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July 23, 2024

Debbie-Anne A. Reese
Acting Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

**Re: Lowell Tannery Hydroelectric Project, FERC Project No. 4202-025;
Offer of Settlement and Explanatory Statement**

Dear Acting Secretary Reese:

Pursuant to Rule 602 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("FERC" or "Commission"),¹ KEI Maine Power Management (II), LLC ("KEI") is pleased to file this Offer of Settlement in the above-referenced proceeding for the relicensing of the Lowell Tannery Hydroelectric Project, FERC Project No. 4202 ("Project").² This Offer of Settlement includes: (1) the Relicensing Settlement Agreement for the Lowell Tannery Project ("Settlement Agreement"); and (2) an Explanatory Statement.

The Settlement Agreement is the culmination of over two years of close collaboration between KEI, U.S. Fish and Wildlife Service ("FWS"), National Marine Fisheries Service (together with FWS, "the Services"), Maine Department of Natural Resources, and the Penobscot Nation (collectively, "the Parties").³ The Settlement Agreement represents a significant milestone in the Project's relicensing as it resolves the most complex issue of the relicensing proceeding—the need for improvements to both the upstream and downstream Project fishways. KEI greatly appreciates the tremendous efforts of the Parties as its settlement partners in participating in the relicensing process and achieving the Settlement Agreement, which is the result of over two years of negotiations. KEI and the Parties worked hard to achieve this Settlement Agreement that will provide substantial benefits for the Passadumkeag River and its tributaries. KEI also expresses sincere appreciation to Commission staff, who extended the relicensing process to afford time for the Parties to reach this Settlement Agreement.

This Offer of Settlement sets forth the Proposed License Measures,⁴ fully developed and ready for the Commission's approval, that meet all statutory and regulatory requirements in this

¹ 18 C.F.R. § 385.602.

² *Pumpkin Hill Power Co.*, 25 FERC ¶ 62,134 (1983).

³ As of the filing of this Offer of Settlement, the Nation has yet to execute the Settlement. Under section 1.1.9 of the Settlement, the Settlement became effective upon the execution by KEI and the Resource Agencies. Under section 1.7 of the Settlement, the Nation's rights and obligations will commence upon the date it executes the Settlement.

⁴ Capitalized terms that are not otherwise described herein have the same meaning as the defined terms in the

proceeding. As described in the Explanatory Statement, the Proposed License Measures—if included in the Project’s Subsequent License without modification—resolve among the Parties all Issues Within the Scope of the Agreement with the pending relicensing effort. The Settlement Agreement establishes the framework for Services’ fishway prescriptions under section 18 of the Federal Power Act (“FPA”),⁵ and constitutes all Parties’ recommended conditions under FPA sections 10(a) and 10(j) for the Project’s Subsequent License.⁶

These measures also meet all federal and state statutory and regulatory requirements for Issues Within the Scope of Agreement in the Project’s relicensing and are supported by substantial evidence in the record, as required under Section 313(b) of the FPA.⁷ In short, this Offer of Settlement allows for the relicensing effort to proceed without delay, as all Issues Within the Scope of the Agreement have been resolved among the KEI and the Parties. As such, the Commission should consider the Settlement Agreement terms to be KEI’s relicensing proposal for the purposes of FERC’s National Environmental Policy Act review.

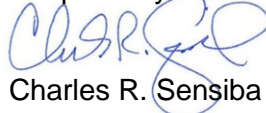
Moreover, all Parties support the Commission’s issuance of a Subsequent License for a term of 50 years. Both because the Settlement Agreement will require KEI to expend significant capital to design, test, and implement fishway improvements, and because a 50-year license term is “an integral part” of this Settlement Agreement, KEI requests that the Commission defer to this arrangement in the Settlement Agreement and issue a Subsequent License for a 50-year term.⁸

For these reasons, KEI respectfully requests that the Commission approve the enclosed Offer of Settlement by including in the Project’s Subsequent License, without modification, the Proposed License Measures set forth in the Settlement Agreement.

In accordance with Rule 602(f)(2),⁹ KEI hereby notifies all participants in this proceeding that unless otherwise provided by the Commission, comments on this Offer of Settlement must be filed on or before August 13, 2024, and that reply comments are due on August 22, 2024.

If you need any additional information, please do not hesitate to contact the undersigned.

Respectfully submitted,



Charles R. Sensiba

Counsel to KEI Maine Power Management (II)

Enclosure

Settlement Agreement.

⁵ 16 U.S.C. § 811.

⁶ *Id.* §§ 803(a), 803(j).

⁷ *Id.* § 825(b).

⁸ *Policy Statement on Establishing License Terms for Hydroelectric Projects*, 161 FERC ¶ 61,078 at P 15 (2017).

⁹ 18 C.F.R. § 385.602(f)(2); *see also id.* § 385.2007(a)(2).

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

KEI (Maine) Power)
Management (II) LLC)

Project No. 4202-025

**LOWELL TANNERY HYDROELECTRIC PROJECT
OFFER OF SETTLEMENT EXPLANATORY
STATEMENT**

Pursuant to Rule 602 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“FERC” or “Commission”),¹ KEI (Maine) Power Management (III) LLC (“KEI” or “Licensee”) hereby files its Offer of Settlement for the relicensing of the Lowell Tannery Hydroelectric Project No. 4202 (“Project”) in the above-captioned proceeding. This Offer of Settlement consists of: (1) the Relicensing Settlement Agreement for the Lowell Tannery Project (FERC No. 4202) (“Settlement”) between KEI, U.S. Fish and Wildlife Service (“FWS”), National Marine Fisheries Service (“NMFS”) (together with FWS, “the Services”), Maine Department of Marine Resources (“MDMR”) (MDMR, together with the Services, are referred to collectively herein as the “Resource Agencies”), and the Penobscot Nation (“Nation”)² (collectively, “the Parties”); and (2) this Explanatory Statement. The Settlement is included herein as Exhibit 1.

The Settlement³ resolves among the Parties all Issues Within the Scope of the

¹ 18 C.F.R. § 385.602.

² As of the filing of this Offer of Settlement, the Nation has yet to execute the Settlement. Under section 1.1.9 of the Settlement, the Settlement became effective upon the execution by KEI and the Resource Agencies. Under section 1.7 of the Settlement, the Nation’s rights and obligations will commence upon the date it executes the Settlement.

³ Capitalized terms in this Explanatory Statement have the same meaning as defined terms in the Settlement.

Agreement related to the relicensing of the Project,⁴ including:

1. Coordinating the timing, process selection, design, and operational parameters of a new upstream fishway and improvements to the existing downstream fishway with the Resource Agencies and the Nation, including an adaptive management framework for ensuring that the fishway meets designated performance standards;⁵
2. Providing for the Licensee's development and FERC's approval of a Fishway Operations Maintenance Plan ("FOMP") and Fishway Operation and Maintenance Report ("FOMR");⁶
3. Implementing certain annual requirements applicable to the existing fishway beginning after the Effective Date of the Settlement;⁷
4. Proposing a Subsequent License term of 50 years for the Project;⁸ and
5. Assuring, through an off-license agreement, the Resource Agencies' support for KEI's request for Low Impact Hydropower Institute certification for the Project.⁹

Subject to certain reservations of authority,¹⁰ the Proposed License Measures of the Settlement to be adopted into the Subsequent License for the Project¹¹ satisfy all Resources Agencies' authorities under sections 10(a) and 10(j) of the Federal Power Act

⁴ The Issues Within the Scope of the Agreement consist of:

(1) measures to ensure the safe, timely, and effective passage of American eel, American shad, alewife, Atlantic Salmon, blueback herring, and sea lamprey upstream and downstream of the Project; (2) the protection, mitigation of damage to, and enhancement of American eel, American shad, alewife, Atlantic Salmon, blueback herring, and sea lamprey and (3) minimum flow and other releases from the Project under the Subsequent License.

Settlement § 1.2.

⁵ See Settlement at Appendix A.

⁶ *Id.*

⁷ *Id.* § 2.1.3.2.

⁸ *Id.* § 2.1.1.

⁹ *Id.* § 6.1.

¹⁰ See *id.* § 1.3.

¹¹ See *id.* § 1.1.35 & Appendix A.

(FPA),¹² and the Services' preliminary fishway prescriptions under FPA section 18 will be in substantial conformance with these Proposed License Measures.¹³

For administrative convenience, proposed ordering paragraphs for the Commission's consideration that would implement applicable Settlement terms into the Subsequent License for the Project appear in Attachment B of the Settlement, and a proposed license article for the Subsequent License, addressing run-of-river operations, appears in Attachment C of the Settlement.

I. BACKGROUND

The Settlement is the culmination of over two years of close collaboration between KEI, the Resource Agencies, and the Nation for the stewardship of fish resources in the Passadumkeag River. During the latter stages of the Project's relicensing, KEI and the Resource Agencies began engaging in settlement negotiations to address the contested issues in that relicensing proceeding, including requirements for the installation of new fish passage measures.

The Project is a one megawatt ("MW") run-of-river hydroelectric facility located on the Passadumkeag River in Penobscot County, Maine. Commission staff issued the original minor license for the Project in 1983 for a period of 40 years.¹⁴ On September 26, 2018, KEI initiated the relicensing effort for the Project by filing a Notice of Intent ("NOI") to File License Application for the Project and Pre-Application Document ("PAD").¹⁵ On March 23, 2021, KEI filed the Draft License Application ("DLA"), and

¹² See *id.* §§ 1.4.1, 2.3.1.

¹³ See *id.* §§ 1.4.1, 1.1.30.

¹⁴ *Pumpkin Hill Power Co.*, 25 FERC ¶ 62,134, at p. 63,304 (1983).

¹⁵ Notice of Intent and Pre-Application Document, Project No. 4202, Accession No. [20180926-5128](#) (filed Sep. 26, 2018).

on September 28, 2021 it submitted the Final License Application (“FLA”) for the Project’s relicensing, which did not propose fish passage measures other than maintaining the existing Denil fish ladder and dedicated downstream passage facility at the Project intake.¹⁶

On May 30, 2024, the Commission issued public notice that the FLA is Ready for Environmental Analysis (“REA Notice”).¹⁷ As such, the Resource Agencies and the Nation have yet to file their recommended license conditions under FPA sections 10(a) and 10(j),¹⁸ as applicable, nor have the Services filed preliminary fishway prescriptions under FPA section 18.¹⁹ The Proposed License Measures set forth in the Settlement will be incorporated into the Parties’ recommended license conditions and will form the basis for the federal agencies’ preliminary fishway prescriptions.²⁰ Moreover, KEI’s request for water quality certification under section 401 of the Clean Water Act (“CWA”) from Maine Department of Environmental Protection (“MDEP”)²¹ will propose certification conditions that are consistent with the terms of the Settlement.²² KEI will file its request

¹⁶ Final License Application, Project No. 4202 at Exhibit E, § 2.4, Accession No. [20210928-5176](#) (filed Sep. 28, 2021).

¹⁷ See Notice of Application Accepted for Filing, Soliciting Motions to Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions, Project No. 4202-025, Accession No. [20240530-3066](#) (issued May 30, 2024).

¹⁸ See 18 C.F.R. § 4.34(b).

¹⁹ See *id.* § 4.34(b)(1). On July 1, 2024, NMFS filed a notice of intervention, together with a request to extend by 30 days the time period to file comments and recommendations, and preliminary fishway prescriptions. See Notice of Intervention and Motion for Extension of Time to File Comments and Recommendations and Notice of Timing of Filing of Terms and Conditions and Prescriptions for the Lowell Tannery Hydroelectric Project No. 4202, Accession No. [20240701-5137](#) (issued July 1, 2024).

²⁰ See *id.* §§ 2.2.1, 2.3.1.

²¹ As required by Commission regulation, KEI will file its request for water quality certification within 60 days of FERC’s issuance of the REA Notice. See *id.* § 4.34(b)(5).

²² See Settlement § 2.1.2.2.

for water quality certification by July 29, 2024.²³

For these reasons, this Offer of Settlement is timely, as it has resolved critical issues in this relicensing process before license recommendations and preliminary mandatory conditions become due—allowing for swift and efficient environmental review and Subsequent License issuance by the Commission.

II. OVERVIEW OF OFFER OF SETTLEMENT²⁴

The Offer of Settlement is comprised of the Settlement and this Explanatory Statement. The Settlement addresses Issues Within the Scope of the Agreement.²⁵ And while the Settlement includes both license and off-license commitments,²⁶ this Explanatory Statement addresses only the Proposed License Measures, which are within the scope of the Commission’s jurisdiction. The Parties assert that, subject to identified reservations in the Settlement,²⁷ these measures should be incorporated into the Project’s Subsequent License, without Material Modification, “as the full, complete, and exhaustive set of License Provisions for Issues Within the Scope of the Agreement for” KEI’s Subsequent License.²⁸

²³ See Notice of Application Accepted for Filing, Soliciting Motions to Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions, Project No. 4202-025, Accession No. [20240530-3066](#) (May 30, 2024).

²⁴ To the extent there is any discrepancy between this overview and the Settlement, the text of the Settlement shall be controlling.

²⁵ The Issues Within the Scope of the Agreement appear *supra* note 4.

²⁶ The off-license commitments of the Parties appear in section 6 of the Settlement.

²⁷ See Settlement § 1.3.

²⁸ *Id.* § 1.2.

A. New Fishway Provisions for Anadromous Target Species

The parties to the Settlement have agreed that the Licensee will construct, operate, and maintain a new upstream fishway and improvements to the existing downstream fishway at the Project, pursuant to the Services' fishway prescriptions for the Subsequent License, to be filed with FERC under FPA section 18.²⁹ Appendix A of the Settlement sets forth a proposed process and metrics that KEI will use to compare alternative upstream fishway types and select a new upstream fishway in consultation with the Resource Agencies and the Nation.³⁰ The Licensee will then design the new upstream fishway based on the metrics outlined in Appendix A, and in consultation with the Resource Agencies and the Nation, who will have the opportunity to participate in the development of the 30, 60, and 90% design plans of both the new upstream fishway and improvements to the downstream fishway.³¹

Prior to KEI's selection of downstream fishway improvements, it will develop, in consultation with the Resource Agencies and the Nation, a Downstream Fishway Monitoring Plan, which will include measures to determine whether improvements to the downstream passage facilities are sufficient to meet performance standards for Anadromous Target Species.³² KEI will file the Downstream Fishway Monitoring Plan for approval by both the Commission and the appropriate Service (FWS or NMFS).³³

²⁹ See 16 U.S.C. § 811; Settlement § 2.2.1; *id.* at A-1 to A-2.

³⁰ Settlement at A-1 to A-2.

³¹ *Id.* at A-2.

³² *Id.* at A-2 to A-3.

³³ *Id.* at A-3.

The Settlement provides that KEI will place the new upstream fishway into service no later than the start of the eighth upstream passage season following the Commission's issuance of the Subsequent License, and the downstream fishway into service prior to April 1 of the year in which the new upstream passage facilities become operational.³⁴ Under the Settlement proposal, the upstream anadromous passage in-service date may be adjusted upon mutual agreement between KEI and the Resource Agencies.³⁵ Delay of the in-service date requires the requesting party to present any New Information that results in an unforeseen circumstance that it believes justifies the alteration of the in-service date.³⁶ New Information means:

(i) A change in relevant, applicable law after the Effective Date [of the Settlement]; or

(ii) Any relevant, material information, including but not limited to scientific, historical, or technical data or studies, that, as of the Effective Date: (a) is not in any applicable administrative record or otherwise known by the relevant Party; and (b) under applicable law establishes the need for a different License Provision than those agreed to in this Agreement for addressing Issues Within the Scope of the Agreement.³⁷

If KEI and the Resource Agencies mutually agree that if the New Information supports the requested change to the in-service date, KEI will submit an application for a license amendment to FERC for the Commission's approval of the alteration.³⁸

KEI will operate the new upstream fishway annually from May 15 through

³⁴ *Id* at A-1. If KEI receives federal funding for at least 30% of the total capital cost of the new upstream fishway and downstream fishway improvements, the Settlement provides that it shall place the new upstream fishway into service no later than the start of the 6th upstream passage season following license issuance.

³⁵ *See id.* § 6.3.

³⁶ *Id.*

³⁷ *Id.* §§ 1.1.23, 6.3.

³⁸ *See id.* § 6.3.

November 15, or as otherwise provided in the FOMP, and the downstream fishway from April 1 (or ice-out, whichever happens last) to December 31 (or ice-in, whichever happens first).³⁹ The FOMP, which will be developed in consultation with the Resource Agencies and the Nation and filed for approval by FERC, will include a description of the Project's existing and proposed fishways, their operations and maintenance measures and associated schedules, and details about biological monitoring, sampling, and recording consistent with MDMR's draft instructions for Biological Monitoring of River Herring.⁴⁰

B. Passage Facilities for American Eel

The Settlement sets forth KEI's obligation to construct, operate, and maintain temporary upstream passage facilities for American eel through the first nine upstream passage seasons following FERC's issuance of the Subsequent License.⁴¹ Beginning with the first American eel passage season after installation of the permanent upstream anadromous fishway discussed in Part II.A above, KEI will perform eelway siting studies in consultation with the Resource Agencies and the Nation to determine the location of the permanent upstream eelway.⁴² It will design the permanent upstream eelway based on the same 30/60/90% design review process that pertains to the new upstream anadromous fishway described in Part II.A above. Beginning with the tenth upstream passage season following FERC's issuance of the Subsequent License, KEI will maintain the new, permanent upstream eelway and will operate it annually from May 1 through

³⁹ *Id.* at A-2 to A-3.

⁴⁰ *Id.* at A-4.

⁴¹ *Id.* at A-5.

⁴² *Id.*

October 31 unless otherwise provided in the FOMP.⁴³

Pursuant to the Settlement, KEI will also construct, operate, and maintain a low-level bypass system at the Project dam for downstream passage of American eel, and shall place it into service concurrently with the new upstream anadromous fishway described in Part II.A above.⁴⁴ KEI will operate the low-level bypass system annually from August 15 through November 15, except as may be provided in the FOMP.⁴⁵

C. Existing Fishway Operational Provisions

The Settlement provides that, while KEI is consulting on and designing its new upstream anadromous fish passage facility and improvements to its downstream passage facility, it will implement certain improvements to the existing Project fishway.⁴⁶ Specifically, KEI will install a means of access to the fishway entrance prior to the 2025 passage season for observation, maintenance, and operation of the fishway.⁴⁷ It will also install a PIT antenna array and data loggers and provide for associated monitoring, data collection, and submittal of the PIT tag logger data at the request of the Resource Agencies and the Nation.⁴⁸

For each fish passage season beginning after FERC's issuance of a Subsequent License for the Project, the Settlement provides that KEI will implement certain operation and maintenance activities, including implementing a pre-season de-watered inspection plan and repairing/maintaining the items identified therein; recording daily

⁴³ *Id.*

⁴⁴ *Id.* at A-6.

⁴⁵ *Id.*

⁴⁶ *Id.* at A-6.

⁴⁷ *Id.*

⁴⁸ *Id.*

headpond and tailwater surface elevations, fishway entrance depth, and depth of flow over stop-logs at the fishway entrance; maintaining a baffle to ensure particular flows in entrance jets to facilitate passage of different species during their presumed peak migration timeframes; and providing a weekly intra-season report on fish passage operations.⁴⁹

Following FERC's approval of the FOMP, the Settlement contemplates that KEI will prepare an annual FOMR during the Subsequent License term for the Project that summarizes operation and maintenance activities associated with the Project fishways and any changes or modifications needed to continue to provide safe, timely, and effective upstream and downstream passage of target species.⁵⁰

D. Species-Specific Fish Passage Performance Standards for Safe, Timely, and Effective Passage at the Project

The Settlement requires KEI to design the Project's fish passage facilities to meet the species-specific performance standards adopted therein.⁵¹ With respect to Alewife and American Shad, the Settlement establishes quantitative species-specific performance standards for both upstream and downstream passage, including alternative "abundance goals" that may be used as an alternative to attaining the upstream performance standard for those species.⁵² For downstream Alewife passage, it requires that at least 95% of the adult and juvenile alewives that approach within 200 meters of the Project's powerhouse pass the Project within 24 hours and survive.⁵³ For upstream alewife passage, the

⁴⁹ *Id.* at A-6 to A-7.

