

UNITED STATES OF AMERICA 100 FERC ¶ 62,209  
FEDERAL ENERGY REGULATORY COMMISSION

PPL Maine, LLC

Project No. 2727-066

ORDER AMENDING LICENSE

(Issued September 27, 2002)

On August 7, 2000, PPL Maine, LLC (PPL Maine or licensee) and the U.S. Department of the Interior (Interior) jointly filed a Comprehensive Fishery Management Plan for the Union River Drainage (management plan). PPL Maine and Interior state that they are filing this plan pursuant to Article 406 of PPL Maine's license for the Ellsworth Project No. 2727, located on the Union River in Hancock County, Maine. The licensee and Interior request that the Commission rescind its 1994 approval of an earlier upstream fish passage plan filed pursuant to Article 406 and approve the management plan in its stead. They also request that the Commission delete the current Article 406 from the project license and substitute a new Article 406 requiring the licensee to comply with those provisions of the management plan that are applicable to it and reserving the Commission's authority to require future prescribed fishways.

Because the management plan represents the current approach for the management of fisheries, including fish passage, in the Union River, the licensee's responsibilities under the management plan now constitute a more appropriate response to fish passage needs at the project than do the requirements of Article 406. Accordingly, Article 406 will be modified to reflect the licensee's responsibilities specified in the management plan, as described below.

BACKGROUND

The Ellsworth Project consists of an upper and a lower impoundment. Ellsworth Dam impounds Lake Leonard and, four miles upstream, Graham Dam impounds Graham Lake. There is a powerhouse at Ellsworth Dam.

In the early 1970's, a fish trap was constructed just below Ellsworth Dam. The trap was cooperatively funded by the U.S. Fish and Wildlife Service (FWS), the Maine Atlantic Sea run Salmon Commission, and Bangor Hydroelectric Company. The trap

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was used to collect Atlantic salmon for brood stock and restoration stocking, and to collect alewives for harvest as lobster bait and transport of a spawning escapement to Graham Lake.<sup>1</sup>

On April 12, 1977, the Commission issued an initial license for the project to Bangor Hydro-Electric Company (Bangor).<sup>2</sup> In that license, the Commission required fish passage facilities at Graham Dam along with assurances that the fish trap at the Ellsworth Dam would remain operational. However, no fish passage facilities were constructed during the term of that license.

A new license for the project was issued on December 28, 1987.<sup>3</sup> Article 406 of the new license required Bangor to develop a plan and schedule for fish passage installation, consistent with any prescription made by the Secretary of the Interior pursuant to Section 18 of the Federal Power Act (FPA).<sup>4</sup> The plan was required to include functional design drawings, flow quantifications, construction and operation schedules, monitoring program descriptions, and provisions for maintaining the collection of Atlantic salmon broodstock, to include modifications to and operation of the existing fish collection facilities. However, by order issued July 29, 1988, the Director, Division of Project Compliance and Administration (Director) revised the article to permit modifications to the existing trap facility so that it could serve as an interim upstream passage facility for at least five years.<sup>5</sup>

On January 3, 1989, Bangor filed a plan and schedule under Article 406. The plan proposed extensive reliance on trap and truck operations, with fish passage facilities to

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<sup>1</sup>The trap is owned by the Maine Atlantic Salmon Commission (MASC), which has an access agreement with the licensee. The MASC leases harvest /operating rights to the City of Ellsworth.

<sup>2</sup> 58 FPC 212 (1977).

<sup>3</sup> 41 FERC ¶ 62,304 (1987).

<sup>4</sup>Under Section 18, the Commission must require the construction, operation, and maintenance of any fishways prescribed by the Secretaries of the Interior or Commerce. In an October 14, 1987 letter, Interior reserved its authority to prescribe fishways at the project. See 41 FERC at p. 63,751.

<sup>5</sup>44 FERC ¶ 62,080.

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be constructed only as Atlantic salmon runs increased. In comments on the plan, Interior's Fish and Wildlife Service (FWS) stated that it could not support any plan which relied on the extended use of trap and truck operations instead of fishways at the two dams, and that its comments should be construed as an exercise of Interior's Section 18 prescription authority. In a November 6, 1991 letter, the Director required Bangor to modify its plan to reflect a recent fishery management decision to discontinue the Union River salmon program and Interior's insistence that fish passage facilities be constructed regardless of whether salmon runs reached the levels specified in the plan.

