

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

FirstLight Hydro Generating Company)	Project No. 2485-071
)	Project No. 1889-085

**REQUEST FOR REHEARING OF
FIRSTLIGHT HYDRO GENERATING COMPANY**

Pursuant to Section 313 of the Federal Power Act (“FPA”)¹ and Rule 713 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”),² FirstLight Hydro Generating Company (“FirstLight”) hereby files this Request for Rehearing of the Director, Office of Energy Project’s Study Plan Determination issued February 17, 2017 (“February 17 SPD”) with respect to the Turners Falls Hydroelectric Project No. 1889 and Northfield Mountain Pumped Storage Project No. 2485 (collectively, “Project”).³ Specifically, FirstLight requests rehearing of Appendix D of the February 17 SPD regarding archaeological studies. Appendix D would require FirstLight to complete Phase IB and Phase II archaeological investigations on all 24,425 meters of the shoreline identified in FirstLight’s Phase IA study as archeologically sensitive and actively eroding, and report the results of those studies by March 1, 2018.

As discussed below, requiring FirstLight to conduct these extensive and costly investigations prior to the completion of relicensing, absent any evidence of a Project

¹ 16 U.S.C. § 825I (2012).

² 18 C.F.R. § 385.713 (2016).

³ Determination on Requests for Study Modifications and New Studies – Turners Falls Hydroelectric Project and Northfield Mountain Pumped Storage Project, Project Nos. 2485-071 and 1889-085 (issued Feb. 17, 2017) (“February 17 SPD”).

effect, is unreasonable, is not required by the National Historic Preservation Act (“NHPA”)⁴ or the National Environmental Policy Act (“NEPA”),⁵ is inconsistent with joint guidance issued by the Commission and the Advisory Council on Historic Preservation (“ACHP”),⁶ and is contrary to the Commission’s own license application and study plan regulations. If the Commission later determines, as a result of its environmental review, that the Project causes erosion on any additional areas within the 24,425 meters of archaeologically sensitive shoreline, then there would be an evidentiary basis to expand FirstLight’s archaeological investigation requirements in the future.

I. BACKGROUND

On October 31, 2012, FirstLight initiated the Integrated Licensing Process (“ILP”) for the Project.⁷ In its Revised Study Plan,⁸ FirstLight proposed Study 3.7.1, *Phase IA Archaeological Survey*. The general purpose of the study was

to identify known archaeological sites, as well as locations where there is a high potential for archaeological sites to exist, within the Turners Falls and Northfield Mountain Projects’ [Area of Potential Effect (“APE”)] that potentially may be eligible for inclusion in the National Register of Historic Places (NRHP), and to provide recommendations for future Phase IB field surveys to yet unknown resources, and assess possible effects from the Projects’ operations on those resources.⁹

⁴ 54 U.S.C. § 300101 et seq. (2012 & Supp. III).

⁵ 42 U.S.C. § 4321 et seq. (2012).

⁶ FERC and ACHP, Guidelines for the Development of Historic Properties Management Plans for FERC Hydroelectric Projects (2002), available at <https://www.ferc.gov/industries/hydropower/gen-info/guidelines/hpmp.pdf> (“Joint Guidelines”).

⁷ The Commission’s Scoping Document 1, issued December 21, 2012, indicated its intent to prepare a single environmental impact statement for FirstLight’s projects as well as TransCanada’s Wilder, Bellows Falls, and Vernon Hydroelectric Projects.

⁸ Revised Study Plan for the Turners Falls Hydroelectric Project (No. 1889) and Northfield Mountain Pumped Storage Project (No. 2485), Project Nos. 2485-063 and 1889-081 (filed Aug. 14, 2013).

⁹ *Id.* at 3-400.

Consistent with Massachusetts Historical Commission practice, the study proposal expressly deferred the issue of more intensive investigations—

FirstLight is not proposing to conduct a Phase 1B or Phase II survey until after it has reviewed the results of the Phase IA survey with the [State Historic Preservation Officers (“SHPOs”)] and the Narragansett [Tribal Historic Preservation Officer] and consultation determines that such surveys are necessary in light of the Phase IA results.¹⁰

For example, a Phase IB archaeological survey would be conducted “if it is determined that Project-induced erosion is occurring within resource sensitive areas of the APE.”¹¹