⁵⁰ *Id.* at A-7.

⁵¹ *See id.* at A-7 to A-8.

⁵² *Id.*

⁵³ *Id.* at A-7.

Settlement requires that at least 90% of the adult alewives that approach within 200 meters of the Project's powerhouse pass upstream of the Project within 48 hours, or, alternatively, a rolling abundance average of at least 678,680 alewives passing the Project annually across four consecutive years.⁵⁴ For downstream American Shad passage, the Settlement requires that at least 95% of the adult and juvenile shad that approach within 200 meters of the Project's powerhouse pass the Project within 24 hours and survive.⁵⁵ For upstream passage, the Settlement provides that at least 75% of the adult shad that approach within 200 meters of the Project's powerhouse pass upstream of the Project within 48 hours or, alternatively, a rolling abundance average of at least 12,765 shad passing the Project annually across four consecutive years.⁵⁶

With respect to Blueback Herring, American Eel, and Sea Lamprey, the Project will be subject to the qualitative standards that Project facilities and operations will achieve the safe, timely, and effective passage of Blueback Herring, American Eel, and Sea Lamprey, unless the Services establish quantitative performance standards for these species, in consultation with the other Resource Agencies, the Nation, and KEI.⁵⁷

E. Adaptive Management and Periodic Monitoring

Importantly, the Settlement establishes an Adaptive Management Process ("AMP") for Meeting Fish Passage Performance Standards that will serve as a measure

⁵⁴ *Id.*

⁵⁵ *Id.* at A-8.

⁵⁶ *Id.*

⁵⁷ *Id.* at A-7 to A-8. The performance standards set forth in Appendix A of the Settlement may be revised prior to approval of the monitoring plans provided in the AMP, in consultation among the Parties and if the best available scientific information and engineering principles indicate that modifying a performance standard is necessary and appropriate to achieve species restoration goals. Any changes to performance standards for Atlantic salmon, in the context of ESA section 7, must be addressed in ESA section 7 consultation between NMFS and FERC.

by which to evaluate the survival and/or delay of upstream and downstream migrants through the Project's fishways after their construction and to identify any necessary or appropriate Adaptive Management Measures ("AMMs") needed to achieve the performance standards.⁵⁸

As set forth in Appendix D of the Settlement, any non-attainment of a performance standard triggers a requirement for KEI to engage in adaptive management to cure the non-attainment in collaboration with the other Parties.⁵⁹ The basic structure of the AMP is build-test-confer, followed by implementation of AMMs and re-testing as necessary, unless KEI elects to follow an alternative fish-counting process to document achievement of certain species-specific "abundance goals" discussed above for Alewives and American shad.⁶⁰ The AMP contemplates several build-test-confer cycles, in anticipation that the species-specific performance standards can be attained with limited adaptive management. However, if performance standards are not attained after completing these cycles, then the Parties will reconvene to determine what, if any, necessary and appropriate next steps might be.⁶¹

F. Subsequent License Term for the Project

The Parties to the Settlement recognize that KEI's implementation of this Agreement will involve significant investment in the Project, including the design, development, implementation, and testing of a new upstream fishway and improvements to the existing downstream fishway. Thus, to allow KEI sufficient time to recoup the

⁵⁸ See *id.* at Appendix D.

⁵⁹ *Id.* at D-2.

⁶⁰ *Id.*

⁶¹ *Id.*

cost of these significant investments, the Parties to the Settlement respectfully request that the Commission grant KEI a Subsequent License with a 50-year license term.⁶² The Commission has repeatedly endorsed the license term advocated by a relicensing settlement where, as here, the settling parties demonstrate that “the term of the license was likely an important element in the negotiations that led to the [s]ettlement.”⁶³

The Parties’ Settlement commitments in this regard are not only supported by Commission precedent, but are fully consistent with the Commission’s 2017 License Term Policy.⁶⁴ There, the Commission established a 40-year default license term for new licenses,⁶⁵ but recognized that it will consider issuing a license for more than 40 years in three circumstances: (1) if necessary to coordinate license terms for projects in the same river basin; (2) in deference to a longer term explicitly agreed upon in a generally supported comprehensive settlement agreement; or (3) when a license applicant requests a longer term based on significant measures expected to be required under the new license or significant measures implemented during the prior license term that were not required by that license or other legal authority and for which the Commission has not already given credit through a license extension.⁶⁶

Two of these circumstances recognized by the Commission’s License Term Policy apply here. First, as a result of the Settlement, KEI plans to expend significant

⁶² See *id.* § 2.4.3.

⁶³ E.g., *Portland Gen. Elec. Co.*, 111 FERC ¶ 61,450, at P 168 (2005); *City of Tacoma*, 132 FERC ¶ 61,037, at P 304 (2010).

⁶⁴ *Policy Statement on Establishing License Terms for Hydroelectric Projects*, 161 FERC ¶ 61,078 (2017).

⁶⁵ *Id.* at P 14.

⁶⁶ *Id.* at PP 15-16.

capital to design, test, and implement a new upstream anadromous fishway and improvements to its existing downstream fishway.⁶⁷ As set forth in Appendices A and D to the Settlement, KEI has committed to working closely with the Resource Agencies and Nation to design fishways that meet the most up-to-date versions of the Services' published design criteria, as well as to make appropriate adjustments to those facilities over time to achieve the safe, timely, and effective passage of the Anadromous Target Species.⁶⁸

Second, the Parties in this proceeding have reached a significant milestone in resolving the most complex issues in this relicensing proceeding. From KEI's perspective, the longer license term for the Project was an essential deal point in negotiating this Settlement. Consistent with the License Term Policy, therefore, KEI respectfully requests the Commission to defer to this arrangement in the Settlement. In fact, the Settlement expressly acknowledges the Commission's License Term Policy and provides:

that the foregoing agreed-upon Subsequent License term is an integral part of this Settlement; that this Agreement is a generally supported comprehensive settlement agreement; and that FERC should defer to these agreed-upon terms. *See Policy Statement on Establishing Terms for Hydroelectric Projects*, 161 FERC ¶ 61,078, at P 15 (2017).⁶⁹

⁶⁷ Settlement at Appendix A.

⁶⁸ *Id.*; *see also id.* at Appendix D.

⁶⁹ *Id.* § 2.4.3.

III. CONSISTENCY WITH COMMISSION POLICIES AND GUIDELINES

The Commission’s Settlement Policy Statement⁷⁰ encourages relicensing settlements and requires that these agreements: (1) support the “greater public interest and the comprehensive development/equal consideration standard”;⁷¹ (2) are supported by substantial evidence⁷²; and (3) are enforceable.⁷³ As discussed more fully below, the Settlement resolves the issues between the Parties and is consistent with FERC’s Settlement Policy Statement as it:

1. Meets the public interest and the comprehensive development/equal consideration standard by providing a date-certain fish passage development plan for the Project on the Passadumkeag River;
2. Is supported by substantial evidence in the relicensing record—
 - a. Indicating that once migrating fish pass the Project in sufficient numbers, the passage requirements of the Settlement will have long-term benefits to important fish species (i.e., American eel, American shad, alewives, Atlantic salmon, Blueback herring and Sea lamprey);⁷⁴
 - b. Demonstrating the presence of Target Species, including American shad, alewives, Atlantic salmon, blueback herring, and sea lamprey, and American eel in the Project area;⁷⁵

⁷⁰ *Policy Statement on Hydropower Licensing Settlements*, 116 FERC ¶ 61,270 (2006).

⁷¹ *Id.* at P 4.

⁷² *Id.* at P 13.

⁷³ *Id.* at P 14.

⁷⁴ *See* Request for Treatment of a Document as a Comprehensive Plan Pursuant to Section 10(a)(2)(A) of the Federal Power Act (20-01), Project No. 3562-025 (filed June 18, 2020). NMFS requested that the Greater Atlantic Region Policy Series, Androscoggin River Watershed Comprehensive Plan for Diadromous Fishes, prepared by National Oceanic and Atmospheric Administration Fisheries Greater Atlantic Regional Fisheries Office (“Androscoggin Plan”) be treated by FERC as a comprehensive plan under Section 10(a)(2)(A) of the FPA. While KEI continues to dispute the plan’s conclusions regarding restoration of the watershed in advance of significant numbers of returning fish, KEI recognizes that should fish return in the numbers anticipated by the Androscoggin Plan, the fish passage measures in the Settlement are appropriate.

⁷⁵ *See* Final License Application, Exhibit E § 4.9.1.2, Project No. 4202-025, Accession No. [20210928-](#)

- c. Recognizing that KEI may present New Information that results in an unforeseen circumstance that it believes justifies a delay of the in-service date of the new upstream passage facility, and may meet with the Resource Agencies and the Nation to discuss in good faith the information presented, and the Resource Agencies will render a timely determination on the request based on the New Information;⁷⁶ and
3. Contains terms that are enforceable by the Commission as license requirements, as the Settlement contemplates that all Settlement terms within the Commission's jurisdiction will be included in an appropriate Subsequent License article and mandatory fishway prescriptions filed by the Services;

IV. PROCEDURAL PROCESS

Following KEI's filing of this Offer of Settlement, KEI anticipates the following actions for the Commission's consideration and decision on the Proposed License

Measures contained herein:

1. *Comments by Parties and other Relicensing Participants.* In accordance with Rule 602, relicensing participants have 20 days to file comments on the Offer of Settlement, with reply comments filed within 30 days of the filing of the Offer of Settlement.⁷⁷
2. *License Recommendations and Preliminary Prescriptions.* The Commission's REA Notice established July 29, 2024 as the deadline for filing comments, recommendations, terms and conditions, prescriptions, and license recommendations under FPA sections 10(a) and 10(j).⁷⁸ Pursuant to its July 1 request for an extension of time, NMFS (and likely FWS) will file their comments, recommendations, terms and conditions, and preliminary FPA section 18 fishway prescriptions by August 28,

[5176](#) (filed Sep. 28, 2021).

⁷⁶ Settlement § 6.3.

⁷⁷ See 18 C.F.R. § 385.602(f).

⁷⁸ See Notice of Application Accepted for Filing, Soliciting Motions to Intervene and Protests, Ready for Environmental Analysis, and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions, Project No. 4202-025, Accession No. [20240530-3066](#) (issued May 30, 2024) [hereinafter, REA Notice]; 18 C.F.R. § 4.34(b).

2024.⁷⁹ Except for powers reserved in the Settlement,⁸⁰ these recommendations and prescriptions will be consistent with Appendices A and D of the Settlement and will not propose any additional license measures for issues Within the Scope of the Agreement.⁸¹

3. *Water Quality Certification.* Within 60 days of the Commission’s REA Notice (i.e., by July 29, 2024),⁸² KEI will seek water quality certification from MDEP.⁸³ KEI’s request will seek conditions in the water quality certification that are consistent with the Settlement.⁸⁴
4. *Environmental Review.* In carrying out its responsibilities under the National Environmental Policy Act (“NEPA”), the Commission will consider all recommended and mandatory license conditions—including those proposed in the Settlement. In its NEPA review, the Commission should consider the measures of this Settlement to constitute KEI’s relicensing proposal with respect to Issues within the Scope of the Agreement. The Commission also will complete any required consultation under section 7 of the Endangered Species Act (“ESA”).⁸⁵
5. *License Decision.* Once the requirements of the FPA, NEPA, ESA, CWA, and any other programs are complete, the Commission will render its licensing decision, and as set forth in the FLA and this Offer of Settlement, KEI seeks a Subsequent License for the Project. In making decisions related to the contents of that license, KEI respectfully requests that the Commission approve the Offer of Settlement by issuing the KEI a 50-year Subsequent License for the Project that incorporates the Proposed License Measures set forth in the Settlement without Material Modification.

⁷⁹ See *supra* note 19.

⁸⁰ See Settlement § 1.3.

⁸¹ *Id.*

⁸² See REA Notice.

⁸³ See 18 C.F.R. § 4.34(b)(5).

⁸⁴ See Settlement § 2.1.2.2.

⁸⁵ KEI notes that the Settlement expressly provides that it is not intended as “prejudging or predetermining the outcome of any required ESA consultation” for the Lowell Tannery Project. See *id.* § 1.3.2. Instead, the Settlement provides: “The Services reserve the right, consistent with federal law, to fully satisfy the requirements of ESA section 7 and to make determinations and take actions as necessary to meet their obligations under the ESA and applicable implementing regulations.” *Id.*

V. CONCLUSION

This Offer of Settlement reflects a reasoned approach to resolving the Issues Within the Scope of the Agreement and was carefully negotiated by the Parties for over two years. The result is a precisely balanced agreement that provides significant benefits to fish species in the Passadumkeag River, while protecting the value of KEI's hydroelectric facilities and KEI's commitments to its customers.

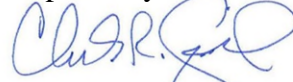
For these reasons, it is critically important that the Commission adopt the Proposed License Measures with precision and without Material Modification. As explained above, the Settlement is fully consistent with the Commission's Settlement Policy Statement and License Term Policy. Each term of the Settlement reflects a delicate balance of developmental and non-developmental resource interests at the Project, and these terms are highly interrelated in achieving an overall package that each Party can support. Thus, any Material Modification to any Proposed License Measure may upset the balanced settlement, deprive one or more of the Parties of the benefits for which they have specifically bargained, and possibly lead to the withdrawal from, and/or termination of, this important Settlement that each Party has invested significant resources to achieve.⁸⁶

WHEREFORE, for the reasons discussed above, KEI respectfully requests that the Commission: (1) approve the Offer of Settlement by incorporating into the Project's

⁸⁶ Under the Settlement, the Parties have agreed that, except for certain powers reserved by the Parties, the Commission should issue a Subsequent License that incorporates the Proposed License Measures without Material Modification. *Id.* § 1.2. In the event that FERC issues a Lowell Tannery subsequent license with any Material Modification, the Parties may invoke the withdrawal and termination provisions in Section 4 of the Settlement, which may result in termination of the Settlement. *See id.* § 4.

Subsequent License, without expansion or modification, the Proposed License Measures set forth in the Settlement; and (2) issue the KEI a new 50-year Subsequent License for the Project.

Respectfully submitted,



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DATED: July 23, 2024

CERTIFICATE OF SERVICE

In accordance with Rule 2010 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission, I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC this 23rd day of July, 2024.

/s/ Elizabeth J. McCormick
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Exhibit 1

**Relicensing Settlement Agreement for the Lowell Tannery Project,
FERC Project No. 4202 (July 2024)**

**RELICENSING SETTLEMENT AGREEMENT
FOR THE LOWELL TANNERY PROJECT, FERC PROJECT NO. 4202**

July 2024

**RELICENSING SETTLEMENT AGREEMENT
FOR THE LOWELL TANNERY PROJECT (FERC PROJECT NO. 4202)**

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- Appendix D Adaptive Management Process for Meeting Fish Passage Performance Standards
- Appendix E MDMR Draft Instructions for Biological Monitoring of River Herring
- Appendix F Authorized Representatives of the Parties

**RELICENSING SETTLEMENT AGREEMENT
FOR THE LOWELL TANNERY PROJECT (FERC PROJECT NO. 4202)**

This **Relicensing Settlement Agreement for the Lowell Tannery Project (FERC Project No. 4202)** (“Agreement”) is made and entered into by and among KEI (Maine) Power Management (II) LLC (“KEI” or “Licensee”), Licensee for the Lowell Tannery Project (FERC Project No. 4202) (“Project”); the U.S. Department of the Interior, United States Fish and Wildlife Service (“FWS”); the U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Service (“NMFS”); the Maine Department of Marine Resources (“MDMR”); and the Penobscot Nation (“Nation”).

RECITALS:

WHEREAS, KEI is the Federal Energy Regulatory Commission (“Commission” or “FERC”) Licensee for the Project, which is a 1-megawatt (“MW”) run-of-river hydroelectric facility located on the Passadumkeag River in Maine, and which currently is equipped with upstream and downstream fish passage facilities;

WHEREAS, FERC issued a minor license to KEI’s predecessor for the Project in 1983 for a period of 40 years in *Pumpkin Hill Power Co.*, 25 FERC ¶ 62,134 (1983);

WHEREAS, KEI acquired and became Licensee of the Project in 2009, following FERC’s order approving license transfer in *Ridgewood Maine Hydro Partners, L.P.*, 128 FERC ¶ 62,226 (2009);

WHEREAS, KEI on September 26, 2018 initiated the relicensing of the Project by filing a Notice of Intent and Pre-Application Document with FERC in FERC Docket No. 4202-024;

WHEREAS, FWS, NMFS, and MDMR (collectively, “Resource Agencies”) have statutory and regulatory responsibilities associated with FERC’s issuance of a Subsequent License for the Project, and the Nation has substantial interests in the fish and aquatic resources affected by the ongoing operation and maintenance of the Project;

WHEREAS, on September 28, 2021 KEI filed, pursuant to Part I of the Federal Power Act (“FPA”), an Application for a Subsequent License to continue operation and maintenance of the Project, following which KEI, the Resource Agencies, and the Nation (collectively, “Parties”), have worked diligently and in good faith to identify compromise on these matters in a manner that they believe would broadly and efficiently facilitate compliance with the applicable statutes and regulations administered by the Resource Agencies and address the concerns of the Nation;

WHEREAS, in February 2024 the Parties reached agreement in principle on protection, mitigation and enhancement measures regarding Issues Within the Scope of the Agreement, which measures are reflected in the Proposed License Measures set forth in this Agreement, and which the Parties desire to be included in the Subsequent License for the Project;

WHEREAS, under the facts known to them as of the Effective Date and subject to the reservations of authority and statutory and regulatory requirements referenced in this Agreement, the Parties believe that the Proposed License Measures should be included in the Subsequent License for the Project without Material Modification;

WHEREAS, the Parties all believe that the Proposed License Measures are in the public interest and are supported by the administrative record, endorse this Agreement as a comprehensive settlement agreement on Issues Within the Scope of the Agreement for purposes of FERC's *Policy Statement on Establishing License Terms for Hydroelectric Projects*, 161 FERC ¶ 61,078 (2017), and have concluded that the obligations in this Agreement justify a statutory-maximum 50-year license term for the Project.

NOW, THEREFORE, in consideration of the mutual covenants set forth herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged each to the other giving, the Parties agree as follows.

AGREEMENT:

SECTION 1 GENERAL PROVISIONS

1.1 Acronyms and Definitions

- 1.1.1 Agreement** means the entirety of this Relicensing Settlement Agreement for the Lowell Tannery Project (FERC Project No. 4202), including all appendices.
- 1.1.2 AMP** means the Adaptive Management Process for Meeting Fish Passage Performance Standards set forth in Appendix D.
- 1.1.3 Anadromous Target Species** means American shad (*Alosa sapidissima*), alewife (*Alosa pseudoharengus*), Atlantic salmon (*Salmo salar*), blueback herring (*Alosa aestivalis*), and sea lamprey (*Petromyzon marinus*).
- 1.1.4 Breach** means the failure of a Party to perform or observe any material term or condition of this Agreement.
- 1.1.5 Breaching Party** means a Party that is in Breach of this Agreement.
- 1.1.6 CWA** means the Federal Water Pollution Control Act Amendments of 1972, known as the Clean Water Act, 33 U.S.C. § 1251 *et seq.*
- 1.1.7 Commission** means the Federal Energy Regulatory Commission.
- 1.1.8 Default** means the failure of a Breaching Party to cure its Breach in accordance with section 8.1 of this Agreement.
- 1.1.9 Effective Date** means the date on which KEI and the Resource Agencies have executed this Agreement.
- 1.1.10 ESA** means the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*
- 1.1.11 FERC** means the Federal Energy Regulatory Commission.
- 1.1.12 FPA** means the Federal Power Act, 16 U.S.C. § 791a *et seq.*

- 1.1.13 FWS** means the United States Fish and Wildlife Service.
- 1.1.14 Issues Within the Scope of the Agreement** means all issues identified in section 1.2 of this Agreement.
- 1.1.15 KEI** means KEI (Maine) Power Management (II) LLC.
- 1.1.16 Licensee** means KEI (Maine) Power Management (II) LLC.
- 1.1.17 License Provision** means any term, condition, prescription, measure, alternative, requirement, holding, reservation of authority, or article that is included in the Subsequent License pursuant to the FPA, ESA, CWA, or any other applicable program, and which relates to Issues Within the Scope of the Agreement.
- 1.1.18 LIHI** means the Low Impact Hydropower Institute.
- 1.1.19 Material Modification** means: (i) any modification to, addition to, expansion of, or deletion of the Proposed License Measures; or (ii) the imposition by FERC or any other regulatory authority of any License Provisions other than the Proposed License Measures into the Subsequent License relating to Issues Within the Scope of the Agreement.

