



DRAFT – Not for External Distribution

March 29, 2021

Secretary Kimberly D. Bose
Federal Energy Regulatory Commission
888 First Street NE, Room 1A
Washington, DC 20426

Comments of the National Hydropower Association re: FERC Docket No. RM21-9-000 *Financial Assurance Measures for Hydroelectric Projects*

Dear Secretary Bose,

NHA commends the Commission for proactively requesting comment on whether reforms are necessary to its financial assurance practices. NHA shares the Commission’s commitment to dam safety and environmental compliance and is more than willing to work with stakeholders on these important issues.

Administering a licensing, compliance, and safety program for a fleet of highly individualized hydropower projects is a complex undertaking, but many diverse stakeholders agree – the Commission operates the most extensive dam safety program in the United States and has substantial expertise and resources.¹

NHA believes the Commission’s existing practices are sufficient to carry out the Commission’s statutory obligations to the public. With regard to financial assurance specifically, NHA believes the Commission currently has and uses its authority judiciously to require financial assurance on a targeted, case-by-case basis and no changes to policies, regulations, or statutes are necessary at this time.

Fortunately, the vast majority of hydropower licensees have good records of compliance, are in good standing with the Commission, and do not require financial assurance. As the Commission notes in the NOI, it is ultimately the licensee’s financial responsibility to accept a license and any financial risks that entails. If the licensee has a good record of compliance, the decision to bond or purchase insurance is a decision best left to the individual licensee. To require such funding from compliant licensees would unnecessarily tie up substantial capital that could otherwise be used to maintain and operate the project.

However, NHA agrees with the Commission that a very small subset of routinely non-compliant projects that receive “implied surrender” orders from the Commission, such as the Edenville or Sanford projects, may pose threats to public safety and the environment depending on site specific characteristics. Our comments provide background on this issue and propose a handful of solutions for the Commission’s consideration, all of which can be implemented without changes to policies, regulations, or statutes.

To the extent the Commission or other stakeholders believe changes are necessary, NHA requests clarity as to how and why the Commission’s existing authorities are insufficient and an opportunity for reply

¹ Stanford University Uncommon Dialogue *Joint Statement of Collaboration on U.S. Hydropower: Climate Solution and Conservation Challenge* (2020). Available [here](#).



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comments. Should any specific shortcomings be identified, NHA believes that effective, long lasting solutions are those that are developed through transparent and stakeholder driven processes with multiple opportunities for public input.

As the Commission knows well, every hydropower project is unique. NHA cautions against any policy statements or proposed rules that may undermine the Commission's current practice of applying financial assurance on a targeted, case-by-case basis or that impose unnecessary financial burdens on compliant licensees. NHA is concerned that broad, industry-wide policies or regulations will incidentally result in less safe and less compliant projects.

The remainder of NHA's comments provide context and greater detail regarding these points. We hope you will find our comments useful in your evaluation of whether reforms are necessary.

Again, we appreciate the Commission's proactive commitment to safety and compliance and we are looking forward to working with the Commission and other stakeholders on these important issues.

Sincerely,

DRAFT



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Commented [DC(1)]: NHA staff proposes striking this language from the comments. FERC OGC is very likely aware of this already. There is no need to give FERC a reason to go to Congress and say “see, NHA agrees – we cannot do this fund on our own. We need more authority”



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- a. NHA encourages the Commission to review the comments submitted by NHA members [placeholder for NHA members who submit individual comments]

IX. Next Steps

Comments:

I. Background on the Commentors

A. National Hydropower Association (NHA)

NHA is a national non-profit trade 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 over 240 organizations, including consumer-owned utilities, investor-owned utilities, independent power producers, equipment manufacturers, environmental and engineering firms, and attorneys.

B. [placeholder for other associations]

[...]

II. The Commission’s Licensing, Compliance, and Safety Programs are Extensive

The Commission administers an extensive hydropower licensing, compliance, and dam safety program for the projects within its jurisdiction.² This program begins with the Division of Hydropower Licensing (DOL), which orchestrates a thorough licensing and relicensing process. Once a project is licensed, the Division of Hydropower Administration and Compliance (DHAC) and the Division of Dam Safety and Inspections (D2SI) ensure the project is constructed, operated, and maintained in accordance with the license and other Commission rules and regulations through a combination of preventive, proactive, and reactive strategies.

