

UNITED STATES OF AMERICA 111 FERC ¶62,061
FEDERAL ENERGY REGULATORY COMMISSION

PPL Maine LLC

Project No. 2534-068

ORDER MODIFYING AND APPROVING AMENDMENT OF LICENSE

(Issued April 18, 2005)

On June 25, 2004, PPL Maine LLC (licensee) filed an application to amend its license for the Milford Project, No. 2534 located on the Penobscot River and Stillwater Branch in Penobscot County, Maine.¹ The licensee proposes modifying articles 301 and 305 to defer installation of the additional turbine/generation unit at the project. The licensee also proposes revising article 402, adding six new articles, and modifying the previously approved log removal plan to reflect provisions of the Penobscot Indian Nation (PIN) Agreement. The proposed amendments to articles 407, 408, and 409 would extend deadlines relating to the installation of upstream and downstream fish passage facilities. The proposed amendment to article 411 substitutes a new reservation of authority to prescribe fishways under section 18 of the Federal Power Act. Finally, the licensee proposes to delete article 410 regarding mitigation of unavoidable losses to Atlantic salmon. Granting these amendments is in the public interest because the amendments are components of a comprehensive settlement agreement which will contribute to the fishery restoration program in the Penobscot Basin and provide for the generation of significant amounts of electric power at the hydroelectric projects covered by the agreement. For the reasons stated below, I am granting the amendment application.

BACKGROUND

On June 25, 2004, the licensee filed: (1) the Lower Penobscot River Basin Comprehensive Settlement Accord (Comprehensive Settlement) composed of agreements entered into by the licensee, PPL Great Works, LLC, the PIN, the U.S. Department of the Interior (Interior) acting through its bureaus the U.S. Fish and Wildlife Service (FWS), the U.S. Bureau of Indian Affairs (BIA), and the National Park Service (NPS), the Maine agencies,² the Conservation Interests,³ and the Penobscot River Restoration Trust (Trust)

¹ A new license was issued for the Milford Project on April 20, 1998. 83 FERC ¶ 61,037.

² The Maine State Planning Office, the Maine Atlantic Salmon Commission, the Maine Department of Inland Fisheries and Wildlife, and the Maine Department of Natural Resources.

concerning the Veazie Project No. 2403, Milford Project No. 2534, Medway Project No. 2666, Orono Project No. 2710, Stillwater Project No. 2712, Howland Project No. 2721, Basin Mills Project No. 10981, Great Works Project No. 2312 and West Enfield Project No. 2600 and (2) the Comprehensive Settlement Agreement Between the PIN, licensees, BIA, and Interior (PIN Agreement).

The Comprehensive Settlement includes the Lower Penobscot River Multiparty Settlement Agreement dated June 2004 (MPA or Agreement). This filing does not request that the Commission approve the Comprehensive Settlement. Rather, the parties to the Comprehensive Settlement request that the Commission approve individual project amendment applications to implement the initial phase of the Comprehensive Settlement.

Section IV of the MPA requires the concurrent filing with the Commission of a number of requests and applications. These various requests and applications (Phase 1 Requests), if granted by the Commission without alteration or change that materially prejudices any party to the Agreement, will permit the parties to proceed to the subsequent phases of the MPA and thus realize the full public interest benefits contemplated by the MPA, including transfer and surrender of some licenses,⁴ and increased generating capacity at other projects. Once fully implemented, this will ultimately result in restoring access to more than 500 miles of fish habitat in the Penobscot River Basin for Atlantic salmon and other anadromous fish. The State of Maine would retain 90 percent of the hydropower generated on the Penobscot because the licensees would be able to increase generation at other dams.

The PIN Agreement resolves mitigation measures that are to be implemented by the licensees to address certain impacts to PIN lands, resources, and interests from operation of the Milford Project and the West Enfield Project and, together with the June 2004 Lower Penobscot River Multiparty Settlement Agreement, to resolve the issues currently in dispute before the Commission that were raised in requests for rehearing of the Commission's April 20, 1998 orders for the various projects in the Penobscot Basin.

PROPOSED MILFORD AMENDMENTS

PIN Agreement

In order to implement the applicable provisions of the PIN Agreement as they relate to the Milford Project, the licensee requests that the Commission modify existing

³ American Rivers, Inc., the Atlantic Salmon Federation, the Maine Audubon Society, the Natural Resources Council of Maine, and Trout Unlimited.

⁴ The Veazie and Great Works Projects would be decommissioned and their dams removed; Howland would be decommissioned and studied for potential dam removal.

articles and approvals, as well as include new license articles (a revised article 402, six new license articles, and modifications of a previously-approved log removal plan).

PPL Maine requests that the Commission approve the following changes to the 1998 Log Removal Plan for Milford:⁵

(1) In Section B (Scope of Plan) thereof, delete the last two sentences in the third paragraph and insert in lieu thereof the following sentence: “Additional log removal shall be governed by the provisions of Section E hereof.”

(2) In Section D (Implementation Responsibility) thereof, add the following proviso at the end of the second sentence of the first paragraph: “*provided, however*, that the licensee will consider using a PIN tribal member for necessary log removal activities.”

(3) In Section E (Schedule for Implementation), delete the existing text of this section and insert in lieu thereof the following: “The licensee will work with the PIN Department of Natural Resources on an annual basis through the term of the existing Milford license to relocate semi-buoyant logs that PIN has determined to be navigational hazards within the Milford impoundment. The PIN Department of Natural Resources will contact the licensee on or before June 30 of each year to confirm its interest in either meeting to discuss and plan for removal of logs, or to confirm that no such navigational hazards are present and that log removals are not necessary for that calendar year.”

(4) In Section F (Methods), delete the second sentence of the first paragraph, delete the second paragraph in its entirety, and replace the deleted paragraph with the following: “Identified logs shall be relocated to an area where they do not present a navigation hazard.”