On May 4, 1992, Bangor filed a revised plan, which, however, again proposed to delay the construction of upstream fish passage facilities until certain specified salmon runs were achieved. Bangor also indicated that, in 1989, it had constructed downstream fish passage facilities at Ellsworth Dam. Noting that the revised plan still failed to conform to Interior's prescription, which the Commission was required to respect, the Director, in a February 16, 1994 order, modified the plan to require the filing of detailed design drawings for proposed fish passage facilities at Ellsworth and Graham Dams and a schedule for their installation, in conformance with Interior's prescription, and pursuant to Article 406. The Director approved the plan with these modifications.<sup>6</sup>

The Commission denied rehearing of the Director's order,<sup>7</sup> and Bangor submitted the required design drawings and construction schedules, which the Director approved.<sup>8</sup> However, Bangor also petitioned the U.S. Court of Appeals for the District of Columbia for review of the Director's order modifying and approving the fish passage plan and the Commission's order on rehearing. On Bangor's request, the Commission stayed, pending completion of the court proceedings, the requirement that Bangor proceed with the

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<sup>6</sup> 66 FERC ¶ 62,079 (1994). The Director also required Bangor to file drawings of the downstream passage facilities at Ellsworth Dam, since those facilities had yet to be approved by the Commission as part of the overall fish passage plan. 66 FERC at pp. 64,255-56.

<sup>7</sup>70 FERC ¶ 61,078 (1995).

<sup>8</sup>70 FERC ¶ 62,043 (1995).

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installation of the fish passage facilities in accordance with the approved schedules.<sup>9</sup> On March 15, 1996, in Bangor Hydro-Electric Company v. FERC, the court of appeals found that Interior had not provided reasonable support for its fishway prescription and vacated the Commission's orders requiring compliance with the prescription.<sup>10</sup>

After the court decision, Bangor, FWS, state fishery agencies, and other interested entities (collectively the Union River Stakeholder Group (stakeholders))<sup>11</sup> began discussions to resolve the upstream fish passage issues at the project and to manage the fishery resources in the Union River drainage. After the license was transferred to PPL Maine, PPL Maine replaced Bangor as a participant.<sup>12</sup> Those discussions resulted in the management plan, as described below.

## THE MANAGEMENT PLAN

It was the intention of the stakeholders, in developing the management plan, to develop a comprehensive, biologically-based plan to support future decisions on fishery management in the Union River, including a commitment to install permanent fish passage facilities at the Ellsworth Project. The stakeholders agreed that the management plan would identify agency goals for diadromous and resident fisheries populations, would describe the various tasks and responsibilities related to the restoration and management of those fisheries resources, and would serve as the basis for decisions on long-term fish passage measures at the project.

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<sup>9</sup>70 FERC ¶ 61,216 (1995).

<sup>10</sup> 78 F.3d 659 (D.C. Cir. 1996).

<sup>11</sup> Stakeholders include PPL Maine, FWS, Maine Department of Marine Resources, Maine Department of Inland Fisheries and Wildlife, Maine Atlantic Salmon Commission, City of Ellsworth, Maine Council of the Atlantic Salmon Federation, Union Salmon Association, and (unspecified) interested members of the public.

<sup>12</sup> In April 1999, the Commission issued an order approving the transfer of the project license from Bangor to Penobscot Hydro, LLC (87 FERC ¶ 62,001), now PPL Maine, LLC (93 FERC ¶ 62,076).

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The management plan consists of a description of the Union River drainage, its fishery resources, the status of its diadromous and resident fish populations, management goals and objectives for the drainage, and recommended measures and activities to be implemented by a Union River Fisheries Coordinating Committee (URFCC). The management plan identifies issues that must be addressed through studies and other activities, including potential conflicts between restored and resident fish populations, in order to accomplish identified management objectives. The management plan initially focuses on fish restoration for the period 2000-2005, with the understanding it will be reviewed and adjusted annually.

