

142 FERC ¶ 62,119
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Black Bear Hydro Partners, LLC

Project No. 2666-033

ORDER AMENDING LICENSE
TO INCORPORATE TERMS AND CONDITIONS
UNDER THE ENDANGERED SPECIES ACT
AND REQUIRING PERIODIC CONSULTATION

(Issued February 21, 2013)

1. On May 15, 2012, Black Bear Hydro Partners, LLC (licensee), filed a request to amend its license¹ for the Medway Project (FERC No. 2666) to incorporate provisions to protect Atlantic salmon. The project is located on the West Branch of the Penobscot River in Penobscot County, Maine.

Amendment Request

2. In its May 15, 2012 filing, the licensee requests to modify the Medway Project license to add a requirement for the licensee to consult with the National Marine Fisheries Service (NMFS) once every five years regarding the status of Atlantic salmon and other Endangered Species Act (ESA) listed fishery species in the Penobscot River to ensure that operation of the Medway Project is consistent with the listing determinations for such species and with the then-current recovery objectives for such species. The licensee states that the purpose of the requirement is to provide for the protection of Atlantic salmon and other fishery species listed under the ESA. The licensee states that it consulted with NMFS, the U.S. Fish and Wildlife Service, the Penobscot Indian Nation, and state fisheries agencies regarding the amendment request.

Consultation under the Endangered Species Act

3. Section 7(a)(2) of the ESA of 1973,² requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of federally listed threatened and endangered species, or result in the destruction or adverse modification of their

¹ See Order Issuing New License, 86 FERC ¶ 62,242 (issued April 29, 1999).

² 16 U.S.C. § 1536(a) (2006).

designated critical habitat. Listed species in the area of the Medway Project include the Gulf of Maine Distinct Population Segment of Atlantic salmon. There is no designated critical habitat for Atlantic salmon in the West Branch of the Penobscot River upstream of the Medway Project. However, the Penobscot River downstream of the project is designated critical habitat for the species.

4. In a letter filed May 18, 2011, the licensee requested that the Commission designate it as the Commission's non-federal representative for the purpose of conducting informal consultation with the NMFS and U.S. Fish and Wildlife Service pursuant to section 7 of the ESA for the proposed action at the Medway Project³ as well as proposed actions at the licensee's (or its affiliate) other projects in the basin including the Orono (FERC No. 2710), Stillwater (FERC No. 2712), West Enfield (FERC No. 2600), and Milford (FERC No. 2534) Projects. On September 14, 2011, the Commission designated the licensee as its non-federal representative for informal consultation. At the time, no amendment application for the Medway Project had been filed with the Commission.

5. On March 7, 2012, the licensee provided the Commission with its Biological Evaluation (BE) regarding the effects of operation of the Medway Project on Atlantic salmon. The BE included a Species Protection Plan for Atlantic salmon. By letter issued April 27, 2012, Commission staff adopted the licensee's BE as its biological assessment and requested that NMFS initiate formal consultation on the actions contained in the licensee's amendment application. NMFS initiated formal consultation on May 3, 2012.

6. On June 8, 2012, the licensee filed a revised Species Protection Plan which included, as an appendix, an Atlantic Salmon Passage Study Plan. Accordingly, on June 27, 2012, Commission staff forwarded the plans to NMFS for inclusion in the formal consultation process. The Species Protection Plan does not include any protection measures to be implemented at the Medway Project. The Atlantic Salmon Passage Study Plan includes a proposal to deploy a telemetry array at the Medway Project to monitor for the presence of Atlantic salmon approaching the tailrace of the project.

7. On August 31, 2012, NMFS filed its Biological Opinion (Opinion) which concludes that operation of the Medway Project may adversely affect, but is not likely to jeopardize the continued existence of, the Gulf of Maine Distinct Population Segment of Atlantic salmon.

³ We note that the proposed amendment to add a license requirement to consult with NMFS on a periodic basis would have no effect on endangered species. Therefore, the proposed amendment, in and of itself, does not require the Commission to initiate consultation under the ESA. However, if a licensee wishes to voluntarily consult under the ESA, such as in this case, the Commission may cooperate in that effort.

8. The East Millinocket Dam is 2.9 kilometers upriver of the Medway Project and is the next upstream barrier to migrating fish. In the Opinion, NMFS states that the approximately 0.46 square kilometers of habitat between the two dams has been made inaccessible to Atlantic salmon by the lack of passage at the Medway Dam. NMFS concludes that the habitat is impounded and, therefore, it is not currently suitable as rearing or spawning habitat. NMFS states that, while there are no fish honing on the West Branch of the Penobscot River (because there are no fish stocked in this branch), the Medway Dam likely delays some fish that are returning to the East Branch of the river and have strayed into the tailrace of the Medway Project.

