

UNITED STATES OF AMERICA 122 FERC ¶ 62,262
FEDERAL ENERGY REGULATORY COMMISSION

Ice House Partners, Inc.

Project No. 12769-000

ORDER GRANTING EXEMPTION FROM LICENSING
(5 MW OR LESS)

(March 31, 2008)

INTRODUCTION

1. On January 22, 2007, Ice House Partners, Inc. (Ice House Partners) filed an application to exempt its proposed 280-kilowatt (kW) Ice House Power Project (Ice House Project) from the requirements of Part I of the Federal Power Act (FPA).¹ The project would be located on the Nashua River, in the Town of Ayer, Middlesex County, Massachusetts.² The project would occupy 133 acres of federal lands administered by the U.S. Fish and Wildlife Service as part of the Oxbow National Wildlife Refuge.³ As discussed below, I am issuing an exemption from licensing for the project.

¹ The Commission is authorized to exempt from the licensing requirements of Part I of the FPA small hydroelectric projects with an installed capacity of 5 megawatts or less that use for the generation of electricity either an existing dam (*i.e.*, one in existence on or before July 22, 2005) or a "natural water feature" without the need for any dam or impoundment. *See* sections 405 and 408 of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §§ 2705 and 2708 (2000) as amended by section 246 of the Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 679.

² The Nashua River is a tributary to the Merrimack River, a navigable waterway. The Ice House dam was built in the 1790s. In 1907, an electrical powerhouse was installed at the dam that operated trolley cars until the 1920s, and subsequently, ice-making machinery. In the 1970s, the powerhouse was destroyed by fire. Ice House Partners proposes to operate two turbine generating units located in the rebuilt powerhouse at the project. Because the project would be located on a commerce clause waterway, would affect interstate commerce through its connection to an interstate power grid, and would involve post-1935 construction, it is required to be licensed or exempted from licensing by the Commission pursuant to FPA section 23(b)(1). *Ice House Partners, Inc.*, 114 FERC ¶ 62,238 (2006).

³ Pursuant to 18 C.F.R. § 4.31(c)(2) (2007), an applicant for an exemption is required to have sufficient rights in any non-federal land required for the project prior to filing its application. On March 13, 2007, in response to an additional information

(Continued)

BACKGROUND

2. On April 27, 2007, the Commission issued a notice accepting the exemption application for filing and soliciting motions to intervene and protests. The notice established June 26, 2007, as the deadline for filing motions to intervene.⁴ On February 28, 2007, the Massachusetts Division of Fish and Wildlife (Massachusetts DFW) filed a motion to intervene. Massachusetts DFW does not oppose issuance of the exemption from licensing. Comments were filed by Massachusetts DFW, the Massachusetts Department of Environmental Protection, and the Massachusetts Historical Commission.

3. The Commission issued a notice on August 14, 2007, indicating the application was ready for environmental analysis, and soliciting comments, recommendations, terms and conditions, and prescriptions.⁵ In response, timely recommendations and terms and conditions were filed by the U.S. Department of the Interior (Interior) and the Massachusetts DFW.

4. An Environmental Assessment (EA) was prepared by Commission staff and issued on December 13, 2007. The EA contains background information, analysis of impacts, and support for related exemption articles. I conclude, based on the record of the proceeding, including the EA, that granting an exemption for the Ice House Project would not constitute a major federal action significantly affecting the quality of the human environment.

5. The Massachusetts DFW and the U.S. Fish and Wildlife Service (FWS) filed comments on the EA. The motion to intervene, comments, recommendations, and terms and conditions have been fully considered in determining whether, and under what conditions, to issue this exemption.

PROJECT DESCRIPTION

6. The Ice House Project would use the existing 190-foot-long, 12-foot-high Ice House dam and spillway topped with existing 24-inch-high flashboards that impound a

request, Ice House Partners provided documentation that it had the property rights for the non-federal lands necessary to develop the project. Under standard Article 5 of this exemption, Ice House Partners has one year from issuance of this exemption to obtain the right to occupy the federal lands included in this exemption. Article 19 requires Ice House Partners to document that it has obtained these rights.

⁴ 72 *Fed. Reg.* 25,299 (May 4, 2007).

⁵ 72 *Fed. Reg.* 46,625 (August 21, 2007).

137-acre reservoir. The project would include an existing headgate structure, equipped with four 8-foot-high, 10-foot-wide gates, leading to an existing 50-foot-wide, 109-foot-long power canal. The restored powerhouse, which contains two existing turbine generating units with a total installed capacity of 280 kilowatts, is located in the canal about 75 feet downstream of the headgate. Water used for generation would be discharged from the powerhouse into an existing 50-foot-wide, 400-foot-long tailrace (measured from the headgate to the tailrace outlet). Project power would be transmitted through an existing 480-volt, 100-foot-long underground transmission cable. The Nashua River reach that would be bypassed by operating the project (measured from the dam to the tailrace outlet) is about 300 feet long. The existing dam, headgate structure, and powerhouse have already been restored.

