

158 FERC ¶ 62,093
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

S.D. Warren Company

Project Nos. 2897-047,
2932-046,
2941-038,
2931-039,
2942-050

ORDER AMENDING LICENSES TO GRANT EXTENSION OF TIME AND
INCORPORATING REVISED FISHWAY PRESCRIPTIONS AND WATER
QUALITY CERTIFICATION CONDITIONS

(February 14, 2017)

1. On November 15, 2016, and supplemented on December 28, 2016, S.D. Warren Company (licensee), filed an application to amend its license to extend the due date for providing fish passage at the Saccarappa Project No. 2897. The licensee's filing includes revised water quality certification conditions issued by the Maine Department of Environmental Protection (Maine DEP) and revised section 18 fishway prescriptions filed by the U.S. Fish and Wildlife Service (FWS).

2. For the reasons discussed below, this order approves the licensee's application for extension of time. This order also incorporates the same revised deadline for fish passage into the licenses for S.D. Warren's upstream Mallison Falls Project No. 2932, Little Falls Project No. 2941, Gambo Project No. 2931, and Dundee Project No. 2942, which in addition to the Saccarappa Project are all located on the Presumpscot River in Cumberland County, Maine (together, the Presumpscot River Projects).

Background and Proposal

3. The Saccarappa license order contains a description of the multi-project proceeding and a discussion of issues common to some or all of the five Presumpscot River Projects, including a description of the fish passage requirements for all five of the Presumpscot River Projects.¹ Maine DEP issued a joint water quality certification

¹ *S.D. Warren Company*, 105 FERC ¶ 61,013 (2003) (Saccarappa license order). In separate orders issued concurrently, subsequent licenses were issued to S.D. Warren Company for the Mallison Falls and Little Falls Projects; new licenses were issued for the Gambo and Dundee Projects. *S.D. Warren Company*, 105 FERC ¶ 61,011 (2003) (Mallison Falls Project); *S.D. Warren Company*, 105 FERC ¶ 61,012 (2003) (Little Falls

(WQC) for the five projects on April 30, 2003, which is attached as Appendix A to each of the license orders. The 2003 WQC required that fish passage facilities be installed and operational at the Saccarappa Project no later than two years after passage is available at the downstream, non-jurisdictional Cumberland Mills Dam. Two years after fish passage facilities are operational and certain passage criteria are met at the Saccarappa Project, the licensee is required to install and operate fish passage facilities at the Mallison Falls Project. The WQC contains similar requirements for the remaining three upstream projects.

4. The five licenses for the Presumpscot River Projects also include section 18 fishway prescriptions from FWS.² The prescriptions, included as Appendix B of each license, contain the same language and scheduling provisions for fish passage facilities as the 2003 WQC.

5. In May 2013, fish passage was installed at the downstream Cumberland Mills Dam, thus triggering the requirement that fish passage facilities be operational at the Saccarappa Project by May 2015.

6. On December 31, 2013, the licensee filed an application to surrender its license for the Saccarappa Project, citing, in part, the high cost of constructing and operating the required fish passage facilities. Nevertheless, the licensee proposed installing a Denil fish ladder at the project as one of the terms of its surrender. The licensee then began negotiations with state and federal resource agencies, the City of Westbrook, and non-governmental organizations to jointly investigate fish passage design alternatives to the Denil fish ladder proposed in its surrender application. These discussions resulted in an agreement to request from the Commission a two year extension of the fish passage deadline at the Saccarappa Project, in order to allow the parties time to engage in a collaborative process to evaluate fish passage alternatives.³ On July 30, 2014, after receiving a revised WQC and section 18 fishway prescription, the Commission issued an

Project); *S.D. Warren Company*, 105 FERC ¶ 61,010 (2003) (Gambo Project); and *S.D. Warren Company*, 105 FERC ¶ 61,009 (2003) (Dundee Project)

² Section 18 of the Federal Power Act permits the Secretaries of the Departments of Interior and Commerce to require fishways at licensed projects (16 U.S.C. § 811 (2012)).

³ Signatories to the Extension Agreement include S.D. Warren Company, FWS, Maine Department of Inland Fisheries and Wildlife, Maine Department of Marine Resources, City of Westbrook, Friends of the Presumpscot River, and the Conservation Law Foundation.

order extending the May 2015 deadline to May 2017.⁴ On September 4, 2014, S.D. Warren filed a notice of withdrawal of its surrender application.

7. The collaborative process resulted in S.D. Warren filing a second surrender application on December 2, 2015. On March 3, 2016, the Commission issued public notice of the surrender application and solicited comments, motions to intervene, and protests.