On September 13, 2013, the Director of Energy Projects issued his initial study plan determination on Study 3.7.1.¹² The Director acknowledged FirstLight’s proposal “that it would only need to do a Phase IB archaeological survey in archeologically sensitive areas within the APE where project-induced erosion has been occurring,” and agreed that the reconnaissance level survey “is a good start to get a basic understanding of what archeological resources may lie within the APE.”¹³ However, the Director was “concerned about FirstLight’s lack of detailed methodology regarding possible Phase IB and Phase II investigations.”¹⁴ The Director therefore went on to prescribe the detailed methodologies FirstLight should use in carrying out the Phase IB and Phase II studies, should they prove necessary. However, the Director appeared to agree with FirstLight that these more intensive investigations would be conducted only “in areas of active

¹⁰ *Id.* at 3-402.

¹¹ *Id.* at 3-403.

¹² Study Plan Determination for the Turners Falls Hydroelectric Project and Northfield Mountain Pumped Storage Project, Project Nos. 2485-063 and 1889-081 (issued Sept. 13, 2013) (“September 2013 SPD”).

¹³ *Id.* at B-46.

¹⁴ *Id.*

erosion or other identified project-related impacts.”¹⁵ The Director stated that “Phase IB survey [sic] will be conducted in archaeological site and sensitive areas *where direct project impacts are occurring*, and as identified during the Phase IA surveys.”¹⁶

In 2014, FirstLight’s consultant, TRC, conducted the Phase IA reconnaissance level survey of the Project located along an approximate 23-mile stretch of the Connecticut River in New Hampshire, Vermont and Massachusetts, as well as short confluence reaches of two major tributaries (Ashuelot and Millers Rivers), and the mountaintop Northfield development area in Massachusetts. The purpose of the Phase IA archaeological reconnaissance was to identify archaeologically sensitive areas within the Project APE and provide recommendations where Phase IB archaeological surveys should occur based on identified sensitivity and potential Project-related effects, including Project-induced erosion. As described in the study plan, the survey information was used to develop a sensitivity model based on landforms and provide recommendations where future intensive surveys should occur based on identified sensitivity and Project-related effects. The Phase IA also involved background research to identify previously recorded archaeological sites, and field investigations consisting of a walkover inspection and boat survey of the shoreline within the Project boundary to assess current environmental conditions. In addition, in order to help identify areas of active erosion, TRC participated in the field and boat surveys of the Turners Falls Impoundment (“TFI”) as part of relicensing Study No. 3.1.1, *2013 Full River Reconnaissance* (Simons & Associates 2014). The Phase IA analysis identified 24,425

¹⁵ *Id.* at B-49 (emphasis added).

¹⁶ *Id.* at B-50 (emphasis added).

meters of shoreline in Massachusetts, New Hampshire, and Vermont that were actively eroding and archaeologically sensitive. These results were provided to the Commission in three reports during December 2014 to May 2015.¹⁷

The Phase 1A studies broadly identified archaeologically sensitive areas within the APE, but the purpose of those studies was not to assess Project effects. Rather, the causes of erosion within the TFI were being examined as part of Study No. 3.1.2, *Northfield Mountain/ Turners Falls Operations Impact on Existing Erosion and Potential Bank Instability*. Accordingly, FirstLight’s 2015 Phase IA report noted: “Based on the results of the sensitivity modeling and the observed erosion, certain portions of the survey segments are recommended for intensive survey (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.”¹⁸ FirstLight’s Draft HPMP similarly noted:

The degree, if any, to which Project operations contributes to erosion on the TFI is being examined as part of ongoing Study No. 3.1.2 *Northfield Mountain/Turners Falls Operations Impact on Existing Erosion and Potential Bank Instability* that is scheduled to be filed with FERC in October 2016 or as directed by FERC in its pending process plan and schedule. This study will help guide recommendations for the location of potential future Phase IB archaeological surveys.¹⁹

¹⁷ References to the reports by Timothy R. Sara, *et al.*, are found at page 6-5 of the *Draft Historic Properties Management Plan* (April 2016) (“Draft HPMP”), filed with FirstLight’s final license application. Final Application for New License for Major Water Power Project – Existing Dam, Project Nos. 2485-071 and 1889-085 (filed Apr. 29, 2016). FirstLight filed the reports as well as the Draft HPMP as non-public documents.

¹⁸ Final Report Relicensing Study No. 3.7.1 Archaeological Phase IA Reconnaissance Survey, Franklin County, Massachusetts at 153, Project Nos. 2485-000 and 1889-000 (filed May 15, 2015).

