

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, DC 20426
July 26, 2024

OFFICE OF ENERGY PROJECTS

Project No. 2322-069—Maine
Shawmut Hydroelectric Project
Brookfield White Pine Hydro LLC

VIA FERC Service

Mr. Randy Dorman
Brookfield White Pine Hydro LLC
150 Main Street
Lewiston, ME 04240

Reference: Water Quality Certification for the Shawmut Hydroelectric Project

Dear Mr. Dorman:

On January 31, 2020, Brookfield White Pine Hydro LLC (Brookfield) filed a license application for the Shawmut Hydroelectric Project No. 2322 (Shawmut Project or project). On August 28, 2020, Brookfield applied to the Maine Department of Environmental Protection (Maine DEP) for water quality certification (WQC) for the project pursuant to section 401 of the Clean Water Act. On August 11, 2021, Maine DEP provided Brookfield with a draft order denying the WQC. Brookfield subsequently withdrew its WQC application on August 18, 2021. On October 15, 2021, Brookfield again applied to Maine DEP for a WQC for the project. Maine DEP received the new WQC application on October 18, 2021.¹ In a letter filed with the Commission on October 12, 2022, Maine DEP denied Brookfield's request for a WQC without prejudice.

Under section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1), a license applicant must obtain either certification from the appropriate certifying authority verifying that any discharge from a project would comply with applicable provisions of the Clean Water Act, or a waiver of certification by the appropriate certifying authority. In accordance with the Commission's policy in *Swift River Company*,² if a WQC request

¹ On October 20, 2021, Brookfield filed a copy of the WQC request receipt of delivery with the Commission.

² *Swift River Co.*, 41 FERC ¶ 61,146 (1987).

is denied, we may dismiss the license application 90 days after the denial unless the applicant notifies the Commission that it has, filed a timely appeal of the denial and/or that it has refiled its WQC request.³

On November 7, 2022, Brookfield filed with the Commission a request for determination that Maine DEP's denial failed to satisfy the criteria of section 121.7(e)(1) of EPA's certification regulations,⁴ and therefore, that certification had been waived.⁵ On November 14, 2022, Brookfield filed a petition for review with the Somerset County Superior Court for review of Maine DEP's decision.

On November 22, 2022, the Secretary of the Commission issued a notice, pursuant to section 121.8(b) of EPA's certification regulations, that Maine DEP had denied certification for the project and that Maine DEP's denial satisfies the requirements of section 121.7(e)(1) of EPA's certification regulations.⁶

Brookfield sought rehearing of the Commission's November 22, 2022 notice and on March 17, 2023, the Commission upheld the findings in the November 22, 2022 notice affirming that Maine DEP had not waived certification. On March 20, 2023, Brookfield filed a Petition for Review of the Commission's ruling in the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit).

On January 17, 2024, the Somerset County Superior Court denied Brookfield's appeal, upholding Maine DEP's Order denying without prejudice the WQC for the Shawmut Project. Brookfield did not appeal the decision.

On July 5, 2024, the D.C. Circuit denied Brookfield's Petition for Review of the Commission's November 22, 2022 notice.⁷ Accordingly, both of Brookfield's appeals of Maine DEP's 2022 Denial of its request for WQC have been denied. Thus, consistent

³ See *Swift River Co.*, 41 FERC at 61,146; *City of Harrisburg*, 43 FERC ¶ 61,438 (1988), *order on clarification*, 41 FERC ¶ 61,053 (1988), *order on reh'g*, 51 FERC ¶ 61,125 (1990), *order on clarification*, 53 FERC ¶ 61,235 (1990).

⁴ The EPA regulation cited here has since been revised, but that amendment did not take effect until November 2023. See *Clean Water Act Section 401 Water Quality Certification Improvement Rule*, 88 Fed. Reg. 66,558 (Sept. 27, 2023). Thus, the Commission applied the regulation in effect at the time of the order.

⁵ Brookfield November 7, 2022 Certification Determination Request at 1.

⁶ See *supra* note 4.

⁷ *Brookfield White Pine Hydro v. FERC*, 2024 WL 3311809 (D.C. Cir. July 5, 2024).

with Commission policy, please notify the Commission within 90 days (by October 24, 2024), whether Brookfield has refiled the certification request with Maine DEP.

The Commission strongly encourages electronic filing. Please file the requested information using the Commission's eFiling system at <https://ferconline.ferc.gov/eFiling.aspx>. For assistance, please contact FERC Online Support at [FERCOnlineSupport @ferc.gov](mailto:FERCOnlineSupport@ferc.gov), (866) 208-3676 (toll free), or (202) 502-8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Debbie Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, D.C. 20426. Submissions sent via any other carrier must be addressed to: Debbie Anne A. Reese, Acting Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include docket number P-2322-069.

If you have any questions, please contact Matt Cutlip at (503) 552-2762 or via email at matt.cutlip@ferc.gov.

Sincerely,

Nicholas Jayjack
Director
Division of Hydropower Licensing