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STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
STATE HOUSE STATION 17 AUGUSTA, MAINE 04333

DEPARTMENT ORDER

IN THE MATTER OF

BENTON FALLS ASSOCIATES)	MAINE WATERWAY DEVELOPMENT AND
Benton, Maine)	CONSERVATION ACT AND
Kennebec County)	WATER QUALITY CERTIFICATION
BENTON FALLS HYDRO PROJECT)	
FISH PASSAGE CONSTRUCTION)	FINDINGS OF FACT AND ORDER
#L-07519-35-S-C (Approval))	CONDITION COMPLIANCE AND
#L-22142-34-A-N (Approval))	NEW PERMIT

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 BENTON FALLS ASSOCIATES with its supportive data, agency review comments, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. INTRODUCTION

The applicant proposes the construction and operation of a permanent upstream fish passage facility at the Benton Falls Hydro Project, located on the Sebasticook River in the Town of Benton, Kennebec County, Maine, in compliance with the terms of Department Order #L-7519-35-R-M dated July 31, 1998. The project is operated as a hydroelectric generating facility under the terms of FERC License No. 5073.

2. PROCEDURAL HISTORY

By Order #02/49-7519-11040 dated September 29, 1983, the Board of Environmental Protection approved a permit and water quality certification for the proposed construction and licensing of the Benton Falls Hydro Project. In its approval, the Board found that adequate fish passage facilities would be needed at the project in the future to support the planned restoration of anadromous fish to the Kennebec River drainage.

On March 8, 1984, FERC issued an original license for the unconstructed Benton Falls Project that included provisions for future construction and maintenance of fish passage facilities, should they become necessary.

By Order #L-7519-35-L-M dated February 24, 1998, the Board modified the terms of its original approval for the Benton Falls Project to be consistent with the 1986 *Agreement Between the State of Maine and Kennebec Hydro Developers Group* ("1986 KHDG

BENTON FALLS ASSOCIATES
BENTON FALLS HYDRO PROJECT
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Agreement), which became effective on January 23, 1987. Under the terms of the *1986 KHDG Agreement*, the signatory dam owners, including Benton Falls Associates, agreed to provide funds over a 12-year period to facilitate anadromous fish restoration efforts and to provide permanent fish passage at their dams during the 1999-2001 period in accordance with a revised restoration plan.

On January 25, 1989, FERC amended the license for the Benton Falls Project to incorporate the fish passage provisions of the *1986 KHDG Agreement*.

By Order #L-7519-35-R-M dated July 31, 1998, the Department modified its 1988 approval to be consistent with the *Agreement Between Members of the Kennebec Hydro Developers Group, the Kennebec Coalition, the National Marine Fisheries Service, the State of Maine, and the US Fish and Wildlife Service ("KHDG Settlement Agreement")*, dated May 26, 1998. The *1998 KHDG Settlement Agreement* was intended to: achieve a comprehensive settlement governing fisheries restoration, for numerous anadromous and catadromous species, that will rapidly assist in the restoration of these species in the Kennebec River after the termination on December 31, 1998 of the *1986 KHDG Agreement*; avoid extensive litigation over fish passage methodologies, timetables and funding; assist in the removal of the Edwards Dam; and fund the next phase of a fisheries restoration program for the Kennebec River. Benton Falls Associates was a signatory to the 1998 agreement.

On September 16, 1998, FERC amended the license for the Benton Falls Project to include the fish passage requirements set forth in the *1998 KHDG Settlement Agreement*.

By letter dated May 29, 2003, the Department of Marine Resources notified Benton Falls Associates that all of the pre-conditions of the *1998 KHDG Settlement Agreement* for the construction of upstream fish passage at the Benton Falls Project were expected to be completed by June 1, 2003. As a result, to satisfy the terms of the *KHDG Settlement Agreement* and Condition 5(C) of the Department's July 31, 1998 Order, permanent upstream fish passage facilities would need to be operational at the Benton Falls Project on or about June 1, 2004.

By letter dated June 23, 2004, the Department of Marine Resources notified Benton Falls Associates that the conditions in the *KHDG Settlement Agreement* triggering upstream fish passage at the Benton Falls Project were completely met on June 13, 2003, as follows: temporary upstream passage at Fort Halifax became operational in 2000; an Alaskan steeppass fishway was installed at the outlet of Pleasant Pond in Stetson Stream in 1999; the Newport Dam was removed in August 2002; two Alaskan steeppass fishways were installed at the outlet of Plymouth Pond in the summer of 2002; and a pool-and-chute fishway became operational at the outlet of Sebasticook Lake on June 13, 2003. As a result, under the terms of the *KHDG Settlement Agreement* and Condition 5(C) of the Department's July 31, 1998 Order, permanent upstream fish passage facilities were required to be operational at the Benton Falls Project by June 13, 2004.

By letter dated July 27, 2004, the Department notified FERC that Benton Falls Associates was in violation of the terms of its water quality certification and FERC license with respect to the construction and operation of permanent upstream fish passage facilities at the project.

By letter dated September 28, 2004, FERC concluded that Benton Falls Associates had violated the license for the project as it relates to the DEP's water quality certification and the requirement to install permanent upstream fish passage facilities at the project by June 13, 2004. By this letter, FERC directed Benton Falls Associates to consult with appropriate state and federal agencies, including the DEP, and file a mitigation plan commensurate with the impacts associated with the violation. This plan was to take into consideration any expenses incurred by the Maine Department of Marine Resources (MDMR) due to the lack of fish passage at the Benton Falls Project and was to include a schedule for its implementation and completion.

By letter dated February 25, 2005, Benton Falls Associates filed the required mitigation plan with FERC. Pursuant to the plan, Benton Falls Associates agreed to 1) pay \$18,000 to the National Fish and Wildlife Foundation, for deposit in the Kennebec River Restoration Fund, for trap and truck expenses incurred by MDMR on the Sebasticook River for the 2005 migratory season if the upstream fish passage facility is not operational by May 1, 2005, and 2) complete construction and begin operation of the upstream fish passage facility at the Benton Falls Project by May 1, 2005, or as soon as possible thereafter, but in no event later than December 31, 2005. Benton Falls Associates also agreed that the upstream fish passage facility will include a trap and sort facility, the details of which will be worked out pursuant to a separate agreement between Benton Falls Associates, MDMR, and certain other Maine State Agencies. This plan was approved by all consulting agencies, including the DEP.

On March 22, 2005, FERC approved the mitigation plan as filed by Benton Falls Associates.

3. FISH PASSAGE CONDITIONS

As modified by the July 31, 1998 Order, Condition 5 of the permit and water quality certification for the Benton Falls Hydro Project reads as follows:

"A. FISHERIES RESTORATION SUPPORT

The applicant shall provide funding, conduct studies, engage in consultation, install fish passage facilities, report on annual restoration activities, and comply with all additional duties and obligations as set forth in the *Agreement Between Members of the Kennebec Hydro Developers Group, the Kennebec Coalition, the National Marine Fisheries Service, the State of Maine, and the US Fish and Wildlife Service ("KHDG Settlement Agreement")*, dated May 26, 1998.