Notwithstanding the preceding paragraph, the following actions will not constitute a **Material Modification**: (i) FERC's inclusion of standard articles from the L-Form (as defined by 18 C.F.R. § 2.9) in the Subsequent License; (ii) FERC's insertion of its approval or its reservation of authority to require changes to implementation schedules or plans set forth in any Proposed License Measure; (iii) FERC's requirement to file a license amendment or compliance filing to implement any Proposed License Measure; (iv) any decision by FERC to grant a stay or extension of time for any License Provision; (v) the inclusion in the Subsequent License of any ESA section 7 Biological Opinion criteria for re-initiation of section 7 consultation pursuant to 50 C.F.R. § 402.16; or (vi) FERC's inclusion in the Subsequent License of any Reasonable and Prudent Measures and Terms and Conditions consistent with 50 C.F.R. § 402.14(i)(2) and identified in an Incidental Take Statement of a Biological Opinion issued under section 7 of the ESA.

- 1.1.20 MDEP** means the Maine Department of Environmental Protection.
- 1.1.21 MDMR** means the Maine Department of Marine Resources.
- 1.1.22 Nation** means the Penobscot Nation.
- 1.1.23 New Information** means:
- (i) A change in relevant, applicable law after the Effective Date; or
 - (ii) Any relevant, material information, including but not limited to scientific, historical, or technical data or studies, that, as of the Effective Date: (a) is

not in any applicable administrative record or otherwise known by the relevant Party; and (b) under applicable law establishes the need for a different License Provision than those agreed to in this Agreement for addressing Issues Within the Scope of the Agreement.

1.1.24 NMFS means National Oceanic and Atmospheric Administration's National Marine Fisheries Service.

1.1.25 Notice means a written communication that meets the requirements of section 10.2.

1.1.26 Other Federal Authorities means federal statutory and regulatory responsibilities of the Resource Agencies applicable to the Project and Subsequent License terms concerning Issues Within the Scope of the Agreement. **Other Federal Authorities** includes, but is not limited to, the CWA, Fish and Wildlife Coordination Act, 16 U.S.C. § 661 *et seq.*, Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1801 *et seq.*, Coastal Zone Management Act, 16 U.S.C. § 1451 *et seq.*, and National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* **Other Federal Authorities** does not include the ESA or FPA.

1.1.27 Party or Parties means, in context, KEI, FWS, NMFS, MDMR, and/or the Nation individually, collectively, or a subset thereof.

1.1.28 Pre-Relicensing Breach means any action by a Party, taken prior to FERC's issuance of the Subsequent License for the Project, that Breaches or is otherwise inconsistent with any obligation of section 2.

1.1.29 Project means the Lowell Tannery Project (FERC Project No. 4202).

1.1.30 Proposed License Measures means the entirety of the License Provisions that the Parties have agreed should be included in the Subsequent License for the Project, as follows: (1) FPA section 18 prescriptions consistent with the terms set forth in Appendix A; (2) the proposed FERC Ordering Paragraphs set forth in Appendix B; (3) the proposed license article set forth in Appendix C and (4) the Adaptive Management Process for Meeting Fish Passage Performance Standards set forth in Appendix D ("AMP").

1.1.31 REA Notice means FERC's issuance of public notice that KEI's Application for Subsequent License is ready for environmental analysis, pursuant to 18 C.F.R. section 4.34(b).

1.1.32 Resource Agencies means, in context, FWS, NMFS, and/or MDMR individually, collectively or a subset thereof.

1.1.33 Secretary means, in context, the U.S. Secretary of the Interior and/or the U.S. Secretary of Commerce.

1.1.34 Service or Services means, in context, FWS and/or NMFS.

1.1.35 Subsequent License means the discretionary, multi-year FPA authorization to be issued by FERC for the continued operation of the Project, following expiration of the existing license issued in *Pumpkin Hill Power Co.*, 25 FERC ¶ 62,134 (1983).

1.1.36 Target Species means the Anadromous Target Species and American eel (*Anguilla rostrata*).

1.2 Scope of the Agreement

This Agreement resolves among the Parties all issues that have been or could have been raised by them with respect to all regulatory requirements for the Project's Subsequent License regarding: (1) measures to ensure the safe, timely, and effective passage of Target Species upstream and downstream of the Project; and (2) the protection, mitigation of damage to, and enhancement of the Target Species. This Agreement also resolves among the Parties all issues that have been or could have been raised by them for the Project regarding minimum flow and other releases from the Project under the Subsequent License.

The resolution of all issues in this Agreement is based on information available to the Parties as of the Effective Date. Accordingly, subject to the reservations in section 1.3 and the procedural requirements of section 2.2.1, FERC should adopt and include, without Material Modification, the Proposed License Measures as the full, complete, and exhaustive set of License Provisions for Issues Within the Scope of the Agreement for the Subsequent License.

1.3 Powers Reserved

1.3.1 Fishway Prescription Under FPA Section 18

The Parties have determined that fish passage measures should be required at the Project as set forth in this Agreement. In addition, the Secretary for each of the Services will reserve authority under FPA section 18 to prescribe the construction, operation, and maintenance of such fishways as deemed necessary during the Subsequent License term for the Project, supported by New Information. The Secretaries shall exercise this reserved authority in accordance with sections 2.2.3 and 2.2.4.

KEI reserves the right to challenge any prescription made under any reservation of authority.

Sections 2.2.3, 2.2.4, 2.4.4, and 7 will apply to a Secretary's exercise of its reservation of FPA section 18 authority and KEI's challenge thereof.

1.3.2 Consultation Under ESA Section 7

Nothing in this Agreement is intended or shall be construed as prejudging or predetermining the outcome of any required ESA consultation for the Project. The Services reserve the right, consistent with federal law, to fully satisfy the requirements of ESA section 7 and to make determinations and take actions as necessary to meet their obligations under the ESA and applicable implementing regulations.

Unless otherwise agreed to by the Parties, the dispute resolution protocols in section 7 of this Agreement will not apply to the Services' exercise of obligations under ESA section 7. KEI reserves the right to challenge the results of any ESA section 7 consultation conducted for the Project that may result in any Material Modification of the Proposed License Measures. The Services reserve any and all defenses they may have to such a challenge.

1.3.3 Amendment and Reopener of Subsequent License

1.3.3.1 Amendment Requests Involving No Material Modification

During the Subsequent License term for the Project, KEI reserves the right to seek an amendment of the Project's Subsequent License that would not involve a Material Modification of any Proposed License Measure incorporated into the Project's Subsequent License. As FERC's regulations require, KEI will provide the other Parties an opportunity to comment on any such proposed amendment, and KEI will not object to a Party's intervention in the FERC amendment proceeding that is allowable under FERC regulation and policy; *provided, however*, that the Parties' participation in any amendment process and FERC proceeding that does not involve a Material Modification of any Proposed License Measure incorporated into the Subsequent License for the Project will be consistent with sections 1.4.1 and 2.

If any Party believes that KEI's proposed Subsequent License amendment under this section 1.3.3.1 constitutes a Material Modification of any Proposed License Measure incorporated into the Subsequent License, the Party may invoke the dispute resolution procedures in section 7 by providing Notice to the Parties, which Notice must be provided during the established time period to review a draft application or other initial consultation document describing the proposed amendment. Upon receipt of such Notice, KEI will suspend the amendment process until the conclusion of the dispute resolution process.

1.3.3.2 Amendment and Reopener Requests Involving a Material Modification

During the Subsequent License term for the Project, the Parties reserve the right to seek an amendment of the Subsequent License or file a petition for FERC to reopen the license, as appropriate, which amendment or reopener would involve a Material Modification of any Proposed License Measure as incorporated into a Project's Subsequent License. Any such amendment or reopener petition must be based on New Information and meet the requirements of sections 2.2.3 and 2.2.4. Subject to the reservations in section 1.3, the acknowledgments, representations, and commitments in section 1.4 will apply to any such amendment or reopener sought under this section.

Each Party reserves the right to challenge any amendment or reopener petition sought under this section.

The protocols of sections 2.4.4 and section 7 will apply to any proposed amendment or reopener sought under this section. Nothing in this Agreement is intended or will be construed as foreclosing, allowing, or limiting the right of any Party to intervene in, and object to, any amendment or reopener sought under this section.

1.3.3.3 Amendment, Reopener, and Enforcement Requests under the AMP

During the Subsequent License term for the Project, the Parties reserve the right to seek an amendment of the Subsequent License, file a petition for FERC to reopen the license, or request MDEP to amend or enforce the Project's CWA section 401 water quality certification, as appropriate, as provided under sections II.A.7.a.v and II.D.2 of the AMP. Any such amendment, reopener, or enforcement petition must be based on New Information. Subject to the reservations in section 1.3, the acknowledgments, representations, and commitments in sections 1.4, 2.2.3, and 2.2.4 will apply to any such amendment, reopener, or enforcement sought under this section.

Each Party reserves the right to challenge any amendment or reopener petition or enforcement request sought under this section.

The protocols of sections 2.4.4 and 7 will apply to any proposed amendment, reopener, or enforcement request sought under this section. Nothing in this Agreement is intended or will be construed as foreclosing, allowing, or limiting the right of any Party to intervene in, and object to, any amendment, reopener, or enforcement request sought under this section. Nothing in this section 1.3.3.3 is intended or shall be construed as an admission or acknowledgement of any right or authority for MDEP to amend or enforce the Project's CWA section 401 water quality certification.

1.3.3.4 Limitation

Nothing in this Agreement, including this section 1.3.3, is intended or will be construed as creating a separate or independent right for a Party to seek an amendment or reopener of the Subsequent License. Any amendment application, reopener petition, or enforcement request must be authorized under federal or state law.

1.3.4 Compliance with FERC Project Safety and Other Directives

KEI reserves the right to fully and timely comply with any FERC directive or compliance order for the Project, including but not limited to any requirement related to the safety or security of the Project. In no instance will any action by KEI that is reasonably necessary or appropriate to comply with any such order or directive from FERC trigger the dispute resolution protocols in section 7 or be construed as a Material Modification or a Breach of this Agreement.

1.3.5 Extensions of Time; Inability to Perform Obligations Under a Subsequent License

All Parties reserve the right to request extensions of time for good cause from FERC, consistent with 18 C.F.R. § 385.2008, to fulfill any Proposed License Measure incorporated into the Subsequent License, or to fulfill any consultation, review, comment, or intervention deadline pertaining to the Project during the Subsequent License term; *provided, however*, that any request to extend the in-service deadline for any fish passage facility established in any Proposed License Measure must adhere to the requirements of section 6.3.

KEI reserves the right to file with FERC any appropriate request for relief arising from any emergency circumstance or other event beyond its reasonable control.

For any request filed with FERC in accordance with this section 1.3.5, FERC's process and standard for ruling will apply.

All Parties reserve the right to oppose any relief request by another Party under this section 1.3.5; *provided further*, that dispute resolution protocols of section 7 will apply to any such request filed by a Party under this section 1.3.5.

1.3.6 Other Federal Authorities

All Parties recognize that during the FERC relicensing of the Project and the pendency of the Subsequent License term for the Project, the Resource Agencies may have statutory and regulatory responsibilities under Other Federal Authorities.

Nothing in this Agreement is intended or shall be construed as prejudging or predetermining the outcome of any substantive or procedural obligation under any Other Federal Authority. The Resource Agencies reserve the right, consistent with applicable federal and state law, to fully satisfy the requirements of Other Federal Authorities.

Unless otherwise agreed to by the Parties, the dispute resolution protocols in section 7 will not apply to Other Federal Authorities. KEI reserves the right to challenge the results of any Other Federal Authority conducted for any of the Projects that may result in any Material Modification of the Proposed License Measures. The Resource Agencies reserve any and all defenses they may have to such a challenge.

1.3.7 Issues Not Within the Scope of this Agreement

Nothing in this Agreement is intended or shall be construed as prohibiting KEI from entering into separate agreements or otherwise resolving with any Party or non-Party any matters that do not concern Issues Within the Scope of this Agreement. If any Party believes that such a separate agreement would impact a Party's commitments, representations, acknowledgments, or obligations under this Agreement, the provisions of section 7 will apply.

1.4 Satisfaction of Statutory and Regulatory Responsibilities

1.4.1 Responsibilities Under the FPA

Based on information available as of the Effective Date and subject to the reservations in section 1.3.1 and the limitations in section 1.4.4, the Resource Agencies represent:

- (i) that the Proposed License Measures are consistent with, and fully satisfy, any and all of their responsibilities under the FPA administered by the Resource Agencies concerning Issues Within the Scope of the Agreement; and
- (ii) that they do not expect that any License Provision, other than the Proposed License Measures, will be necessary throughout the Subsequent License term for each Project to satisfy any and all of the Resource Agencies' responsibilities under the FPA concerning Issues within the Scope of the Agreement.

Any decision by a Resource Agency that is inconsistent with its representation in the foregoing paragraph must be supported by New Information.

1.4.2 Responsibilities Under the ESA

NMFS acknowledges that based on applicable material information available as of the Effective Date, the measures contained in this Agreement will minimize effects to Atlantic salmon, and does not expect any ESA section 7 consultation concerning Issues Within the Scope of the Agreement to result in any conditions or measures that would constitute a Material Modification of any Proposed License Measure.

The Services acknowledge that in preparing any biological opinion for the Project, the Services will consider FERC's proposed action, including any Proposed License Measures, consistent with ESA section 7 and implementing regulations.

1.4.3 Responsibilities under Other Federal Authorities

Subject to the reservations in section 1.3.6, each Resource Agency acknowledges that based on applicable material information available as of the Effective Date, it does not expect the exercise of its responsibilities under any Other Federal Authority concerning Issues Within the Scope of the Agreement to result in any conditions or measures that would constitute a Material Modification of any Proposed License Measure. In carrying out its responsibilities under any Other Federal Authority, each Resource Agency will give appropriate consideration to the Proposed License Measures.

1.4.4 Limitations

- 1.4.4.1** The acknowledgments, representations, and commitments in sections 1.4.1 through 1.4.3 and the commitments of each Resource Agency throughout this Agreement apply only to each Resource Agency's individual

authorities and responsibilities under federal and/or state law. Nothing in this Agreement is intended or will be construed as establishing that a Resource Agency has agreed to or taken any position on any matter that is beyond its individual authorities or responsibilities.

1.4.4.2 Nothing in this Agreement is intended or will be construed as a predetermination or binding commitment regarding the outcome of any administrative process by a Resource Agency.

1.4.4.3 Nothing in this Agreement will be construed as obligating any federal, state, or local government to expend in any fiscal year any sum in excess of appropriations made by Congress, state legislatures, or local legislatures, or administratively allocated for the purpose of this Agreement for any fiscal year; or involving the Resource Agencies in any contract or obligation for the future expenditure of money in excess of such appropriations or allocations.

1.5 No Precedent for Other Proceedings

This Agreement is made with the express understanding that it constitutes a negotiated resolution of issues specific to the Project. No Party will be deemed, by virtue of execution of this Agreement, to have established precedent or admitted or consented to any fact, process, methodology, legal position, or principle, except as expressly provided herein.

If the Proposed License Measures set forth in this Agreement are approved by FERC, such approval will not be deemed precedential or controlling regarding any particular issue or contention in any other proceeding. Further, by entering into this Agreement, KEI will not be deemed to have admitted to any liability for any action arising from the construction, operation, and maintenance of the Project, and this Agreement will not be evidence of, or otherwise construed as, liability for any action arising from the construction, operation, and maintenance of the Project.

This section 1.5 will survive any termination of this Agreement. Any Party withdrawing from this Agreement will continue to be bound by the provisions identified in section 10.15 following withdrawal.

1.6 Term of Agreement

The term of this Agreement will begin on the Effective Date. Unless terminated as provided in section 4.2, this Agreement will remain in effect through the end of the Project's Subsequent License term, as well as through any subsequent authorization issued by FERC under section 9 of the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*

1.7 Effective Date of Parties' Rights and Obligations

For KEI and the Resource Agencies, their rights and obligations under this Agreement commence as of the Effective Date. For the Nation, its rights and obligations under this Agreement commence upon the later of: (1) the Effective Date; or (2) the date upon which it executes this Agreement.

1.8 Evidentiary Support for Proposed License Measures

The Parties have determined that the evidence available and known to them as of the Effective Date supports the Proposed License Measures.

SECTION 2 COMMITMENTS RELATED TO REGULATORY MATTERS

2.1 Commitments of KEI

2.1.1 Offer of Settlement Filed with FERC

Within 30 days of the Effective Date, KEI will file an Offer of Settlement pursuant to Rule 602 of FERC's Rules of Practice and Procedure in the Project's relicensing proceeding. The Offer of Settlement will include an executed copy of this Agreement, including appendices, an explanatory statement, and any other exhibits and information required by FERC's regulations. The Offer of Settlement will request that FERC: (i) issue a Subsequent License that adopts and incorporates, without Material Modification, each and all of the Proposed License Measures; (ii) issue a Subsequent License for a term of 50 years; and (iii) identify all applicable Proposed License Measures, if any, that are unenforceable by FERC.

2.1.2 Filings with MDEP

Within 60 days after FERC's issuance of the REA Notice, KEI will file a request for CWA section 401 water quality certification with MDEP, which request will include this Agreement, including all appendices, together with a request that MDEP issue a water quality certification consistent with the terms of this Agreement.

2.1.3 Implementation of Fish Passage Measures under Existing License

Prior to FERC's issuance of the Subsequent License, KEI will implement the measures of this section 2.1.3 to improve fish passage at the Project, seeking approval by FERC, as may be necessary.

2.1.3.1 Prior to 2025 Passage Season

Prior to the 2025 fish passage season, KEI will install a means of access to the upstream fishway entrance for observations, maintenance, and operation of the upstream fishway.

2.1.3.2 Annual Requirements

For each fish passage season beginning after the Effective Date of this Agreement until FERC approves the Fishway Operation and Maintenance Plan, KEI will:

- (i) Implement the pre-season de-watered inspection plan;

- (ii) Repair and maintain all fishway components identified during the pre-season de-watered inspection;
- (iii) Record daily headpond and tailwater water surface elevations, fishway entrance depth, and depth of flow over stop-logs at fishway entrance and provide data to the Resource Agencies or the Nation upon request;
- (iv) Maintain a baffle to ensure an entrance jet of 4-6 ft/s during the river herring upstream passage season (May 1 to June 15), and 6-8 ft/s during the Atlantic salmon upstream passage season (June 16 to November 15) to facilitate passage of different species during their presumed peak migration timeframes. The baffle will be designed to meet velocities for the associated fish passage operating range for each species (e.g., 5 to 95% exceedance flows), when possible;
- (v) Operate the fishway at 10 cfs from May 1 to June 15 to facilitate upstream river herring passage and increase flow up to 30 cfs from June 16 to November 15 for the Atlantic salmon upstream passage season. KEI will consult with the Resource Agencies and Nation before the settings are changed (e.g., lowered headpond, removal of baffles). Any changes that may affect Atlantic salmon must be consistent with the biological opinion issued in connection with the license for this project;
- (vi) Operate the auxiliary flow system during the entirety of the river herring and Atlantic salmon seasons unless it is determined by the Resource Agencies that the auxiliary flow system is negatively affecting performance;
- (vii) Update the tailwater rating curve as well as data (specifically headpond and tailwater elevations) for a minimum of 10 years, if available, and incorporating data collected as discussed above;
- (viii) Provide a weekly intra-season report on fish passage operations to the Resource Agencies and the Nation; and
- (ix) Provide an annual Fishway Operation and Maintenance Report (“FOMR”) to the Parties by February 28 for the previous year’s fish passage season. The report may be in letter format and will include a summary of the state of the fishways (structures, flows, etc.), and a review of the previous year’s fishway operation and maintenance activities (e.g., deviations, issues, timing of installation, inspection results, etc.). The report shall document fish passage operations and provide an assessment of any necessary or recommended changes to fish passage facilities and their operations. These may include, but are not limited to, any changes to the provision in seasonal operation schedule for the fishways and any proposed modifications to the existing fish passage facilities.