Fish Passage

In order to implement the MPA, the licensee asks the Commission to modify Articles 407, 408, 409 and 411 to incorporate the fish passage provisions contained in Attachment A of the MPA.

In addition to the above requested modifications to the Milford Project license, the licensee requests that the Commission delete article 410, pertaining to mitigation of unavoidable losses to Atlantic salmon. The consulted agencies, interested parties, and PIN consented to this deletion in their letters of support of the filing (and the parties to

⁵ The Log Removal Plan was approved on June 1, 1998. (87 FERC ¶62,245)

the MPA agreed to the deletion), because of the fish passage measures agreed to by the licensee.

The licensee also requests that the time deadline specified in article 305 for the submission of design documents for the fishway be revised to reflect the fishway implementation schedule in the MPA. For article 305, the licensee specifically requests that the Commission replace the reference in the second sentence to “Within 90 days from the effective date of the license” in the second sentence therein with “As ordered by the Commission”.

Miscellaneous

The licensee requests the Commission to modify Article 301 to reflect the agreement of the parties in the MPA to defer installation of the additional turbine/generation unit at the project. Specifically, the licensee requests that article 301 be revised to read:

“Article 301: The licensee shall commence and complete construction of the additional turbine/generator unit authorized herein as ordered by the Commission.”

AGENCY COMMENTS

On June 29, 2004, Commission staff issued a public notice of the applications and requested comments, motions to intervene, or protests. Nine entities filed comments and/or interventions in response to the public notice. The intervenors include: Interior, NOAA Fisheries, Maine State Planning Office, PIN, and the “Conservation Interests” (American Rivers, Atlantic Salmon Federation, Maine Audubon Society, Natural Resources Council of Maine, and Trout Unlimited).

On November 3, 2004, Commission staff issued a draft environmental assessment (DEA) for comment and requested that comments be filed by November 30, 2004. On November 29, 2004, a joint letter was filed on behalf of American Rivers, Atlantic Salmon Federation, Maine Audubon Society, Natural Resources Council of Maine, PIN, and Trout Unlimited supporting the conclusion of the DEA. The FWS, by letter dated November 30, 2004, also concurred with the conclusion in the DEA.

NOAA Fisheries, by letter dated November 29, 2004, provided comments and recommendations on the DEA. NOAA Fisheries states it is uncomfortable with any proposal to bind it to an agreement it neither negotiated nor signed (article 410 for the Veazie Project, article 411 for the Milford Project, and article 409 for the Stillwater Project). NOAA Fisheries is not willing to restrict its authority to the MPA, however, it would not object to articles with reservation of authority language limiting the exercise of

prescriptive authority to “Attachment A,” which outlines fish passage requirements and does not prevent NOAA Fisheries from doing anything that it could reasonably be expected to do otherwise.

NOAA Fisheries notes that it submitted fishway prescriptions for the basin in 1995 and that FWS offered similar prescriptions in 1997. NOAA Fisheries believes that both prescriptions remain relevant and are supported by the best available science. The MPA, however, necessitates modification to these earlier prescriptions to reach the desired fish passage and habitat related goals. Further, NOAA Fisheries believes that Attachment A to the MPA directly reflects the requirements of the FWS July 1, 2004, prescriptions, and also satisfies the fish passage goals of NOAA Fisheries’ 1995 prescription.

Pursuant to Section 18 of the Federal Power Act (FPA), NOAA Fisheries states it adopts and incorporates by reference the prescriptions set forth in its November 29, 2004 letter (Attachment III) as its preliminary prescriptions, consistent with Attachment A of the MPA (for the projects specified in this action). The notable exception is the articles limiting reservation of authority. NOAA Fisheries also states that the present license article modifications proposed by the licensees, excepting the reservation of authority issue outlined above, satisfy these prescriptions. NOAA Fisheries offers one additional preliminary process prescription pursuant to Section 18 of the FPA:

Integral to its development of fishways, PPL shall develop a plan to monitor the effectiveness of all the facilities and flows provided pursuant to the articles of this license that will enable the “efficient, timely, and safe” passage of diadromous fish migrating upstream and downstream. The plan shall include (1) a description of the criteria and a process that will be used to determine if “efficient, timely, and safe” passage of Atlantic salmon, American shad, alewife, blueback herring, and American eel utilizing fishways has been achieved, and (2) a process for evaluating whether operational modifications for American eel are necessary to achieve “efficient, timely, and safe” passage of American eel. The process for determining “efficient, timely, and safe” passage will include input and consultation with the resource agencies. In so doing, the licensee will utilize biological indicators, such as escapement and recruitment for each species, to assess whether passage for all diadromous species of concern is “efficient, timely, and safe.” The plan shall include a goal for upstream and downstream passage of each species of concern, a goal for minimizing migratory delay, and a goal for the survival (immediate and delayed) of upstream and downstream migration. Results of these monitoring studies, in addition to results from the monitoring process for all diadromous species, shall be submitted to the participating resource agencies and shall provide a basis for recommending future structural or operational changes at the project.

On March 11, 2005, the MDEP provided a final Maine Waterway Development and Conservation Act Permit and Water Quality Certification (WQC). The WQC is attached to this order.

In a letter dated March 21, 2005, NOAA Fisheries modifies its preliminary prescription submitted on November 29, 2004 in a manner that maintains consistency with fish passage requirements outlined in the MPA. Specifically, NOAA Fisheries reaffirms the preliminary prescription as its final modified prescription with the only change being that the process prescription for the referenced projects be omitted.

In April 2005, a multi-project Final Environmental Assessment (FEA) was issued which analyzed the impacts associated with the amendment requests for the Veazie Project, Milford Project, West Enfield Project, Medway Project, and Stillwater Project.