7. The proposed exhibit G drawing does not show or enclose within the project boundary, the dam, reservoir (up to the height of the existing flashboards), headgate structure, power canal, powerhouse, tailrace, or transmission line. Therefore, Article 13 requires Ice House Partners to file revised exhibit G drawings enclosing the above project facilities to conform to sections 4.39 and 4.41 of the Commission's regulations.

8. Ice House Partners would operate the project in a run-of-river mode, and maintain a 1 million gallon per day flow⁶ (mgd) in the bypassed reach year-round via a notch that would be cut in the flashboards.

9. The project would be equipped with a real-time water level recording device to match turbine discharge with river inflow. When flow in the Nashua River is equal to or less than the hydraulic capacity of one turbine unit (160 cfs), no units would operate, and all inflow would spill over the flashboards. When flow exceeds 160 cfs, one turbine unit would begin generating and the excess would be spilled over the flashboards until such inflow exceeds an additional 160 cfs or 320 cfs (the hydraulic capacity of two units), at which time the second turbine unit would begin generating, with all flows over 320 cfs spilled over the flashboards.

SECTION 30(c) CONDITIONS

10. Pursuant to section 405 of Public Utility Regulatory Policies Act (PURPA),⁷ exemptions for projects of less than 5 megawatts (MW) must include the mandatory fish

⁶ One mgd is equal to about 1.55 cfs.

⁷ 16 U.S.C. § 2705(b) (2000).

and wildlife conditions as set out in section 30(c) of the FPA.⁸ Article 2 of all exemptions requires compliance with the terms and conditions filed by federal and state fish and wildlife agencies to protect fish and wildlife resources.⁹

11. Interior, by letter filed October 10, 2007, and Massachusetts DFW by letter filed October 11, 2007, provided nearly identical section 30(c) conditions that require: operating the project in a run-of-river mode; installing, operating, and maintaining upstream and downstream fish passage facilities when notified by the agencies in the future; notifying agencies when project operation commences; allowing agencies to inspect the project; reserving the right to modify the section 30(c) terms and conditions; including the terms and conditions in any conveyance of the project by lease or sale; and developing plans for maintaining and monitoring run-of-river operation and spillway flows.

12. Additional Massachusetts DFW conditions require: providing the proposed 1 mgd flow in the bypassed reach year-round on an interim basis; passing 90 percent of inflow downstream during impoundment refilling after maintenance drawdowns; installing, operating, and maintaining upstream and downstream American eel passage facilities by the time the project is operational; developing plans for sediment removal and vegetation management; and conducting a bypassed-reach flow evaluation to determine a permanent minimum flow. The section 30(c) conditions are set forth in Appendices A and B of this order and are incorporated into the exemption by ordering paragraph A. Article 18 clarifies that the required interim minimum flow for the bypassed reach is to be provided on a continuous basis.

THREATENED AND ENDANGERED SPECIES

13. Section 7 of the Endangered Species Act¹⁰ requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of the critical habitat of such species. In a letter dated November 3, 2006, included with the exemption application, the FWS indicated that no federally listed threatened or endangered species

⁸ 16 U.S.C. § 823a(c) (2000). Section 30(c) applies to conduit exemptions, but PURPA section 405 made that section a requirement for 5 MW exemptions as well.

⁹ These conditions are submitted by the agencies in response to the notice that the application is ready for environmental analysis or included in the exhibit E of the exemption application.

¹⁰ 16 U.S.C. § 1536(a) (2000).

or critical habitat are known to occur in the project area. Because no listed species are present on the project area, issuing an exemption from licensing for the project would not affect federally listed threatened or endangered species or critical habitat. No further consultation under section 7 is required.

NATIONAL HISTORIC PRESERVATION ACT

14. Under section 106 of the National Historic Preservation Act (NHPA)¹¹ and its implementing regulations,¹² federal agencies must take into account the effect of any proposed undertaking on properties listed or eligible for listing in the National Register (defined as historic properties) and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. This generally requires the Commission to consult with the State Historic Preservation Officer (SHPO) to determine whether and how a proposed action may affect historic properties, and to seek ways to avoid or minimize any adverse effects.

15. The West Main Street Ice House Industrial Area, including the project's power canal, dam, and powerhouse, and an adjacent office building are potentially eligible for listing in the National Register of Historic Places for their association with the events and activities surrounding the development of the town's economy. The EA found that proposed project operation is not likely to have an effect on the identified historic resources because the proposed project would not involve new construction or modifications to the existing facilities. However, future actions involving any necessary project maintenance or construction may impact the eligibility of the industrial complex. The EA noted that a memorandum of agreement (MOA) with the SHPO would ensure that any future modifications or new construction do not adversely affect known and potential historic properties, as well as any as-yet unidentified archaeological resources.

16. On March 11, 2008, the Commission executed a MOA with the Massachusetts State Historic Preservation Officer.¹³ Ice House Partners concurred on February 20, 2008. The MOA requires the exemptee to prepare and implement a Historic Properties Management Plan (HPMP) for the term of any exemption from licensing issued for this project. Execution of the MOA demonstrates the Commission's compliance with section 106 of NHPA. Article 16 requires the exemptee to implement the MOA and to file its HPMP with the Commission within one year of the exemption issuance.