The management plan's overall goal is to manage all sport and commercial fish species in the Union River drainage for optimum habitat utilization, abundance, and public benefit. To accomplish this, the stakeholders divided the watershed into six subdivisions and developed objectives for each subdivision. For the initial 2000-2005 period, the management plan focuses on the development of self-sustaining runs of river herring (alewife and blueback herring) and Atlantic salmon above Ellsworth Dam. Returning adults will be collected and transported into suitable habitat along with stocking of juvenile, hatchery-reared salmon. The optimum river herring escapement at the project, the locations, quantity, quality, and accessibility of Atlantic salmon habitat, and the effectiveness of the existing interim upstream fish passage measures (that is, the trap and truck operation) at the project in accommodating current and projected fish runs, including American eels, will be determined.

Actual studies and activities are proposed to be carried out by the licensee, the FWS, and the Maine state fishery agencies under the supervision of the URFCC. The licensee will be responsible for convening the URFCC, running its meetings, and preparing its reports. In addition, the licensee will be responsible for operating the existing upstream fish passage facilities at the project and providing the resources to achieve an initial annual escapement of 100,000 alewife spawning escapement into Graham Lake. The licensee will also continue to operate existing downstream fish passage facilities.

The management plan is proposed to serve as the interim fish passage plan at the project until sufficient information is developed from the studies and activities outlined in the management plan to allow for resolution of the issue of permanent upstream fish passage measures at the project.

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## DISCUSSION

From the time of the issuance of the new license through the Bangor court decision, efforts to implement fish passage at the project pursuant to Article 406 have been marked by the disagreement between the licensee and Interior about the need for, and the timing of the installation of, upstream fish passage facilities of a permanent nature. The licensee's position has been, essentially, that runs of Atlantic salmon and alewives in the Union River have not yet developed to the point that trap and truck operations are insufficient, and that it should not have to undergo the significant expenditures that would be required to install permanent fishways before a need for such facilities is shown. Interior has insisted on limited reliance on trap and truck and on the earlier construction of fishways.

The management plan resolves that disagreement, in that it provides for the operation of existing fish passage facilities and measures until studies conducted under the management plan determine the need for permanent fish passage facilities. The management plan indeed goes beyond the specific issue of fishway types and construction timing by addressing overall fisheries management in the basin. Among other things, the management plan will provide an increase in the escapement of alewives to Graham Lake, an evaluation of the efficacy of achieving restoration goals using a stocking rate of 100,000 alewives, and an assessment of whether there are conflicts between the numbers of alewives stocked in Graham Lake and the lake's smallmouth bass fishery. In addition, the management plan addresses restoration of Atlantic salmon, blueback herring, American eel, and other migratory fishes, interim and permanent fish passage, and management strategies for resident fishes throughout the Union River basin. In light of the management plan's potential for resolving fish passage and management issues, as well as the long-standing dispute between the licensee and Interior, it would be in the public interest to require the licensee's adherence to the pertinent provisions of the management plan.

The licensee and Interior request rescission of the Director's approval of the 1992 plan filed under Article 406. Because the court in Bangor vacated the Director's order modifying and approving the plan, and the Commission order affirming it, no further action with regard to that plan is necessary. The licensee and Interior request that the management plan be approved in lieu of the 1992 plan. The management plan encompasses fishery management directives for areas outside the project and establishes responsibilities of entities other than the licensee. Because the Commission cannot

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require actions by any other such entities, approval of the entire management plan goes beyond the scope of the Commission's authority.

Nevertheless, it is possible to accomplish essentially what the licensee and Interior seek. They request that present Article 406 be replaced by a new Article 406 that requires the licensee to comply with the provisions of the management plan that are applicable to it. Since Article 406, as now worded, requires the filing of functional design drawings, construction schedules, and monitoring plans for fish passage facilities whose construction the licensee and Interior now agree should be deferred, the present Article 406 requirements do not reflect the revised approach to managing the Union River fishery, as determined by the fishery agencies in the management plan. Therefore, replacement of the existing Article 406 by a new article as described by the licensee and Interior would reflect the changed fishery goals and would be an appropriate method of implementing the licensee-related provisions of the management plan.