¹⁹ Draft HPMP at 2-23.

FirstLight filed Study 3.1.2 on October 14, 2016. In a December 28, 2016 letter to the Commission,²⁰ FirstLight explained that the erosion causation study identified an approximately 1,000-meter stretch of shoreline in Massachusetts where Project operations contribute to (but are not the primary cause of) erosion and which the Phase IA archaeological study had identified as having high sensitivity for archaeological resources. FirstLight went on to explain that it had therefore applied to the Massachusetts Historical Commission for a permit to conduct a Phase IB archaeological survey on the 1,000 meters of shoreline.

To FirstLight's surprise and chagrin, the February 17 SPD flatly rejected this approach with minimal explanation and despite the Director's apparent endorsement in the September 2013 SPD of focusing the intensive archaeological investigations on areas of Project effects:

While we agree that FirstLight should conduct Phase IB investigations on the proposed 1,000-meter section of shoreline, we also recommend that FirstLight conduct Phase IB investigations along all legally-accessible portions of the 24,425 meters of shoreline identified in the draft HPMP, because, while study 3.1.2 did not identify project effects as the primary source of erosion in these other areas, the Phase IA analysis identified these areas as archeologically sensitive.²¹

The February 17 SPD further stated: “[B]ecause these other areas are within the APE, these areas should be surveyed, to the extent possible, to determine if they would be eligible for listing on the [NRHP] and/or if any measures are necessary to protect or document these sites.”²²

²⁰ Letter from Gus Bakas, FirstLight, to Kimberly D. Bose, FERC, Project Nos. 1889-000 and 2485-000 (filed Dec. 28, 2016).

²¹ February 17 SPD, Appendix D.

²² *Id.*

II. STATEMENT OF ISSUES

It is well established that a Commission study plan determination is subject to rehearing.²³ Pursuant to Rule 713(c)(2) of the Commission's regulations,²⁴ FirstLight submits the following statement of issues:

1. Whether compelling FirstLight to conduct the Phase IB and Phase II studies on the entire 24,425 meters of shoreline deemed archaeologically sensitive is required by the NHPA, NEPA, or the Commission's license application regulations, where the record evidence shows a Project effect on only 1,000 meters of shoreline. 16 U.S.C. § 825l(b); 18 C.F.R. § 4.51(f)(4); 54 U.S.C. § 300101 et seq.; 36 C.F.R. Part 800 (2016).
2. Whether requiring the Phase IB and Phase II studies on the entire 24,425 meters of shoreline is inconsistent with joint guidance issued by the Commission and the ACHP. *See* Joint Guidelines.
3. Whether requiring the Phase IB and Phase II studies on the entire 24,425 meters of shoreline is contrary to the Commission's own study plan regulations. 18 C.F.R. § 5.9(b)(1)-(7).

²³ *Duke Power*, 117 FERC ¶ 61,303 at P 13 (2006); Order No. 2002-A, *Hydroelectric Licensing Under the Federal Power Act*, 106 FERC ¶ 61,037 at P 17 (2004); *see TransCanada Hydro Northeast, Inc.*, 151 FERC ¶ 61,116 (2015) (granting rehearing of study plan determination for Connecticut River projects).

²⁴ 18 C.F.R. § 385.713(c)(2).

III. REQUEST FOR REHEARING

A. **The NHPA, NEPA, and the Commission’s License Application Regulations Do Not Require Intensive Archaeological Investigations Pre-Licensing and the Commission’s Determination to Require the Phase IB and Phase II Studies at this Stage Lacks Any Evidentiary Support.**

Section 313(b) of the FPA requires the Commission’s decisions to be supported by substantial evidence.²⁵ Substantial evidence is “such relevant evidence as a reasonable mind might find adequate to support a conclusion.”²⁶ To meet the standard, the Commission must “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”²⁷

In this case, the Director’s abrupt decision to require the Phase IB and Phase II investigations on all 24,425 meters of archaeologically sensitive shoreline is unreasonable because there is simply no evidence of a Project effect beyond the 1,000 meters of shoreline where the Project is a secondary, contributing factor to erosion.²⁸ FirstLight understands that the Commission has not adopted the findings of its erosion causation study, and is unlikely to opine on the results of that study until it issues its draft NEPA document. FirstLight is not asking the Commission to agree with the erosion causation study’s conclusions at this early juncture. By the same token, FirstLight’s study is the only credible evidence currently in the record regarding the extent of Project-

²⁵ 16 U.S.C. § 825l(b).