DISCUSSION

Regarding the proposed article which requires the licensee to make contributions to the PIN for use by PIN for monitoring and other activities at the project and thereafter annually contributing to PIN for use by PIN for such purposes for a nine-year period beginning on the one-year anniversary date of the initial contribution, the licensee should be required to notify the Commission within 30 days of making the contribution. This will allow the Commission to monitor the licensee's compliance with this article, ensuring the contributions have been made.

The licensee's request to amend its license for the Milford Project, with the above modification, is in the public interest and should, therefore, be approved.

The Director orders:

(A) The licensee's request to amend the June 1, 1999 Order Modifying and Approving Log Removal Plan (87 FERC ¶62,245) for the Milford Project, as indicated in the June 25, 2004 filing, is approved as follows:

In Section B (Scope of Plan) thereof, the last two sentences in the third paragraph are deleted and replaced with the following sentence: "Additional log removal shall be governed by the provisions of Section E hereof."

In Section D (Implementation Responsibility) thereof, the following proviso is added at the end of the second sentence of the first paragraph: "*provided, however,* that the licensee will consider using a PIN tribal member for necessary log removal activities."

In Section E (Schedule for Implementation), the existing text of this section is deleted and replaced with the following: “The licensee will work with the PIN Department of Natural Resources on an annual basis through the term of the existing Milford license to relocate semi-buoyant logs that PIN has determined to be navigational hazards within the Milford impoundment. The PIN Department of Natural Resources will contact the licensee on or before June 30 of each year to confirm its interest in either meeting to discuss and plan for removal of logs, or to confirm that no such navigational hazards are present and that log removals are not necessary for that calendar year.”

In Section F (Methods), the second sentence of the first paragraph is deleted, the second paragraph is deleted in its entirety, and replaced with the following: “Identified logs shall be relocated to an area where they do not present a navigation hazard.”

(B) Article 301 is revised to read:

Article 301. The licensee shall commence and complete construction of the additional turbine/generator unit authorized herein as ordered by the Commission.

(C) Article 305 is revised to read:

Article 305. The design and construction of those permanent and temporary facilities, including unit 2, the fishways, impounding cofferdams, and deep excavations that would be an integral part of, or that could affect the structural integrity or operation of the project, shall be done in consultation with and subject to the review and approval of the Commission's New York Regional Office. As ordered by the Commission, the licensee shall furnish the Commission's Regional Director, for his review, a schedule for submission of design documents and plans and specifications for the project. If the schedule does not afford sufficient review and approval time, the licensee, upon request of the Commission shall meet with the Commission staff to revise the schedule accordingly.

(D) Article 402 is revised to read:

Article 402. The licensee shall operate the Milford Project in a run-of-river mode for the protection of fishery resources and recreational opportunities in the Penobscot River and the Stillwater Branch of the Penobscot River.

The licensee shall at all times act to minimize the fluctuation of the reservoir surface elevation by maintaining a discharge from the project so that, at any point in time, flows, as measured immediately downstream from the project tailrace, approximate the sum of inflows to the project reservoir.

Run-of-river operation may be temporarily modified if required by operating emergencies beyond the control of the licensee, and for short periods of time upon mutual agreement between the licensee and the Maine Department of Environmental Protection. If the flow is so modified, the licensee shall notify the Commission and the Penobscot Indian Nation (PIN) as soon as possible, but no later than 10 days after each such incident.

The licensee shall immediately notify the United States Bureau of Indian Affairs (BIA) and the PIN Department of Natural Resources of emergencies at the project beyond the control of the licensee other than those referenced in the preceding paragraph, such as emergency maintenance activities and unusual operating conditions. Upon request, the licensee shall provide BIA and PIN with appropriate records regarding unscheduled outages, drawdowns of the project reservoir, and the powerhouse flows during such emergencies.

The licensee shall maintain a stream-flow gauge at Sunkhaze Rips on the Penobscot River and shall provide to BIA and PIN upon request flow data sufficient to demonstrate compliance with the run-of-river operation requirement of this article.

(E) Article 407 is deleted in its entirety and the following language replaces original article 407:

Article 407. The licensee shall install and operate permanent downstream fish passage facilities at the Milford Project. Fishways shall be maintained and operated to maximize fish passage effectiveness throughout fish migration period(s) as defined below. The downstream migration period shall be defined as April 1 to June 30 and November 1 to December 15 for Atlantic salmon, July 1 to December 31 for American shad and alewife, August to December 31 for blueback herring, and August 15 to November 15 (or other time periods determined when adequate information is available, and during any spring run that may occur) for American eel. Downstream facilities are to operate whenever generation occurs during the downstream migration period. The licensee shall keep the fishways in proper order and shall keep fishway areas clear of trash, logs, and material that would hinder passage. Anticipated maintenance shall be performed in

sufficient time before a migratory period such that fishways can be tested and inspected and will operate effectively prior to and during the migratory periods.

Fishway maintenance and operational plans (including schedules) for all fish passage facilities shall be developed by the licensee in consultation and cooperation with the U.S. Fish and Wildlife Service (FWS), the Penobscot Indian Nation (PIN), and other fishery agencies (including the Maine Department of Inland Fisheries and Wildlife, Maine Department of Marine Resources, Maine Atlantic Salmon Commission, and NOAA Fisheries). Functional design and final design plans for all fishways shall be developed in consultation and cooperation with the FWS, PIN, and other fishery agencies.

Downstream fishways shall consist of: (1) a downstream fishway as described in the licensee's filing dated January 12, 1990 (Response to FERC's Additional Information Request, Items 10 through 13); (2) outer trashracks with 1-inch clear bar spacing over the upper 12 feet of the rack (or 4-inch clear bar spacing on outer rack and 1-inch clear bar spacing on the inner trashracks with two additional entrance ports installed on the inner trashrack); (3) twin 4-foot-wide (8 feet total) weirs at the outer trashrack, capable of passing up to 280 cfs; the location of the weirs is to be west of the edge of the new generation unit (No. 2); (4) attraction flows to the downstream fishway of 280 cfs; (5) a gated bottom intake to the downstream migrant facilities for the downstream passage of American eels; and (6) a downstream migrant conduit designed so that the discharge jet does not impact on any vertical walls.

