA reconnaissance survey reports concluded that the projects' APE is considered sensitive for precontact and early historic period archaeological sites.<sup>75</sup> The Warrior Project's Smith development has a 35-mile-long, 21,200-acre reservoir – here the Turners Falls impoundment is 2,110 acres – and much of the archaeological evidence was difficult to identify.<sup>76</sup> Finally, in both the Pillager Project and the Piercefield Hydroelectric Project erosion was minimal,<sup>77</sup> or not a significant concern.<sup>78</sup> Importantly, in each of those cases – unlike here – the relevant SHPO agreed to the phased approach.

34. In this case, where 24,425 meters (approximately 15 miles) of shoreline within the Turners Falls Project APE have been identified as actively eroding and archaeologically sensitive, the Director's decision to require pre-licensing completion of Phase IB and Phase II studies to identify archaeologically significant sites is consistent with the HPMP Guidance. Also, as discussed above, the Director's decision to restrict the area for the Phase IB surveys to "legally-accessible portions" of the 24,425 meters of shoreline

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<sup>72</sup> FirstLight Rehearing Request at 12-14 (citing *Sabine River Auth. of Texas*, 148 FERC ¶ 62,171 (2014); *Albany Engineering Corp.*, 154 FERC ¶ 62,140 (2016); *Alabama Power Co.*, 130 FERC ¶ 62,271 (2010); *Minn. Power & Light Co.*, 83 FERC ¶ 62,073 (1998); and *Erie Boulevard Hydropower, L.P.*, 113 FERC ¶ 62,079 (2005)).

<sup>73</sup> Toledo Bend Project No. 2305 December 19, 2013 Final EIS at 132.

<sup>74</sup> Green Island Hydro Electric Project No. 13 January 5, 2011 Final Environmental Assessment (EA) at 66.

<sup>75</sup> See Relicensing Study 3.7.1 Phase IA, Results of Archaeological Reconnaissance Fieldwork Reports.

<sup>76</sup> Warrior River Hydroelectric Project No. 2165 March 2, 2009 EA at 12 and 104 – 107.

<sup>77</sup> Pillager Hydroelectric Project No. 2663 April 9, 1998 EA at 12.

<sup>78</sup> Piercefield Hydroelectric Project No. 7387 June 23, 2005 EA at 25.

(continued ...)

(i.e. not requiring FirstLight to survey “restricted areas”), is consistent with the flexibility afforded by the HPMP Guidance.

**C. Consistent with the Commission’s Study Plan Regulations and Commission Guidance**

35. FirstLight argues that the Commission’s Exhibit E license application regulations do not require extensive cultural resource investigations, regardless of whether a project affects those resources.<sup>79</sup> FirstLight argues that its Phase IA surveys satisfy the Commission’s Exhibit E requirements,<sup>80</sup> and emphasizes that it is not required to locate, identify, protect, or mitigate archaeological resources that would not be affected by project operations.<sup>81</sup>

36. At issue here is the “locating” and “identifying” archaeological resources, not “protection” or “mitigation.”<sup>82</sup> Consistent with the Commission’s obligations under section 106 of the NHPA, the Commission’s Exhibit E regulation “must contain . . . identification of any sites either listed or determined to be eligible for inclusion in the National Register of Historic Places that are located in the project area, or that would be affected by operation of the project or by new development of project facilities.”<sup>83</sup> This regulation is consistent with how the Commission defined the Turners Falls/Northfield Mountain APE as required under the regulations implementing section 106 of the

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<sup>79</sup> FirstLight Rehearing Request at 10 (citing 18 C.F.R. § 4.51(f)(4) (2017)).

<sup>80</sup> FirstLight asserts that its Phase IA report identified “all known archaeological resources,” but the NHPA requires a good faith effort to identify all potential historic properties, not just those already documented. *See* 36 C.F.R. § 800.4(b)(1) (2017).

<sup>81</sup> *Id.* at 10-11.

<sup>82</sup> We agree that FirstLight is not obligated under NHPA to protect or mitigate archaeological resources that are not adversely affected by the project. *See* 36 C.F.R. §§ 800.5, 800.6 (2017) (mitigation efforts applicable only to historic properties adversely affected by the project). This does not mean, however, that the Commission must not gather sufficient information to determine whether the project may affect historic properties, prepare a NEPA document, and make a licensing decision.

<sup>83</sup> 18 C.F.R. § 4.51(f)(4)(i) (2017).



NHPA.<sup>84</sup> As discussed above, FirstLight has not challenged the Commission-defined APE for the projects. Moreover, FirstLight appears to erroneously correlate “operation of the project” to operation induced-erosion, to the exclusion of other potential project effects, such as recreation.