¹¹ 16 U.S.C. § 470 (2000) *et seq.*

¹² 36 C.F.R. Part 800 (2007).

¹³ See letter executing MOA issued March 21, 2008.

COMMENTS ON THE EA

17. On January 11 and 16, 2008, respectively, the Massachusetts DFW and the FWS filed comments on the EA.

A. Vegetation Management

18. Massachusetts DFW's original section 30(c) condition 11 required Ice House Partners to obtain the agency's approval before commencing any routine vegetation management. The condition required such approval no later than three months prior to the commencement of project operation. The EA did not recommend this measure, concluding that because of the small size of the project and its location in a developed area, the need for vegetation management appears to be negligible.

19. In its comments on the EA, Massachusetts DFW agrees that the relevant timing for review and approval of vegetation management is prior to implementation of vegetation management, rather than prior to commencement of project operation. I am modifying condition 11 in appendix B to require the agency's approval no later than three months prior to implementing any vegetation management measures.

B. Fish Passage Plans and Schedules

20. Ice House Partners proposes to provide fish passage facilities when requested by the FWS and Massachusetts DFW. The Massachusetts DFW 30(c) condition 8 and Interior 30(c) condition 4 would require that Ice House Partners be responsible for constructing, operating, maintaining, and evaluating upstream and downstream anadromous fish passage facilities at the project when requested by the Massachusetts DFW or the FWS.

21. While the Massachusetts DFW does not note the need for the construction of anadromous fish passage facilities at this time, its condition 10 would require that Ice House Partners file, for approval by the Massachusetts DFW and the FWS, plans and schedules for the operation, maintenance, monitoring, and evaluation of the fishways required in condition 8 no later than three months prior to the commencement of project operation.

22. The EA notes that no anadromous fish are currently found in the project area and upstream and downstream passage facilities are not yet in place at the next downstream dam. The EA therefore found that, while a provision for fish passage facilities, if needed in the future, seems reasonable, the filing of plans and schedules for such facilities prior to commencement of project operation was unnecessary until such anadromous fish can reach the project and a fishway has been prescribed.

23. In its comments on the EA, FWS concurred with staff's conclusion that plans and schedules for fishways for anadromous fish are not needed at this time, since the need for passage has not yet been triggered. Massachusetts DFW, however, did not comment on staff's fish passage recommendation, so the Massachusetts DFW condition remains unchanged, and Ice House Partners must submit a fishway plan and schedule prior to commencement of project operation. Article 14 requires the exemptee to file the required fish passage plans and schedules for Commission approval.

C. Eel Passage

24. Ice House Partners proposes to provide eel passage when requested by the FWS and Massachusetts DFW. Massachusetts DFW's condition 9 requires that Ice House Partners provide upstream and downstream passage for American eels at the project, with the eelways to be operational concurrent with the commencement of project operation.

25. The EA found that, while providing passage facilities would enhance and protect American eel populations by providing access to upstream tributary habitat and safe downstream passage, construction of such facilities does not appear to be needed until eel passage facilities have been constructed at the downstream Pepperell Paper Mill Project, the next downstream dam on the Nashua River (located 11.5 miles downstream of the Ice House Project). The EA noted that evaluating the effectiveness of such facilities now, as recommended by the Massachusetts DFW, would be problematic without the presence of American eels whose movement upstream to the project dam appears to currently be blocked.

26. In its comments on the EA, Massachusetts DFW reiterated the immediate need for eel passage facilities at the project, noting that sampling it conducted in 2003 documented the occurrence of American eel in tributaries of the Nashua River, both in the Squannacook River upstream of the Pepperell Paper Mill Project, as well as in the Catacoonmug Brook upstream of the Ice House Project. Massachusetts DFW also noted that the Pepperell Paper Mill Project has been found by the Commission to be required to be licensed or exempted,¹⁴ and an application for an exemption from licensing is being prepared. Massachusetts DFW further states that it will be requiring eel passage at the Pepperell Paper Mill Project as a condition of its exemption.

27. The FWS, in comments on the EA, stated that the existence of American eels both immediately upstream and downstream of the project clearly demonstrates the need for these facilities at this time.

¹⁴ *Swift River Hydro Operations Company*, 116 FERC ¶ 62,140 (2006).

28. Based on the information provided by Massachusetts DFW, American eel are currently found in the Nashua River Basin, both upstream and downstream of the Ice House Project and passage facilities at the next downstream dam are likely to be provided in the near future. Therefore, providing passage for eel at the Ice House Project concurrent with project operation seems reasonable. Article 14 requires the exemptee to file the required eel passage designs with the Commission for approval.

OTHER ISSUES

A. Administrative Conditions

29. The Commission collects annual charges from exemptees for the administration of its hydropower program.¹⁵ Under the regulations currently in effect, projects, with authorized installed capacity of 1,500 kW or less, like this project, are not assessed an annual charge.