The parties request that the new Article 406 require the licensee to comply with the directions of the URFCC pertaining to fish passage measures at the project, to the extent that such compliance would not be inconsistent with the requirements of the FPA and the rules, regulations, and orders of the Commission. Article 406 will require the licensee to comply with these directions, as requested, but any directions to construct or install new project fish passage facilities would necessitate an application to amend the license.<sup>13</sup> To avoid uncertainty about the scope of the licensee's responsibilities under the revised article, the article will, insofar as practical, specify those particular responsibilities of the licensee that are set out in the management plan. This will include a requirement to maintain and continue operating existing upstream and downstream fish passage facilities or measures at the project.

The parties request that the Commission reserve its authority to require the licensee to construct, operate, and maintain, or to provide for the construction, operation, and maintenance of, such upstream fishways as the Secretary of the Interior might prescribe under Section 18 of the FPA. The right of Interior to prescribe fishways in the future was, in effect, observed in Article 406 through the article's requirement that the

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<sup>13</sup>Since requiring such compliance cannot be construed as authorizing actions that would be inconsistent with the FPA, Commission regulations, or other Commission requirements, there is no need to specify this reservation in the revised article.

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licensee's fish passage plan be consistent with any prescription made by Interior. Moreover, the understanding that the present fish passage measures at the project are only interim measures and that circumstances might eventually require the substitution of permanent upstream fishways is central to the management plan to which the licensee and Interior have agreed. Therefore, the revised Article 406 will reserve the Commission's authority to require fishways in the future.



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The Director orders:

(A) Article 406 of the license for the Ellsworth Project is revised to read:

The licensee shall comply with those provisions of the Comprehensive Fishery Management Plan for the Union River Drainage (Plan), prepared by the Union River Stakeholder Group and filed with the Commission on August 7, 2000, that pertain to the restoration of anadromous and catadromous fishes and their effects on resident fishes within the lower reaches of the Union River up to, and including Graham Lake and its environs during the five-year period, 2000-2005. The provisions shall include, but not be limited to: (1) evaluating impacts of stocking 100,000 alewives in Graham Lake on smallmouth bass; (2) determining annual alewife escapement needed at the Ellsworth Dam to achieve stated restoration goals for the Union River; (3) collecting and updating information on anadromous Atlantic salmon habitat in the Union River drainage; and (4) evaluating upstream and downstream fish passage needs at the Ellsworth Project and determining the need for additional fish passage for American eel.

During the period, 2000-2005, the licensee shall be responsible for convening the Union River Fisheries Coordinating Committee (URFCC), as identified in the Plan, running its meetings and preparing its reports. The licensee shall comply with the directions of the URFCC as to fish passage measures at the project and shall file an application for amendment of this license when those directions require the construction or installation of additional fish passage facilities. The licensee shall be responsible for operating the existing upstream and downstream fish passage facilities at the project in accordance with the provisions of the Plan and providing the resources to achieve an initial annual spawning escapement of 100,000 alewife into Graham Lake.

Because the Plan is proposed to serve as the interim fish passage plan at the project until sufficient information is developed from the studies and activities outlined in the Plan to allow for resolution of the issue of permanent upstream fish passage measures at the project, the licensee shall also be responsible for providing to the Commission annual reports on the progress towards those goals and for resolution of the permanent fish passage issue at the project. The licensee shall file annual progress reports by March 1 of 2003, 2004, and 2005, with a final report due by March 1, 2006. Each report shall outline progress towards meeting

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the goals of the management measures implemented the previous year and proposed activities for the following year. The final report shall contain management measures and activities proposed under the Plan for the following 5-year period.

The Commission reserves the right to require changes to the licensee's responsibilities under the Plan as appropriate after review of each of the annual progress reports or the final progress report, to include the operational schedule and handling protocol for fish trapping at the project.

Authority is reserved to 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 under Section 18 of the Federal Power Act.

(B) The licensee shall file an original and eight copies of any filing required by this order with:

The Secretary  
Federal Energy Regulatory Commission  
Mail Code: DHAC, PJ-12.3  
888 First Street, N.E.  
Washington, D.C. 20426

(C) 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 C.F.R. § 385.713.

George H. Taylor  
Chief, Biological Resources Branch  
Division of Hydropower Administration  
and Compliance

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