37. FirstLight also argues that the 2017 Modification Determination is inconsistent with the Commission’s Study Criteria 5 and 7 set forth in section 5.9 of the Commission’s regulations.<sup>85</sup> Study Criteria 5 requires a study request to “[e]xplain any nexus between project operations and effects (direct, indirect, and/or cumulative) on the resource to be studied, and how the study results would inform the development of license requirements.”<sup>86</sup> Study Criteria 7 requires that a study request “[d]escribe considerations of level of effort and cost, as applicable, and why any proposed alternative studies would not be sufficient to meet the stated information needs.”<sup>87</sup>

38. FirstLight argues that the 2017 Modification Determination is inconsistent with Criteria 5 because there is no nexus between project operations and erosion on the entire 24,425 meters of shoreline that may contain archaeological resources.<sup>88</sup> FirstLight also contends that the 2017 Modification Determination does not explain how Phase IB and Phase II studies on all 24,425 meters would inform the development of license requirements and claims the Commission seeks these studies only for general knowledge.<sup>89</sup> FirstLight argues that the 2017 Modification Determination is inconsistent with Criteria 7 because, by its estimate, the Phase IB studies would cost \$520,000 and that the total cost could be well over a million dollars with the addition of Phase II evaluations.<sup>90</sup>

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<sup>84</sup> 36 C.F.R. § 800.16(d) (2017) (defining APE to mean the area within which an undertaking – here the operation of the existing project – may directly or indirectly cause alterations to historic properties).

<sup>85</sup> FirstLight Rehearing Request at 15 (citing the study criteria at 18 C.F.R. § 5.9(b)(5) and (7)).

<sup>86</sup> 18 C.F.R. § 5.9(b)(5) (2017).

<sup>87</sup> 18 C.F.R. § 5.9(b)(7) (2017).

<sup>88</sup> FirstLight Rehearing Request at 15.

<sup>89</sup> *Id.* at 16.

<sup>90</sup> FirstLight Rehearing at 16-17.

(continued ...)

39. FirstLight's arguments are misplaced, as the study criteria set forth in section 5.9 of our regulations do not apply to proposals for study plan modifications, which FirstLight's December 28, 2016 letter and rehearing request are. In Order No. 2002, the final rule adopting sections 5.9 and 5.15 of our regulations, the Commission explicitly declined to require that a request to modify a study address each study criterion set out in section 5.9.<sup>91</sup> Instead, the regulations require "any proposal to modify an ongoing study . . . must be accompanied by a showing of good cause of why the proposal should be approved."<sup>92</sup> FirstLight has failed to show good cause in both its December 28, 2016 letter and its request for rehearing. In any event, as we have seen, the required nexus between project operations and effects is not limited to direct effects, and can be shown by indirect and cumulative effects.

40. FirstLight also claims that the 2017 Modification Determination goes against the Commission's guidelines, which caution against requiring expensive studies to determine minor potential impacts.<sup>93</sup> FirstLight also challenges the 2013 Determination's Phase IB cost estimates of \$175,000 - \$200,000, and estimates that Phase IB Studies would cost \$520,000 and that the total cost could be well over a million dollars with the addition of Phase II evaluations.<sup>94</sup> FirstLight requests that if the Commission requires completion of Phase IB surveys on the entire 24,425 meters of shoreline as a part of the study plan, that the Commission allow FirstLight to defer Phase II studies to the post-license phase, which would limit the pre-license study cost to \$520,000.

41. While we are sympathetic to the potential financial impact that these studies may have, as detailed above, we find that completion of the Phase IB and Phase II surveys on the identified 24,425 meters of the APE represents a reasonable and good faith effort to identify potentially eligible historic properties. We also note that these study costs are not unreasonable for major projects such as these.<sup>95</sup> Moreover, FirstLight's study plan costs cannot be calculated to a degree of absolute certainty, because they depend on a number of factors such as the extent to which private property owners will grant access to

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<sup>91</sup> Order No. 2002 at P 121.

<sup>92</sup> 18 C.F.R. 5.15 (2017).

<sup>93</sup> A Guide to Understanding and Applying the Integrated Licensing Process Study Criteria (2012). <https://www.ferc.gov/industries/hydropower/gen-info/guidelines/guide-study-criteria.pdf>

<sup>94</sup> FirstLight Rehearing at 16 – 17.

<sup>95</sup> The total installed capacity of the projects is: Turners Falls Project, 67.7 MW and Northfield Mountain, 1,119.2 MW.

*(continued ...)*

conduct the required investigations and the number of potential archaeological sites that will be found and require the more in depth Phase II study. Accordingly, FirstLight's estimate for the Phase IB surveys appears to be, at worst, the upper limit of potential costs. Notwithstanding FirstLight's estimated price tag for Phase II studies, the cost of Phase II is, as FirstLight states, "impossible to estimate."<sup>96</sup>

### **III. Conclusion**

42. Accordingly we deny rehearing, affirm that FirstLight is required to complete the Phase IB on the entire 24,425 meters of shoreline and the Phase II investigation on the portion of the 24,425 meters that Phase IB identifies as archaeologically significant, and deny FirstLight's request to defer any Phase II evaluations to the post-license phase under procedures to be set forth in the HPMP. We note that the March 1, 2018 deadline set by the 2017 Modification Determination for filing the results of the Phase IB and Phase II investigations has passed. We will grant FirstLight a six-month extension of that deadline.

43. With respect to FirstLight's request that the Commission allow the HPMP to govern the treatment and management of archaeological resources potentially affected by unanticipated project activities that may occur post-licensing,<sup>97</sup> we affirm that, consistent with the ACHP's regulations, the HPMP may be used to address post-review discoveries.<sup>98</sup>

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<sup>96</sup> *Id.* at 18.

<sup>97</sup> FirstLight Rehearing Request at 19.

<sup>98</sup> 36 C.F.R § 800.13 (governing post-review discoveries).

The Commission orders:

(A) The request for rehearing filed by FirstLight on March 20, 2017, is denied.

(B) FirstLight is granted a six month extension, to September 1, 2018, to file the results of the Phase IB and Phase II investigations.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.