9. Since the Medway Project currently lacks upstream fish passage facilities, NMFS assumes that 100 percent of Atlantic salmon that approach the project are adversely affected due to delay or alteration in spawning behavior. Because no upstream passage facilities are proposed at the project, NMFS states that these adverse effects would continue during the entirety of the period that the Medway Project will operate. NMFS concludes that the licensee's monitoring of salmon that approach the Medway Project will be used to assess the level of delay that is due to the Medway Project dam. NMFS states that if the telemetry monitoring, conducted under the Atlantic Salmon Passage Study Plan, demonstrates that significant delay is occurring, possible solutions would be discussed at the consultation meetings held once every five years, as proposed by the licensee.

10. Along with the Opinion, NMFS issued an incidental take statement and included reasonable and prudent measures and terms and conditions to minimize and monitor incidental take of Atlantic salmon at the Medway, Orono, Stillwater, Milford, and West Enfield Projects. The terms and conditions of the Opinion, as they pertain to the Medway Project, are incorporated into the license by ordering paragraph (B) and attached to this order as Appendix A.

Discussion and Conclusions

11. The licensee's proposed amendment includes consultation, once every five years, with NMFS. It does not include consultation with any other entities. However, the licensee consulted with the U.S. Fish and Wildlife Service, Penobscot Indian Nation, Maine Department of Inland Fisheries and Wildlife, and Maine Department of Marine Resources regarding the proposed amendment and on the proposed plans. Any consultation on these matters should include all of the parties with interest in fisheries resources at the project. Therefore, ordering paragraph (A) requires the licensee to consult, once every five years, with NMFS, U.S. Fish and Wildlife Service, Penobscot Indian Nation, Maine Department of Inland Fisheries and Wildlife, and Maine Department of Marine Resources once every five years regarding the status of Atlantic salmon and other Endangered Species Act-listed fishes in the Penobscot River to ensure that operation of the Medway Project is consistent with the listing determinations for such species and with the then-current recovery objectives for such species.

12. The Atlantic Salmon Passage Study Plan includes provisions to monitor salmon approaching the Medway Project dam to determine the extent that those fish are delayed. The plan briefly mentions the licensee's proposal to monitor Atlantic salmon approaching the Medway Project dam, but lacks detail regarding this monitoring. In particular, section 6.0, Data Analysis and Reporting, does not include a provision for analyzing the data collected at the Medway Project or for filing the results of the consultation, conducted once every five years, with the Commission. Also, while the plan states that telemetry arrays will be deployed, the plan does not include any detail regarding the locations where the arrays will be deployed and section 7.0, Schedule, does not include the timing of deployment at the Medway Project. In addition, the proposed Species Protection Plan and corresponding Atlantic Salmon Passage Study Plan are inconsistent with several terms and conditions of the Opinion.

13. Therefore, ordering paragraph (C) requires the licensee to revise the Species Protection Plan and the corresponding Atlantic Salmon Study Passage Plan, in order to incorporate the terms and conditions of the Opinion and provide additional detail regarding the proposed monitoring.

14. The modification of the Medway Project license to include a provision for the licensee to consult with NMFS once every five years regarding the status of Atlantic salmon and other Endangered Species Act-listed fishes in the Penobscot River would help ensure that operation of the Medway Project is consistent with the listing determinations for such species and with the then-current recovery objectives for such species. The licensee's proposed amendment, with staff modifications, should therefore be approved.

The Director orders:

(A) Black Bear Hydro Partner's, LLC (licensee) proposed amendment for the Medway Project, filed May 15, 2012, as modified herein is approved. The licensee shall consult with the National Marine Fisheries Service, U.S. Fish and Wildlife Service, Penobscot Indian Nation, Maine Department of Inland Fisheries and Wildlife, and Maine Department of Marine Resources once every five years regarding the status of Atlantic salmon and other Endangered Species Act-listed fishes in the Penobscot River to ensure that operation of the Medway Project is consistent with the listing determinations for such species and with the then-current recovery objectives for such species.

(B) The terms and conditions of the incidental take permit included with the National Marine Fisheries Service's Biological Opinion, filed on August 31, 2012, as they pertain to the Medway Project, are hereby incorporated into the license for the Medway Project. The terms and conditions are attached to this order as Appendix A.

(C) By September 14, 2013, the licensee shall file, for Commission approval, a revised Species Protection Plan and corresponding Atlantic Salmon Passage Study Plan.