A. Division of Hydropower Licensing

DOL oversees a comprehensive licensing and relicensing process that incorporates input, conditions, and authorizations from a broad range of diverse stakeholders, including states, tribes, local governments,

² The Commission has jurisdiction over roughly 2,500 of the Nation’s 90,000 dams

Commented [DC(2): Is anyone uncomfortable with NHA encouraging the Commission to review other NHA members comments, but stopping short of endorsing? NHA staff is concerned about the time it would take to have all members support the endorsement of each other’s comments.



other federal agencies, non-governmental organizations (NGOs), and the public. DOL conducts a “hard look” review under the National Environmental Policies Act and consults with other federal and state agencies regarding the Clean Water Act, the Endangered Species Act, the National Historic Preservation Act, and several other federal statutes. All told, the process takes between 5-7 years on average.

As the Commission notes in the NOI, the Commission is charged with balancing the power and non-power benefits of a license, which includes renewable energy generation, recreation, flood control, irrigation, conservation, and more.³ In practice, however, the licensing process grants states, the Department of the Interior, the Department Commerce, other federal agencies, and tribes the authority to impose mandatory conditions. Since most mandatory conditions are not required to undergo a cost-benefit analysis, they occasionally override the Commission’s careful balance of power and non-power benefits. However, as the Commission notes in the NOI, it is the applicant’s decision to accept the license and any financial risks that entails. When appropriate, DOL includes a project financing plan or financial assurance articles in licenses.

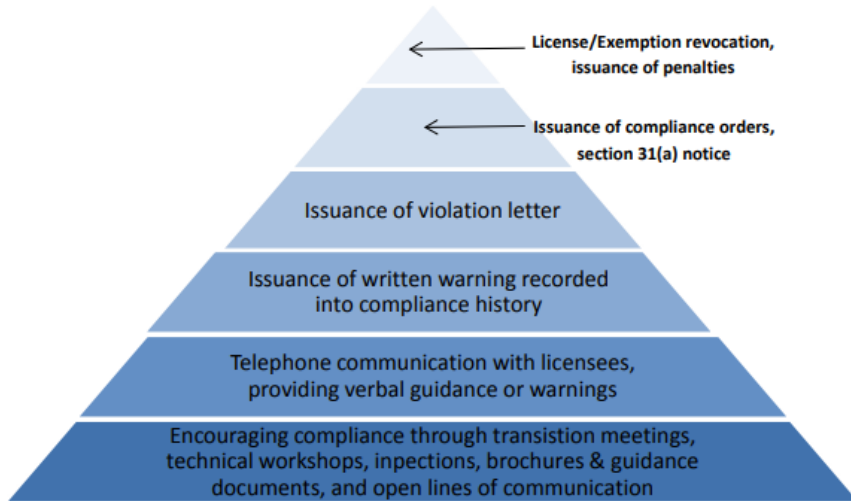
B. Division of Hydropower Compliance and Administration

DHAC is responsible for ensuring compliance with the terms and conditions of the license and with the Commission’s rules and regulations.⁴ DHAC uses a mix of proactive, preventive, and reactive strategies to carry out their mission. This is a change in practice from the 1980s and 1990s, where imposition of civil penalties was used to incent compliance.

Instead, DHAC now undertakes efforts to assist the licensee prior to imposing civil penalties or revoking the license. Proactive and preventive measures are now used most frequently, such as transition meetings, technical workshops, inspections, guidance documents, and open lines of communication. Compliance orders and license revocation are only a matter of last resort:

³ Hydropower Primer: A Handbook of Hydropower Basics (2017). Available [here](#).

⁴ Division of Hydropower Administration & Compliance: Compliance Handbook (2015). Available [here](#).



DHAC's enforcement pyramid: activities at the base are used more frequently

DHAC implements compliance procedures for construction, license amendments, license transfers, license surrenders, and non-compliant and non-operational projects. When appropriate, DHAC's procedures include reviews of the licensee's financial capability.