30. Article 11 requires the exemptee to start rehabilitation of the facilities within two years of the date of this exemption issuance and complete rehabilitation within four years of issuance of this exemption.

B. Exhibit F and G Drawings

31. The Commission requires exemptees to file sets of approved project drawings (exhibits F) on microfilm and in electronic file format.

32. The four exhibit F drawings filed on July 27, 2007, are approved and made part of this exemption. Article 12 requires the filing of the approved exhibit F drawings in aperture card and electronic file format.

33. The revised exhibit G drawing filed on July 27, 2007, does not show or enclose within the project boundary, the dam, reservoir (up to the height of the existing flashboards), headgate structure, power canal, powerhouse, tailrace, or transmission line. Further, the exhibit G drawing does not show three known reference points, as required by section 4.107(d) OR 4.41(h) of our regulations. Therefore, the exhibit G drawing is not approved and is not made part of the exemption order. Article 13 requires the refiling of an exhibit G drawing that encloses all project facilities, and conforms to sections 4.39 and 4.41 of the Commission's regulations, 18 C.F.R. §§ 4.39 and 4.41 (2007).

¹⁵ See 18 C.F.R. § 11.1 (2007).

C. Consultation on Resource Plans

34. The section 30(c) conditions (Appendices A and B of this order) require that plans be prepared for: monitoring run-of-river operation and spillway flows; constructing, operating, maintaining and evaluating fishway and eel passage facilities; sediment removal (if necessary); and conducting a bypassed reach flow evaluation. However, the conditions do not require the plans to be filed with the Commission for approval. Therefore, Article 14 requires the filing of each plan with the Commission for approval.

D. Public Access

35. In addition to the section 30(c) conditions, Interior and Massachusetts DFW recommended providing access to project waters and lands to allow for public use of fish and wildlife resources where consistent with maintaining public safety and protecting project civil works. Article 15 requires the exemptee to allow year-round recreational access, and inform the public of the availability of recreational opportunities at the project, such as posting signs at major points of access.

E. Project Safety

36. Ensuring the safety of all jurisdictional dams is an important public interest function of the Commission. A dam failure could result in loss of life or property damage, and could also result in significant negative environmental effects. In the interest of ensuring the safety of this project, I am including Article 17, which requires the exemptee to comply with Part 12 of the Commission's regulations, which govern the safety of water power projects and project works.¹⁶

The Director orders:

(A) The Ice House Power Project is exempted from Part I of the FPA, subject to conditions submitted by the U.S. Department of the Interior and Massachusetts Division of Fisheries and Wildlife, under section 30(c) of the FPA, as those conditions are set forth in Appendices A and B to this order, and the articles specified below.

(B) The project consists of:

(1) All lands, to the extent of the exemptee's interests in those lands, described in the project description and the project boundary discussion of this order.

¹⁶ 18 C.F.R. Part 12 (2007). To the extent that special Article 17 conflicts with standard Article 8 (contained in the attached E-2), the provisions of the special article govern.

<u>Exhibit G Drawing</u>	<u>FERC No. 12769-</u>	<u>Description</u>
G-1	1	Identification Map

(2) The following project works: (1) the existing 190-foot-long, 12-foot-high Ice House dam and spillway topped with existing 24-inch-high flashboards impounding; (2) an existing 137-acre, 965-acre-foot reservoir with a normal full pond elevation of 216.45 feet National Geodetic Vertical Datum; (3) an existing headgate structure equipped with four 8-foot-high, 10-foot-wide gates of which two are operational and two are stationary leading to; (4) an existing 50-foot-wide, 109-foot-long power canal connected to; (5) a restored powerhouse containing two Kaplan turbine generating units with a total installed capacity of 280 kilowatts discharging flow to; (6) an existing 50-foot-wide, 400-foot-long tailrace; (7) an existing 480-volt, 100-foot-long underground transmission cable; and (8) appurtenant facilities.

The project works generally described above are more specifically shown and described by those portions of exhibits A and F below:

Exhibit A: Sections 1 and 2 on pages 1 through 7, filed on July 27, 2007.

Exhibit F: The following exhibit F drawings filed on July 27, 2007:

<u>Exhibit F Drawing</u>	<u>FERC No. 12769-</u>	<u>Description</u>
F-1	2	Flow Schematic
F-2	3	Head Gate Views
F-3	4	Powerhouse Top View
F-4	5	Powerhouse Layout Side View

(3) All of the structures, fixtures, equipment or facilities used to operate or maintain the project, all portable property that may be employed in connection with the project, and all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project.

(C) The exhibits A and F described above are approved and made part of the exemption. The exhibit G filed on July 27, 2007, is not approved.

(D) This exemption is also subject to the articles set forth in Form E-2 entitled Standard Terms and Conditions of Exemption from Licensing (attached), and the following additional articles:

Article 10. *Administrative Annual Charges*. The exemptee shall pay the United States annual charges, effective the first day of the month in which the

exemption is issued, as determined in accordance with the provisions of the Commission's regulations in effect from time to time, for the purpose of reimbursing the United States for the cost of administration of the Commission's hydropower program. The authorized installed capacity for that purpose is 280 kilowatts. Under the regulations currently in effect, projects with authorized installed capacity of less than or equal to 1,500 kilowatts will not be assessed annual charges.