²⁶ *Allegheny Elec. Coop., Inc. v. FERC*, 922 F.2d 73, 80 (2d Cir. 1990) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

²⁷ *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

²⁸ Study 3.1.2 identified secondary causes of erosion as those contributing at least 5 percent but less than 50 percent to erosion at a given location. See February 17 SPD, Appendix B at 6.

induced erosion in the TFI. In the February 17 SPD, the Director rejected all stakeholder suggestions to modify Study 3.1.2, finding that FirstLight’s analysis of the primary causes of erosion, including the potential for Project-related erosion, was done in a manner consistent with the approved study plan, and that the analyses and information in the report were reasonable and sufficient for Commission staff’s analysis and development of any necessary license requirements.

FirstLight also understands that the Commission requires certain information in order to meet its obligations under NEPA and the NHPA. NEPA requires that federal agencies take a “hard look” at a project.²⁹ However, FERC’s NEPA document “is required to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project.”³⁰

As to the NHPA, Section 106 requires a federal licensing agency with jurisdiction over an “undertaking” to “take into account *the effect* of the undertaking on any historic property.”³¹ The NHPA Section 106 implementing regulations provide that the agency “shall make a reasonable and good faith effort to carry out appropriate identification efforts, which may include . . . *sample* field investigation.”³² The regulations provide that the agency “may also defer final identification and evaluation of historic properties.”³³ A phased process should include “an *appropriate* level of field

²⁹ *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

³⁰ *Nat. Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 88 (2d Cir. 1975) (citing *Indian Lookout All. v. Volpe*, 484 F.2d 11 (8th Cir. 1973)).

³¹ 54 U.S.C. § 306108 (emphasis added).

³² 36 C.F.R. § 800.4(b)(1) (emphasis added).

³³ *Id.* § 800.4(b)(2).

investigation.”³⁴ Ultimately, the agency may conclude “that either there are no historic properties present *or there are historic properties present but the undertaking will have no effect upon them . . .*.”³⁵ In other words, if there is no project effect the presence or absence of historic properties becomes moot.

The Commission’s regulations governing license application requirements accordingly do not require exhaustive, new cultural resource investigations of a project area simply for the Commission’s information and regardless of whether a project affects those resources. The Exhibit E requirements for historic and archeological resources are: (i) identify any sites either listed or determined to be eligible for inclusion in the NRHP that are located in the project area or that would be affected by the project; and (ii) propose measures for “locating, identifying, and salvaging historical or archaeological resources *that would be affected by operation of the project, or by new development of project facilities . . .*.”³⁶ FirstLight’s Phase IA report identified all known archaeological resources, including those that are listed in or eligible for listing in the NRHP, within the Project APE. FirstLight’s reconnaissance survey identified culturally sensitive areas within the APE where additional archaeological resources may be present. Further, FirstLight has proposed conducting a Phase IB investigation, and Phase II evaluations of any potentially eligible sites discovered during the Phase IB study, within the 1,000 meters of shoreline where the Project is a contributing cause of erosion. The Commission’s regulations do not require FirstLight to furnish measures for locating,

³⁴ *Id.* (emphasis added).

³⁵ *Id.* § 800.4(d) (emphasis added).

³⁶ 18 C.F.R. § 4.51(f)(4)(ii) (emphasis added).

identifying, and protecting or mitigating archaeological resources that would not be affected at all by operation of the Project or any new Project facilities.

FirstLight's phased approach to the cultural resource assessment is entirely consistent with NEPA, the NHPA and its implementing regulations, and the Commission's application requirements. Treatment of cultural resources post-licensing will be governed by FirstLight's final HPMP as ultimately approved by the Commission. In its Draft HPMP, FirstLight proposes management measures for ground disturbing Project activities and managing potentially eligible archaeological sites.³⁷ Those measures include performing additional Phase IB and Phase II investigations of particular sites as needed in response to a proposed Project activity, as well as mitigation measures if a Project effect cannot be avoided.

Therefore, unless and until it is established that the Project adversely affects archeologically sensitive areas outside of the 1,000 meters of shoreline FirstLight has proposed for Phase IB investigations, it is not reasonable or necessary under NEPA or the NHPA for FirstLight to conduct Phase IB or Phase II investigations on any other areas within the APE. With the completion of FirstLight's investigation on the 1,000 meters of shoreline, the Commission will have sufficient information to prepare its NEPA document and comply with the NHPA.