C. Division of Dam Safety and Inspections

D2SI regulates and inspects the safety of hydropower projects both prior to construction and throughout the operating life of the project. D2SI proactively develops comprehensive engineering guidelines and ensures their implementation through Part 12D inspections, which occur with regularity based on a project's hazard classification. These inspections must be conducted by a credentialed, Commission approved third party engineer. D2SI also requires the development of Emergency Action Plans and Potential Failure Mode analyses, the postage of public signage and appropriate security barriers, and other mechanisms to keep the public safe and well informed.

D2SI assigns hazard classification based on potential losses if the dam should fail, not based on the dam's structural integrity or likelihood of failure. There are three different classifications:

1. **High Hazard:** failure or mis-operation would cause a probable loss of human life
2. **Significant Hazard:** failure or mis-operation results in no probable loss of human life, but can cause economic loss, environmental damage, disruption of lifeline facilities, or other concerns
3. **Low Hazard:** failure or mis-operation results in no probable loss of human life and low economic and/or environmental losses



The Commission recently issued a Notice of Proposed Rulemaking to enhance dam safety inspections and engineering guidelines. NHA strongly believes in dam safety and supports many of D2SI's proposals, with a few suggested changes, and commends D2SI for proactively working to improve safety.⁵

III. The Commission's Existing Financial Assurance Practices are Comprehensive and No Changes to Policies, Regulations, or Statutes Are Necessary at This Time

At least as early as the 1990s, the Commission has required submission of financial information to protect against inadequate funding of hydropower projects. This practice has evolved to ensure that funds are available for construction, operation, and maintenance.

Fortunately, the overwhelming majority of Commission-regulated hydropower projects are compliant, in good standing, and do not require financial assurance. However, there are extremely rare instances of non-compliance where, according to the Commission, even civil penalties or criminal prosecution fail to conjure up funding for safety or environmental improvements. To help avoid these rare circumstances, the Commission applies a financial review for original licenses prior to construction, license transfer, or relicense on a case-by-case basis determined by an applicant's or transferee's record of compliance or legal, technical, and financial qualifications.

Commented [DC(3)]: If criminal prosecution from the U.S. Department of Justice is insufficient to incent compliance, is there any chance that FERC-imposed financial assurance will make a difference? Is this a point NHA should expand upon?

NHA is concerned that any changes to policies, regulations, or statutes may unnecessarily restrict the Commission's ability to require financial assurance on a targeted, case-by-case basis.

A. Original License 90 Days Prior to Construction

The Commission includes a standard article in new licenses requiring a project financing plan 90 days prior to construction:

“Article 305. *Project Financing Plan*. At least 90 days before starting construction, the licensee shall file with the Commission, for approval, three copies of a project financing plan. The plan must show that the licensee has acquired the funds, or commitment for funds, necessary to construct the project in accordance with this license. The licensee shall not start any project construction or ground-disturbing activities that are inseparably associated with the project, before the project financing plan is approved.”⁶

In instances where the applicant has a history of non-compliance, or if the financing plan is insufficient, the Commission requires financial assurance. For example: when the owner of the Sanford dam, which was routinely non-compliant, applied for a new license for a different project, the Commission required him to post financial assurance:

⁵ NHA's Comments on the NOPR can be found [here](#) and on the engineering guidelines chapters [15](#), [16](#), [17](#), and [18](#).

⁶ NHA: *Understanding FERC's Existing Financial Assurance Practices* (2021). Available [here](#).



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“Mr. XXX XXXXXX is also the primary licensee representative for the licensed Sanford Hydroelectric Project No. 2785 where insufficient funding was given as the reason for failing to make timely dam safety repairs ordered by the Commission’s Chicago Regional Engineer... In addition, we have continually needed to remind Mr. XXXXXX of his license obligations.”

As a result, FERC includes an additional license article requiring financial assurance:

“Article 316. *Financial Assurance Plan*. Within 120 days from the issuance date of this license, the licensee shall file, for Commission approval, a Financial Assurance Plan that identifies those project facilities that would be removed, secured in-place, or otherwise modified to ensure public safety and any other measures needed to protect environmental resources *in the event the licensee cannot complete project construction or is unable to operate the project once construction is completed*. The plan shall include an itemized cost estimate prepared by a registered engineer for each proposed measure contained in the plan.”⁷

The Commission currently reviews an applicant’s compliance history prior to issuing an original license to determine if financial assurance is necessary. NHA believes this is a good practice.