2.1.4 Federal Funding Opportunities

If eligible, KEI shall apply for federal funding assistance for the new upstream fishway and improvements to downstream fish passage required by the Proposed License Measures adopted in the Subsequent License under the Maintaining and Enhancing Hydroelectricity Incentives Program created by section 247 of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005) (as amended by the Bipartisan Infrastructure Law, Pub. L. No. 117-58, 135 Stat. 429 (2021)), or other federal funding program identified by the Services.

2.2 Commitments of Resource Agencies

2.2.1 Fishway Prescriptions Under FPA Section 18

Within a reasonable time following FERC's issuance of the REA Notice, the Services will file preliminary fishway prescriptions for the Subsequent License with FERC under FPA section 18. The Services' preliminary fishway prescriptions will conform in substance to Appendix A and will not result in any Material Modification to any Proposed License Measure.

Within the time allotted under regulations of FERC and the Services, the Services will file modified fishway prescriptions under FPA section 18. The Services' acknowledgments, representations, and commitments in sections 1.4.1, 2.2.3, and 2.2.4 will apply to the modified fishway prescriptions.

2.2.2 ESA Section 7

As provided under ESA section 7 and the Services' implementing regulations, the appropriate Service will consult with FERC, in response to a request for consultation from FERC, on FERC's proposed issuance of the Subsequent License. Subject to the reservations in section 1.3, the acknowledgments, representations, and commitments in section 1.4.2 will apply to such ESA section 7 consultation.

2.2.3 Reasonable and Cost-Sensitive Solutions

Subject to the reservations in section 1.3, the Resource Agencies, in discharging their roles and responsibilities under the Proposed License Measures, including but not limited to review and approval of designs and operations of fishways, the AMP, and the consultation and approval requirements under section 2.4.5, will seek reasonable solutions that meet their statutory and regulatory responsibilities in a cost-effective manner, informed by costs as noted in the AMP and the Project's sensitivity to them. Among other things:

- (i) During the fishway design plan and review process, the Parties will work together in good faith in an effort to combine, in whole or in part, flow releases that would meet both downstream bypass and upstream attraction needs. In the event the Parties successfully develop a mutually agreeable fishway design plan that

combines, in whole or in part, upstream attraction and downstream bypass needs, KEI can provide a written justification for updated flow release requirements for review and comment by the Nation and for review and concurrence by the Resource Agencies. If the Resource Agencies give their concurrence, the flow release requirements specified in Appendix A will be correspondingly reduced, as appropriate.

- (ii) If after demonstrating that the new fishway with recommended flows can provide safe, timely, and effective upstream and/or downstream passage, KEI can demonstrate that the same or better results can be achieved with flows of less than the amounts specified in Appendix A, the Resource Agencies and the Nation will consent to lowering the release requirements to those demonstrated by KEI.
- (iii) When selecting an adaptive management measure under Table I of the AMP, the Resource Agencies, except with the possibility of developing a new intake structure, intend to select a measure that is an incremental and cost-effective adjustment or addition to existing Project operations or infrastructure. While the Resource Agencies shall develop the specifications of a selected adaptive management measure on a case-by-case basis, in no instance shall a selected measure under Table I of the AMP involve the construction, operation, or maintenance of any new upstream or downstream fish passage facility at the Project.
- (iv) For any Action Plan developed under section II.A.7(a) of the AMP, the Resource Agencies will seek to select measures that are reasonable and cost-effective adjustments or additions to existing Project operations or infrastructure.
- (v) A Resource Agency's exercise of consultation and approval rights and responsibilities under section 2.4.5 will also be subject to this consideration.

2.2.4 Commitment to Fish Passage Facilities Contemplated under AMP

Absent New Information and subject to the reservations in section 1.3, the Resource Agencies and the Nation do not anticipate seeking any upstream or downstream fish passage facility other than those contemplated in Appendix A and the AMP.

2.2.5 Use of PIT Tag Logger Data Collections System

KEI's obligation under the fishways prescribed under the Proposed License Measures to monitor PIT tagged fish at the new PIT tag logger data collections system is not intended and shall not be construed as an obligation for KEI to apply any PIT tags on fish. Except as may be mutually agreed by the Parties relative to effectiveness testing of the fishways prescribed, the Resource Agencies shall not require or request any other entity to require KEI to apply PIT tags to any fish.

2.3 Commitments of the Resource Agencies and Nation

2.3.1 FPA Sections 10(a) and 10(j) Recommended Terms and Conditions

The Nation may submit license recommendations to FERC under FPA section 10(a) that are consistent with the Proposed License Provisions and do not result in any Material Modification to Issues within the Scope of the Agreement.

Section 1.4.1 will apply to any recommendations filed with FERC by the Resource Agencies under FPA section 10(a) or 10(j) for the Project's Subsequent License for Issues within the Scope of the Agreement.

2.3.2 Support for Subsequent License Application

The Resource Agencies and Nation will each submit a timely statement in support of KEI's Application for Subsequent License from FERC. All such statements in support will request FERC to approve that application by issuing a Subsequent License that: (i) adopts and incorporates, without any Material Modification, the Proposed License Measures; and (ii) will have a term of 50 years, consistent with section 2.4.3.

2.4 Commitments of All Parties

2.4.1 Filings and Submittals Consistent with the Agreement

Subject to the reservations in section 1.3, each Party will ensure that, throughout the term of the Subsequent License, any and all of its filings or other submittals with FERC, MDEP, or any other administrative entity or court are consistent with this Agreement and will not result in a Material Modification of any Proposed License Measure, and no Party will support, propose, advocate, impose, or adopt any License Provision that is in any way contrary to, or inconsistent with, this Agreement, or encourage any other entity to do so.

2.4.2 Support Adoption of Proposed License Measures

Subject to the reservations in section 1.3, each Party will support, in all relevant regulatory proceedings in which the Party is participating, the incorporation of the Proposed License Measures into the Subsequent License issued by FERC without Material Modification and incorporation of consistent terms into other applicable permits and authorizations, as appropriate.

2.4.3 Support FERC's Adoption of Proposed Subsequent License Term

The Parties recognize that KEI's implementation of this Agreement will involve significant investment in the Project. To allow KEI sufficient time to recoup the cost of these significant investments, the Parties will support FERC's adoption of a 50-year Subsequent License term for the Project.

The Parties acknowledge that the foregoing agreed-upon Subsequent License term is an integral part of this Settlement; that this Agreement is a generally supported comprehensive

settlement agreement; and that FERC should defer to these agreed-upon terms. *See Policy Statement on Establishing Terms for Hydroelectric Projects*, 161 FERC ¶ 61,078, at P 15 (2017).

2.4.4 Consultation Following New Information

Should New Information arise during the term of this Agreement that may impact a Party's commitments, representations, acknowledgments, or obligations under this Agreement, the Parties will, upon Notice issued by any Party, consult in accordance with the dispute resolution requirements in section 7 for purposes of determining whether New Information warrants a change to this Agreement or the Subsequent License. After initiating the dispute resolution requirements in section 7 the Parties may exercise any reservations in section 1.3 to seek an amendment or reopener of the Subsequent License, as appropriate.

2.4.5 Consultation and Concurrence for Implementing Prescription Requirements

2.4.5.1 Fishway Construction, Operation, or Maintenance Plans

If any Resource Agency has objections or recommendations in response to KEI's proposed fishway design, construction, operation, or maintenance plans, for which a Resource Agency's concurrence is required in accordance with this Agreement or the FPA section 18 fishway prescriptions filed by the Services and included in the Subsequent License, the Resource Agency will:

- (i) Base its concurrence, recommendations, and/or objections on generally accepted scientific and engineering principles and the best available scientific and technical information;
- (ii) Adhere to the obligations of sections 2.2.3 and 2.2.4; and
- (iii) Provide its concurrence, recommendations, and/or objections to KEI, together with the Resource Agency's underlying rationale for its determination (including an explanation of how it met its obligations under sections 2.2.3 and 2.2.4) and all scientific and technical evidence relied upon by the Resource Agency in making its determination.

2.4.5.2 Resource Agency Approvals

2.4.5.2.1 KEI Responsibilities

Except as required consistent with the Reasonable and Prudent Measures and implementing Terms and Conditions arising from an ESA section 7 consultation, KEI will request contemporaneous review and approval or concurrence, as appropriate, from all Resource Agencies of the following obligations set forth in the Services' FPA section 18 fishway prescriptions, this Agreement, and/or the AMP:

- (i) Approval of the construction of the PIT tag monitoring system (as

described in Appendix A Part III);

- (ii) Concurrence with the 30% and 60% design plans for the upstream and downstream fishways. (as described in Appendix A Part I);
- (iii) Approval of the Fishway Operation and Maintenance Plan (as described Appendix A part I);
- (iv) Approval of the study plans to determine the effectiveness of the fish passage facilities or any modifications made pursuant to the AMP to meet performance standards or counts except with respect to studies related to Atlantic salmon for which NMFS has sole discretion;
- (v) Approval of the ten-year post-AMP monitoring plan (as described in Appendix A Part V) except with respect to monitoring related to Atlantic salmon for which NMFS has sole discretion; and
- (vi) Approval of any post-AMP action or mitigation (as described in Appendix D).

2.4.5.2.2 Resource Agencies' Rights and Responsibilities

Upon receipt of a request from KEI under section 2.4.5.2.1 to review and approve or concur, as appropriate, the Resource Agencies will:

- (i) Confer on KEI's submitted review and approval request;
- (ii) Seek to consult with the Nation on KEI's submitted review and approval request; and
- (iii) Render a determination, as appropriate, in a timely manner and in accordance with section 2.4.5.1.

2.4.5.2.3 Other Rights and Responsibilities

- (i) In the event that the Resource Agencies' review and concurrence or approval process, as appropriate, under section 2.4.5.2.2 creates an immediate threat of noncompliance under KEI's Subsequent License, the Parties will support KEI's request for a stay or extension of time to avoid the noncompliance situation, consistent with sections 1.3.5 and 4.3.3, as applicable.
- (ii) The Parties will resolve any disputes arising under this section 2.4.5 in accordance with section 7 of this agreement except with respect to disputes related to Atlantic salmon for which NMFS has sole discretion.

2.4.6 No Trial-Type Hearing Request or Submission of Alternatives to Fishway Prescriptions

In the event the Services' preliminary fishway prescriptions for the Subsequent License filed with FERC conform in substance to Appendix A, no Party shall, with respect to the preliminary fishway prescriptions:

- (i) seek a trial-type hearing under FPA section 18 or support any non-Party's request for such a trial-type hearing; or
- (ii) submit any alternative to the submitted preliminary fishway prescription under FPA section 33(b) or support any non-Party's alternative fishway submittal.

2.5 Pre-Relicensing Breach

In the event of a Pre-Relicensing Breach, any Party may provide Notice to all Parties of another Party's Pre-Relicensing Breach, which Notice will explain with specificity the action(s) taken by the Breaching Party that constitute the Pre-Relicensing Breach. Unless the Breaching Party cures the Pre-Relicensing Breach within 15 days of the Notice, or provides a response Notice reasonably demonstrating that a Pre-Relicensing Breach did not occur, any non-Breaching Party may withdraw from this Agreement by providing a Notice of its withdrawal to all Parties within 30 days of its initial Notice. Section 4.3 will apply upon any such Notice of withdrawal.

If any Party reasonably does not agree with any Notice under this section 2.5 that it has committed a Pre-Relicensing Breach, it will provide a response Notice to all Parties explaining with specificity why its actions did not constitute a Pre-Relicensing Breach. Any such response Notice must be provided within 15 days of the initial Notice of the Pre-Relicensing Breach. Upon the timely provision of any such response Notice under this paragraph, no Party may withdraw from this Agreement due to the alleged Pre-Relicensing Breach; instead, the Parties will resolve the matter as provided in section 7.

SECTION 3 SUBSEQUENT LICENSE WITHOUT MATERIAL MODIFICATION

3.1 General

Subject to the reservations in section 1.3, the Parties have entered into this Agreement with the express expectation that FERC's issuance of a Subsequent License for the Project adopts and incorporates, without Material Modification, the Proposed License Measures.

3.2 No Rehearing with FERC

Subject to the reservations in section 1.3, if FERC issues a Subsequent License for the Project that adopts and incorporates, without Material Modification, the Proposed License Measures for the Project, the Parties will not, for Issues Within the Scope of the Agreement: (i) seek rehearing of FERC's order; or (ii) support any rehearing request filed by any non-Party to this Agreement.

SECTION 4

SUBSEQUENT LICENSE WITH A MATERIAL MODIFICATION

4.1 General

If FERC issues an order for the Project that adopts and incorporates any Material Modification of the Proposed License Measures for the Project, then this Agreement and the applicable Proposed License Measures will be deemed amended to conform to the FERC order, unless a Party whose interests are materially aggrieved by such action fully invokes the withdrawal and termination provisions in this section 4.

Notwithstanding the preceding sentence, the Parties acknowledge that participation in administrative and judicial proceedings by MDMR is dependent upon approval by the Maine Attorney General's Office. Any decision by the Maine Attorney General's Office not to participate in an administrative or judicial proceeding shall excuse MDMR from invoking the pertinent withdrawal and termination provision in this section 4.

4.2 Withdrawal and Termination

4.2.1 Notice of Objectionable License Provisions

Within 20 days of FERC's order containing the objectionable License Provision(s), any Party whose interests are materially aggrieved by such License Provision(s) will provide Notice to all other Parties of its intent to withdraw from this Agreement if the objectionable License Provisions are not corrected on rehearing or judicial review (if sought) to conform to this Agreement, or the affected interests of the Noticing Party are not otherwise satisfied.

4.2.2 Administrative Appeals

In addition to providing Notice under section 4.2.1, the aggrieved Party or Parties may file a request for rehearing and/or pursue all appropriate administrative appeals, requesting the agency responsible for the objectionable License Provision(s) to amend such License Provision(s) to conform to this Agreement. Any rehearing request or other appropriate appeal filed by an aggrieved Party will request FERC or other agency to hold the proceeding in abeyance to allow the Parties sufficient time to complete negotiations under section 4.2.3.

4.2.3 Negotiations

Following the Notice provided in section 4.2.1, the Parties will engage in negotiations to agree to either: jointly defend this Agreement in pending proceedings before FERC, other regulatory authority, or court; amend this Agreement by making it conform to the objectionable License Provision(s); or otherwise resolve the matter, if possible. Such negotiations will extend for no longer than 120 days, with a minimum of three meetings to be held during the initial 90-day period, unless the Parties unanimously agree in writing to a different meeting and process schedule.

If, during the pendency of the negotiations, an order is issued that alleviates the aggrieved Party's concerns, the Parties will discontinue the negotiation process. If, however, an order is issued during the pendency of the negotiations that denies the aggrieved Party's or Parties' administrative appeal or does not resolve the objectionable License Provision(s), the Parties will continue the negotiations under this section 4.2.3, but the aggrieved Party or Parties may seek additional administrative review and/or pursue judicial review, as appropriate, pursuant to section 4.2.4. Any Party may ask the appropriate administrative body or court to defer action on the merits of any appeal or other review while these negotiations are being pursued.

If the negotiations result in an agreement among all Parties to amend this Agreement to conform it to the objectionable License Provision(s) or to otherwise resolve the objectionable License Provision(s), the Parties will notify FERC, other administrative body, or court of the resolution. Upon approval of the resolved objectionable License Provision(s) by FERC, other administrative body, or court of the resolution, the Parties will withdraw or voluntarily dismiss any applicable administrative appeal(s) filed pursuant to section 4.2.2 or petition for review filed pursuant to section 4.2.4, as appropriate, and this Agreement will be deemed modified to conform to said order.

4.2.4 Judicial Review

If, as a result of the administrative appeal(s) filed pursuant to section 4.2.2, a final order is issued denying the merits of the appeal by not reversing the objectionable License Provision(s), the aggrieved Party or Parties may file an appeal or petition for review by an appropriate reviewing court. Other Parties may intervene in the proceeding, but subject to the reservations in section 1.3, such Parties will not take a position adverse to the terms of this Agreement.

4.2.5 Withdrawal

A Party whose interests are materially aggrieved by any License Provision may withdraw from this Agreement, but only after the Parties comply with sections 4.2.1 through 4.3, including exhaustion of all reasonably available avenues for administrative review of the order(s) imposing the objectionable License Provision(s) before FERC or other federal or state agency. Following the final administrative order or ruling that fails to remedy the objectionable License Provision(s), the aggrieved Party may provide Notice to the other Parties of its withdrawal from this Agreement within 30 days of the final administrative order or ruling. Upon such Notice, section 4.3 will apply.

Notwithstanding the foregoing paragraph, if any Party exercises its discretionary right to pursue judicial review, as provided in section 4.2.4, no Party will be authorized to withdraw from this Agreement: (i) until the conclusion of all judicial proceedings and any associated proceedings on remand from the court; and (ii) unless the final and non-appealed order or ruling fails to remedy the objectionable License Provision(s). Following the final and non-appealed order or ruling under this paragraph that fails to remedy the objectionable License Provision(s), the aggrieved Party may provide Notice to the other Parties of its withdrawal from this Agreement within 30 days of the final and non-appealed order or ruling.

If the aggrieved Party fails to comply with sections 4.2.1 through 4.2.3, including the exhaustion of all reasonably available avenues for administrative review of the order(s) imposing the objectionable License Provision(s), then the Party may not withdraw from this Agreement, and, upon expiration of the time period to continue the review process, this Agreement will be deemed amended with the final and non-appealed order issued by an administrative agency or court.

4.3 Effect of Withdrawal; Termination

4.3.1 Withdrawal by KEI

Withdrawal from this Agreement by KEI will terminate this Agreement and render it null and void. Upon termination, the Parties, except as provided in section 10.15, will not have any rights or obligations under this Agreement, nor will any Party receive any benefits under this Agreement. If this Agreement is terminated, this Agreement, together with any regulatory filing to implement this Agreement, will not be used by any Party as evidence that the Proposed License Measures are reasonable, appropriate, supported by substantial evidence, or endorsed by any Party, and no Party will use this Agreement as evidentiary support in any filing before FERC or any other regulatory agency or court.

This section 4.3.1 will survive any termination of this Agreement. If KEI withdraws from this Agreement, all Parties will continue to be bound by the provisions identified in section 10.15 following withdrawal.

4.3.2 Withdrawal by a Party Other than KEI

Withdrawal by any Party other than KEI will not automatically render this Agreement null and void. Within 30 days after the withdrawal of a Party other than KEI, the remaining Parties will meet and confer to determine whether the responsibilities of the withdrawn Party should be undertaken by any other Party or Parties. Section 7 will apply to such discussions. If the remaining Parties cannot agree on how to account for the responsibilities of the withdrawing Party after discussions, any Party may withdraw from the Agreement.

The withdrawing Party will have no rights and receive no benefits under this Agreement. This section 4.3.2 will survive any termination of this Agreement. Any Party withdrawing from this Agreement will continue to be bound by the provisions identified in section 10.15 following withdrawal.