Within 6 months of the effective date of the transfer of the licenses for the Veazie (no. 2710), Great Works (no. 2312), and Howland (no. 2721) Projects pursuant to the terms of the Lower Penobscot River Multiparty Settlement Agreement, the licensee shall file, for Commission approval, detailed design drawings of the licensee's proposed permanent downstream fish passage facilities. This filing shall include but not be limited to: (1) the location and design specifications of the passage facilities; (2) a schedule for installing the facilities within 18 months of a Commission order approving the design drawings; and (3) procedures for operating and maintaining the facilities.

The licensee shall include with the filing documentation of consultation, copies of agency and PIN comments and recommendations on the drawings, plans, and schedule after they have been prepared and provided to the agencies and PIN, and specific descriptions of how the

agencies' and PIN's comments are accommodated by the licensee's plan. The licensee shall allow a minimum of 30 days for the agencies and PIN to comment and to make recommendations before filing the drawings, plans, and schedule with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project specific information.

The Commission reserves the right to require changes to the proposed facilities and schedule. No construction of downstream fish passage facilities shall begin until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee shall implement the proposal, including any changes required by the Commission.

Until the twin 4-foot-wide weirs at the outer trashracks above are installed, the licensee shall continue to operate the existing surface weir bypass facilities at the project.

(F) Article 408 is deleted in its entirety and the following language replaces original article 408:

Article 408. The licensee shall install and operate permanent upstream fish passage facilities at the Milford Project. Fishways shall be maintained and operated to maximize fish passage effectiveness throughout fish migration period(s) as defined below. The upstream migration period shall be defined as April 15 to November 15 for Atlantic salmon, May 1 to June 30 for American shad and alewife, June 1 to July 31 for blueback herring, and April 1 to November 30 for American eel. The licensee shall keep the fishways in proper order and shall keep fishway areas clear of trash, logs, and material that would hinder passage. Anticipated maintenance shall be performed in sufficient time before a migratory period such that fishways can be tested and inspected and will operate effectively prior to and during the migratory periods.

Fishway design, maintenance and operational plans (including schedules) for all fish passage facilities shall be developed by the licensee in consultation and cooperation with the U.S. Fish and Wildlife Service (FWS), the Penobscot Indian Nation (PIN), and other fishery agencies (including the Maine Department of Inland Fisheries and Wildlife, Maine Department of Marine Resources (MDMR), Maine Atlantic Salmon Commission, and NOAA Fisheries). Functional design and final design plans for all fishways shall be developed in consultation and cooperation with the FWS, PIN, and other fishery agencies.

During the first upstream eel migration season after a Commission order inserting this replacement article into the license, the licensee shall assess the appropriate location for the siting of a new upstream eel fishway at the project in consultation with the FWS, MDMR, and PIN, and, upon approval by those entities of a proposed location, file, for Commission approval, a plan for the fishway. This plan shall include but not be limited to: (1) the location and design specifications of the passage facilities; (2) a schedule for installing the facilities and completing initial testing and have the fishway fully operational prior to the third upstream migration season following the effective date of the Lower Penobscot River Multiparty Settlement Agreement; and (3) procedures for operating and maintaining the facilities.

Within 6 months of the effective date of the transfer of the licenses for the Veazie (no. 2710), Great Works (no. 2312), and Howland (no. 2721) Projects pursuant to the terms of the Lower Penobscot River Multiparty Settlement Agreement, the licensee shall file, for Commission approval, detailed design drawings for the “state of the art” upstream anadromous fish passage facilities specified in Attachment A to that Agreement. This filing shall include but not be limited to: (1) the location and design specifications of the passage facilities; (2) a schedule for installing the facilities within 18 months of a Commission order approving the design drawings; and (3) procedures for operating and maintaining the facilities.

The licensee shall include, with the filings required by the two preceding paragraphs, documentation of consultation, copies of agency and PIN comments and recommendations on the completed plan after it has been prepared and provided to the agencies and PIN, and specific descriptions of how these comments and recommendations are accommodated by the plan. The licensee shall allow a minimum of 30 days for the agencies and PIN to comment and to make recommendations before filing the drawings, plan, and schedule with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project specific information.

The Commission reserves the right to require changes to the proposed facilities and schedule. No construction of upstream fish passage facilities shall begin until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee shall implement the proposal, including any changes required by the Commission.

(G) Article 409 is deleted in its entirety and the following language replaces original article 409:

Article 409. Within 12 months of the deadline established by Articles 407 and 408 for filing design drawings or a plan for a fish passage device, the licensee shall file with the Commission, for approval, a plan to monitor the effectiveness of all the facilities and flows provided pursuant to Articles 407 and 408 of this license that will enable the efficient and safe passage of diadromous fish migrating upstream and downstream. The results of these monitoring studies shall be submitted to the agencies listed below and shall provide a basis for recommending future structural or operational changes at the project, if necessary.

The monitoring plan shall include a schedule for: (1) implementation of the plan; (2) consultation with the appropriate federal, state, and tribal agencies concerning the results of the monitoring; and (3) filing the results, agency comments, and licensee's response to agency comments with the Commission.

The licensee shall prepare the monitoring plan after consultation with the U.S. Fish and Wildlife Service, Maine Fisheries Agencies (IFW, DMR, MASC), the Maine Department of Environmental Protection, the Penobscot Indian Nation (PIN), and NOAA Fisheries.

The licensee shall include with the plan documentation of agency consultation, copies of agency and PIN comments and recommendations on the plan after it has been prepared and provided to them, and specific descriptions of how the agencies' comments are accommodated by the licensee's plan. The licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project specific information.