However, the Commission currently requires submission of a financing plan or financial assurance 90 days prior to construction of a new project, rather than at license issuance or shortly thereafter. NHA believes this is a good practice, because requiring a financing plan or assurance at license issuance would significantly impede new development of renewable energy without any added benefits to safety or compliance. Further information on this can be found in section VII.(B) on pages 12-13 of NHA’s comments.

B. License Transfer

Prior to approving a transfer, the Commission requires the transfer to be in the public interest:

“DHAC has been charged with the obligation to scrutinize license transfers to ensure that a transferor with a poor compliance record is not trying to escape that record and give a transferee an advantage in relicensing, *or handing off an increasingly marginal project to a new licensee that lacks the financial resources to maintain the project*. We make a determination concerning the proposed transferee’s fitness under the FPA.”⁸

In practice, the Commission reviews the transferee’s legal, technical, and financial capabilities to comply with the terms and conditions of the license. Based on the review, the Commission will approve, condition, or deny the transfer.

For example: In the transfer of Yards Creek Pumped Storage (P-2309) from PSEG and Jersey Central Power and Light to Yard Creek Energy (YCE), a subsidiary of LS Power, the Commission determined YCE and LS Power satisfied the legal, technical, and financial capabilities. The transfer was approved.

⁷ NHA: *Understanding FERC’s Existing Financial Assurance Practices* (2021). Available [here](#).

⁸ Division of Hydropower Administration & Compliance: *Compliance Handbook* (2015). Available [here](#).



Another example: In the attempted transfer of the Klamath Hydroelectric Project (P-2082) from PacifiCorp to the Klamath River Renewal Corporation (KRRC), the Commission determined KRRC did not have satisfactory legal, technical, and financial capabilities. The transfer was conditioned.

C. Relicense

At the time of relicense, the Commission reviews the applicant’s record of compliance. This review contributes to a public interest determination of whether or not to issue a new license, how long to issue it for, and what conditions to include in the license.

At the time of relicense, any stakeholder may request the Commission consider financial assurance measures. Presumably the Commission could make a determination at relicense similar to how it is implemented for original licenses or license transfers – a case by case basis based on the applicant’s record of compliance or legal, technical, and financial capability. NHA encourages the Commission to consider NHA’s comments in section VII on pages 13-16 when considering applying financial assurance at the request of a stakeholder.

Commented [DC4]: Keep this? Or strike?

IV. Hydropower Projects That Receive Implied Surrenders or are Non-operational, Such as Edenville or Sanford, May Pose Risks to Public Safety and the Environment, But These Projects and Licensees Are Not Representative of the Industry at Large

NHA agrees with the Commission’s statement in the NOI that “inadequate financing may result in threats to public safety and environmental resources”, and that “Non-operational or non-compliant projects can pose public safety hazards”, but we believe both of these statements only apply to a very small, unrepresentative sub-section of hydropower projects. The vast majority of licensees have good records of compliance and there is no reason to doubt their financial capability.

For the few licensees who neither comply with nor voluntarily surrender their license, the Commission pursues “implied surrender” and terminates the license. Once a project receives an implied surrender, it is no longer one of the 1,600 hydropower projects regulated by the Commission, but one of the 90,000 non-powered in the United States regulated by states and other entities. Many non-powered dams have outlived their useful lives and are candidates for retrofit, rehab, or removal.

NHA reviewed implied surrenders the past ten years and the Commission’s list of non-operating projects to determine if there are common trends or characteristics of non-compliant projects. NHA believes these projects are not representative of the industry at large, but there are common themes. Any solutions should be tailored to specific projects, not the industry as a whole.

A. Implied Surrenders



NHA's review of implied surrenders the past ten years found average project size for implied surrenders is 424 kilowatts, the largest being 1,500 kilowatts.⁹ The majority of these projects were owned by individuals, often referred to among the industry as "mom and pop" owners. In nearly every case, the project was non-operational at least 10 years before implied surrender was ordered. In a few cases, the project was never constructed or put in to operation. Nearly every project was repeatedly negligent in filing timely reports with the Commission and often only responded once the threat of implied surrender was presented by the Commission. Even then, many licensees did not respond to the Commission.