4.3.3 Stay of Subsequent License Obligations

With respect to any License Provision for the Project that is subject to a rehearing request, the Parties will not object to KEI's request to stay any License Provision materially affected by such rehearing request.

Notwithstanding the foregoing paragraph, a Party may object to a request by KEI to stay a License Provision if the Party believes that the License Provision for which a stay is sought is not materially affected by a rehearing request. Any disputes among the Parties regarding

the stay of any License Provision by FERC will not be subject to the dispute resolution protocols of section 7.

SECTION 5 ENFORCEMENT OF THIS AGREEMENT

5.1 Enforcement of Proposed License Measures

The Proposed License Measures do not create any regulatory, contractual, or equitable rights or obligations of any Party and have no force or effect. Rather, the Proposed License Measures will create obligations only as, and to the extent, they are individually adopted and incorporated as License Provisions in the final and non-appealable Subsequent License for the Project. All License Provisions will be enforced as provided by the FPA and FERC's Rules of Practice and Procedure, except to the extent that any License Provisions that are also conditions of a water quality certification issued by MDEP are held to be enforceable by MDEP. Prior to initiating any enforcement action before FERC or MDEP on any Issues Within the Scope of the Agreement, the Parties will attempt to resolve any disputes related to the Subsequent License as provided in section 7

5.2 Enforcement of Contractual Measures

All provisions of this Agreement other than the Proposed License Measures are enforceable as a matter of contract among the Parties. Prior to initiating any action in law or equity regarding any contractual obligations in this Agreement, the Parties will attempt to resolve any disputes as provided in section 7. Nothing in this Agreement is intended or will be construed as: (i) a waiver of federal or state sovereign immunity; (ii) a waiver of the Nation's sovereign immunity; or (iii) consent to suit by the United States, the State of Maine, or the Nation, where such waivers are not otherwise available in law.

SECTION 6 NON-LICENSE CONTRACTUAL COMMITMENTS

6.1 Resource Agency and Nation Support for LIHI Certification

Upon request by KEI, but no earlier than the issuance of a Subsequent License incorporating the terms of this Agreement without Material Modification, each Resource Agency and the Nation will prepare and file with LIHI a letter of support for LIHI certification for the Project. Each Resource Agency and the Nation reserves the right to withhold its support or withdraw its support previously given to LIHI for the Project if KEI is not in compliance with any License Provision for the Project. KEI reserves the right to challenge any determination by a Resource Agency or the Nation that KEI is not in compliance with any License Provision. The Resource Agencies and the Nation reserve any and all defenses they may have to such a challenge.

6.2 Resource Agency and Nation Support for Federal Funding Applications

Upon request by KEI and consistent with individual agency policies, all Parties will support an application by KEI for section 247 Bipartisan Infrastructure Law funding or similar federal funding

programs, to offset costs of capital improvements associated with the new upstream fishway and downstream passage improvements. At a minimum, no Party will oppose KEI's application.

6.3 Potential Adjustment of Regulatory Deadlines

Up to nine months prior to the start of construction of the new upstream passage facility for the Project that will be prescribed by the Services, KEI may request that the Resource Agencies approve a delay of the in-service date of the passage facility. KEI will present any New Information that results in an unforeseen circumstance that it believes justifies such a delay. The Resource Agencies, KEI, and the Nation will meet to discuss in good faith the information presented, and the Resource Agencies will render a timely determination on the request based on all relevant information then before them. If the Resource Agencies concur that a delay is warranted, the Resource Agencies will support KEI's request for approval of FERC and MDEP, as appropriate, for the said delay.

Any agreement by the Parties to extend the operational date of upstream passage may include mutually agreed-upon monitoring and/or habitat improvement projects implemented by KEI, as appropriate, to address Project-related impacts that may be inhibiting the return of upstream migration of Target Species in the Passadumkeag River.

SECTION 7 RESOLVING DISPUTES AMONG THE PARTIES

7.1 General Applicability

Except as provided in sections 2.5 and 4.2, and unless otherwise expressly provided herein or precluded by statute or agency regulation, the Parties will undergo the following dispute resolution procedures in the event of: (i) disputes between Parties relating to compliance with, or performance of, obligations under the Subsequent License, including the Proposed License Measure incorporated therein; (ii) disputes between the Parties related to compliance with, or performance of, any contractual obligations of this Agreement; (iii) consultation pursuant to section 2.4.4; (iv) disputes arising under section 1.3.7 or 2.4.5; or (iv) as expressly provided in section 1.3 (collectively, "Dispute Resolution Situation").

7.2 Dispute Resolution Procedures

7.2.1 Notice of Dispute

Any Party that believes a Dispute Resolution Situation has occurred will provide Notice to the other Parties specifying the Parties with whom the dispute exists and describing the matter(s) in dispute, including the proposed relief or resolution of the dispute. Each Party who wishes to participate in the resolution of the dispute ("Participating Parties") may do so by providing, within 15 days of receipt of such Notice, a response Notice to the other Parties of its intention to do so.

7.2.2 Informal Consultation

The Participating Parties will commence a 30-day consultation period (measured from the date of the response Notice deadline in section 7.2.1) to engage in negotiations to resolve the dispute(s). During the consultation period, the Participating Parties will hold at least one meeting. The Participating Parties may unanimously agree in writing to a different meeting and process schedule, including additional time for continued informal negotiations to resolve the dispute. At any time during this consultation period, the Participating Parties may, by mutual consent, initiate FERC or judicial proceedings as set forth in section 7.2.3.

7.2.3 FERC or Judicial Proceedings

If a disagreement persists at the conclusion of the informal consultation, or if the Participating Parties mutually consent during informal consultation, an aggrieved Participating Party may initiate FERC or judicial proceedings, as further provided in section 5.

7.3 Effect of Dispute Resolution Procedures on Other Proceedings

Nothing in this section 7 precludes any Party from timely filing and pursuing an action for administrative or judicial relief of any Dispute Resolution Situation; *provided* that any such Party will initiate these procedures under this section 7 as soon as practicable thereafter or concurrently therewith.

SECTION 8 DEFAULT

8.1 General

Upon a Breach, the non-Breaching Party will give Notice of such Breach to the Breaching Party. If the Breaching Party does not agree that a Breach has occurred, the dispute will be resolved in accordance with the dispute resolution procedures set forth in section 7. If the Breaching Party acknowledges the Breach, the Breaching Party will have 30 days from receipt of the Breach Notice within which to cure such Breach; *provided, however*, if such Breach is not capable of cure within 30 days, the Breaching Party will commence such cure within 30 days after Notice and continuously and diligently complete such cure within 90 days from receipt of Breach Notice; and if cured within such time, the Breach specified in such Notice will cease to exist. No Default will exist where such failure to discharge an obligation is the result of Force Majeure as defined herein in section 9.1.

8.2 Right to Withdraw

If a Breach is not cured as provided for in section 8.1, or if a Breach is not capable of being cured within the period provided for herein, the non-Breaching Party will have the right to declare a Default, immediately and unilaterally withdraw from this Agreement and be relieved of any further obligation hereunder, and/or seek any remedies consistent with section 10.4. Section 4.3 will apply to any withdrawal under this section 8.2.

SECTION 9 FORCE MAJEURE

9.1 Force Majeure Defined

An event of “Force Majeure” as used in this Agreement means any event beyond the reasonable control of any Party which occurs without the fault or negligence of a Party or any entity controlled by the Party, including its contractors and subcontractors (to the extent said contractor was acting under the control or direction of a Party), that prevents a party from complying with its contractual obligations under this Agreement. Events that prevent compliance with License Provisions are handled as provided in section 5.1, and not under this section 9.

9.2 Effect of Force Majeure

If any event of Force Majeure directly renders a Party unable, wholly or in part, to perform any contractual obligations under this Agreement, such Party is authorized, upon giving Notice and full particulars of such event of Force Majeure to the other Parties as soon thereafter as practicable, to suspend performance under such obligations during the continuance of any inability or incapacity so caused, but for no longer period; *provided, however*, the Party will not be relieved from any obligations of this Agreement which are not directly affected by the event of Force Majeure. The Party will use commercially reasonable efforts to remedy the cause of such inability or incapacity with all reasonable dispatch, including, without limitation, the prompt commencement and prosecution of litigation, except that the Parties acknowledge that: (1) litigation by FWS and NMFS, and positions in any such litigation, is within the control and sole discretion of the U.S. Department of Justice; and (2) litigation by MDMR is dependent upon approval by the Maine Attorney General’s Office. When the Party is able to resume performance of its obligations, it will give the other Parties Notice to that effect. The occurrence of a Force Majeure that results in impossibility of performance of an obligation, however, will excuse the Party’s performance.

SECTION 10 MISCELLANEOUS

10.1 Settlement Negotiations Privileged

The Parties have entered into the negotiations and discussions leading to this Agreement with the understanding that, to the fullest extent allowed by law, all discussions relating to this Agreement are privileged and confidential. This material will not prejudice the position of any Party or participant taking part in such discussions and negotiations, and are not to be used by any entity in any manner, including admission into evidence, in connection with these or any other proceedings related to the subject matter of this Agreement. In the event that this Agreement is terminated, this Agreement, and all drafts, work papers, and notes related to its development, to the fullest extent allowed by law, will be deemed settlement materials and will not constitute a part of the record in any proceeding, nor be admissible into evidence in any proceeding related to the subject matter of this Agreement. Notwithstanding the prior sentence, this Agreement may be admissible in an action to enforce this Agreement, including those terms that survive termination. This provision does not prohibit the disclosure of any information held by a federal agency that is not protected

from disclosure pursuant to the Freedom of Information Act, 5 U.S.C. § 552, or other applicable law.

This section 10.1 will survive any termination of this Agreement. Any Party withdrawing from this Agreement will continue to be bound by the provisions identified in section 10.15 following withdrawal.

10.2 Notice

Any Notice required by this Agreement will be written. If practicable, Notice will be provided by e-mail or comparable electronic messaging agreed to by all Parties. For the purposes of this Agreement, and unless otherwise specified, a Notice, including Notice via e-mail, will be effective upon receipt, but if provided only by U.S. Mail, seven days after the date on which it is mailed.

For the purpose of Notice, the list of authorized representatives of the Parties as of the Effective Date is attached as Appendix F. The Parties will provide Notice of any change in the authorized representatives designated in Appendix F and KEI will maintain the current distribution list of such representatives. The Parties acknowledge their responsibility to keep the other Parties informed of their current address, telephone, and e-mail information. Notice obligations under this section 10.2 are in addition to any notice provisions required by applicable law.

10.3 Governing Law and Forum

Except as provided in section 5.1, any and all obligations under this Agreement will be governed and construed under Maine law and United States federal law, as applicable, without reference to its conflicts of law principles. Except as provided in section 5.1, any action at law, suit in equity, or other judicial proceedings for the enforcement of any provision of this Agreement must be brought in and maintained only in a court of competent jurisdiction in Cumberland County, Maine, or Washington, D.C.

10.4 No Damages at Law

This Agreement does not create a cause of action in contract for monetary damages. No Party or employee, agent, or representative of a Party will be liable for damages at law for any Breach of this Agreement or any of its provisions; any performance or failure to perform an obligation imposed by any or all of them; or any other cause of action arising from any or all of them.

10.5 Responsibility for Costs

Except as expressly provided for in this Agreement, all Parties are to bear their own costs and attorney's fees for participating in this Agreement. In the event of administrative or judicial proceedings related to this Agreement or the Subsequent License, Parties will bear their own costs and attorneys' fees unless otherwise provided by applicable law.

10.6 Elected Officials, Employees and Agents Not to Benefit

No elected officials, employees or agents thereof will be entitled to any share or part of this Agreement or to any benefit that may arise from it.

10.7 Entire Agreement

This Agreement, including all appendices attached hereto, constitutes the entire agreement among the Parties with respect to the subject matter hereof, and supersedes all prior and contemporaneous understandings or agreements, oral or written, between the Parties with respect to the subject matter of this Agreement.

10.8 Severability of Terms of Agreement

This Agreement is made on the understanding that each term is in consideration and support of every other term, and each term is a necessary part of the entire Agreement.

Notwithstanding, if a court rules that any provision in this Agreement is invalid, the Parties agree to meet and confer as provided in section 7 regarding the continued viability of this Agreement.

10.9 Amendment of Agreement

This Agreement may be amended at any time from the Effective Date throughout its term, by written unanimous agreement of all Parties still in existence, including any successors.

10.10 Relationship of the Parties

Except as otherwise expressly set forth herein, nothing contained in this Agreement is intended or will be construed to create an association, trust, partnership or joint venture, or impose any trust or partnership duty, obligation or liability on any Party, or create an agency relationship between or among the Parties or between any Party and any employee of any other Party.

10.11 Waiver

The failure of any Party to this Agreement to insist, on any occasion, upon strict performance of any provision of this Agreement will not be considered a waiver of any obligation, right, or duty of, or imposed upon, such Party.

10.12 Section Titles for Convenience Only

Section titles in this Agreement are used only for convenience of reference and organization, and will not be used to modify, explain, or interpret any Agreement provisions or the Parties' intentions. To the extent that there is any inconsistency between the heading of a section of this Agreement and the text of the section, the text will govern.

10.13 Third Party Beneficiaries

This Agreement does not create any right or interest in any member of the public as a third-party beneficiary and does not authorize any non-Party to maintain a suit at law or equity pursuant to this Agreement. The duties, obligations, and responsibilities of the Parties with respect to third parties remain as imposed under applicable law.

10.14 Successors and Transferees

This Agreement will apply to, be binding on, and inure to the benefit of the Parties and their successors, and any transferee of any Subsequent License, unless otherwise specified in this Agreement. Voluntary assignments of this Agreement are not permitted.

10.15 Survival

Sections 1.5, 4.3.1, 4.3.2, and 10.1 of this Agreement will survive the term or termination of this Agreement. Any Party withdrawing from this Agreement will continue to be bound by these provisions.

SECTION 11 EXECUTION OF AGREEMENT

11.1 Signatory Authority

Each signatory to this Agreement certifies that he or she is authorized to execute this Agreement and to legally bind the Party he or she represents, and that such Party will be fully bound by the terms hereof upon such signature without any further act, approval, or authorization by such Party.


11.2 Signing in Counterparts

This Agreement may be executed in any number of counterparts, and each executed counterpart will have the same force and effect as if all signatory Parties had signed the same instrument. The signature pages of counterparts of this Agreement may be compiled without impairing the legal effect of any signatures thereon.


IN WITNESS WHEREOF,

The Parties, through their duly authorized representatives, have caused this Agreement to be executed as of the date set forth adjacent to the signature of each Party's representative below.

KEI (MAINE) POWER MANAGEMENT (III), LLC AND KEI (MAINE) POWER MANAGEMENT (II), LLC



DATE: July 17th, 2024
Jean Roy
Senior Vice President and Chief Operating Officer



DATE: July 17th, 2024
Justin Jeffrey Davis
Vice President, Operations and Asset Management

UNITED STATES FISH AND WILDLIFE SERVICE

DATE: _____
Amanda Cross
Project Leader

NATIONAL MARINE FISHERIES SERVICE

DATE: _____
Michael Pentony
Regional Administrator

PENOBSCOT NATION

DATE: _____
[Name]
[Title]

MAINE DEPARTMENT OF MARINE RESOURCES

DATE: _____
Patrick Keliher
Commissioner

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DATE: _____
Jean Roy
Senior Vice President and Chief Operating Officer

DATE: _____
Justin Jeffrey Davis
Vice President, Operations and Asset Management

UNITED STATES FISH AND WILDLIFE SERVICE

AMANDA CROSS Digitally signed by AMANDA CROSS
Date: 2024.07.22 11:40:36 -04'00'

DATE: _____
Amanda Cross
Project Leader

NATIONAL MARINE FISHERIES SERVICE

DATE: _____
Michael Pentony
Regional Administrator

PENOBSCOT NATION

DATE: _____
[Name]
[Title]

MAINE DEPARTMENT OF MARINE RESOURCES

DATE: _____
Patrick Keliher
Commissioner

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DATE: _____
Jean Roy
Senior Vice President and Chief Operating Officer

DATE: _____
Justin Jeffrey Davis
Vice President, Operations and Asset Management

UNITED STATES FISH AND WILDLIFE SERVICE

DATE: _____
Amanda Cross
Project Leader

NATIONAL MARINE FISHERIES SERVICE

Michael Pentony  Digitally signed by Michael Pentony
Date: 2024.07.16 11:45:02 -04'00'

DATE: _____
Michael Pentony
Regional Administrator

PENOBSCOT NATION

DATE: _____
[Name]
[Title]

MAINE DEPARTMENT OF MARINE RESOURCES

DATE: _____
Patrick Keliher
Commissioner

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Jean Roy
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DATE: _____
Justin Jeffrey Davis
Vice President, Operations and Asset Management

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DATE: _____
Amanda Cross
Project Leader


NATIONAL MARINE FISHERIES SERVICE

DATE: _____
Michael Pentony
Regional Administrator

PENOBSCOT NATION

DATE: _____
[Name]
[Title]

MAINE DEPARTMENT OF MARINE RESOURCES

 _____
DATE: 07/12/2024
Patrick Keliher
Commissioner

Appendix A

**Measures to Be Included in Federal Power Act
Section 18 Fishway Prescriptions**

Appendix A
Measures to be Included in Federal Power Act Section 18 Prescriptions

Description	Elements of Prescription
Part I: New Fishway Provisions for Anadromous Target Species	
Requirement to Install New Upstream Fishway	<ul style="list-style-type: none"> • The Licensee shall construct, operate, and maintain a new upstream fishway at the Project.
Timing for Placing New Upstream Fishway into Service	<ul style="list-style-type: none"> • The Licensee shall place the new upstream fishway into service no later than the start of the 8th upstream passage season following FERC’s issuance of the Subsequent License. • If the Licensee receives federal funding as described in section 2.1.4 of the Relicensing Settlement Agreement for the Lowell Tannery Project (FERC Project No. 4202), filed with the Federal Energy Regulatory Commission on [date] (“Agreement”), for at least 30% of the total capital cost of the new upstream fishway and improvements to downstream fish passage, the Licensee shall place the new upstream fishway into service under the terms of the award(s), but no later than the start of the 6th upstream passage season following license issuance.
Process for Selecting New Upstream Fishway Type	<ul style="list-style-type: none"> • At least 4 years prior to construction of the new upstream fishway, the Licensee shall prepare and distribute to the Resource Agencies and the Nation a report that investigates and compares alternative fishway types and identifies KEI’s preferred fishway type.¹ At a minimum, the report shall demonstrate that the Licensee considered the following metrics: <ul style="list-style-type: none"> ○ Ability to meet the most up-to-date version of the FWS published design criteria and support safe, timely, and effective passage of the Anadromous Target Species; ○ Ability to be appropriately sized to: (a) meet the Passadumkeag River watershed’s biological capacity, as determined by the Resource Agencies in consultation with the Nation and KEI; and (b) the potential to achieve the performance standards identified in Part IV below; ○ Cost (Capital, operation, and maintenance); and ○ Technical feasibility specific to the Project. • Following distribution of the report discussed above, the Licensee shall consult with the Service, other Resource Agencies, and the Nation regarding viable alternatives for the new fishway, and the Licensee shall refine the report based on this consultation with a preferred fishway type and submit it to the Service, other Resource Agencies, and the Nation for review. • If the Service, in consultation with the other Resource Agencies and Nation, concurs that the Licensee’s preferred fishway type meets the metrics outlined above, then the Licensee shall obtain FERC approval as necessary, and proceed to construction. • If the Service, in consultation with the other Resource Agencies and Nation, determines that the Licensee’s preferred fishway type does not meet one or more of the metrics identified above, the Licensee shall refine the report in response to the rationale and technical and scientific information provided by the Service and submit it to the Resource Agencies and the Nation for review and concurrence following the same process outlined above. • The Licensee shall repeat this process, as necessary, until the Service, in consultation with the other Resource Agencies and Nation, concurs with the Licensee’s preferred fishway type.