The Commission reserves the right to require changes to the proposed plan. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

If the results of the monitoring indicate that changes in project structures or operations, including alternative flow releases, are necessary to protect fish resources, the licensee shall first consult with the agencies listed above to develop recommended measures for amelioration and then file its proposal with the Commission, for approval. The Commission

reserves its authority to require the licensee to modify project structures or operations to protect and enhance aquatic resources.

(H) Article 410 is deleted from the license.

(I) Article 411 is deleted in its entirety and the following language replaces original article 411:

Article 411. Authority is reserved by the Commission to require the licensee to construct, operate, and maintain, or to provide for the construction, operation, and maintenance of, such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce under Section 18 of the Federal Power Act consistent with the Lower Penobscot River Multiparty Settlement Agreement.

(J) The following articles are added to the license:

Article 417. (a) Within 180 days after the date an order is issued adding this article to the license, the licensee shall file, for Commission approval, a plan for it to stabilize on an ongoing basis the stream banks of the project impoundment with stream bank stabilization measures directed at those areas of the Penobscot Indian Nation (PIN) Reservation within the project impoundment most severely impacted by project operations, including, but not limited to, the area of Indian Island beginning at Sockalexis Arena and extending to the southern tip of Indian Island and the southeastern shore of Orson Island.

(b) The overall goal of the plan is to prevent further erosion. The plan shall be developed in consultation with PIN and the United States Bureau of Indian Affairs (BIA). The plan shall include: (1) a description of the licensee's proposal; (2) a proposed schedule for implementing the plan consistent with the requirements of paragraph (c) hereof; (3) documentation of consultation with PIN and BIA; (4) copies of comments and recommendations of PIN and BIA on the completed plan after it has been prepared and provided to PIN and BIA; and (5) specific descriptions of how the comments and recommendations of PIN and BIA are accommodated by the plan. The licensee shall allow a minimum of 30 days for PIN and BIA to comment and make recommendations on the plan before filing the plan with the Commission. If the licensee is unable to reach agreement with PIN and BIA on the appropriate stream bank stabilization measures to be included in the plan, it will utilize the dispute resolution procedures set forth in Section XIX of the June 2004 Comprehensive Settlement Agreement Between The Penobscot Indian

Nation, PPL Maine, LLC, And The Bureau Of Indian Affairs Of The Department Of The Interior.

(c) The Commission reserves the right to require changes to the proposed plan. The licensee shall commence implementation of the stream bank stabilization measures included in the plan as approved by the Commission within 90 days following Commission approval of the plan, or within the first construction season following such approval, subject to any changes to such implementation schedule ordered by the Commission in approving the plan.

(d) Beginning one year after the date the above-referenced plan is filed with the Commission and continuing through the term of this license, the licensee shall annually survey the erosive effects of project operations on PIN Reservation lands within the project impoundment in order to ascertain whether unforeseen or new erosive conditions have occurred. Beginning three years after the date the above-referenced plan is filed with the Commission and continuing every three years thereafter through the term of this license, the licensee shall file with the Commission and provide copies to PIN and BIA a report on the results of the annual monitoring.

(e) Within 90 days of the filings of the three-year monitoring reports, the licensee shall consult with PIN and BIA to review the results of the annual monitoring and to determine if the approved stream bank stabilization plan should be revised. If the licensee, PIN, and BIA so agree, and subject to the dispute resolution procedures referenced in paragraph (b) hereof, the licensee shall thereafter promptly file, for Commission approval, revisions to the plan in accordance with the procedures set forth in paragraph (b) hereof.

(f) The Commission reserves the right to require changes to the proposed revisions. The licensee shall commence implementation of the stream bank stabilization measures included in the revisions as approved by the Commission within 90 days following Commission approval of the revisions, or within the first construction season following such approval, subject to any changes to such implementation schedule ordered by the Commission in approving the revisions.

Article 418. Within 60 days of the date the withdrawal of all the requests for rehearing of the Commission's April 20, 1998 orders in Project Nos. 10981, 2403, 2534, 2710, and 2712 becomes effective and final, the licensee shall contribute \$20,000 to the Penobscot Indian Nation (PIN) for use by PIN for monitoring and other activities at the project and thereafter

shall annually contribute \$20,000 (adjusted annually based on the Consumer Price Index for that current year) to PIN for use by PIN for such purposes for a nine-year period beginning on the one-year anniversary date of the initial \$20,000 contribution. The licensee shall file, within 30 days of making the contribution to the PIN, a report notifying the Commission when the contribution was made.

Article 419. The licensee shall promptly notify the Penobscot Indian Nation (PIN) and the United States Bureau of Indian Affairs (BIA) upon receipt of confirmation from the Commission that the Commission expects to perform an inspection of the project. The licensee shall allow representatives of the PIN Department of Natural Resources and BIA to participate in such inspections if they notify the licensee of their intent to participate following their receipt of the above-referenced notice. The licensee shall also afford PIN representatives, upon request, accompanied access to all project areas consistent with applicable safety and liability guidelines and Commission requirements.

Article 420. (a) The licensee, within five (5) years of the date the withdrawal of all the requests for rehearing of the Commission's April 20, 1998 orders in Project Nos. 10981, 2403, 2534, 2710, and 2712 becomes effective and final, and after consultation with the Penobscot Indian Nation (PIN) and the United States Bureau of Indian Affairs (BIA), shall acquire and convey to PIN clear title to a parcel or parcels of land consisting of 164 acres, or such other amount of land mutually agreeable to the licensee, PIN, and BIA, that are acceptable to PIN.

(b) The licensee, in lieu of acquiring and conveying to PIN any or all of the acreage referenced in (a) hereof, may, with the agreement of PIN, contribute funds to PIN to acquire land. The amount of such funds will be determined in consultation with the PIN Land Committee and in consideration of the fair market value of comparable parcels of riverfront or river access land along the Penobscot River north of Milford. If the licensee is unable to reach agreement with PIN on the appropriate amount of funding, it will utilize the dispute resolution procedures set forth in Section XIX of the June 2004 Comprehensive Settlement Agreement Between The Penobscot Indian Nation, PPL Maine, LLC, And The Bureau Of Indian Affairs Of The Department Of The Interior.