B. Non-operating Projects

Though the Commission's NOI states there are 88 non-operating projects as of December 2020, the Commission's publicly available list shows 10 non-operating projects as of July 2020.¹⁰ The ten projects on that list have an average size under 350 kilowatts, the largest being 1,300 kilowatts.

NHA speculates that the majority of non-operational projects are working in good faith to restore operations.

V. NHA's Suggested Solutions to Improve Public Safety and Environmental Compliance for Projects that Receive Implied Surrenders or are Non-operational

NHA understands the Commission may be reluctant to invoke implied surrender and hand a project off to another regulator, especially if the project requires safety or environmental upgrades. To help address this scenario, NHA proposes the following solutions for the Commission's consideration. None of them require changes to policies, regulations, or statutes.

A. Fair Market Valuation Helps Prevent Non-compliance

As a preventative measure, the Commission can work with licensees and stakeholders to ensure hydropower projects are valued for the services they provide. Often the only source of revenue for a hydropower project is the sale of electricity, despite the project providing recreation, irrigation, navigation, or other valuable services, including zero emission energy, ancillary services, and capacity.

In addition, hydropower is often left behind when it comes to federal and state funding for renewable energy. For example: of the \$19.9 billion in direct tax expenditures on renewable resources from 2010 to 2016 under the Production Tax Credit and Investment Tax Credit, less than 0.5% was spent on hydropower, despite hydropower providing 40% of renewable energy.¹¹ Similar disparities exist in state renewable portfolio standards, where every state defines hydropower eligibility differently.¹²

⁹ A full list of implied surrenders is included in the appendix of these comments.

¹⁰ D2SI Non-operating Projects (July 2020). Available [here](#).

¹¹ EIA: *Direct Federal Financial Interventions and Subsidies in Energy in Fiscal Year 2016* (2018). Available [here](#).

¹² Clean Energy States Alliance: *The Role of Hydropower in State Clean Energy Policy* (2020). Available [here](#).



Commission engagement with the hydropower industry regarding proposals to improve the valuation of hydropower projects could help prevent non-compliance and non-operation.

B. Maintain Publicly Available Lists of Non-operational Projects and Implied Surrenders That Includes Project Numbers and Risk Classification

To develop more effective solutions, NHA requests the Commission address the discrepancy between the number of non-operating projects listed in the NOI compared to the Commission’s website.¹³ In addition, NHA requests the Commission maintain a publicly available list of implied surrenders.

These publicly available lists are important tools for climate change mitigation and environmental restoration, as they will enable stakeholders involved in dam rehab, retrofit, and removal to identify potential targets, especially regarding high or significant hazard dams. This could lead to greater generation of renewable energy, restoration of miles of free-flowing rivers, and increased public safety.

C. Solicit New Licenses for Projects That Have Had Their Licenses Revoked

In some instances, when licensees file to surrender a project, the Commission will solicit applications from other entities for a new license prior to initiating the decommissioning process.

For example: For the 600-kilowatt Mousam River Project in Maine, the licensee filed to surrender the project. However, the local community voted overwhelmingly in favor of keeping the project. As a result, the Commission solicited applications from new entities to operate the project and bring it into compliance.

The Commission could undergo a similar process for implied surrenders - solicit license applications from other entities willing to take over operations and maintenance of the project. This would allow previously abandoned projects to be repowered to generate renewable energy while bringing the project back into compliance. If necessary, the Commission could include a financing plan article in any new license it issues for a project that previously received an implied surrender.

Should no applications for a new operating license be successful, but a state, local government, or other stakeholder want to maintain the project for non-power purposes, the Commission could allow the state or another entity the opportunity to file for a non-power license.

As the Commission has previously stated:

“Where a project has multiple uses, State or municipal authorities may be willing to assume responsibility in order to keep major nonpower elements of the project in operation. Where this is the case, the Commission will entertain the request that it simply require the shut-down of power operations without further actions that could affect those other functions. It is unlikely

¹³ D2SI Non-operating Projects (July 2020). Available [here](#).



that a dam or reservoir serving key municipal water needs, for example, is going to be shut down.”¹⁴

Lastly, there are non-profits and groups of citizens with expertise in dam removal. To the extent there are projects that received implied surrenders and no parties are interested in either a power or non-power license, the Commission could solicit applications for a license to decommission the project.