Article 11. Start of Construction. The exemptee shall commence rehabilitation of the project works within two years from the issuance date of the exemption and shall complete rehabilitation of the project within four years from the issuance date of the exemption.

Article 12. Exhibit Drawings. Within 45 days of the issuance date of this exemption, the exemptee shall file the approved exhibit drawings in aperture card and electronic file format.

(a) Three sets of the approved exhibit drawings shall be reproduced on silver or gelatin 35mm microfilm. All microfilm shall be mounted on type D (3-1/4" X 7-3/8") aperture cards. Prior to microfilming, the FERC Project-Drawing Number shall be shown in the margin below the title block of the approved drawing. After mounting, the FERC Drawing Number shall be typed on the upper right corner of each aperture card. Additionally, the Project Number, FERC Exhibit (i.e., F-1, etc.), Drawing Title, and date of this exemption shall be typed on the upper left corner of each aperture card.

Two of the sets of aperture cards shall be filed with the Secretary of the Commission, ATTN: OEP/DHAC. The third set shall be filed with the Commission's Division of Dam Safety and Inspections New York Regional Office.

(b) The exemptee shall file two separate sets of exhibit drawings in electronic raster format with the Secretary of the Commission, ATTN: OEP/DHAC. A third set shall be filed with the Commission's Division of Dam Safety and Inspections New York Regional Office. Exhibit F drawings must be identified as critical energy infrastructure information (CEII) material under 18 C.F.R. § 388.113(c). Each drawing must be a separate electronic file, and the file name shall include: FERC Project-Drawing Number, FERC Exhibit, Drawing Title, date of this exemption, and file extension in the following format [P-12769-1, F-1, Project Description, MM-DD-YYYY.TIF]. Electronic drawings shall meet the following format specification:

IMAGERY - black & white raster file
 FILE TYPE – Tagged Image File Format, (TIFF) CCITT Group 4
 RESOLUTION – 300 dpi desired, (200 dpi min)
 DRAWING SIZE FORMAT – 24” X 36” (min), 28” X 40” (max)
 FILE SIZE – less than 1 MB desired

Article 13. Exhibit G Drawing. Within 90 days of the issuance date of this exemption, the exemptee shall file, for Commission approval, revised exhibit G drawings enclosing within the project boundary all principal project works necessary for operation and maintenance of the project, including the dam, reservoir (up to the height of the existing flashboards), headgate structure, power canal, powerhouse, tailrace, and transmission line. The Exhibit G drawings must comply with sections 4.39 and 4.41 of the Commission’s regulations.

Article 14. Commission Approval and Reporting.

(a) Requirement to File Plans for Commission Approval

Various measures in the U.S. Department of the Interior (Interior) and Massachusetts Division of Fisheries and Wildlife (Massachusetts DFW) conditions issued pursuant to section 30(c) of the Federal Power Act (Appendices A and B) require the exemptee to prepare plans in consultation with state and federal agencies to implement specific measures without prior Commission review and approval. Each such plan shall also be submitted to the Commission for approval. The exemptee shall not implement these plans unless notified by the Commission that the plans are approved. The plans are listed below.

<u>30(c) Condition No.</u>		Plan Name	Date Due to Commission
Interior	Mass DFW		
3	2	Run-of-river maintenance and monitoring plan	Within 6 months of exemption issuance
	4	Bypassed reach flow study plan/results	Within 1 year of exemption issuance
	6	Bypassed reach flow maintenance and monitoring plan	Within 1 year and 6 months of exemption issuance
	7	Sediment removal plan	Within 6 months of exemption issuance
	9	Eel passage design	Within 6 months of exemption issuance
4	8 and 10	Fishway operation, maintenance, monitoring and evaluation plan	Within 6 months of exemption issuance

(b) Requirement to File Notification with the Commission

The exemptee shall also file with the Commission notification of the following activities.

<u>30(c) Condition No.</u>		Exemption Requirement	Date Due to Commission
Interior	Mass DFW		
1	1	Notification of temporary run-of-river operation modification	Within 10 days of each occurrence
	3	Notification of temporary refill procedure modification	Within 10 days of each occurrence
5	12	Notification when the project commences operation	Within 30 days of commencement of project operation
7	4,5,14	Notification if additional terms and conditions are imposed	Within 30 days of receipt of conditions

The exemptee shall include documentation of agency approval with its filing to the Commission. The Commission reserves the right to make changes to any plan submitted. Upon Commission approval the plan becomes a requirement of the exemption from licensing, and the exemptee shall implement the plan or changes in project operations or facilities, including any changes required by the Commission. In addition, Interior condition 7, and Massachusetts DFW conditions 4, 5, and 14 contemplate unspecified long-term changes to project operations or facilities for the purpose of mitigating environmental impacts. These changes may not be implemented without prior Commission authorization granted after the filing of an application to amend the exemption.