B. The February 17 SPD is Inconsistent with the Commission and ACHP's Guidance.

The Phase IB and Phase II investigations required by the Director's February 17 SPD are not only unnecessary under NEPA, the NHPA, and the Commission's license

³⁷ Draft HPMP at 5-6.

application requirements, but the approach taken by the February 17 SPD is flatly inconsistent with the 2002 joint guidance issued by the Commission and the ACHP on development of HPMPs.³⁸ As specifically noted in the Draft HPMP, FirstLight followed the Joint Guidelines in developing its Draft HPMP.

The Joint Guidelines specifically address the question of whether archaeological studies within the APE must be completed prior to license issuance. Principle 3 states: “The HPMP should be based on sufficient studies to predict the likely effects of Project activities on historic properties, and should provide for the conduct of additional studies that may be needed.” The Joint Guidelines go on to say that while “[i]t is not good practice to defer *all* identification and evaluation of historic properties until after the license is issued, especially with large and/or complex Projects. . . . *it is not necessary to complete identification of each and every historic property within the APE before licensing.*”³⁹

FERC’s licensing decisions illustrate the flexibility in the Joint Guidelines regarding the timing of archaeological investigations, regardless of whether project effects on cultural resources are known or not yet known. In the recent relicensing of the Toledo Bend Hydroelectric Project, for example, the approved study plan provided for a phased approach to cultural resources investigations. Because less than 10 percent of the project APE was formally surveyed during the relicensing process, the new license required implementation of the HPMP,⁴⁰ which included a program “to complete the

³⁸ See Joint Guidelines.

³⁹ *Id.* at 11-12 (emphasis added).

⁴⁰ *Sabine River Auth. of Texas & Sabine River Auth., State of Louisiana*, 148 FERC ¶ 62,171 at p. 64,592 (2014) (Article 412).

formal survey of the APE within 15 years, and to assess and resolve project-related adverse effects to historic properties identified within the APE.”⁴¹

In the Green Island Project relicensing, the licensee conducted a Phase 1A literature review and archaeological sensitivity assessment during relicensing. The Phase 1A report recommended that a Phase 1B archaeological survey of limited shovel testing be conducted in areas of the riverbank where there was shoreline fishing access, and where construction of a pedestrian walkway and fishing pier were proposed. FERC approved the final HPMP, which included an outline for the Preliminary Phase 1B Survey Plan to be conducted post-license in specified areas of project effects.⁴²

FERC has endorsed a phased approach to cultural resources, consistent with the Joint Guidelines, in numerous other relicensing proceedings, including: the Warrior Project relicensing, in which FERC approved an HPMP that allowed the licensee to complete a field reconnaissance survey (Phase I) by year 20 of the new license;⁴³ the Pillager Project relicensing, in which FERC found that the results of the literature review of archaeological sites at the project “strongly indicate the need for further study, including ground reconnaissance and possible excavation,”⁴⁴ and required such studies to be carried out post-license through a Cultural Resources Management Plan,⁴⁵ and the

⁴¹ Final Environmental Impact Statement for the Toledo Bend Project at xxvii, FERC/EIS-F-0245, Project No. 2305-036 (issued Dec. 19, 2013).

⁴² See *Albany Engineering Corp. and Green Island Power Authority*, 154 FERC ¶ 62,140 (2016); HPMP filed Dec. 29, 2015 in P-13.

⁴³ *Ala. Power Co.*, 130 FERC ¶ 62,271 (2010); see also Letter from Robert Fletcher, FERC, to James Crew, Alabama Power, Project No. 2165-026 (issued Sept. 2, 2014) (accepting Phase I Cultural Resource Surveys).

⁴⁴ Final Environmental Assessment for Hydropower Licensing – Pillager Hydroelectric Project at 30, Project No. 2663-004 (issued Apr. 9, 1998).

⁴⁵ *Minn. Power & Light Co.*, 83 FERC ¶ 62,073 (1998).

Piercefield Hydroelectric Project relicensing, in which FERC required the licensee to complete Phase IA study and Phase IB field work and incorporate the results into an HPMP post-license.⁴⁶

In sum, the February 17 SPD's insistence on completion of all archaeological investigations in culturally sensitive and actively eroding areas of the APE as part of the pre-licensing study plan is an unexplained departure from the Joint Guidelines and the Commission's past practice and precedent.