Article 421. (a) If the Veazie and Great Works dams are removed from the Penobscot River as contemplated by Section VI of the June 2004 Lower Penobscot River Multiparty Settlement Agreement, the licensee, within two (2) years from the date removal of both dams is completed, shall consult

with the Penobscot Indian Nation (PIN), the United States Bureau of Indian Affairs (BIA), the City of Old Town, Maine (City), and other affected landowners regarding whether a canoe portage trail should be constructed by the licensee around the Milford Dam on the west shore of the Penobscot River and file with the Commission a report on such consultation. If it is concluded as a result of such consultation that such a canoe portage trail should be constructed, the licensee shall include in the report, for Commission approval, a plan to construct the trail.

(b) The plan shall be developed in consultation with PIN, BIA, the City, and other affected landowners, and shall include: (1) a description of the licensee's proposal; (2) a proposed schedule for implementing the proposal; (3) documentation of consultation with the above entities; (4) copies of comments and recommendations of such entities on the completed plan after it has been prepared and provided to them; and (5) specific descriptions of how the comments and recommendations of such entities are accommodated by the plan. The licensee shall allow a minimum of 30 days for such entities to comment and make recommendations on the plan before filing the plan with the Commission.

(c) The Commission reserves the right to require changes to the proposed plan. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

Article 422. To the extent not otherwise required in any article of this license, the licensee shall include the Penobscot Indian Nation (PIN) and the United States Bureau of Indian Affairs (BIA) in all consultations associated with all post-licensing studies, reports or activities related to archaeological, cultural and historic resources, land and water resources, fisheries and wildlife, navigation, and recreation in the project area. The licensee shall provide any related draft reports to the PIN Department of Natural Resources and BIA and provide a minimum of 30 days for their comments and recommendations before filing them with the Commission. The licensee shall further address and incorporate all such comments and recommendations in any final reports filed with the Commission.

(K) This order constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days of the date of issuance of this order, pursuant to 18 CFR § 385.713.

J. Mark Robinson
Director
Office of Energy Projects

Water Quality Certification

**STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

COMMENTS

March 11, 2005

Magalie R. Salas, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

RE: Application for Amendment of License
Milford Hydro Project
FERC No. 2534

Dear Secretary Salas:

This is in response to the Application for Amendment of License of PPL Maine LLC for the existing Milford Hydro Project, FERC No. 2534, located on Penobscot River in the Town of Milford and City of Old Town, Penobscot County, Maine.

On February 18, 2005, the Maine Department of Environmental Protection (MDEP) issued a draft Maine Waterway Development and Conservation Act (MWDCA) Permit and Water Quality Certification, with conditions, for the proposed modification of the Milford Project. The draft order incorporated all appropriate terms and conditions of the June 25, 2004 Lower Penobscot River Basin Comprehensive Settlement Accord.

The MDEP has now issued a final MWDCA Permit and Water Quality Certification for the proposed modification of the Milford Project. The final permit and certification reflects the comments received by the MDEP on the draft Order. A copy of the Department Order approving the modification is attached.

In summary, the proposed modification of the Milford Project has been certified as meeting applicable water quality standards, subject to the following conditions:

- The applicant shall provide upstream eel passage, shall continue to operate the existing upstream and downstream anadromous fish passage facilities, and shall install permanent upstream and downstream anadromous fish passage facilities, in accordance with the terms of the Lower Penobscot River Multiparty Settlement Agreement.
- The applicant shall submit final design and operational plans for all upstream and downstream fish passage facilities required by this approval.
- The applicant shall conduct studies to determine the effectiveness of all required interim and permanent upstream and downstream fish passage facilities and/or operational measures. The MDEP reserves the right to require such reasonable changes in fish passage design and/or operation as are warranted by the results of the studies.
- The applicant shall provide compensation and other mitigation in accordance with the provisions of the “Comprehensive Settlement Agreement Between the Penobscot Indian Nation, PPL Maine, LLC, and the Bureau of Indian Affairs of the Department of the Interior” dated June, 2004, as it relates to the Milford Project.
- The applicant shall file a copy of a revised Log Removal Plan with the MDEP.
- The applicant shall submit plans and a schedule for constructing a new canoe portage trail around the west end of the Milford Dam, if such a trail is deemed appropriate in accordance with the PIN Agreement.

We recommend that the forgoing conditions be included in the Articles of the Amendment of License issued for the Milford Hydro Project, in compliance with the provisions of Sections 401 (a) and (d) of the Clean Water Act.

By Executive order of the Governor of the State of Maine, the terms and conditions in the attached Water Quality Certification represent the State’s official recommendations regarding the subject Application for Amendment of License, superceding all preliminary recommendations by individual State agencies.

Please direct any questions regarding these comments to Dana Murch of the MDEP staff at 207-287-7784.