Article 15. Recreation Access. The exemptee shall allow public access to the project for outdoor recreational purposes. The exemptee shall make reasonable efforts to inform the public of the availability of recreational opportunities at the project. Such efforts shall include the posting of signs at major points of access to the project. The Commission reserves the right to require the exemptee to allow public recreational uses of any project property. The exemptee may reserve from public access such portions of the project as may be necessary for the protection of life, health, and property.

Article 16. Memorandum of Agreement and Historic Properties Management Plan. The exemptee shall implement the "Memorandum of Agreement Among the

Federal Energy Regulatory Commission and the Massachusetts State Historic Preservation Officer for Managing Historic Properties that May be Affected by Issuing an Exemption from Licensing for the Ice House Power Project in Middlesex County, Massachusetts (FERC No. 12769),” executed on March 11, 2008, and including but not limited to the historic properties management plan (HPMP) for the project. Pursuant to the requirements of this Memorandum of Agreement (MOA), the exemptee shall file, for Commission approval, an HPMP within one year of the issuance date of this exemption. The Commission reserves the authority to require changes to the HPMP at any time during the term of this order. If the MOA is terminated prior to Commission approval of the HPMP, the exemptee shall obtain approval from the Commission and the Massachusetts State Historic Preservation Officer, before engaging in any ground-disturbing activities or taking any other action that may affect any historic properties within the project’s area of potential effects.

Article 17. This project is subject to Part 12 of the Commission’s regulations, 18 C.F.R. Part 12 (2007) (as they may be amended from time to time). For the purposes of applying these provisions of Part 12, the exempted project is deemed to be a licensed project development and the owner of the exempted project is deemed to be a licensee.

Article 18. *Minimum Bypassed Reach Flow.* Until such time as a permanent flow is established, the exemptee shall release a continuous 1 million gallon per day (1 mgd) flow, or its equivalent in cubic feet per second, into the project bypassed reach, in accordance with Massachusetts Division of Fish and Wildlife (Massachusetts DFW) section 30(c) condition No. 5, for the protection of aquatic habitat and water quality in the Nashua River. The minimum bypassed reach flow release may be temporarily modified if required by operating emergencies beyond the control of the exemptee, and for short periods upon mutual agreement between the exemptee, Massachusetts DFW, and the U.S. Department of the Interior. If the flow is so modified, the licensee shall notify the Commission as soon as possible, but no later than 10 days after each such incident.

(E) The exemptee shall serve copies of any Commission filing required by this order on any entity specified in this order to be consulted on matters related to that filing. Proof of service on these entities must accompany the filing with the Commission.

(F) This order is final unless a request for rehearing is filed within 30 days from the date of its issuance, as provided in section 313(a) of the FPA. The filing of a request for rehearing does not operate as a stay of the effective date of this exemption or of any other date specified in this order, except as specifically ordered by the Commission. The exemptee's failure to file a request for rehearing shall constitute acceptance of this order.

Article 19. Right to Occupy Federal Lands. Within one year of the issuance date of this exemption, the exemptee shall file documentation with the Commission showing it has obtained the right to occupy any federal lands necessary for the construction, operation, and maintenance of the project.

J. Mark Robinson
Director
Office of Energy Projects

Form E-2

FEDERAL ENERGY REGULATORY COMMISSION

Section 4.106 - Standard Terms and Conditions of Exemption from Licensing

Any exemption from licensing granted under this subpart for a small hydroelectric power project is subject to the following standard terms and conditions:

Article 1. The Commission reserves the right to conduct investigations under sections 4(g), 306, 307, and 311 of the Federal Power Act with respect to any acts, complaints, facts, conditions, practices, or other matters related to the construction, operation, or maintenance of the exempt project. If any term or condition of the exemption is violated, the Commission may revoke the exemption, issue a suitable order under section 4(g) of the Federal Power Act, or take appropriate action for enforcement, forfeiture, or penalties under Part III of the Federal Power Act.

Article 2. The construction, operation, and maintenance of the exempt project must comply with any terms and conditions that the United States Fish and Wildlife Service and any state fish and wildlife agencies have determined are appropriate to prevent loss of, or damage to, fish or wildlife resources or to otherwise carry out the purposes of the Fish and Wildlife Coordination Act, as specified in exhibit E of the application for exemption from licensing or in the comments submitted in response to the notice of the exemption application.

Article 3. The Commission may revoke this exemption if actual construction of any proposed generating facilities has not begun within two years or has not been completed within four years from the date on which this exemption was granted. If an exemption is revoked under this article, the Commission will not accept from the prior exemption holder a subsequent application for exemption from licensing or a notice of exemption from licensing for the same project within two years of the revocation.

Article 4. This exemption is subject to the navigation servitude of the United States if the project is located on navigable waters of the United States.

Article 5. This exemption does not confer any right to use or occupy any Federal lands that may be necessary for the development or operation of the project. Any right to use or occupy any Federal lands for those purposes must be obtained from the administering Federal agencies. The Commission may accept a license application by any qualified license applicant and revoke this exemption, if any necessary right to use or occupy Federal lands for those purposes has not been obtained within one year from the date on which this exemption was granted.