Commented [DC(5): Too ambitious?

D. Leverage President Biden’s Call for an “All of Government” Approach to Tackling the Climate Crisis and Coordinate with FEMA, the Department of Energy, and the National Labs

If applications for a new license are unsuccessful and the Commission utilizes implied surrender, the Commission could leverage other federal agencies with expertise in non-powered dams to help ensure public safety and environmental compliance.

Congress charged the Federal Emergency Management Agency (FEMA) with the establishment and maintenance of an effective national dam safety program. Similarly, the Department of Energy Water Power Technologies Office (WPTO) and the National Labs have significant experience with non-powered dams, especially regarding resource assessments, safety, and environmental concerns.

Interagency coordination with FEMA, the WPTO, and the National Labs regarding previously Commissioned-licensed projects that received implied surrenders fits with President Biden’s “All of Government” approach to tackling the climate crisis. Leverage of these agencies’ expertise could help alleviate Commission concerns about overburdening other regulators who assume authority over the project after implied surrender. NHA suggests the Commission prioritize high and significant hazard dams in any coordination efforts. NHA is more than willing to contribute to these interagency dialogues.

Efforts to coordinate with other federal agencies should be exhausted before pursuing changes to policies, regulations, or statutes.

VI. NHA is Opposed to an Industry Wide Fund Due to Concerns About Equity, Costs, Overreliance, and Administration

NHA believes an industry wide fund is bad policy that will result is less safe and less compliant hydropower projects due to insurmountable challenges related to equity, costs, overreliance, and logistics.

A. An Industry Wide Fund Would Never Be Equitable

NHA is opposed to an industry wide fund that is not equitable to all participants. Given the uniqueness of every hydropower project and the broad stakeholders involved in each project, NHA is concerned that an industry wide fund could never be equitable in its administration of fees and payments.

¹⁴ Commission Policy Statement: Project Decommissioning at Relicensing (1995). Available [here](#).



NHA is opposed to an industry wide fund that charges ratepayers in one region of the country to pay for the financial obligations of licensees in another region of the country. A ratepayer for a Washington State hydropower-based utility has just as much responsibility for a non-compliant project in Michigan as does a taxpayer in a hydropower-less state. In addition, a state’s public service commission and the rate payers they represent would have no representation or oversight for their utility funds that go into an industry wide trust nor how those funds would be dispersed.

If all licensees must contribute to the trust, how is an individual licensee’s share determined? What is the estimated yearly cost to an average licensee? Would contributions be capped, to avoid large assessments from being a “surprise” to licensees who have not budgeted for an excess contribution? How is a determination made about who gets payment(s) from the trust? What happens if a few licensees deplete the trust? This trust or fund would be an insurance pool for licensees who planned poorly, so who would underwrite it?

B. An Industry Wide Fund Would Result in Less Safety and Less Compliance by Imposing Unnecessary Additional Costs on Compliant Licensees

Though the vast majority of hydropower licensees are compliant, most operate on budgets with finite or limited resources. The imposition of an additional cost on compliant licensees to pay for the obligations of non-compliant licensees may inadvertently lead to less compliance, especially if implemented with little warning ahead of time. Given the urgency of climate change and importance of renewable energy, NHA strongly opposes any additional costs on compliant licensees.

Commented [DC(6)]: Request other suggestions on how to phrase this

C. An Industry Wide Fund Would Result in Less Safety and Less Compliance Through Overreliance

NHA is concerned that the presence of an industry-wide fund may incent bad actors to rely on the fund, rather than maintain their projects themselves, leading to less safety and less compliance.

D. An Industry-Wide Fund Presents Logistical Challenges to Implementation

Many licensees have long had concerns with the transparency and oversight of the Commission’s annual charges program, which does not give NHA confidence in the administration of another industry-wide fund.

Commented [DC(7)]: Too aggressive?

VII. NHA is Opposed to Financial Assurance for the Vast Majority of Hydropower Projects

A. NHA is Opposed to Financial Assurance for Licensees with Good Records of Compliance

Good performance should not be penalized with increased costs. If the licensee has a good record of compliance, there is no reason to doubt their financial capability. As the Commission states, it is



ultimately the licensee's financial responsibility to carry out the obligations of the license.¹⁵ A good record of compliance demonstrates a licensee's commitment to this responsibility.