¹ The Resource Agencies’ and the Nation’s preferred new upstream fishway type will allow for the volitional passage of the Anadromous Target Species, unless the report demonstrates that: (1) it is not technically feasible to install a volitional fishway that meets the other requirements; or (2) a non-volitional fishway will be no less protective than a volitional fishway and would cost significantly less to implement or would result in improved operation of the project works for electricity production; consistent with FPA section 33(b)(2), 16 U.S.C. § 823d(b)(2).

Description	Elements of Prescription
Design of New Upstream Fishway	<ul style="list-style-type: none"> • When designing the new upstream fishway, the Licensee shall ensure that it is: <ul style="list-style-type: none"> ○ Based on the report described above; ○ Consistent with the fishway type supported by the Service in consultation with the other Resource Agencies and the Nation, as described above; ○ Consistent with the most up-to-date version of the FWS published design criteria as of the date on which the Licensee submits the report; ○ Sized to pass the Passadumkeag River watershed’s biological capacity for the Anadromous Target Species, as determined by the Service, in consultation with the other Resource Agencies, the Nation, and the Licensee; ○ Reasonably anticipated to provide safe, timely, and effective passage of Anadromous Target Species and meet the performance standards identified below; ○ Designed to include an automated entrance gate; ○ Designed to allow for counting of Anadromous Target Species that have successfully ascended the new upstream fishway in a way that does not interfere with the safe, timely, and effective passage of Atlantic salmon; and ○ Designed to incorporate a PIT tag logger data collections system. • No later than 3 years prior to the start of construction of the new fishway, the Licensee shall submit the 30% design plans for review and concurrence by the Service, in consultation with the other Resource Agencies and the Nation. When concurring with the 30% design plans, the Service reserves the right based on the best technical and scientific information available to it, to suggest any appropriate changes to the proposed design. • No later than 2 years prior to the start of construction of the new fishway, the Licensee shall submit the 60% design plans for review and concurrence by the Service, in consultation with the other Resource Agencies and the Nation. The same process for review and concurrence applicable to the 30% design plans will apply to the review and concurrence at the 60% design phase. • No later than 18 months prior to the start of construction of the new fishway, the Licensee shall submit the 90% design plans for review and concurrence by the Service, in consultation with the other Resource Agencies and the Nation. The same process for review and concurrence applicable to the 30% design plans will apply to the review and concurrence at the 90% design phase. • Upon concurrence of final design plans by the Service, and prior to the start of construction of the new fishway, the Licensee shall submit the plans to FERC for its approval. • Upon completion of fishway construction, the Licensee shall submit final as-built drawings that accurately reflect the fishway as constructed to the Service, other Resource Agencies, the Nation, and FERC.
Operation of New Upstream Fishway	<ul style="list-style-type: none"> • The Licensee will operate the new upstream fishway annually from May 15 through November 15 or as otherwise articulated in the Fishway Operation and Maintenance Plan (FOMP). • Throughout the term of the Subsequent License, the Licensee at the request of a Resource Agency shall monitor all PIT tagged species, including any Target Species and other co-evolved species, at the PIT tag logger data collections system installed as part of the new upstream fishway. • No later than 1 year prior to construction of the new fishway, the Licensee shall submit an Upstream Fishway Monitoring Plan for review and approval by the Service, in consultation with the other Resource Agencies and the Nation. The Licensee shall include in the Upstream Fishway Monitoring Plan:

Description	Elements of Prescription
	<ul style="list-style-type: none"> ○ Appropriate measures for testing to determine whether improvements to upstream passage meet performance standards for Anadromous Target Species; and ○ Procedures, as appropriate, to ensure consistency with the requirements of section IV of the AMP filed with FERC on [date]. ● Following approval of the Upstream Fishway Monitoring Plan by the Service, the Licensee shall submit the Plan to FERC for review and approval. ● The Licensee shall implement the plan following approval by FERC.
Description of New Downstream Fishway and Timing for Placing into Service	<ul style="list-style-type: none"> ● The Licensee shall construct, operate, and maintain the following improvements to downstream fish passage infrastructure at the Project: <ul style="list-style-type: none"> ○ Within one year of FERC’s issuance of the Subsequent License, the Licensee shall install full depth seasonal intake rack overlays consisting of a 0.75-inch hole diameter punch plate. The Licensee shall deploy the rack overlays on a seasonal basis, consistent with timeframes established in the FOMP. ○ Prior to April 1 of the year in which the new upstream passage facilities become operational, the Licensee shall place the following downstream fish passage infrastructure into service: <ul style="list-style-type: none"> ▪ The Licensee shall add a second entrance for downstream fish passage on the side of the intake rack opposite the existing downstream entrance, or at another location approved by the Service, in consultation with the other Resource Agencies and the Nation. ▪ The Licensee shall incorporate a new flume or pipe capable of passing an additional 15% of flow (total of 20% when combined with fishway attraction flow). This new flume or pipe will discharge near the entrance of a new facility when flows exceed the powerhouse discharge capacity.
Design of New Downstream Fishway	<ul style="list-style-type: none"> ● The Licensee shall include the design plans for the downstream fish passage improvements as part of the 30/60/90 design plans for the new upstream fish passage facilities, and shall submit them for review and concurrence as described above.
Operation of New Downstream Fishway	<ul style="list-style-type: none"> ● The Licensee shall operate the new downstream fish passage infrastructure annually from April 1 (or ice-out, whichever happens last) to December 31 (or ice-in, whichever happens first).
Downstream Fishway Monitoring Plan	<ul style="list-style-type: none"> ● Within three months after FERC’s issuance of the Subsequent License, the Licensee shall submit a Downstream Fishway Monitoring Plan for review and approval by the Service, in consultation with the other Resource Agencies and the Nation. ● The Licensee shall include in the Downstream Monitoring Plan: <ul style="list-style-type: none"> ○ Appropriate measures for testing to determine whether improvements to downstream passage meet performance standards for Anadromous Target Species; ○ Procedures, as appropriate, to ensure consistency with the requirements of section IV of the AMP filed with FERC on [date] and ○ Procedures for evaluating the risk of impingement and gilling² of Atlantic salmon smolts in the punchplate overlay. ● Following approval of the Downstream Fishway Monitoring Plan by the Service, the Licensee shall submit the Plan to FERC for review and approval.

² For purposes of this prescription, “gilling” is defined as the trapping of a fish beyond its gills so that it cannot move forward or back out of the device.

Description	Elements of Prescription
	<ul style="list-style-type: none"> The Licensee shall implement the plan following approval by FERC.
Flow Release Requirements	<ul style="list-style-type: none"> Except as may be approved under section 2.2.3 of the Agreement, the Licensee shall provide a minimum downstream fishway flow of 45 cfs (i.e., 5% of station capacity) or inflow (whichever is less), which the Licensee shall: (1) release through a combination of one or both downstream bypass pipes/flumes; and (2) provide from the later of April 1 or ice-out (whichever happens last) to December 31 or ice-in, whichever happens first. Except as may be approved under section 2.2.3 of the Agreement, upon the in-service date of the new upstream fishway described above, the Licensee shall provide, from May 15 through November 15 annually, a minimum attraction flow of 45 cfs (i.e., 5% of station capacity) or inflow (whichever is less).
Operation of Existing Fishway	<ul style="list-style-type: none"> The Licensee shall continue to operate the existing fishway until the new upstream fishway and improvements to downstream fish passage are constructed.
Development and Implementation of a FOMP	<ul style="list-style-type: none"> Within 6 months of FERC’s issuance of a Subsequent License for the Project, the Licensee shall submit a FOMP to the Service, other Resource Agencies, and the Nation. The Licensee shall include in the FOMP: <ul style="list-style-type: none"> A description of fishway facilities and operational measures associated with the Project; An installation and seasonal operation schedule for the new upstream fishway described above; the improvements to downstream fish passage described above; and passage facilities for American eel described below; Details for the operation and maintenance of the existing fishway until the new upstream fishway and improvements to downstream fish passage are placed into service; Details regarding the monitoring and reporting to be performed on an annual basis; Details for the operation and maintenance of PIT antennas and loggers; A requirement for the Licensee to conduct annual biological sampling consistent with MDMR’s draft instructions for Biological Monitoring of River Herring;³ Applicable operation, maintenance, and inspection procedures; Replacement of flashboards and limiting leakage within 3 days after river flow is within the hydraulic control of the powerhouse, or within such longer period as is necessary to account for worker safety concerns; Standards for temporary suspension or other changes to fishway operations due unplanned (e.g., unusual weather events such as ice conditions) or planned (e.g., maintenance) circumstances upon approval by the resource agencies; and Provisions for updating the FOMP over the term of the Subsequent License, as needed, in consultation with the Service, other Resource Agencies, the Nation, and the Licensee, and as approved by the Resource Agencies and FERC. Following approval of the FOMP by the Service, in consultation with the other Resource Agencies and the Nation, the Licensee shall submit the FOMP to FERC for review and approval. The Licensee shall implement the plan following approval by FERC.
Development of FOMR	<ul style="list-style-type: none"> Following FERC’s approval of the FOMP, the Licensee shall prepare a Fishway Operation and Maintenance Report (FOMR) annually during the remaining Subsequent License term for the Project, unless the Service approves a less frequent schedule for the FOMR.

³ MDMR’s draft Instructions for Biological Monitoring of River Herring are included as Appendix E to the Agreement.

Description	Elements of Prescription
	<ul style="list-style-type: none"> • In each FOMR, the Licensee shall: <ul style="list-style-type: none"> ○ Include a summary of the current state of the fishways and yearly fishway operation and maintenance activities; and ○ Provide an assessment of any needed changes to the operation or maintenance of the fishways to continue to provide safe, timely, and effective upstream and downstream passage of target species, including, but not limited to, any changes to the seasonal operation schedule for the fishways, based on information produced from the monitoring and studies and the best available scientific and technical information as appropriate. • The Licensee shall submit the FOMR to the Service, other Resource Agencies, and the Nation by February 28, beginning with the first full calendar year following approval of the FOMP by FERC, as follows: <ul style="list-style-type: none"> ○ The Licensee shall provide a draft FOMR to the Service, other Resource Agencies, and the Nation for a 30-day opportunity to review and comment; and ○ The Licensee shall consider comments received on the draft FOMR, make any appropriate adjustments, and submit a revised draft FOMR to the Service for approval, in consultation with the other Resource Agencies and the Nation. • Following the Service’s approval of the updated draft FOMR, the Licensee shall: <ul style="list-style-type: none"> ○ File the final, approved FOMR with FERC, for informational purposes; ○ Seek FERC approval of any operation or maintenance changes to the Project’s fishways identified in the final FOMR, as appropriate; and ○ Implement any operation or maintenance modifications to fish passage facilities identified in the final FOMR, including any such modifications approved by FERC, as appropriate. • The Service reserves the right to reduce the frequency of the FOMR, following consultation with the other Resource Agencies, the Nation, and the Licensee.
Part II: Passage Facilities for American Eel	
Temporary Upstream American Eel Passage	<ul style="list-style-type: none"> • Through the first 9 upstream passage seasons for American eel following FERC’s issuance of the Subsequent License, the Licensee shall construct, operate and maintain temporary facilities for the upstream passage of American eel at the Project, as follows: <ul style="list-style-type: none"> ○ The Licensee shall submit its proposed location for temporary eel passage for approval by the Service in consultation with the other Resource Agencies and the Nation. The Licensee shall base its siting proposal on previous siting studies conducted at the Project. ○ Following approval of the temporary eel passage location, the Licensee shall place the temporary upstream eel passage system into service no later than the start of the 3rd upstream passage season following FERC’s issuance of the Subsequent License. ○ The Licensee shall operate the temporary upstream eel passage system annually from May 1 through October 31, or on a different schedule consistent with timeframes established in the FOMP. ○ The Licensee shall operate and maintain the temporary eel passage facility until the permanent eel passage facility is constructed and operational, as provided below.
Permanent Upstream American Eel Passage System	<ul style="list-style-type: none"> • Beginning with the 10th upstream passage season for American eel following FERC’s issuance of the Subsequent License, the Licensee shall operate and maintain a new, permanent American eel passage system.
Design of Permanent Upstream American Eel Passage System	<ul style="list-style-type: none"> • Beginning the first eel passage season after the permanent upstream anadromous fishway is installed, the Licensee shall perform eelway siting studies in consultation with the Resource Agencies and the Nation to determine the location of the permanent upstream eelway. Based

Description	Elements of Prescription
	<p>on the siting studies, the Licensee shall propose a location for the permanent eel passage for approval by the Service in consultation with the other Resource Agencies and the Nation.</p> <ul style="list-style-type: none"> • The Licensee shall design the permanent upstream eel passage system as follows: <ul style="list-style-type: none"> ○ The Licensee shall design the permanent eelway in accordance with the most up-to-date version of the FWS published design criteria as of the date in which the Licensee submits the 30% design plans for the permanent eelway; ○ The Licensee shall design the permanent eelway to meet the performance standards for American eel, described below; and ○ The Licensee shall adhere to the 30/60/90 design plan review that pertains to the new upstream fishway, described above.
Operation of Permanent Upstream American Eel Passage System	<ul style="list-style-type: none"> • The Licensee shall operate the permanent upstream American eel passage system annually from May 1 through October 31, unless otherwise provided in the FOMP.
Downstream American Eel Passage System	<ul style="list-style-type: none"> • The Licensee shall construct, operate, and maintain a low-level bypass system at the Project’s dam for downstream American eel passage at the Project. • The Licensee shall place the low-level bypass system into service concurrent with the new upstream anadromous fishway described above. • The Licensee shall adhere to the same 30/60/90 design plan review that pertains to the new upstream anadromous fishway, described above. • If the Licensee discovers mortality or delay issues for downstream passage of American eel prior to the implementation of the low-level bypass system, the Licensee shall develop and implement a temporary measure to prevent the associated passage issue as approved by the Service in consultation with the other Resource Agencies and the Nation, to ensure that the issue has been adequately resolved. • The Licensee shall operate the low-level bypass system for downstream passage of American eel annually from August 15 through November 15, except as may be provided in the FOMP.
Part III: Existing Fishway Operational Provisions	
Improvements to Existing Fishway Operational Provisions	<ul style="list-style-type: none"> • The Licensee shall implement the following improvements to the existing fishway at the Project: <ul style="list-style-type: none"> ○ Prior to the 2025 fish passage season, the Licensee shall install a means of access to the upstream fishway entrance for observations, maintenance, and operation of the upstream fishway, unless the Licensee provides for this access during the term of the original license. ○ Within two years after FERC’s issuance of the Subsequent License, the Licensee shall install a PIT antenna array and data loggers, as described above. Following installation of the PIT antenna array and data loggers: <ul style="list-style-type: none"> ▪ The Licensee shall monitor all PIT tagged species, including any Target Species and other co-evolved species; and ▪ By December each year (or more frequently upon request), the Licensee shall provide PIT tag logger data requested by a Resource Agency to the requesting Resource Agency(ies) and the Nation. ○ For each fish passage season beginning after FERC’s issuance of the Subsequent License through FERC’s approval of the FOMP as described above, the Licensee shall: <ul style="list-style-type: none"> ▪ Implement a pre-season de-watered inspection plan; ▪ Repair and maintain all fishway components identified during the pre-season de-watered inspection;

Description	Elements of Prescription
	<ul style="list-style-type: none"> ▪ Record daily headpond and tailwater water surface elevations, fishway entrance depth, and depth of flow over stop-logs at fishway entrance; ▪ Maintain a baffle to ensure an entrance jet of 4-6 ft/s during the river herring upstream passage season (May 1 to June 15), and 6-8 ft/s during the Atlantic salmon upstream passage season (June 16 to November 15) to facilitate passage of different species during their presumed peak migration timeframes; the baffle shall be designed to meet velocities for the associated fish passage operating range for each species (e.g., 5 to 95% exceedance flows), when possible; ▪ Operate the fishway at 10 cfs from May 1 to June 15 to facilitate upstream river herring passage and increase flow up to 30 cfs from June 16 to November 15 for the Atlantic salmon upstream passage season. KEI will consult with the Resource Agencies and Nation before the settings are changed (e.g., lowered headpond, removal of baffles). Any changes that may affect Atlantic salmon must be consistent with the biological opinion issued in connection with the license for this project; ▪ Operate the auxiliary flow system during the entirety of the river herring and Atlantic salmon season unless testing determines a negative effect on performance; ▪ Update the tailwater rating curve as well as data (specifically headpond and tailwater elevations) for a minimum of 10 years, if available, and incorporating data collected as discussed above; ▪ Provide a weekly intra-season report on fish passage operations; and ▪ Provide an annual FOMR to the Service, other Resource Agencies, and the Nation by February 28 for the previous year’s fish passage season. The report may be in letter format and shall include a summary of the state of the fishways (structures, flows, etc.), and a review of the previous year’s fishway operation and maintenance activities (e.g., deviations, issues, timing of installation, inspection results, etc.). In the report, the Licensee shall document fish passage operations and provide an assessment of any necessary or recommended changes to fish passage facilities and their operations. These may include, but are not limited to, any changes to the provision in seasonal operation schedule for the fishways, and any proposed modifications to the existing fish passage facilities.
Part IV: Species-Specific Fish Passage Performance Standards for Safe, Timely, and Effective Passage at the Project	
Species-specific performance standards	<ul style="list-style-type: none"> • The Licensee shall design the Project’s fish passage facilities to meet, and shall test against, the species-specific performance standards set forth below. • The performance standards provided herein may be revised by the Service prior to the Service’s approval of the monitoring plans as provided in the AMP, in consultation with the other Resource Agencies, the Nation, and the Licensee if the best available scientific information and engineering principles indicate that modifying a standard would be necessary and appropriate to achieve restoration goals. • Any changes to performance standards for Atlantic salmon, in the context of ESA section 7, must be addressed in ESA section 7 consultation between NMFS and FERC.
Alewife	<ul style="list-style-type: none"> • For downstream passage: at least 95% of the adult and juvenile alewives that approach within 200 m of the Project’s powerhouse pass the project within 24 hours and survive. • For upstream passage: At least 90% of the adult alewives that approach within 200 m of the Project’s powerhouse pass upstream at the Project within 48 hours.

Description	Elements of Prescription
	<ul style="list-style-type: none"> ○ Alternative Abundance Goal: A rolling average of greater than or equal to 678,680 alewives passing the Project annually across four consecutive years can be substituted for the Project to be deemed safe, timely, and effective for upstream passage of alewives.
Blueback Herring	<ul style="list-style-type: none"> • Unless the Service, in consultation with the other Resource Agencies, the Nation, and KEI, establishes a quantitative performance standard for blueback herring as provided below, the Project will be subject to the qualitative standard that Project facilities and operations will achieve safe, timely, and effective passage of blueback herring upstream and downstream of the Project. • Prior to the Service’s approval of the monitoring plans as provided in the AMP and as above, the Service, in consultation with the other Resource Agencies, the Nation, and KEI, may establish quantitative performance standards for blueback herring for the Project. Any such performance standards will be based on generally accepted scientific and engineering principles and supported by the best available scientific information. These standards are expected to be based on a similar approach to alosine standards at other projects in the Northeast.
American Shad	<ul style="list-style-type: none"> • For downstream passage: at least 95% of the adult and juvenile shad that approach within 200 m of the Project’s powerhouse pass the Project within 24 hours and survive. • For upstream passage: At least 75% of the adult shad that approach within 200 m of the Project’s powerhouse pass upstream at the Project within 48 hours. <ul style="list-style-type: none"> ○ Alternative Abundance Goal: A rolling average of greater than or equal to 12,765 shad passing the Project annually across four consecutive years can be substituted for the Project to be deemed safe, timely, and effective for upstream passage of American shad.
Atlantic Salmon	<ul style="list-style-type: none"> • The performance standard for Atlantic salmon will be finalized during the ESA section 7 consultation between NMFS and FERC and is expected to include performance standards for upstream and downstream passage. These standards will be developed based on the best available scientific and commercial information, including dam impact assessments and consideration of standards at other hydro projects where Gulf of Maine DPS Atlantic salmon are present. The standards for Atlantic salmon are likely to be at least 95% passage efficiency for upstream migrating adults and survival for downstream migrating smolts, and will incorporate passage delay standards (i.e., number of hours to pass that would constitute safe, timely, and effective passage). Performance standards for downstream migrating kelts (post-spawn adults) may also be established. Any changes to performance standards for Atlantic salmon must be addressed in an ESA section 7 consultation between NMFS and FERC.
American Eel	<ul style="list-style-type: none"> • Unless the Service, in consultation with the other Resource Agencies, the Nation, and KEI, establishes quantitative performance standards for American eel as provided below, the Project will be subject to the qualitative standard that Project facilities and operations will achieve safe, timely, and effective passage of American eels upstream and downstream of the Project. • Prior to the Service’s approval of the monitoring plans as provided in the AMP and as above, the Service, in consultation with the other Resource Agencies, the Nation, and KEI, may establish quantitative American eel performance standards for the Project. Any such performance standards will be based on generally accepted scientific and engineering principles and supported by the best available scientific information.