8. On March 7, 2016, the licensee requested that the Commission immediately stay all filing deadlines in the surrender proceeding until July 1, 2016, to allow the parties to the agreement time to further evaluate fish passage alternatives at the Saccarappa Project. Commission staff extended the time for filing comments, motions to intervene, and protests on the surrender application until July 1, 2016.

9. On May 27, 2016, the licensee requested a one-year extension of the deadline for operational fish passage at the Saccarappa Project, providing a revised WQC and section 18 fishway prescriptions. On June 17, 2016, the Commission granted the licensee's request, extending the deadline until May 2018.⁵

10. On November 15, 2016, S.D. Warren filed a settlement agreement with the U.S. Department of the Interior, FWS, Maine Department of Marine Resources, Conservation Law Foundation, Friends of the Presumpscot River, and the City of Westbrook, Maine (Settlement Agreement). The Settlement Agreement sets forth the obligations of the parties over the next year in their effort to design and install fish passage at the Saccarappa Project as part of S.D. Warren's surrender of the project. The Settlement Agreement is not submitted for Commission approval at this time, but rather as evidence that the parties have made tangible progress toward a plan to install fish passage upon S.D. Warren's surrender.

Extension of Time Request

11. On November 15, 2016, and supplemented on December 28, 2016, the licensee filed an application to again extend the deadline for providing fish passage at the Saccarappa Project, from May 2018 to May 2019. The licensee states that the extension would allow the settling parties time to undertake certain obligations set forth in the Settlement Agreement, including designing and constructing fish passage facilities at the

⁴ *S.D. Warren Company*, 148 FERC ¶ 62,086 (2014).

⁵ *S.D. Warren Company*, 155 FERC ¶ 62,223 (2016).

Saccarappa Project. The licensee's application is accompanied by revised mandatory WQC conditions from Maine DEP and section 18 fishway prescriptions from FWS.⁶

12. On November 15, 2016, the Conservation Law Foundation and Friends of the Presumpscot River, jointly, and the Maine Department of Marine Resources, filed statements supporting the licensee's request. On November 16, 2016, the City of Westbrook filed a statement supporting the licensee's request. American Whitewater filed a statement in support of the request on December 14, 2016.

13. Comments objecting to the proposed extension of time were filed by Friends of Sebago Lake on December 19, 2016, and by Friends of Merrymeeting Bay on December 28, 2016. On December 20, 2016, the licensee responded to the Friends of Sebago Lake's filing.

Public Notice

14. On January 18, 2017, Commission staff issued a public notice establishing February 2, 2017, as the deadline for filing comments, motions to intervene, and protests. Friends of Sebago Lake and Mr. Douglas Watts jointly filed a motion to intervene and protest on January 30, 2017. Friends of Merrymeeting Bay filed an intervention and protest on January 31, 2017.

15. The licensee filed an Answer in Opposition to the motions to intervene on February 7, 2017. If an answer in opposition to a timely motion to intervene is filed within 15 days after the motion to intervene is filed, the motion must be expressly granted for the movant to become a party.⁷ Friends of Merrymeeting Bay explains that it has a direct interest in the proceeding because the organization's goal is to preserve, protect, and improve the unique ecosystems of Merrymeeting Bay, and it has been involved in fish passage issues affecting the Presumpscot River and Sebago Lake since 2008. Mr. Douglas Watts and Friends of Sebago Lake similarly state that they have been involved in proceedings related to the Saccarappa Project for over 16 years. Accordingly, because the movants have demonstrated sufficient interest in the proceeding,⁸ the opposed motions to intervene are granted.

⁶ See revised section 18 fishway prescriptions issued by FWS on November 15, 2016, included in the licensee's application, and WQC conditions issued by Maine DEP on December 27, 2016, filed with the Commission on December 28, 2016.

⁷ 18 C.F.R. § 385.214(c)(2) (2016).

⁸ *Id.* § 385.214(b).

16. On January 31, 2017, American Whitewater filed an intervention and comment in support of the settlement and proposed extension. Timely, unopposed motions to intervene are granted by operation of Rule 214(c) of the Commission's Rules of Practice and Procedure.⁹

Discussion

17. The licensee states that its request to extend the deadline by one year for installation of fish passage facilities is necessary to allow the settling parties to undertake obligations pursuant to the Settlement Agreement; these obligations include finalizing the design for and constructing, after approval from the Maine Department of Marine Resources and FWS, fish passage facilities at the Saccarappa Project site.