Sincerely,

/s/ Andrew C. Fisk

Andrew C. Fisk, Director
Bureau of Land & Water Quality

Attachment

**STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

DEPARTMENT ORDER

IN THE MATTER OF

PPL MAINE LLC Milford and Old Town, Maine Penobscot County MILFORD HYDRO PROJECT FACILITY AND OPERATIONAL MODIFICATIONS #L-16011-35-H-M (APPROVAL))))))))	MAINE WATERWAY DEVELOPMENT AND CONSERVATION ACT and WATER QUALITY CERTIFICATION FINDINGS OF FACT AND ORDER PERMIT MODIFICATION
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Pursuant to the provisions of 38 MRSA Sections 464 et seq. and Sections 630 et seq., 06-096 CMR 450 (Administrative Rules for Hydropower Projects, effective date September 1, 1987), and Section 401 of the Federal Water Pollution Control Act (a.k.a. Clean Water Act), the Department of Environmental Protection has considered the application of PPL MAINE, LLC with its supportive data, agency review comments, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. APPLICATION SUMMARY

A. Application. The applicant proposes to modify the conditions of the permit and certification for the expansion and operation of the Milford Hydro Project. Specifically, the applicant proposes to (a) modify the fish passage requirements in the current FERC license to be consistent with the modified DOI/NMFS fishway prescriptions outlined in Attachment A to the Lower Penobscot River Basin Comprehensive Settlement Accord; (b) delete the permit condition which requires the development and implementation of a plan for mitigation of any unavoidable losses to Atlantic salmon due to fish passage inefficiencies; and (c) incorporate the provisions of the settlement agreement between the Penobscot Indian Nation, PPL Maine, and the DOI Bureau of Indian Affairs. The proposed modifications qualify as a change in the terms and conditions of the Maine Waterway Development and Conservation Act (MWDCA), 38 MRSA Section 630 et seq. permit and Water Quality Certification currently in effect for the project that must be approved by the Department.

The applicant is also proposing the modification of FERC license conditions which set schedules for the installation of an additional turbine-generator unit at the Milford Project. The Department permit for the project contains no comparable condition, and the Department has no objection to the proposed change.

B. Existing Project. The expansion and operation of the Milford Project was approved by the DEP in Department Order #L-16011-35-B-N, dated October 23, 1992, in which the

Department approved the installation of an additional turbine-generator unit at the project. The project is operated as a hydroelectric generating facility under the terms of FERC License No. 2534.

2. COMPREHENSIVE SETTLEMENT ACCORD

The Lower Penobscot River Basin Comprehensive Settlement Accord (Accord), dated June 25, 2004, established a comprehensive settlement governing fisheries restoration for numerous anadromous and catadromous species to assist in the restoration of these species in the lower Penobscot River Basin. The Accord was designed to accomplish the following:

- The sale by PPL of the Veazie, Great Works, and Howland dams to the Penobscot River Restoration Trust (Trust), the decommissioning and removal of Veazie and Great Works, and the decommissioning and bypassing of Howland;
- The upgrading of fish passage at the remaining PPL dams in the lower Penobscot River Basin;
- The provision for increased power production at remaining PPL dams to replace power lost by removals/bypass;
- The provision for continued public outreach and other appropriate steps to address local concerns;
- The settlement of outstanding litigation regarding Basin Mills, Milford and other projects and resolution of the pending Great Works and Howland licensing proceedings; and,
- The provision of a Contingent Mitigation Fund (Mitigation Fund) in the event that the Veazie and Great Works dams are not purchased and removed by the Trust.

The Accord includes the Lower Penobscot River Multiparty Settlement Agreement, dated June 2004 (MPA). The MPA is intended to: significantly enhance fishery restoration efforts in the Penobscot River Basin and resolve to the Parties' satisfaction all pending fish passage issues associated with the Veazie, Great Works, and Howland Projects ("Designated Projects") and other hydroelectric projects in the Penobscot River Basin currently owned or operated by PPL Maine. The MPA is also intended to resolve to the Parties' satisfaction all issues raised in the requests for rehearing filed by PPL Maine's predecessor in interest, Department of the Interior, Penobscot Indian Nation, Atlantic Salmon Federation, Maine Audubon Society, Maine Council of the Atlantic Salmon Foundation and Trout Unlimited of the Federal Energy Regulatory Commission's April 30, 1998, orders for Basin Mills, Veazie, Milford, Orono, and Stillwater projects.

The Accord also includes the Comprehensive Settlement Agreement Between The Penobscot Indian Nation, PPL Maine, LLC, and the Bureau of Indian Affairs of the Department of the Interior (PIN Agreement). The purpose of the PIN Agreement is to resolve the mitigation measures that are to be implemented by PPL Maine and Bangor-Pacific Hydro Associates (BPHA) at the direction of PPL Maine to address certain impacts to PIN lands, resources, and interests from PPL Maine's operation of the Milford Project and BPHA's operation of the West Enfield Project and, together with the MPA to resolve the issues currently in dispute before

FERC that were raised in the requests for rehearing of FERC's April 30, 1998, orders, as they relate to these issues.

3. FISHERY RESOURCES

A. Applicant's proposals. The applicant proposes to comply with the Lower Penobscot River Multiparty Settlement Agreement as it applies to the Milford Project. There are existing upstream and downstream fish passage facilities installed and operational at the project. Under the MPA, PPL is obligated to make the following provisions relating to the Milford Project:

- Continue to operate the existing passage facilities.
- Install an upstream fishway for eels, to be operational prior to the beginning of the third upstream eel migration season (approximately May 1) following the Effective Date of the Agreement; and,
- In the event the option to purchase the Veazie, Great Works, and Howland projects is exercised and those projects are acquired by the Trust, install a new state-of-the-art fish lift and modify downstream passage at the Milford project in accordance with the terms of the MPA;
- In the event the option to purchase the Veazie, Great Works, and Howland projects is not exercised or is terminated prior to the expiration of the Option period, or the projects are not acquired by the Trust, implement the specific requirements of the current DOI fishway prescription (May 20, 1997) in accordance with the terms of the MPA.
- Conduct effectiveness studies of all interim and permanent fish passage facilities to be installed at the Milford Project.

The applicant is also proposing to delete the existing permit condition which requires the development and implementation of a plan for mitigation of any unavoidable losses to Atlantic salmon due to fish passage inefficiencies.

B. Discussion. The Department finds that the applicant's proposals to continue to provide passage for anadromous and catadromous fish at the Milford Project, install an upstream fishway for eels, and provide other mitigation in accordance with the Lower Penobscot River Multiparty Settlement Agreement will be adequate to ensure that project waters are suitable for the designated use of habitat for fish. The Department also finds that with the new fish passage provisions of the Agreement make the previously required mitigation plan unnecessary.