Article 6. In order to best develop, conserve, and utilize in the public interest the water resources of the region, the Commission may require that the exempt facilities be modified in structure or operation or may revoke this exemption.

Article 7. The Commission may revoke this exemption if, in the application process, material discrepancies, inaccuracies, or falsehoods were made by or on behalf of the applicant.

Article 8. Any exempted small hydroelectric power project that utilizes a dam that is more than 33 feet in height above streambed, as defined in 18 C.F.R. § 12.31(c) of this chapter, impounds more than 2,000 acre-feet of water, or has a significant or high hazard potential, as defined in 33 C.F.R. Part 222, is subject to the following provisions of 18 C.F.R. Part 12, as it may be amended:

- (1) Section 12.4(b)(1)(i) and (ii), (b)(2)(i) and (iii), (b)(iv), and (b)(v);
- (2) Section 12.4(c);
- (3) Section 12.5;
- (4) Subpart C; and
- (5) Subpart D.

For the purposes of applying these provisions of 18 C.F.R. Part 12, the exempted project is deemed to be a licensed project development and the owner of the exempted project is deemed to be a licensee.

Article 9. Before transferring any property interests in the exempt project, the exemption holder must inform the transferee of the terms and conditions of the exemption. Within 30 days of transferring the property interests, the exemption holder must inform the Commission of the identity and address of the transferee.

APPENDIX A

Mandatory section 30(c) conditions filed by the U.S. Department of the Interior on October 10, 2007.

1. The Exemptee shall operate the project in a run-of-river mode, whereby inflow to the project will equal outflow from the project and water levels above the dam are not drawn down for the purpose of generating power. Run-of-river operation may be temporarily modified if required by operating emergencies beyond the control of the Exemptee, or for short periods upon mutual agreement between the Exemptee, the U.S. Fish and Wildlife Service, and the Massachusetts Division of Fisheries and Wildlife.
2. The Exemptee shall discharge a minimum flow over the project spillway. The flow shall be determined after additional consultation with the Massachusetts Division of Fisheries and Wildlife and the U.S. Fish and Wildlife Service. A series of demonstration flows may be needed for the agencies to establish the required flow.
3. The Exemptee shall, within three (3) months of the date of issuance of an exemption from licensing, prepare and file for approval by the U.S. Fish and Wildlife Service, a plan for maintaining and monitoring run-of-river operation and spillway flows at the project. The plan shall include a description of the mechanisms and structures that will be used, the level of manual and automatic operation, the methods to be used for recording data on run-of-river operation and spillway flows, an implementation schedule, and a plan for maintaining the data for inspection by the U.S. Fish and Wildlife Service, the Federal Energy Regulatory Commission, and the Massachusetts Division of Fisheries and Wildlife.
4. The Exemptee shall be responsible for constructing, operating, maintaining, and evaluating upstream and downstream fish passage facilities at this project when notified by the U.S. Fish and Wildlife Service and/or the Massachusetts Division of Fisheries and Wildlife that such fishways are needed. The fishways shall be constructed and operational in accordance with the schedule identified by the agencies. Any fishways prescribed by the aforementioned agencies shall be designed in consultation with, and the designs shall require approval by, the U.S. Fish and Wildlife Service.
5. The Exemptee shall notify the U.S. Fish and Wildlife Service in writing when the project commences operation. A set of as-built drawings shall be furnished with the notification. Such notice shall be sent within thirty (30) days of start-up to Supervisor, New England Field Office, 70 Commercial Street, Suite 300, Concord, New Hampshire 03301.

6. The Exemptee shall allow the U.S. Fish and Wildlife Service to inspect the project area at any time while the project operates under an exemption from licensing to monitor compliance with their terms and conditions.

7. The U.S. Fish and Wildlife Service is reserving the right to add to and alter terms and conditions for this exemption as appropriate to carry out its responsibilities with respect to fish and wildlife resources. The Exemptee shall, within thirty (30) days of receipt, file with the Federal Energy Regulatory Commission any additional terms and conditions imposed by the U.S. Fish and Wildlife Service.

8. The Exemptee shall incorporate the aforementioned terms and conditions in any conveyance - by lease, sale or otherwise - of its interests so as to legally assure compliance with said conditions for as long as the project operates under an exemption from licensing.

APPENDIX B

Mandatory section 30(c) conditions filed by the Massachusetts Division of Fisheries and Wildlife on October 11, 2007, as amended by Commission staff (changes in bold).