18. The Commission grants extensions of time for "good cause, upon a motion made before the expiration of the period prescribed or previously extended."¹⁰ In this case, Commission staff has determined that the licensee's proposal to allow the settling parties additional time to reach agreement on the design and installation of fish passage facilities at the Saccarappa Project establishes good cause for the requested extension. The Settlement Agreement is the culmination of more than three years of discussions between the licensee, state and federal resource agencies, and other interested stakeholders, in an effort to reach agreement on the terms of S.D. Warren's surrender of the Saccarappa Project. The Commission has a longstanding policy of encouraging settlements in hydropower licensing proceedings, viewing settlement agreements as an effective method to resolve disputes between interested parties and provide the Commission with a clearer sense of the parties' views on important issues.¹¹ This policy applies equally to the complex surrender proceeding at issue here.

19. Moreover, the fish passage requirements at issue were incorporated into the Saccarappa Project license pursuant to FWS' and Maine DEP's mandatory conditioning authority under section 18 of the Federal Power Act¹² and section 401 of the Clean Water Act.¹³ The licensee submitted with its application a revised WQC issued by Maine DEP

⁹ *Id.* § 385.214(a).

¹⁰ *Id.* § 385.2008.

¹¹ *See Settlements in Hydropower Licensing under Part I of the Federal Power Act*, 116 FERC ¶ 61,270, at PP 1-4 (2006).

¹² 16 U.S.C. § 811 (2012).

¹³ 33 U.S.C. § 1341(a)(1) (2012).

on December 28, 2017, and a revised section 18 fishway prescription issued by FWS on November 15, 2016. The revised conditions extend the deadline for fish passage to the May 2019, as requested in this proceeding. The decisions by FWS and Maine DEP to grant extensions of time on conditions they imposed provides strong support for S.D. Warren's requested extension.

20. Friends of Sebago Lake and Mr. Douglass Watts argue that the amendment application is not ripe for processing because the deadline for installation of fish passage is not until May 1, 2018. They also argue that the application is incomplete because it offers only the prospective settlement agreement as justification for the request. Friends of Merrymeeting Bay requests that the extension be denied and that the current passage requirements remain in place.

21. While Commission staff ordinarily does not extend deadlines more than a year in advance, in this case, the unique context of a surrender proceeding and the broad support from state and federal agencies and other entities justifies the early extension. The settlement is designed to provide S.D. Warren with the time necessary to design and construct fish passage facilities that are satisfactory to all parties to the Settlement Agreement. Staff also notes that in a surrender proceeding, while the Commission considers what conditions are necessary to protect the public interest, and will consider breaching or removing a dam in appropriate cases, it has stated that it would not require a licensee to install new facilities, such as fish ladders, as a condition of the surrender and decommissioning.¹⁴

22. The opposing parties also object to the Settlement Agreement itself, particularly the provisions that would eliminate required fish passage facilities at the upstream Gambo and Dundee Projects. Douglas Watts and Friends of Sebago Lake allege that the Settlement Agreement contains "a privately arranged *quid pro quo* of questionable legality," makes false representations, and is contrary to several Supreme Court rulings.

23. The Settlement Agreement has not been submitted for Commission approval; the licensee would need to amend its application for surrender before the Commission takes any action on the Settlement Agreement. Consequently, this proceeding concerns only S.D. Warren's request for an extension of time to construct fish passage facilities at the Saccarappa Project. For the reasons discussed above, Commission staff finds good cause to give the licensee and the settling parties the additional time they seek to reach a consensus in accordance with their Settlement Agreement. Should they reach consensus

¹⁴ See *Project Decommissioning at Relicensing; Policy Statement*, FERC Stats. & Regs., Regulations Preambles (1991-1996), ¶ 31,011, at 31,222, 31,229-30, and 31,234 (1994).

and file an amendment application that would implement the Settlement Agreement, the Commission will review any arguments opposing the settlement at that time.

Commission staff notes that in reviewing any settlement, the Commission looks not only to the wishes of the settling parties, but also at the greater public interest, including the interests of parties opposed to the settlement.¹⁵ Any Commission decision on a settlement must ultimately be supported by substantial evidence and be in the public interest.¹⁶

24. In light of the above, this order amends the license for the Saccarappa Project to grant the requested extension of time until May 1, 2019, for installation of fish passage, as extended by the amended WQC and section 18 fishway prescription.

Administrative Provisions

25. Because extending the deadline for fish passage at the Saccarappa Project affects the four upstream Presumpscot River Projects, which have the same WQC and section 18 fishway prescriptions, this order also amends the upstream licenses to reflect the extended deadline for fish passage at the Saccarappa Project. The same administrative amendment was granted in the previous two extension orders issued July 30, 2014, and June 17, 2016.