Description	Elements of Prescription
Sea Lamprey	<ul style="list-style-type: none"> • Unless the Service, in consultation with the other Resource Agencies, the Nation, and KEI, establishes quantitative performance standards for sea lamprey as provided below, the Project will be subject to the qualitative standard that Project facilities and operations will achieve safe, timely, and effective passage of sea lamprey upstream and downstream of the Project. • Prior to the Service’s approval of the monitoring plans as provided in the AMP and as above, the Service, in consultation with the other Resource Agencies, the Nation, and KEI, may establish quantitative sea lamprey performance standards for the Project. Any such performance standards will be based on generally accepted scientific and engineering principles and supported by the best available scientific information.⁴
Part V: Adaptive Management and Periodic Monitoring	
Adaptive Management	<ul style="list-style-type: none"> • The Licensee shall implement the Adaptive Management Process for Meeting Fish Passage Performance Standards filed with FERC on [date] (AMP).⁵
Periodic Monitoring	<ul style="list-style-type: none"> • Following completion of the adaptive management process under section II.A of the AMP, the Licensee shall carry out monitoring of upstream and downstream passage of target species (or an agreed upon subset of species) every 10 years during the remaining Subsequent License term, for purposes of informing the consideration and implementation of any potential repairs or improvements to the Project’s fishways to ensure achievement of safe, timely, and effective fish passage for the target species. • This 10-year monitoring cycle shall include the following: <ul style="list-style-type: none"> ○ No later than one year prior to the beginning of a 10-year monitoring cycle, the Licensee shall prepare a draft Monitoring Plan and submit it to the Service, the other Resource Agencies, and the Nation; ○ The Licensee shall include in the draft Monitoring Plan measures for testing sufficient to determine whether the fishways prescribed by the Service meet the performance standards. ○ The Licensee shall ensure that the draft Monitoring Plan is consistent with the requirements of section IV of the AMP. ○ The Licensee shall consult with the Service, other Resource Agencies, and the Nation to address comments provided on the Draft Monitoring Plan and to attempt to reach consensus on a final Monitoring Plan; ○ Once the Service, other Resource Agencies, the Nation, and the Licensee reach consensus on the Monitoring Plan, the Licensee shall submit the Monitoring Plan to the Service for approval, in consultation with the other Resource Agencies and the Nation; and ○ Upon approval, the Licensee shall implement the Monitoring Plan, as approved. • Within six months of completing the Monitoring Plan, the Licensee shall prepare a written report that details the monitoring results and identifies any recommended operation, maintenance, or construction measures that may be warranted to attain or maintain safe, timely, and effective fish passage for the target species. The Licensee shall distribute the written report to the Resource Agencies and the Nation.

⁴ For reference, performance standards for sea lamprey have been developed for the Kennebec River and require 80% of adult sea lamprey that approach within 200 meters of the project to pass upstream within 48 hours. While a specific downstream passage standard has not been identified as part of the Kennebec standard, both upstream and downstream passage facilities will be operated 24 hours a day to accommodate the nocturnal migratory movements of sea lamprey.

⁵ The AMP is included as Appendix D to the Agreement.

Description	Elements of Prescription
	<ul style="list-style-type: none"> • Within six months of the Licensee’s distribution of the written report, the Licensee shall meet and confer with the Service, other Resource Agencies, and the Nation on any maintenance, operation, or construction measures that may be warranted to attain or maintain safe, timely, and effective fish passage for the target species. • The Licensee shall request FERC approval and any other permitting agency to implement any measure agreed upon by consensus of the Service, other Resource Agencies, the Nation, and the Licensee. • Upon approval by FERC and any other applicable permitting agency, the Licensee shall implement the approved measure.

Proposed Ordering Paragraphs for FERC's Subsequent License

Appendix B
Proposed Ordering Paragraphs for FERC's Subsequent License

The Director orders:

(A) This license is issued to KEI (Maine) Power Management (II) LLC (Licensee), for a period of 50 years, effective the first day of the month in which this order is issued, to operate and maintain the Lowell Tannery Hydroelectric Project. This license is subject to the terms and conditions of the Federal Power Act (FPA), which is incorporated by reference as part of this license, and subject to the regulations the Commission issues under the provisions of the FPA.

(B) This license is subject to the fishway prescription submitted by the Secretary of the U.S. Department of the Commerce on [date] and the Secretary of the U.S. Department of Interior on [date] under section 18 of the FPA, as those conditions are set forth in Appendices __ and __, respectively, of this order issuing Subsequent License.

Appendix C
Proposed License Article

Appendix C

Proposed License Article

Article ---. *Run of River Operations.* Except for planned and unplanned deviations described below, the Licensee shall operate the Project in run-of-river mode wherein the impounded water level fluctuation is generally equal to inflow and there is no significant effect on overall river flow regime; provided that, the impounded water level fluctuation shall be limited to one foot or less during normal Project operations.

Planned Deviations

Requirements regarding run-of-river operation, as well as flow release requirements under the license (e.g., attraction flows required by the fishway prescriptions appearing in Appendices ___ and ____), may be temporarily modified for short periods, up to 3 weeks, after mutual agreement among the Licensee, U.S. Fish and Wildlife Service, National Marine Fisheries Service, and Maine Department of Marine Fisheries (collectively “Resource Agencies”). After concurrence from the Resource Agencies, the Licensee shall file a report with the Secretary of the Commission as soon as possible, but no later than 14 calendar days after the onset of the planned deviation. Each report must include: (1) the reason(s) for the deviation and how project operations were modified; (2) the duration and magnitude of the deviation; (3) any observed or reported environmental effects; and (4) documentation of consultation with the Resource Agencies. For planned deviations exceeding 3 weeks, the Licensee must file an application for a temporary amendment of the operational requirements of this license and receive Commission approval prior to implementation. The Licensee shall avoid, to the extent possible, Atlantic salmon passage seasons for planned deviations and to the extent practicable, all planned deviations should occur in August.

Unplanned Deviations

Run-of-river operation, as well as flow release requirements under the license (e.g., attraction flows required by the fishway prescriptions appearing in Appendices ___ and ____), may be temporarily modified if required by operating emergencies beyond the control of the Licensee (i.e., unplanned deviations). For any unplanned deviation that lasts longer than 3 hours or results in visible environmental effects such as a fish kill, the Licensee must notify the Resource Agencies and the Nation as soon as possible but no later than 3 calendar days after the unplanned deviation. The Licensee also must file a report with the Commission as soon as possible, but no later than 14 calendar days after each such incident. The report must include: (1) the reason(s) for the deviation; (2) the duration and magnitude of the deviation; (3) any pertinent operational and/or monitoring data; (4) a timeline of the incident and the Licensee’s response; (5) any comments or correspondence received from the Resource Agencies, or confirmation that no comments were received from the Resource Agencies; (6) documentation of any observed or reported environmental effects; and (7) a description of measures implemented to prevent similar deviations in the future. The Licensee shall avoid, to the extent possible, Atlantic salmon passage seasons for unplanned deviations.

For unplanned deviations lasting 3 hours or less that do not result in visible environmental effects, the Licensee must include an annual report, by March 31, describing each incident that

occurred during the prior January 1 through December 31 time period. The report must include for each deviation lasting 3 hours or less: (1) the reason(s) for the deviation; (2) the duration and magnitude of the deviation; (3) any pertinent operational and/or monitoring data; (4) a timeline of each deviation and the Licensee's response; (5) any comments or correspondence received from the Resource Agencies, or confirmation that no comments were received from the Resource Agencies; and (6) a description of measures implemented to prevent similar deviations in the future.

Appendix D

**Adaptive Management Process for Meeting Fish Passage
Performance Standards**

APPENDIX D

LOWELL TANNERY HYDROELECTRIC PROJECT FERC PROJECT NO. 4202

Adaptive Management Process for Meeting Fish Passage Performance Standards

I. Introduction and Governing Principles

This Adaptive Management Process (AMP) is designed by KEI (USA) Power Management Inc. (KEI), U.S. Fish and Wildlife Service (USFWS), National Marine Fisheries Service (NMFS), Maine Department of Marine Resources (MDMR), and Penobscot Nation (Nation) (collectively, Parties) and constitutes part of the USFWS and NMFS's (together, the Services) Federal Power Act (FPA) section 18 fishway prescriptions. Its purpose is to establish a series of agreed-upon testing measures to determine whether performance standards have been met after installation of new fish passage facilities followed by an agreed-upon sequence of Adaptive Management Measures (AMMs) that may be taken if the performance standards are not met. Foundational principles that shall apply to all elements of this AMP as it is implemented during the subsequent license of the Lowell Tannery Hydroelectric Project, FERC No. 4202 (Project) are as follows:

- A. ***Purpose of Performance Standards.*** For purposes of this AMP, all performance standards set forth in the FPA section 18 prescriptions serve as a measure by which to evaluate the survival and delay of upstream and downstream migrants through the Project's fishways after construction/modification and to identify the necessary and appropriate AMMs to achieve the performance standards.
- B. ***Adoption of AMMs.*** Any non-attainment of a performance standard triggers a requirement for KEI to engage in adaptive management to cure the non-attainment after consultation with, and in collaboration with, the other Parties to attempt to reach consensus on what AMMs may be appropriate. When considering the selection of AMMs, the Parties shall be guided by the following factors:
 - 1) AMMs should be reasonably calculated to cure real deficiencies in safe, timely, and effective fish passage at the Project. This includes selecting alternatives most likely to solve observed problems with passage at the Project, selecting actions proportional to the deficiency, and considering whether apparent deficiencies are real, as opposed to artifacts of testing, measurement, or modeling.
 - 2) In the selection between alternative AMMs anticipated to produce the same level of improvement to fish passage effectiveness, the Parties should prefer the lower-cost solution.

- 3) No AMM may be adopted that would interfere with the safe, timely, and effective passage of species listed under the Endangered Species Act (ESA), as determined by NMFS and USFWS.

C. *Final Determination on AMMs.* If the Parties are unable to reach consensus on whether to adopt an AMM and/or the type or scope of any AMM, USFWS, NMFS, and MDMR (collectively, Resource Agencies) or any single resource agency with mandatory conditioning authority shall make the final determination on the AMM by: (a) considering the factors in section I.B; and (b) selecting a measure that is within the scope of Table I. KEI shall seek any permits and authorizations that may be required to implement the selected AMM.

D. *Implementation Timing.* Unless otherwise provided herein or circumstances beyond the reasonable control of KEI, KEI shall implement a selected AMM no later than 15 months after the Resource Agencies' receipt of KEI's report as described in section II.2.a.i.

The basic structure of this AMP is build-test-confer, followed by (as necessary) implementation of AMMs and retesting, unless KEI elects to follow the fish counting process provided in section II.C. And if necessary, the conferral-adaptive management-retesting process shall be repeated. There are several decision points that have informed this AMP. The first is how many cycles to plan for in this agreement. The second is how to test safe, timely, and effective passage. The third is what should be done in response to various test results. As to the latter, if all the performance standards are attained, the cycle stops as the goal has been achieved and no further adaptive management measure shall be warranted. If, however, any performance standard (or counts as outlined in section II.C if applicable) is not attained, the Parties shall consult for the purposes of determining the significance of any deviation from the standard and collaborating to reach consensus on the appropriate response, considering all the factors identified in section I.B, to either: (a) continue to gather additional information before deciding whether to select and implement an AMM; or (b) select an AMM that is within the scope of Table I and which can reasonably be expected to increase survival or decrease delay, based on the test results and the best available scientific information. The Parties shall engage collaboratively and in good faith as described in section I.B, and except as provided in section II.A.7, all final determinations shall be rendered as provided in section I.C.

This AMP includes a limited number of cycles in anticipation that these performance standards can be attained with limited adaptive management. However, if performance standards are not attained after completing these cycles, it is appropriate for the Parties to reconvene and determine what, if any, necessary and appropriate next steps would be, as outlined in Step 7 of this AMP set forth in section II.A.7.

II. Adaptive Management Process

- A. The adaptive management process for shad, alewife, blueback herring, American eel, and sea lamprey shall follow the development of monitoring plans (a.k.a. "effectiveness studies" or "effectiveness testing") pursuant to the prescription and

assess survival, injury, and delay in upstream and downstream fish passage and shall be initiated the first full, downstream fish passage season and the second, upstream fish passage season following installation of the new upstream fishway as follows:

1) Step 1:

- a. Task: Effectiveness testing for shad, alewife and blueback herrings, American eel, and sea lamprey. Within at least one year prior to the start of construction of the new prescribed upstream fishway, KEI will prepare a Passage Monitoring Plan for review and approval by the Resource Agencies following consultation with the Nation. The Passage Monitoring Plan will:
 - i. include appropriate measures for testing to determine whether the fishways developed under the prescription meet the applicable performance standards; and
 - ii. be consistent with the requirements of section IV of this AMP.

Following approval of the Passage Monitoring Plan by the Resource Agencies, the licensee shall submit it to FERC for review and approval. KEI shall carry out effectiveness studies in accordance with the approved Passage Monitoring Plan.

- b. Task: KEI shall operate the Project and fish passage facilities as provided for in the Fishway Operation and Maintenance Plan (FOMP).

2) Step 2:

- a. Task: Review of Step 1 effectiveness testing.
 - i. KEI shall prepare a comprehensive report on the results of effectiveness studies from Step 1 and provide the report to the Resource Agencies and the Nation by January 15 following the completion of Step 1.
 - ii. KEI shall convene a meeting by February 15th following the distribution of the report prepared under section II.A.2.a.i to review the effectiveness report and determine what, if any, AMMs should be implemented, considering all the factors identified in section I.B, above. All available AMMs are identified in Table I.
 1. If the Parties determine that an additional year of testing, or a test using a different method is necessary to make an AMM determination, the AMM determination may be delayed a year while those studies are done, with subsequent steps likewise delayed. This may be considered in the case of a

study that is not carried out according to approved study methods, a clearly anomalous year, inconclusive study results, or if the study performed reveals that the performance standard is not attained but does not identify why the performance standard is not attained.

2. Task: Conduct effectiveness study if required by section II.A.2.a.ii.1. Based on the results of the annual reports, the Parties may agree on adjustments to the study methodology for the next year of the evaluation.
 - b. Task: Identification of AMM. If all performance standards are attained, the Project shall be deemed safe, timely, and effective for passage of all target species and no further AMMs under section II.A of this AMP shall be required. However, KEI shall continue to comply with the requirements of section II.D. If any performance standard is not attained, the Parties shall consult, as provided in section I.B, to determine what AMM should be adopted, as provided in section I.C. All available AMMs appear in Table I, and the Parties shall establish the timeline to implement any AMM determined to be necessary as provided in section I.C (*See also* section III). If, based on the study results, all the Parties agree that an alternate AMM (i.e., an AMM not included in Table I) is appropriate to improve survival or reduce delay, then the Parties shall establish the timeline to implement the alternative AMM recognizing that such action may require FERC or other approvals.
 - c. Task: Implement AMM and Edit/File FOMP
 - i. KEI shall implement AMM as approved in accordance with section I.C.
 - ii. KEI shall consult with the Resource Agencies and the Nation and obtain approval of the Resource Agencies on changes to the FOMP and/or designs before implementing AMM. KEI shall file the revised FOMP with the FERC for approval, along with consultation records.
- 3) Step 3¹: Repeat Step 1 procedures.
- 4) Step 4: Repeat Step 2 procedures.
- 5) Step 5: Repeat Step 1 procedures.
- 6) Step 6: Repeat Step 2 procedures.

¹ If the AMM chosen in the prior cycle takes a year to build before being tested, this step and subsequent ones shall be delayed. Likewise, if a second year of testing is deemed necessary, this and subsequent steps may be delayed.

7) Step 7:

a. *Option 1: Action Plan*

- i. Except as provided in section II.A.7.b (if applicable), if any performance standard(s) (or counts as outlined in section II.C if applicable) for non-ESA listed species (e.g., not Atlantic salmon²) has not been attained following implementation of all AMMs required through Step 6, KEI shall consult with the Resource Agencies and the Nation to determine what action(s) would be necessary to achieve the performance standard.
- ii. Within one year after the February 15th meeting in Step 6, KEI shall develop an action plan intended to attain the performance standard(s). KEI's action plan shall include one or more measures agreed upon by the Parties that are intended to meet all performance standards identified in the prescription.
- iii. If the Parties reach consensus on the action plan measures, after considering all the factors identified in section I.B, KEI shall file the plan with FERC for its approval, as may be necessary, and implement the actions in accordance with the FERC-approved plan.
- iv. Upon full implementation of the FERC-approved action plan, no further AMMs under section II.A of this AMP shall be required. However, KEI shall continue to comply with the requirements of section II.D.
- v. If the Parties are unable to reach consensus on the action plan measures, after considering all the factors identified in section I.B: (1) each Resource Agency reserves its rights to seek additional improvements through regulatory processes; and (2) KEI reserves all rights to challenge any Resource Agency's exercise of rights.

b. *Option 2: Mitigation Plan*

- i. If any upstream performance standard(s)³ (or upstream counts as outlined in section II.C if applicable) for non-ESA listed species (e.g., not Atlantic salmon) has not been attained following implementation of all AMMs required

² For purposes of clarity, procedures for addressing the non-attainment of Atlantic salmon performance standards shall be addressed separately through section 7 of the ESA and therefore this section II.A.7.a does not apply to Atlantic salmon.

³ For purposes of clarity, the Project's non-attainment of any downstream performance standard(s) shall be addressed exclusively through an action plan under section II.A.7.a, and not through a mitigation plan under this section II.A.7.b. Moreover, procedures for addressing the non-attainment of Atlantic salmon performance standards shall be addressed separately through section 7 of the ESA and therefore this section II.A.7.b does not apply to Atlantic salmon.

through Step 6, but the Project is within 10 percentage points of the numeric performance standard (e.g., effectiveness is \geq 80% for a 90% standard), KEI may elect to propose a plan to mitigate for unattained upstream performance standard(s) in lieu of an action plan under section II.A.7.a.

- ii. If KEI elects to prepare a mitigation plan under this section II.A.7.b, it shall: (1) prepare the mitigation plan for non-attainment of upstream passage performance standards in consultation with the Resource Agencies and Nation; (2) file any mitigation plan agreed upon by the Parties with FERC for its approval, as may be necessary; and (3) implement the actions in accordance with the FERC-approved plan.
 - iii. Upon full implementation of the agreed-upon mitigation plan (as approved by FERC, as may be necessary), no further AMMs under section II.A of this AMP shall be required. However, KEI shall continue to comply with the requirements of section II.D.
 - iv. If the Parties are unable to reach consensus on a mitigation plan, KEI shall prepare an action plan as provided in section II.A.7.a.
- B. A separate, but parallel and complementary, process shall be carried out to test for survival, injury, and delay of Atlantic salmon at the Project. This process for Atlantic salmon adaptive management shall be guided by the framework of this AMP as well as the anticipated ESA section 7 consultation process to be carried out by NMFS and FERC and any requirements of any Incidental Take Statement included with a Biological Opinion issued by NMFS to FERC for this Project. Timing and scope of study plans for Atlantic salmon may be different than those for other species due to the availability of study fish, need for additional permits/authorizations, etc. Note that, given NMFS' jurisdiction under the ESA for Atlantic salmon and the anticipated section 7 consultation between NMFS and FERC, final approval for, and any amendments of, Atlantic salmon study plans rest solely with NMFS.
- C. Beginning as early as Step 1 under section II.A.1. (i.e., during effectiveness testing), but at any time during the section II.A process, KEI may initiate counts to document achievement of the species-specific "abundance goals" set forth in the prescription. Achievement of these abundance goals for alewives and/or shad may be used as an alternative to attaining the upstream performance standard for those species⁴ (see flowchart in Figure 1). Under this framework, KEI must demonstrate a rolling average that meets or exceeds the stated Abundance Goal in the prescription to be deemed safe, timely, and effective for upstream passage of alewives and/or shad. If the Parties concur that the interim counts demonstrate the potential for reaching the

⁴ Alewives and American shad exhibit different life history requirements, and thus, species counts shall be evaluated individually (i.e., alewife counts cannot be substituted for shad counts and vice versa).