4. PENOBSCOT INDIAN NATION AGREEMENT

The applicant also proposes to provide compensation and other mitigation in accordance with the provisions of the "Comprehensive Settlement Agreement Between The Penobscot Indian Nation, PPL Maine, LLC, and The Bureau of Indian Affairs of the Department of the Interior" dated June, 2004, as it relates to the Milford Project.

5. OTHER ISSUES, REVIEW COMMENTS

No other significant issues involving any statutory criteria of the Maine Waterway Development and Conservation Act have been identified. No objections to the proposed activity have been raised by State review agencies or the affected municipalities. The State review agencies have submitted letters supporting the approval of these modifications.

BASED on the above Findings of Fact, and the evidence contained in the application and supporting documents, the Department CONCLUDES that the proposed modification of conditions relating to the operation of the Milford Hydro Project satisfy the criteria of the Maine Waterway Development and Conservation Act and applicable water quality standards.

THEREFORE, the Department hereby MODIFIES Department Order #L-16011-35-B-N, dated October 23, 1992, as follows:

Conditions 3, 4, 5, 6 and 7 of Department Order #L-16011-35-B-N, dated October 23, 1992, are repealed and replaced by the following:

3. FISH PASSAGE

A. UPSTREAM EEL PASSAGE

The applicant shall install and operate an upstream fishway for eels at the Milford Project, in accordance with the terms of the Lower Penobscot River Multiparty Settlement Agreement, dated June 2004.

B. INTERIM FISH PASSAGE

The applicant shall continue to operate the existing upstream and downstream passage facilities, in accordance with the terms of the Lower Penobscot River Multiparty Settlement Agreement, dated June 2004.

C. PERMANENT FISH PASSAGE

(1) Upon Acquisition of Designated Projects by the Trust. In the event the option to purchase the Veazie, Great Works, and Howland projects is exercised and those projects are acquired by the Trust, the applicant shall install a new state-of-the-art fish

lift and modify downstream passage at the Milford project in accordance with the terms of the Lower Penobscot River Multiparty Settlement Agreement, dated June 2004. The modified downstream passage facilities shall be as prescribed by the May 20, 1997, DOI Fishway Prescription.

- (2) If Designated Projects are Not Acquired by the Trust. In the event the Veazie, Great Works, and Howland projects are not acquired by the Trust, the applicant shall install fish passage facilities in accordance with the terms of the Lower Penobscot River Multiparty Settlement Agreement, dated June 2004. These fish passage facilities shall be as prescribed by the May 20, 1997 DOI Fishway Prescription.

D. FISH PASSAGE FACILITIES PLANS

The applicant shall, in accordance with the terms of the Lower Penobscot River Multiparty Settlement Agreement, dated June 2004, or upon such other schedule(s) as established by FERC, submit final design and operational plans for all upstream and downstream fish passage facilities and/or operational measures required by this approval, prepared in consultation with state and federal fisheries agencies and the Penobscot Indian Nation. These plans shall include a schedule for facilities construction and operation. These plans shall be reviewed by and must receive approval of the DEP prior to construction.

E. FISH PASSAGE EFFECTIVENESS STUDIES AND RESULTS

- (1) Studies. The applicant shall, in consultation with state and federal fisheries agencies and the Penobscot Indian Nation, conduct a study or studies to determine the effectiveness of all interim and permanent upstream and downstream fish passage facilities and/or operational measures required by this approval.
- (2) Study plans. The applicant shall, in accordance with the schedule(s) established by FERC, submit plans for a study or studies to determine the effectiveness of all interim and permanent upstream and downstream fish passage facilities and/or operational measures required by this approval, prepared in consultation with state and federal fisheries agencies and the Penobscot Indian Nation. These plans shall be reviewed by and must receive approval of the DEP prior to implementation.
- (3) Results of studies. The applicant shall, in accordance with the terms of the Lower Penobscot River Multiparty Settlement Agreement, dated June 2004, or the schedule(s) established by FERC, submit the results of any fish passage effectiveness study or studies, along with any recommendations for changes in the design and/or operation of any interim or permanent upstream or downstream fish passage facilities constructed and/or operated pursuant to this approval. The Department reserves the right, after notice and opportunity for hearing, to require reasonable changes in the design and/or operation of these fish passage facilities as may be deemed necessary to adequately pass anadromous fish through the project site. Any such changes must be approved by FERC prior to implementation.

The following new condition 12 is added to Department Order #L-16011-35-B-N, dated October 23, 1992:

12. COMPENSATION AND MITIGATION TO THE PENOBSCOT INDIAN NATION

- A. The applicant shall provide compensation and other mitigation in accordance with the provisions of the "Comprehensive Settlement Agreement Between The Penobscot Indian Nation, PPL Maine, LLC, and The Bureau of Indian Affairs of the Department of the Interior" dated June, 2004, as it relates to the Milford Project.
- B. The applicant shall file a copy of the revised Log Removal Plan for the Milford Project with the Department.
- C. In the event a new canoe portage trail around the west end of the Milford Dam is considered to be appropriate in accordance with the PIN Agreement, the applicant shall, in accordance with the schedule set out in the Agreement, submit plans and a schedule for constructing the portage trail. These plans and schedule shall be reviewed by the Maine Department of Conservation and the DEP Bureau of Land and Water Quality, and must receive approval of the DEP Bureau of Land and Water Quality.

DONE AND DATED AT AUGUSTA, MAINE, THIS 10th DAY OF March 2005.

By: /s/ Dawn R. Gallagher
Dawn R. Gallagher, Commissioner

PLEASE NOTE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES

Date of receipt of application: 6/14/04

Date application accepted for processing: 6/25/04

Date filed with the Board of Environmental Protection: March 11, 2005