26. Finally, Article 406 or 407 of the licenses for the Presumpscot River Projects requires the development of a fish passage implementation plan.¹⁷ The licensee filed a plan covering all five projects on July 2, 2004, and the plan was approved in an order issued on December 13, 2004.¹⁸ The approved plan incorporates the scheduling provisions for operation of upstream and downstream fish passage facilities pursuant to the section 18 fishway prescriptions and water quality certification. Therefore, this order amends the due date for fish passage in the approved plan in order to make it consistent with the remainder of the license.

¹⁵ See *Settlements in Hydropower Licensing under Part I of the Federal Power Act*, 116 FERC ¶ 61,270, at P 4 (2006).

¹⁶ *Id.* at PP 4-5; 16 U.S.C. § 825l (2012).

¹⁷ The fish passage implementation plan is required by Article 406 in the licenses for the Saccarappa and Little Falls Projects and by Article 407 in the licenses for the Dundee, Gambo, and Mallison Falls Projects.

¹⁸ *S.D. Warren Company*, 109 FERC ¶ 62,183 (2004).

The Director orders:

(A) The water quality certification conditions contained in Appendix A of the licenses for the Saccarappa (No. 2897), Mallison Falls (No. 2932), Little Falls (No. 2941), Gambo (No. 2931), and Dundee (No. 2942) Projects are amended to incorporate the revised water quality certification conditions issued by the Maine Department of Environmental Protection on December 27, 2016, as shown below:

5. Upstream and Downstream Anadromous Fish Passage

Saccarappa Project

- A. The applicant shall install and operate the following upstream fish passage facilities at the project:

Phase I. A Denil “fish ladder,” or other passage facilities of comparable efficiency in passing the target species, designed to pass at least 18,000 American shad, 109,000 blueback herring, and 273 Atlantic salmon annually. These facilities, which shall include a counting, trapping and sorting facility, must be operational no later than 6 years after passage is available at the downstream Cumberland Mills Dam.

Phase II. Convert or replace the Phase I passage facilities with a fish lift, or other passage facilities of comparable efficiency in passing the target species, designed to pass up to 58,000 American shad, 353,000 blueback herring, and 426 Atlantic salmon annually. These facilities, which shall include a counting, trapping and sorting facility, must be operational no later than 2 years after (1) notification from the Department of Marine Resources and the Department of Inland Fisheries and Wildlife of initiation of Phase II restoration above Gambo Dam and (2) the capacity of the installed Phase I passage facilities has been reached for any of the target species.

(B) The section 18 fishway prescriptions contained in Appendix B of the licenses for the Saccarappa (No. 2897), Mallison Falls (No. 2932), Little Falls (No. 2941), Gambo (No. 2931), and Dundee (No. 2942) Projects are amended to incorporate the revised section 18 fishway prescriptions as prescribed by the U.S. Fish and Wildlife Service on November 15, 2016, as shown below:

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Amending the third sentence of the second paragraph of Section 10.1(E) to provide as follows:

“In order to allow for proper consultation with resource agencies and approval by the Commission of all design plans, permanent fish passage must be operational at the Saccharappa Dam within 6 years of the completion of fishway installation at Cumberland Mills Dam.”

Amending the anadromous fish upstream passage section of Table 3 that applies to the Saccharappa Project as follows:

“Upstream passage completed 6 years after passage is available at Cumberland Mills Dam, or at such later time as may be designated by the Service by written notice to the Commission.”

(C) The licensee’s fish passage implementation plan approved in the Commission’s Order Approving Anadromous Fish Passage Implementation Plan Pursuant to Article 406 for the Saccharappa (No. 2897) and Little Falls (No. 2941) Projects and Article 407 of the licenses for the Dundee (No. 2942), Gambo (No. 2931), and Mallison Falls (No. 2932) Projects issued December 13, 2004 is amended as shown below:

Amending Table 1 of the plan under Phase I for the Saccharappa Project to provide as follows:

“No later than 6 years after passage is available at the downstream Cumberland Mills Dam (nonjurisdictional).”

(D) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days from the date of its issuance, as provided in section 313(a) of the Federal Power Act, 16 U.S.C. § 825l (2012), and the Commission’s regulations at 18 C.F.R. § 385.713 (2016). The filing of a request for rehearing does not operate as a stay of the effective date of this order, or of any other date specified in this order. The licensee’s failure to file a request for rehearing shall constitute acceptance of this order.

For Steve Hocking
Chief, Environmental and Project Review
Division of Hydropower Administration
and Compliance

Document Content(s)

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