The vast majority of hydropower licensees are compliant. And the majority of non-compliant licensees are working in good faith to restore their projects. Only a very few bad actors are resistant to the Commission's orders, especially regarding civil penalties and criminal charges. In every instance of implied surrender, the licensee was repeatedly negligent for several years. To prevent those issues from arising, NHA offers solutions in section VI on pages 9-11 of our comments.

B. NHA is Opposed to Financial Assurance for the Issuance of Original Licenses

NHA supports the Commission's current practice of requiring a financing plan 90 days prior to construction for original licenses, but is opposed to requiring submission of a financing plan or assurance prior to license issuance or shortly thereafter. Such a requirement would pose a major new barrier to new hydropower development with no added benefits to safety or compliance.

Given the length and complexity of the licensing process, many hydropower developers who obtain the license are not the firm who eventually constructs or owns the project. For many large businesses, the risks and costs of the licensing process are too much to take on. Instead, smaller firms with expertise in citing, studying, and engaging with stakeholders obtain the license. However, these may not be the firms who obtain the financing to construct, operate, and maintain the project. Once these firms partner with a construction firm and an owner, they can and do submit thorough financing plans 90 days prior to construction.

This is the model for most new major hydropower developments in the United States the past two decades. The requirement for a financing plan 90 days prior to construction ensures the Commission can carry out its obligations to the public regarding safety and compliance, but does not unnecessarily constrain new development. Given the urgency of climate change and need for new renewable energy resources, NHA requests the Commission maintain its current practice of requiring a financial plan 90 days prior to construction, but not require a financing plan prior to or shortly thereafter license issuance.

C. NHA is Opposed to Financial Assurance for Projects Located on Infrastructure Not Owned by the Licensee

Most new hydropower developments are located on existing water infrastructure that is not owned by the licensee, such as non-powered dams owned by the Army Corps of Engineers or canals and conduits owned by the Bureau of Reclamation and other water managers.

NHA understands if owners of the water infrastructure prefer submission of a financial plan or assurance, but requests the Commission consider those requests on a case-by-case basis, rather than through a formal Commission policy statement or regulation. Any financial plan or assurance should be limited to project works, not the infrastructure that the licensee does not own.

¹⁵ Some hydropower licensees make the individual decision to purchase insurance under certain circumstances



NHA notes that as a condition of development, the licensee must have the permission of the dam or canal owner. The owners of those projects could require a financing plan or assurance as a condition of their own approval process. NHA encourages those owners to only require financial assurance 90 days prior to construction for the reasons outlined in the previous section.

D. NHA is Opposed to Financial Assurance for Licensees or License Applicants with Publicly Available Financial Information, Including Credit Ratings

Many hydropower licensees publish publicly available and easily accessible information on a yearly basis that clearly details the licensees’ financial capability. Public utilities and many investor-owned utilities file 10-K’s with the Securities and Exchange Commission every year, which is public information. Many independent power producers also publish annual reports that are publicly available. Any stakeholder, including states, concerned with a licensee’s financial capabilities could access these reports.

Commented [DC8]: Are we inviting trouble with this section?

In addition, there is no need to require financial assurance for licensees who’ve received credit ratings of investment grade or higher.

Commented [DC9]: Any concerns? NHA staff does not believe this point negatively portrays members with lower credit ratings, but if others feel differently, we can discuss.

E. NHA is Opposed to Financial Assurance for Licensees or License Applicants with Cost Recovery

Though adding costs to the rate base is generally to be avoided if possible, there is no need to require financial assurance for licensees or license applicants with the ability to recover costs through the rate base.

Commented [DC10]: Request feedback on better ways to phrase this

F. NHA is Opposed to Financial Assurance for Decommissioning

Decommissioning is a stakeholder driven process that is out of the licensee’s direct control. Several federal and state agencies, as well as NGOs and the public, play a prominent role in the decommissioning process, including the imposition of mandatory conditions. The outcome of a decommissioning process is far from certain once it is initiated.

Requiring financial assurance for a complicated and unknown decommissioning process would require the licensee to predict the results of decommissioning, which will impose substantial additional costs with no guarantee of any benefit.