C. The February 17 SPD is Inconsistent with the Commission's Own Study Plan Regulations.

Under FERC's ILP regulations, a study request must meet each of seven criteria:⁴⁷

- (1) Describe the goals and objectives of each study proposal and the information to be obtained;
- (2) If applicable, explain the relevant resource management goals of the agencies or Indian tribes with jurisdiction over the resource to be studied;
- (3) If the requestor is not a resource agency, explain any public interest considerations in regard to the proposed study;
- (4) Describe existing information concerning the subject of the study proposal, and the need for additional information;
- (5) Explain 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;
- (6) Explain how any proposed study methodology (including any preferred data collection and analysis techniques, or objectively quantified information, and a schedule including appropriate field season(s) and the duration) is consistent with generally accepted practice in the scientific community or, as appropriate,

⁴⁶ *Erie Boulevard Hydropower, L.P.*, 133 FERC ¶ 62,144 (2010).

⁴⁷ 18 C.F.R. § 5.9(b).

considers relevant tribal values and knowledge; and

- (7) Describe 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.

These criteria apply to any studies proposed by Commission staff as well as other licensing participants.⁴⁸ The Commission has also prepared guidelines to help stakeholders design study requests that comply with these seven criteria.⁴⁹

The February 17 SPD's requirement to complete Phase IB and Phase II archeological studies on the entire 24,425 meters of archaeologically sensitive shoreline fails to meet the Commission's own study criteria. In particular, the February 17 SPD fails to comply with Study Criteria 5 and 7.

Study Criterion 5 requires that the requestor explain the nexus between project operations and effects on the resource. It also requires an explanation of how the study results would inform the development of license requirements. It is not the purpose of relicensing to begin or support programs of multi-year research at an applicant's expense, and studies should recognize the timeframe available under the ILP. A study request must show how the results of the study will provide information relevant to potential protection, mitigation, and enhancement measures and not just contribute to general knowledge of a resource.

As discussed above, there is no nexus between Project operations and the entire 24,425 meters of actively eroding shoreline that may contain archaeological resources—

⁴⁸ *Id.* §§ 5.9(a), 5.15(e)(5).

⁴⁹ FERC, A Guide to Understanding and Applying the Integrated Licensing Process Study Criteria (Mar. 2012), available at <https://www.ferc.gov/industries/hydropower/gen-info/guidelines/guide-study-criteria.pdf> ("Study Guidelines").

only the 1,000 meters which the erosion causation study identified as being subject to Project-induced erosion as a secondary contributing cause. Further, the February 17 SPD does not explain how the information would inform the development of license requirements. The requirement to conduct Phase IB and Phase II investigations on the entire 24,425 meters of shoreline, regardless of Project effects, smacks of a research study for the general knowledge of the Commission and other stakeholders at FirstLight's expense. If the Commission were to determine at a later date, contrary to FirstLight's erosion causation study, that more areas of shoreline within the archaeologically sensitive area are in fact subject to Project-induced erosion or other Project impacts, a schedule for completion of additional Phase IB and Phase II work could easily be incorporated into the HPMP. The February 17 SPD fails to comply with Study Criterion 5.

Study Criterion 7 requires a study request to describe the level of effort and cost, and why any proposed alternative study would not be sufficient to meet information needs. The Commission's Study Guidelines state with respect to Criterion 7: "The cost of the study should be in line with the potential level of effect. For example, *we would not require a million dollar study to determine a precise answer to a minor potential impact.*"⁵⁰

The September 2013 SPD estimated the cost of the Phase IB survey at \$175,000-\$200,000, with the cost of the Phase II evaluations unknown pending the number of sites identified in Phase IB.⁵¹ In fact, the cost of a Phase IB survey on the entire 24,425 meters of shoreline would be approximately \$520,000, as compared to a cost of

⁵⁰ *Id.* at 15 (emphasis added).

⁵¹ September 2013 SPD at B-57.

approximately \$79,000 for the 1,000 meters FirstLight proposes to survey—an added cost of \$441,000. The combined cost to complete Phase IB and Phase II NRHP evaluations, should multiple potentially eligible sites be discovered in Phase IB, could be well over a million dollars.