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The revised plans shall incorporate the terms and conditions of the National Marine Fisheries Service's Biological Opinion, filed on August 31, 2012. In addition, the revised plans shall include: (1) a provision for analyzing the data collected at the Medway Project; (2) a description of the location and timing of the proposed monitoring in the tailrace; (3) a schedule for providing data and reports to the consulted entities; and (4) a provision for filing the results of the consultation, conducted once every five years, with the Commission. The plans shall also clarify in what year the first consultation would take place. The plans shall be revised in consultation with the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, the Penobscot Indian Nation, the Maine Department of Inland Fisheries and Wildlife, and the Maine Department of Marine Resources.

Following the revision of the plans in consultation with the resource agencies and Penobscot Indian Nation, the licensee shall provide a copy of the proposed plans to these entities and allow them a minimum of 30 days to review and comment on the plans. The final plans filed with the Commission shall include documentation of consultation including copies of any comments received. The licensee shall address all comments and recommendations in its filing. If the licensee does not adopt a recommendation from the resource agencies or Penobscot Indian Nation, the licensee shall include its reasons based on project-specific information. The Commission reserves its authority to require the licensee to modify the plans, project structures, or operations in order to protect and enhance aquatic resources.

(D) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days from the date of its issuance, as provided in section 313(a) of the Federal Power Act, 16 U.S.C. § 825f (2006), and the Commission's regulations at 18 C.F.R. § 385.713 (2012). The filing of a request for rehearing does not operate as a stay of the effective date of this order, or of any other date specified in this order. The licensee's failure to file a request for rehearing shall constitute acceptance of this order.

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

APPENDIX A

DEPARTMENT OF COMMERCE NATIONAL MARINE FISHERIES SERVICE

REASONABLE AND PRUDENT MEASURES AND TERMS AND CONDITIONS OF THE INCIDENTAL TAKE STATEMENT AS PART OF THE BIOLOGICAL OPINION FOR THE MEDWAY PROJECT (FERC NO. 2666)

Filed August 31, 2012

Reasonable and Prudent Measures

1. FERC must ensure, through enforceable conditions of the project licenses, that Black Bear minimize incidental take from all in-water and near-water activities by applying best management practices to the proposed action that avoid or minimize adverse effects to water quality and aquatic resources.
2. To minimize incidental take from project operations, FERC must require that Black Bear measure and monitor the performance standards contained in the June 7, 2012 Species Protection Plan (SPP) in a way that is adequately protective of listed Atlantic salmon.
3. FERC must ensure, through enforceable conditions of the project licenses, that Black Bear complete an annual monitoring and reporting program to confirm that Black Bear is minimizing incidental take and reporting all project-related observations of dead or injured salmon or sturgeon to NMFS.
4. If the new Milford upstream fish lift is not operational prior to the Veazie Dam removal, or if it is proven ineffective during upstream monitoring studies, FERC must require Black Bear to install a broodstock collection device at the existing Denil fishway.

Terms and Conditions

1. To implement reasonable and prudent measure #1, FERC and ACOE must require Black Bear to do the following:
 - a. Hold a pre-construction meeting with the contractor(s) to review all procedures and requirements for avoiding and minimizing impacts to Atlantic salmon and to emphasize the importance of these measures for protecting salmon.

- b. Black Bear must notify NMFS one week before in-water work begins.
- c. Use Best Management Practices that will minimize concrete products (dust, chips, larger chunks) mobilized by construction activities from entering flowing or standing waters. Best practicable efforts shall be made to collect and remove all concrete products prior to rewatering of construction areas.
- d. Employ erosion control and sediment containment devices at the Stillwater, Orono and Milford Dams construction sites. During construction, all erosion control and sediment containment devices shall be inspected weekly, at a minimum, to ensure that they are working adequately. Any erosion control or sediment containment inadequacies will be immediately addressed until the disturbance is minimized.
- e. Provide erosion control and sediment containment materials (e.g., silt fence, straw bales, aggregate) in excess of those installed, so they are readily available on site for immediate use during emergency erosion control needs.
- f. Ensure that vehicles operated within 150 feet (46 m) of the construction site waterways will be free of fluid leaks. Daily examination of vehicles for fluid leaks is required during periods operated within or above the waterway.
- g. During construction activities, ensure that BMPs are implemented to prevent pollutants of any kind (sewage, waste spoils, petroleum products, etc.) from contacting water bodies or their substrate.
- h. In any areas used for staging, access roads, or storage, be prepared to evacuate all materials, equipment, and fuel if flooding of the area is expected to occur within 24 hours.
- i. Perform vehicle maintenance, refueling of vehicles, and storage of fuel at least 150 feet (46 m) from the waterway, provided, however, that cranes and other semi-mobile equipment may be refueled in place.
- j. At the end of each work shift, vehicles will not be stored within, or over, the waterway.
- k. Prior to operating within the waterway, all equipment will be cleaned of external oil, grease, dirt, or caked mud. Any washing of equipment shall be conducted in a location that shall not contribute untreated wastewater to any flowing stream or drainage area.