G. NHA is Opposed to Financial Assurance for Unknown or Unforeseen Circumstances

NHA is opposed to financial assurance for the unknown. As the Commission states in the NOI: “such forecasts could never be more than a general guide.” Requiring compliant licensees to post financial assurance for the unknown will result in additional costs and less compliance, with no guarantee that the financial assurance will provide any benefit.



The best way to reduce the unknown or unforeseen is to publish the list of implied surrenders and update the list of non-operating projects. NHA believes an examination of these projects will reduce the “unknown” behind why a project becomes non-operational in the first place. For example: NHA’s review of implied surrenders revealed projects were non-operational for a variety of reasons, including burglary, PPA expiration, flood damage, and bankruptcy.

In addition, part of the unknown is the changing valuation of the asset over time.

H. NHA is Opposed to Financial Assurance Applied Through Reopeners

NHA is opposed to the use of a reopener to impose financial assurance. If a stakeholder is concerned about a licensee’s financial capabilities, they can request a license amendment, which the Commission can review on a case-by-case basis based on the licensee’s record of compliance or the licensee’s legal, technical, and financial capability.

Commented [DC11]: Again, inviting trouble?

VIII. Other Comments From NHA Members

NHA encourages the Commission to review the comments submitted by NHA members [placeholder for NHA members who submit individual comments]

IX. Next Steps

If a problem is identified and unable to be resolved through NHA’s suggested solutions, the Commission should clearly define the problem and develop a solution through a transparent, stakeholder driven process with multiple opportunities for public input.

Appendix: Implied Surrenders the past ten years

Project Number	Project Name	Owner	Size (kw)	Date of Implied Surrender	Date and Reason for Non-operation	License or Exemption
P-11610	Cherry Grove Project	Gary R. Hubbs	224	Sep-18	Never constructed	exemption
P-4254	Exeter River Project	Paul T. Phillips II	60	Jan-17	1997, Flooding	exemption



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P-8722	Landis-Harde Water Power Project	David O. Harde	100	Jun-16	2006, low water levels	license
P-7856	Potosi project	Willow Creek Hydro	359	Apr-16	1994, penstock rupture	license
P-10200	Congdon Dam	William Fay	60	Mar-16	2002, unknown	exemption
P-4362	Riverdale Hydroelectric Project	Inman Mills	1,240	Dec-15	2001, unknown	license
P-6142	Dardanelles Creek	Robert T. Suter	224	Nov-15	2009, lack of flow	Exemption
P-10852	Ace Ranch	Mr. Richard Bertea	95	Sep-15	1999, unknown	license
P-9421	Gardner Brook	Dale R. Davis	50	Jan-16	2007, damage to transformer	exemption
P-12588	A.H. Smith Dam	Hydraco Power	150	Nov-14	Never operated	Exemption
P-10881	Gardner Brook	Daniel Nelson Evans Jr	225	Apr-14	2005, unknown	license
P-7684	Leishman Irrigation System	Sharon and Marcia Leishman	33	Mar-14	1996-1999, unknown	exemption
P-12119	PowerWheel Demonstration	PowerWheel Associates	75	Nov-13	Never operated	exemption
P-8233	Tallapoosa River	L.E. Bell Construction Company	450	Aug-13	unknown	exemption
P-7783	Cedar Falls	Piedmont Triad Regional Water Authority	275	Apr-13	2003-2006, unknown	exemption
p-8657	Harvell	Virginia Hydrogeneration and Historical Society	150	Mar-13	2005, unknown	license
P-5730	Oakland	American Hydro	1,500	Feb-13	2000, PPA termination	exemption
P-7910	Milburnie	Milburnie Hydro Inc	645	Jan-13	2006-2009, theft of equipment	exemption
P-2928	Merrimac	Merrimac Paper Company	1,250	Jul-12	2005, bankruptcy	license
P-2927	Aquamac	Aquamac Corporation	250	Jul-12	2005, bankruptcy	license



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P-11572	RWCD Conduit	Roosevelt Water Conservation District	860	Jul-12	2004-2005, never operated	exemption
P-7269	Jim Boyd	James and Janet Boyd	1,200	Aug-11	2002, PPA expired	license
P-3156	Worthville Dam	Miller and Miller	280	May-11	1995, unknown	license

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