The following is a detailed rationale and breakdown of costs to conduct Phase IB archaeological resource surveys on 24,425 meters of shoreline in the Project’s APE in Vermont, New Hampshire, and Massachusetts:

1. The Phase IB survey includes the following major components: project management and preparation of a Massachusetts intensive archaeological research permit application approving the proposed scope of work in Massachusetts;⁵² field work; curation and analysis of artifacts; and preparation of reports.
2. The largest component of the Phase IB survey is the field work. The three states have required minimum transect intervals, based on state regulations and prior studies conducted in the area. The transect intervals are 7.5 meters in Massachusetts, 10 meters in Vermont, and 8 meters in New Hampshire. More restrictive intervals are required in areas of recorded sites.
3. Per the Phase IA report, there are approximately 11,000 meters of high sensitivity areas in Massachusetts; 5,350 meters in Vermont; and 6,900 meters in New Hampshire. This equates to 21 mobilization and field days in Massachusetts; 9 mobilization and field days in Vermont; and 13 mobilization and field days in New Hampshire for approximately 10 field staff.
4. Lab curation and analysis costs are dependent on the number of recordable sites and artifacts found. For the purposes of budgeting, FirstLight assumes that the number of sites and artifacts found in New Hampshire and Vermont combined would equal the number of sites and artifacts found in Massachusetts.
5. As opposed to a Project that is located in one state, this Phase IB survey will require three separate reports in accordance with each state’s guidelines.

⁵² Vermont and New Hampshire do not require permits for Phase IB work.

The rationale and breakdown of costs to conduct Phase II archaeological evaluations is as follows:

1. Until the Phase IB surveys are completed and approved by the respective state SHPOs, it is impossible to estimate the cost of conducting Phase II surveys or to estimate the time it will take to complete the Phase II surveys. The cost and schedule for Phase II surveys would be dependent upon when SHPO approval of the Phase IB reports is received, and more importantly, the number of potentially eligible sites that are recommended for Phase II.
2. The field work for just one hypothetical Phase II survey would require approximately five to six days for mobilization and field work for eight field staff.
3. The curation/analysis/report preparation for a Phase II survey can be as much as, if not more than, the cost of field work, depending on what is found in the field and the amount of research required to determine whether a site is eligible. As with the Phase IB work, separate reports will be required for each state if a Phase II is recommended in that state.
4. The costs of recent Phase II surveys conducted by TRC have ranged from approximately \$58,000 to \$82,000 per potentially eligible site. The cost per site is dependent on the size of the potentially eligible site.

Clearly, the Phase IB and Phase II work for 24,425 meters of shoreline would be very substantial efforts with costs that could range from over half a million dollars, if no potentially eligible sites are found (which is unlikely), to well over a million dollars if a number of potentially eligible sites are found and must be fully evaluated for NRHP status. This expense and level of effort cannot be justified here because there is no demonstrated Project effect on that entire shoreline area. Further, more detailed archaeological investigations can be done at a later time if Project activities are proposed for any locations within this larger area or the Project is later determined to cause or contribute to erosion or other effects within this area. The February 17 SPD cannot be justified under the Commission's Study Criterion 7 because it prescribes "a million

dollar study to determine a precise answer” to a question that is not even related to Project effects.

IV. CONCLUSION AND REQUEST FOR RELIEF

For all of the above reasons, the Commission should grant rehearing and approve FirstLight’s proposal to conduct Phase IB and Phase II investigations only of the 1,000 meters of archaeologically sensitive shoreline identified as affected by the Project. The Commission should allow FirstLight to defer Phase 1B and Phase II archaeological investigations unless and until the Commission makes a final determination regarding the impacts of Project operations, including Project-induced erosion, on the entire 24,425 meters of archeologically sensitive shoreline. Post-licensing, the HPMP should govern the treatment and management of archaeological resources potentially affected by unanticipated Project activities that may arise during the course of the license.

Alternatively, if the Commission insists on completion of the Phase IB survey on the entire 24,425 meters of shoreline as part of the study plan, the Commission should allow FirstLight to defer any Phase II evaluations to the post-license phase under procedures to be set forth in the HPMP. This would at least have the benefit of “limiting” further pre-licensing archaeological study costs to \$520,000. If future, unanticipated Project ground-disturbing or other activities have the potential to adversely affect any

potentially eligible properties identified during Phase IB, the HPMP will provide that full Phase II evaluations and appropriate mitigation be carried out at that time.

Respectfully submitted,



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DATED: March 20, 2017

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission, I hereby certify that I have this day caused the foregoing document to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC, this 20th day of March, 2017.

/s/ Mealear Tauch _____

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