- l. Use temporary erosion and sediment controls on all exposed slopes during any hiatus in work exceeding seven days.
 - m. Place material removed during excavation only in locations where it cannot enter sensitive aquatic resources.
 - n. Minimize alteration or disturbance of the streambanks and existing riparian vegetation to the greatest extent possible.
 - o. Remove undesired vegetation and root nodes by mechanical means only. No herbicide application shall occur.
 - p. Mark and identify clearing limits. Construction activity or movement of equipment into existing vegetated areas shall not begin until clearing limits are marked.
 - q. Retain all existing vegetation within 150 feet (46 m) of the edge of the bank to the greatest extent practicable.
2. To implement reasonable and prudent measure #2, FERC and ACOE must require Black Bear to do the following:
- a. Contact NMFS within 24 hours of any interactions with Atlantic salmon, Atlantic sturgeon or shortnose sturgeon, including non-lethal and lethal takes (Jeff Murphy: by email (Jeff.Murphy@noaa.gov) or phone (207) 866-7379 and the Section 7 Coordinator (incidental.take@noaa.gov))
 - b. In the event of any lethal takes, any dead specimens or body parts must be photographed, measured, and preserved (refrigerate or freeze) until disposal procedures are discussed with NMFS.
 - c. Notify NMFS of any changes in project and fishway operations (including maintenance activities such as flashboard replacement and draft tube dewatering) at the Orono, Stillwater, Milford, West Enfield, and Medway Projects.
 - d. Submit a fish evacuation protocol to NMFS at least two weeks prior to the commencement of in-water work. Daily visual surveys will be conducted by qualified personnel to verify that there are no Atlantic salmon within the project area during the installation and removal of any in-water cofferdam or bypass structure. If cofferdams overtop due a high flow event, the cofferdam will be resurveyed for adult Atlantic salmon prior to dewatering.

If any Atlantic salmon are observed within the enclosed cofferdam they should be removed, either by herding or by capture. Handling should be minimized to the extent possible.

3. To implement reasonable and prudent measure #3, the FERC must require that Black Bear do the following:
 - a. Require Black Bear to measure the survival performance standard for downstream migrating Atlantic salmon smolts and kelts at the Orono, Stillwater, Milford, and West Enfield Projects of 96% (within the lower and upper 75% confidence limit) using a scientifically acceptable methodology.
 - i. That is, 96% of downstream migrating smolts and kelts approaching the dam structure survive passing the project, which would include from 200 meters upstream of the trashracks and continuing downstream to the point where delayed effects of passage can be quantified. Black Bear must coordinate with NMFS in selecting an adequate location for the downstream receivers.
 - ii. Passage must occur within 24 hours of a smolt or kelt approaching within 200 meters of the trashracks for it to be considered a successful passage attempt that can be applied towards the performance standard.
 - iii. The survival standard is considered achieved if each year of a three year study period achieves at least 96%, based on a 75% confidence interval, at each project. A Cormack-Jolly-Seber (CJS) model must be used to determine if the survival standard has been achieved and present 75% error bounds around survival estimates.
 - iv. Black Bear must consult with NMFS concerning the application of appropriate statistical methodology and must provide an electronic copy of the CJS model(s) and data to NMFS.
 - b. All tags released in the system should have codes that are not duplicative of tags used by other researchers in the river, including university, state, federal and international tagging programs.
 - c. Submit a study plan for a one year adult upstream study at the West Enfield Project to be conducted ten years post implementation of the SPP.
 - d. Submit a study plan for a three year downstream kelt study at the Orono, Stillwater, Milford, and West Enfield Projects.
4. To implement reasonable and prudent measure #4, the FERC must require that Black Bear do the following:

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- a. Require that Black Bear seek comments from NMFS on any fish passage design plans at the 30%, 60%, and 90% design phase. Also, allow NMFS to inspect fishways at the projects at least annually.
- b. Submit annual reports at the end of each calendar year summarizing the results of proposed action and any takes of listed sturgeon or Atlantic salmon to NMFS by mail (to the attention of the Section 7 Coordinator, NMFS Protected Resources Division, 55 Great Republic Drive, Gloucester, MA 01930 and to incidental.take@noaa.gov).

Document Content(s)

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