



JANET T. MILLS
GOVERNOR

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION



MELANIE LOYZIM
COMMISSIONER

October 12, 2022

Brookfield White Pine Hydro LLC
Kelly Maloney, Senior Manager, Compliance - Northeast
kelly.maloney@brookfieldrenewable.com

Via E-mail

RE: Final Order L-019751-33-I-N

Dear Ms. Maloney,

The Maine Department of Environmental Protection (Department) is issuing the enclosed Order, denying without prejudice Brookfield White Pine Hydro LLC's (Brookfield) October 18, 2021, application for Water Quality Certification (WQC) for the Shawmut Hydroelectric Project (Project). The Department carefully considered the comments by your representatives and others on the July 29, 2022, draft Order, and hopes that clarification of its assessment of the WQC application in the context of anticipated additional sources of relevant information and analysis will resolve confusion regarding the effect of this Order.

Background

Maine's Water Quality Standards require riverine impoundments to meet the habitat characteristic and aquatic life criteria described in 38 M.R.S. § 465. As you are aware, on August 11, 2021, the Department issued a draft denial of Brookfield White Pine Hydro LLC's (Brookfield) August 28, 2020, application for WQC, finding that it did not adequately demonstrate that Brookfield's proposed operation of the Project would meet Maine's water quality standards. Brookfield filed a revised application with the Department on October 18, 2021, with additional measures to improve fish passage. Brookfield supplemented its application with additional proposed measures on September 22, 2022. Federal law requires that the Department take action on all WQCs within one year from the date of their submission. This means that the Department must either approve or deny Brookfield's WQC application by October 18, 2022.

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Forthcoming Additional Information

On August 8, 2022, the Federal Energy Regulatory Commission (FERC) granted a request from the National Marine Fisheries Service (NMFS) to extend the deadline to issue its biological opinion. In its request for the extension, NMFS stated:

“This additional time is necessary to consider information and analysis related to downstream passage studies that was not included in the Biological Assessment, the Species Protection Plan, or the Environmental Assessment. This analysis emerged as a result of discussions between us and the licensees related to addressing effects of the action on Atlantic salmon.” (FERC Accession #20220715-5168.)

This information and analysis, as well as any forthcoming responsive comments from Brookfield, agencies, and others, and the biological opinion itself, are all relevant to the state WQC process and are necessary for the Department’s review of any Project WQC application.

This additional information was not available to the Department when Brookfield filed its 2021 WQC application. Although Brookfield identified the additional measures it has proposed to NMFS in its supplement to the WQC on September 22, 2022, NMFS’s assessment of those measures is not due until October 13, 2022, and will not be available to the Department until NMFS provides it to FERC in accordance with 50 CFR Part 402. NMFS’ biological opinion will provide the most up to date analysis of the Project’s impact on the continued existence of listed Atlantic salmon.

Implications for Department’s WQC assessment

Given the relative timing of FERC’s extension and the Department’s deadline to act on the current WQC application, the Department will not have adequate opportunity to evaluate the new information, analyses, and comments.

If the Department were to issue a conditioned approval under the current deadline, it could create unnecessarily conflicting or redundant requirements based on outdated or incomplete biological information and analysis. The Department believes it is crucial to take into account all relevant and updated information and analysis, and it believes that Brookfield’s application deserves due and full consideration because a Department Order approving the application could contain enforceable conditions and timelines.

Conclusion

Therefore, a denial without prejudice of the current WQC application is based on procedural facts and addresses the above concerns by acting on the request in a way that allows Brookfield an opportunity to submit another WQC application with the benefit of the forthcoming NMFS biological opinion and related information and analysis expected to be submitted pursuant to the extended FERC deadline. Issuance by the Department of a final Order denying Brookfield’s WQC application without prejudice constitutes final Department action on the pending WQC application and does not waive the Department’s WQC authority.

Furthermore, this denial without prejudice does not require any changes to current operational requirements for the Project dam, nor would it require removal of the dam as asserted by some commenters.

Department staff are committed to working with Brookfield to ensure Maine's water quality standards are met. If you have any questions about this matter, please contact me at kyle.olcott@maine.gov or 207-641-9012.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kyle Olcott". The signature is fluid and cursive, with the first name "Kyle" and last name "Olcott" clearly distinguishable.

Kyle Olcott
Hydropower Coordinator
Bureau of Land Resources

cc: Sharon Newman, Preti-Flaherty
Matthew Warner, Preti-Flaherty
Scott Boak, AGO