1. The Exemptee shall operate the project in a run-of-river mode, whereby inflow to the project will equal outflow from the project on an instantaneous basis and water levels above the dam are not drawn down for the purpose of generating power. Instantaneous run-of-river operation may be temporarily modified if required by operating emergencies beyond the control of the Exemptee, or for short periods upon mutual agreement between the Exemptee, the Massachusetts Division of Fisheries and Wildlife (Division), and the U.S. Fish and Wildlife Service.
2. The Exemptee shall, within three (3) months of the date of issuance of an exemption from licensing, prepare and file for approval by the Division, and the U.S. Fish and Wildlife Service, a plan for maintaining and monitoring run-of-river operation at the project. The plan shall include a description of the mechanisms and structures that will be used, the level of automatic operation, the methods to be used for recording data on run-of-river operation, an implementation schedule, and a plan for maintaining the data for inspection by the Division, the Federal Energy Regulatory Commission, and the U.S. Fish and Wildlife Service.
3. The Exemptee shall implement a refill procedure whereby, during impoundment refilling after drawdowns for maintenance (including flashboard repair/replacement) or emergency purposes, 90 percent of inflow is passed downstream and the headpond is refilled on the remaining 10 percent of inflow to the project. This refill procedure may be modified on a case-by-case basis with the prior approval of both the Division and the U.S. Fish and Wildlife Service.
4. The first field season following commencement of project operation, the Exemptee shall conduct a flow study to determine a suitable bypass discharge sufficient to maintain water quality and habitat in the bypass reach. The study plan shall be developed in consultation with the Division and the U.S. Fish and Wildlife Service, and shall require approval by the Division and the U.S. Fish and Wildlife Service prior to implementation. Based on study results, the Division and the U.S. Fish and Wildlife Service, may mandate a continuous minimum bypass flow for the project.
5. Until a permanent bypass flow has been mandated by the U.S. Fish and Wildlife Service, the Exemptee shall provide an interim conservation flow of 1 mgd (as suggested by the exemptee) at the dam to protect habitat in the bypass reach. This flow shall be released upon commencement of project operation, and shall continue until the agencies notify the Exemptee of a permanent bypass flow requirement (to be determined via

condition 4 above). The specific location and mechanism of flow release shall be determined in consultation with the Division and the U.S. Fish and Wildlife Service, and shall require the approval by the Division and the U.S. Fish and Wildlife Service prior to the project commencing operation.

6. The Exemptee shall, within three (3) months of receiving notification of a permanent bypass flow requirement by the agencies, prepare and file for review and approval by the Division, and the U.S. Fish and Wildlife Service a plan for maintaining and monitoring the bypass discharge. The plan shall include a description of the mechanisms and structures that will be used to provide the flow, the level of automatic operation, the methods to be used for recording data on bypass flow, an implementation schedule, and a plan for maintaining the data for inspection by the U.S. Fish and Wildlife Service, the Federal Energy Regulatory Commission, and the Division.

7. The Exemptee shall, if necessary, within ninety (90) days of exemption issuance, develop a Sediment Removal Plan in consultation with the U.S. Fish and Wildlife Service, the Division, and the Massachusetts Department of Environmental Protection. The purpose of the plan is to develop a protocol for the periodic removal of accumulated sediment from the project that minimizes impacts to aquatic resources. The project shall not commence operation until the Division and the U.S. Fish and Wildlife Service has approved the Plan.

8. The Exemptee shall be responsible for constructing, operating, maintaining, and evaluating upstream and downstream anadromous fish passage facilities at this project when notified by the U.S. Fish and Wildlife Service and/or the Division. The fishway(s) shall be designed in consultation with, and the designs shall require approval by, the U.S. Fish and Wildlife Service and the Division.

9. The Exemptee shall be responsible for constructing, operating, maintaining, and evaluating upstream and downstream passage for American eels. The fishways shall be designed in consultation with, and require approval by, the U.S. Fish and Wildlife Service and the Division prior to the start of fishway construction. The eelways shall be operational concurrent with the commencement of project operation.

10. No later than three (3) months prior to commencement of project operation, the Exemptee shall file for approval by the U.S. Fish and Wildlife Service and the Division, plans and schedules for the operation, maintenance and monitoring, and evaluation of the fishways specified in conditions 8 and 9. All plans related to fish passage require approval from the U.S. Fish and Wildlife Service and the Division prior to implementation by the Exemptee.

11. No later than three (3) months prior to **[implementing vegetation management]**, the Exemptee shall file for approval by the Division for the routine vegetation management associated with the project.

12. The Exemptee shall notify the Division and the U.S. Fish and Wildlife Service in writing when the project commences operation. A set of as-built drawings shall be furnished with the notification. Such notice shall be sent within 30 days of start-up to Anadromous Fish Project Leader, MADFW Field HQ, 1 Rabbit Hill Road, Westborough MA, 01581.

13. The Exemptee shall allow the Division to inspect the project area at any time while the project operates under an exemption from licensing to monitor compliance with their terms and conditions.

14. The Division is reserving the right to add to and alter terms and conditions for this exemption as appropriate to carry out its responsibilities with respect to fish and wildlife resources. The Exemptee shall, within thirty (30) days of receipt, file with the Federal Energy Regulatory Commission any additional terms and conditions imposed by the Division.

15. The Exemptee shall incorporate the aforementioned terms and conditions in any conveyance -- by lease, sale or otherwise -- of its interests so as to legally assure compliance with said conditions for as long as the project operates under an exemption from licensing.

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