Abundance Goal over the four-year period (see section II.C.iii.1.), KEI may, at its discretion, defer implementation of alewife- or shad-specific AMMs. This process for interim and final compliance is further described below.

- i. If KEI elects to pursue Abundance Goal counts as an alternative to meeting the identified upstream percentage-based performance standards as set forth in the prescription, KEI shall develop a plan for performing annual counts of alewives and shad at the Project in consultation with the Resource Agencies and Nation. The plan shall include counting techniques, the dates events shall be conducted,⁵ equipment being used, and data reporting. Conducting alewife and/or shad counts must not interfere with the safe, timely, and effective passage of Atlantic salmon at the Project. KEI shall submit a draft plan to the Resource Agencies and the Nation for their review, at least 6 months before the start of the first passage season when counting shall begin. Once the plan is approved by the Resource Agencies, in consultation with the Nation, KEI shall follow the terms of the plan.
- ii. If the comprehensive report prepared by KEI under Step 2 (section II.A.2.a.ii) demonstrates that the upstream performance standard for alewife and/or shad has not been met after the Step 1 first round of testing as outlined in section II.A.1, KEI may, as part of the comprehensive report, provide documentation that the Abundance Goal counts for alewives and/or shad have been met for a particular year and request concurrence from the Resource Agencies in consultation with the Nation.
- iii. Upon receipt of the report, the Resource Agencies shall review the data and other information from the passage studies or counts and either:
 1. Provide written concurrence that the Abundance Goal counts have been met, and no testing or AMM shall be required for upstream passage of alewives and/or shad during the following season; or
 2. Provide a written explanation of the Abundance Goal counts that were not adequately satisfied and/or identify documented passage deficiencies that have not been adequately resolved to date as well as recommendations for additional monitoring and/or recommendations for addressing deficiencies. Following implementation of these recommendations, KEI may resubmit the report and request for concurrence. Once concurrence from the Resource Agencies has been received, the adaptive management and testing for upstream passage of alewives and/or shad shall be deferred for the following passage season.
- iv. KEI shall continue monitoring counts following the approved counting plan (section II.2.C.i) and as outlined in sections II.2.C.ii and II.2.C.iii for three additional years.
 1. If the average count across the four years is greater than or equal to the Abundance Goal for alewives and/or shad as set forth in the

⁵ Counting at the facility annually should commence on the same day the fishway is opened each season and should continue for the duration of the upstream passage season for each of the target species.

prescription, the Project shall be deemed safe, timely, and effective for the upstream passage of alewives and/or shad and no further AMMs under section II.A of the AMP shall be required for the upstream passage of those species. However, KEI shall continue to comply with the requirements of section II.D.

2. If in any year, the running average drops below 75% of the Abundance Goal (i.e., $0.75 * 678,680$ alewives = 509,010 alewives or $0.75 * 12,765$ shad = 9,574 shad), the process reverts to section II.A.3 (i.e., effectiveness testing and adaptive management).
- v. After implementation of an AMM, KEI may resume counting of alewives and/or shad at the fishway. If KEI can demonstrate a count of greater than or equal to the Abundance Goal has been met, then KEI can submit a report to the Resource Agencies for review and concurrence as outlined in section II.C.ii. Upon concurrence from the Resource Agencies, further adaptive management and testing shall be deferred as outlined in section II.C.iii, and additional years of counting shall be repeated as outlined in section II.C.iv.
- vi. Consistent with section II.A, there shall be a maximum of three opportunities to pause adaptive management in response to count data. If after three rounds of testing and adaptive management, the counting approach has not resulted in the numeric targets having been met, this process reverts to section II.A.7.

D. Achievement of Performance Standards or Counts

Once Steps 1 through 7 under section II.A have been completed (or, alternatively, the Abundance Goal counts have been attained as provided in section II.C), no further adaptive management is required under this AMP. However, KEI shall implement actions identified in this section II.D.

1. FOMP and Fishway Operation and Maintenance Report

KEI shall continue to implement the FOMP and Fishway Operation and Maintenance Report requirements under the prescription;

2. 5-Year Review Cycle

Every 5 years following completion of the adaptive management process under section II.A, or more frequently as requested by one or more of the Parties, KEI shall convene the Parties to discuss modifications at the Project that may be implemented to attain performance standard(s) or counts that were not attained following the completion of the adaptive management process under section II.A, based on information produced from monitoring and studies conducted during the AMP, under the FOMP, and any other best available scientific and technical information.

If the Parties reach consensus on any modifications under this section, KEI shall seek approval from FERC and any other permitting agency to implement the measures;

Once the licensee receives all permits and authorizations, the licensee shall implement the agreed-upon measures. If the Parties do not reach consensus on any modifications under this section II.D.2, each Resource Agency reserves its rights to seek additional improvements through regulatory processes and the licensee reserves all rights to challenge any Resource Agency's exercise of rights.

The review cycle required by this section II.D.2 shall expire once all performance standards (or the alternative abundance goals for alewives and shad).are attained.

3. 10-Year Review Cycle

KEI shall implement the requirements under the prescription to conduct monitoring on a 10-year cycle.

III. Determination and Implementation of AMMs

Any AMM selected for implementation in accordance with section I.C shall be implemented as soon as practicable, preferably prior to the next fish passage season, and consistent with requirements for the timing of implementation as provided in section I.D.

Within 60 days of USFWS and NMFS concurrence of 90% design plans for the upstream fishway, KEI shall convene a meeting of the Parties to discuss whether the upstream passage AMM in Table I are appropriate for the design. Any changes to the list of AMM in Table I must be agreed upon by the Parties and reported to FERC.

AMMs specific to Atlantic salmon smolt and kelt downstream passage at the Project are also identified below; implementation of AMM for Atlantic salmon shall be carried out in consideration of this AMP as well as any outcomes of the ESA section 7 consultation between FERC and NMFS and any requirements of any Incidental Take Statement included with a Biological Opinion issued by NMFS to FERC for this Project.

IV. Effectiveness Testing

A. Upstream Passage

Upstream passage effectiveness of the new facilities at the Project shall be evaluated for adult American shad, alewife, blueback herring, sea lamprey and American eel in accordance with the prescription. To meaningfully assess the physical environment within and around the fishway and fish behavioral response to that environment, study plans shall be developed pursuant to Paragraph II.A.1.a of this AMP. Potential study methods for upstream passage facility testing could include

the use of Acoustic Doppler Current Profiler (ADCP), or Computational Fluid Dynamic (CFD) modeling. Survival, injury, and delay and likely causes of mortality and delay may be studied through acoustic, radio, and/or passive integrated telemetry fish tagging techniques, or other methods as appropriate.⁶ The scope and choice of method shall be informed by cost and the nature of the questions to be answered and shall include considerations of sample size, and technology necessary to make conclusions. Data from studies shall provide the necessary information for evaluating whether the new fishway meets the defined passage standards for safe, timely, and effective passage for these species. Based on study results, the Parties may identify adjustments to the study methodology for any subsequent evaluation year.

Timing and scope of study plans for Atlantic salmon may be different than those for other species and shall be developed consistent with the requirements of the anticipated section 7 consultation between NMFS and FERC; final approval for, and any amendments of, Atlantic salmon study plans rest solely with NMFS.

B. Downstream Passage

Downstream passage effectiveness at the Project shall be evaluated for adult and juvenile alosine species and American eel. To meaningfully assess the physical environment associated with downstream fish passage and fish behavior, study plans shall be developed to assess passage route selection, impingement, and survival of downstream migrants. Pursuant to the prescription, a downstream fishway monitoring plan shall be developed through consultation with the Parties and approved by the Resource Agencies. Potential study methods for downstream fish passage could include the use of ADCP or CFD modeling. Survival injury and delay and likely causes of mortality and delay may be studied through acoustic, radio, and/or passive integrated telemetry fish tagging techniques, balloon tags, and/or other methods as appropriate. The scope and choice of method shall be informed by cost and the nature of the questions to be answered and shall include considerations of sample size, and technology necessary to make conclusions. Data from these studies shall provide necessary information for evaluating whether the Project facilities meet the identified passage standards for alewife and shad and safe, timely, and effective downstream passage for American eel. Based on study results, the Parties may identify adjustments to the study methodology for any subsequent evaluation year.

Timing and scope of study plans for Atlantic salmon may be different than those for other species and shall be developed consistent with the requirements of the anticipated section 7 consultation between NMFS and FERC; final approval for, and any amendments of, Atlantic salmon study plans rest solely with NMFS.

⁶ Note, we anticipate that requirements for upstream and downstream studies involving listed Atlantic salmon shall be developed by NMFS in consultation with KEI and FERC as part of the ESA section 7 consultation for the issuance of any new license for the Lowell Tannery Project.

Table I. Adaptive Management Measures

Target Area and Species	AMMs
Attraction Flow - Shad, Alewife, Blueback Herring, Atlantic salmon, and Sea lamprey	<ul style="list-style-type: none"> ● Increase attraction flow up to 20% of the authorized maximum hydraulic capacity when river flow exceeds station capacity
Internal Fishway Upstream Passage - Shad, Alewife, Blueback Herring, Atlantic salmon, and Sea lamprey	<ul style="list-style-type: none"> ● Operational modifications (e.g., lift frequency, baffle modifications, and entrance gate positions), which may include associated structural modifications that would support the original design intent of the fishway. ● Adjust flow (+/-) within the fishway to address hydraulic concern and/or seasonal species-specific passage needs, subject to the limitation that attraction flows within the fishway shall not exceed 5% of station discharge. When river flows exceed the station discharge, up to an additional 15% of station discharge may need to be provided via the new flume/pipe that shall be located near the entrance of the fishway. ● Addition or modification of fallback prevention devices (e.g., weirs, baffles, trap gates, etc.).
Upstream Eel Passage – Operational	<ul style="list-style-type: none"> ● Modify attraction flow. ● Adjust spray bars. ● Modify substrate/add substrate.
Upstream Eel Passage – Structural	<ul style="list-style-type: none"> ● Move location of the entrance(s). ● Modify length/geometry of eelway(s). ● Modifying ledges.
Downstream passage - Shad, Alewife, Blueback Herring, Atlantic salmon, American eel, sea lamprey	<ul style="list-style-type: none"> ● Add a second downstream fishway entrance, which would be satisfied through KEI’s addition of the new flume/pipe that is referenced above.

Target Area and Species	AMMs
	<ul style="list-style-type: none"> ● Install uniform acceleration weir in entrance to downstream bypass. ● Address impingement and downstream guidance issues through the following sequential modifications, prioritized as follows: (1) removing the concrete support beam at the top of the intake structure to increase the gross area of the intake racks; and/or (2) modifying the intake rack to increase surface area. ● Increase the combined downstream attraction flow up to 10% of the authorized maximum hydraulic capacity.
Atlantic Salmon Smolt and Kelts – Downstream	<p>If studies indicate that, after implementing the downstream passage improvement measures identified above, the average survival of Atlantic salmon smolts or kelts is less than 96%, then KEI, in consultation with NMFS, must implement a spill plan*. Details of the spill plan shall be determined as part of the ESA Section 7 consultation process, but are expected to include requirements similar to the following⁷:</p> <ul style="list-style-type: none"> a. Provide nighttime spill between 20% and 50% of river flow at the Lowell Tannery Project during the smolt outmigration for a period to be determined in consultation with NMFS; or b. Increase nighttime spill to between 50% and 75% of river flow for a period to be determined in consultation with NMFS; or c. Provide 100 percent spill of river flow at night for a period to be determined in consultation with NMFS.

⁷ Implementation of the spill plan may result in false upstream attraction of American shad, alewife, blueback herring, American eel, adult Atlantic salmon, and sea lamprey. If a spill plan is implemented, studies of upstream passage shall be needed to determine if additional measures are needed to meet passage standards for upstream passage of all species. These additional upstream passage studies shall be determined collaboratively by the Parties.

Target Area and Species	AMMs
	<p>Note that the time of year for implementation of these measures may be different depending on whether smolts or kelts are being targeted.</p> <p>*The Biological Opinion anticipated to result from ESA section 7 consultation between NMFS and FERC may include alternative or additional measures</p>

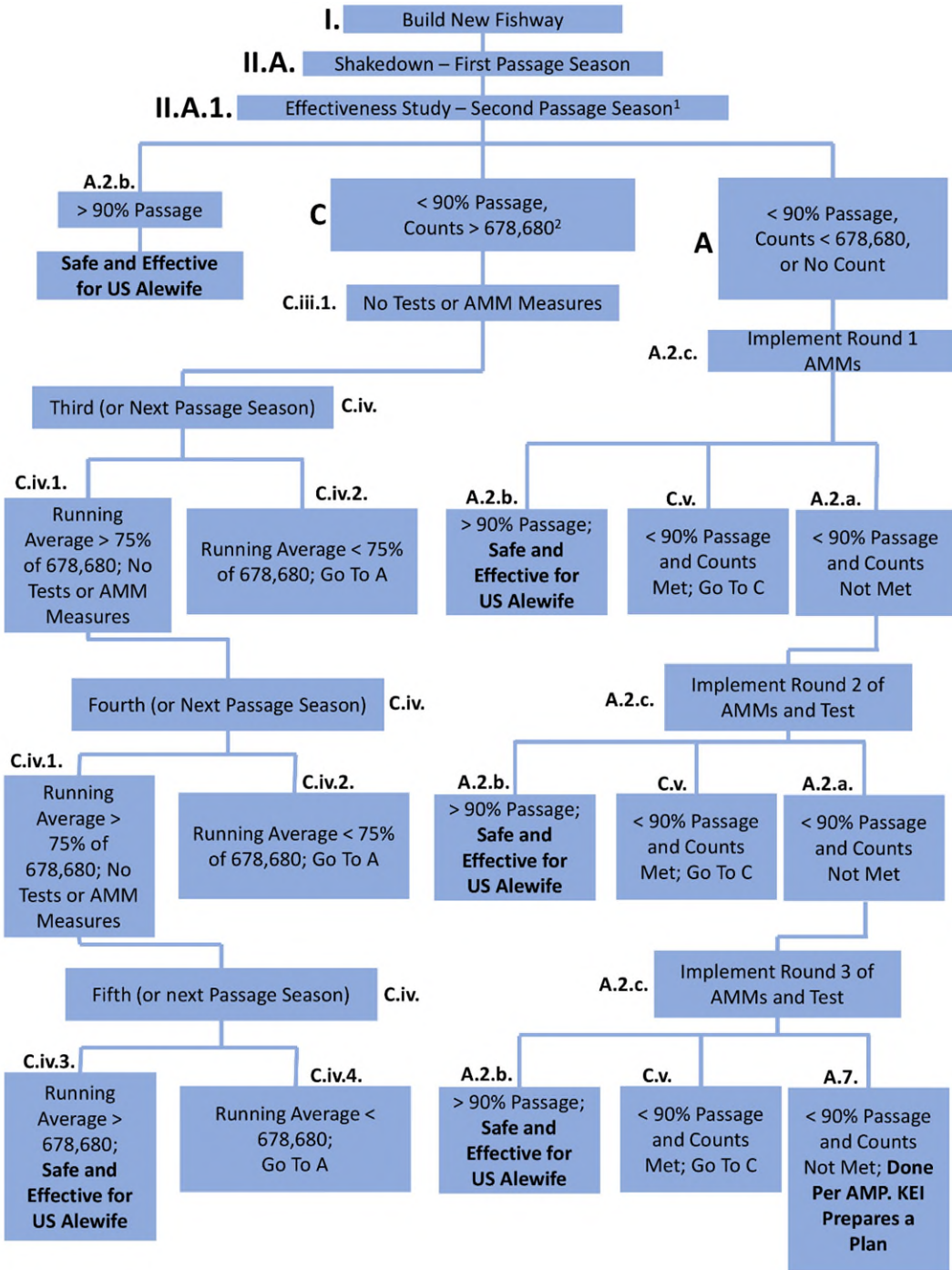


Figure 1. Flow chart of the adaptive management process described in Section II.A. (prior to II.A.7.) and Section II.C for upstream alewives. Bold labels outside boxes match section labels in the AMP text. Bold text inside the boxes depicts endpoints in the process. If counts are to be pursued, KEI must present a plan for approval by the Resource Agencies as outlined in Section II.C.i (footnote 1 in flow chart). KEI must document adherence to the identified counts in a report for each year of counting, which requires concurrence from the Resource Agencies as outlined in Section II.C.ii and Section II.C.iii (footnote 3 in flow chart).

Appendix E

**MDMR Draft Instructions for
Biological Monitoring of River Herring**



JANET T. MILLS
GOVERNOR

APPENDIX E
STATE OF MAINE
DEPARTMENT OF MARINE RESOURCES
21 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0021

PATRICK C. KELIHER
COMMISSIONER

Draft
Instructions for Biological Monitoring of River Herring

Materials Provided:

- 100 scale sample envelopes
- 1 pre-labelled return envelope
- 1 waterproof Scale Collections & Observations Worksheet
- 1 paper copy of Scale Collections & Observations Worksheet

Reasons for Collecting Data:

The Maine Department of Marine Resources collects data from municipal alewife and blueback herring runs in Maine to meet management goals and objectives established by the Atlantic States Marine Fisheries Commission (ASMFC). These data will help inform biological metrics for the population and document progress towards management goals.

Instructions:

Scale Samples: Collect **at least** 10-15 scales from **randomly selected** individual fish and place them inside the folded paper insert located in the scale sample envelope. Enter the location, date and sample number on the scale envelope. These numbers will be 1 through 100 at the conclusion of the season. No other information needs to be written on the scale envelope. Please wipe off the scale collection knife with a rag between each fish sampled so that every scale sample envelope has scales from only one fish.

The scales need to be collected from the region on the fish shown in the illustration on the **Scale Collections and Observations Worksheet**. Please enter the name of the fishway of collection on the worksheet. The goal is to collect 25 samples per week during the duration of the alewife run. If the season is shorter than 4 weeks, more than 25 samples will need to be collected each week (up to 50).

The only information required on the **Scale Collection and Observation Worksheet** are:

1. Date the samples were collected (for example May 1, 2023).
2. An estimate of the number of fish present when the scales were collected.
3. Number of scale samples collected during that day.

There are 5 additional scale envelopes for scales that are for your use outside of the routine sampling (for example, if you see a large alewife and you want to know how old it is, collect a sample from it with one of these 5 envelopes). We will age these fish for you, but **please** do not include these in the routine random sampling.

Place all the scale envelopes and datasheets in the pre-labelled return envelope, apply appropriate postage, and mail them at the conclusion of the run.

If you have any questions, please call Michael Brown at 207-624-6341.

The Maine Department of Marine Resources may charge a fee to cover the actual cost of processing the scale samples.

OFFICES AT 32 BLOSSOM LANE, MARQUARDT BUILDING, AUGUSTA, MAINE
<http://www.Maine.gov/dmr>

PHONE: (207) 624-6550

FAX: (207) 624-6024

Appendix F

Authorized Representatives of the Parties

Appendix F
Authorized Representatives of the Parties

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