

August 5, 2022

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Maine Dept. of Environmental Protection
17 State House Station
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RE: Draft Order, Brookfield White Pine Hydro LLC, Shawmut Hydroelectric Project, L-019751-33-I-N

Dear Mr. Olcott:

On behalf of Brookfield White Pine Hydro LLC (“BWPH”), this letter comments on the above-captioned draft order regarding the Shawmut hydroelectric project (the “Shawmut Project”) in which the Maine Department of Environmental Protection (“DEP” or the “Department”) would deny “without prejudice” BWPH’s October 18, 2021 request for water quality certification for the Shawmut Project (the “Denial”). The Department is aware that the economy of the lower Kennebec River valley hinges on the continued operations of the Shawmut Project and the Sappi Somerset Mill. By proposing to deny the application for water quality certification without cause, the Department is jeopardizing the future of this region of Maine. For this reason and the reasons outlined below, BWPH urges the Department to reconsider the Denial before it becomes final.

1. The Denial is predicated on speculation, not facts.

DEP has not explained why it lacks sufficient information to make a decision on BWPH’s request for certification of the Shawmut Project pursuant to 38 M.R.S. §464. Instead, the Denial simply assumes that BWPH will need to revise its proposed fish passage measures for the Shawmut Project as a result of future federal activity, *i.e.*, issuance of the National Marine Fisheries Service (“NMFS”) Biological Opinion (“BiOp”) for the Shawmut Project and the Federal Energy Regulatory Commission (“FERC”) multi-project supplemental Environmental Impact Statement (“EIS”). This is pure speculation. No federal process requires the amendment of BWPH’s proposed fish passage measures for the Shawmut Project, and BWPH has made no decision as of the date of this letter to “update” or otherwise change its water quality certification application for Shawmut. The Denial states without attribution that BWPH staff “*have publicly acknowledged that the NMFS review could require changes to proposed fish passage measures.*” Denial at 2, Section 1(B). This is nothing more than a truism applicable to every FERC-related application for water quality certification. BWPH has never stated that its fish passage proposals *will be revised*, because this would be entirely speculative.

An agency cannot deny a permit based on speculation. *See Hannum v. Bd. of Env’t Prot.*, 2003 ME 123, ¶ 17, 832 A.2d 765 (“the finding of fact speculating that future development of

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other docks could have cumulative impacts ... is unsupported by evidence in the record and cannot support the portions of the Board's decision that rely on that finding"). The Denial, because it is based on speculation and not facts, is unsupported by evidence in the record and thus illegal under state law.

2. The Department cannot require BWPH to file a new and different application.

Section 3 (Decision and Order) of the Denial assumes that BWPH must revise its proposal, stating: "*Brookfield should file an updated request for certification once it has fully developed its final proposal....*" Denial at 3. However, BWPH has already fully developed its final proposal for the Shawmut Project, which is the one the Department is about to reject without cause. As noted above, BWPH has made no decision to revise its certification application for the Shawmut Project. Therefore, the Department should act on the merits of that application by October. Furthermore, any additional requirements that may be developed through the BiOp and EIS processes may not constitute or require any revision to BWPH's own proposal. They would simply be incorporated into any resulting FERC license in much the same way that conditions to any water quality certification issued by the DEP would be required to be incorporated; FERC would not first require BWPH to update its proposal to reflect them.

At a minimum, the Department cannot require BWPH to file a new and different application in the future. Therefore, the above-quoted text from Section 3 and all other statements to that effect should be stricken from the Denial.¹

3. The Denial is unclear as to when the Department will act on a future application.

The Department states that it is appropriate to issue a denial without prejudice when "*there are reasonably foreseeable but not yet developed sources of information.*" Denial at 2, Section 2(B). However, the Denial is unclear as to when the Department will consider any such sources of information to be developed sufficiently for purposes of acting on a future certification application. The Denial indicates that DEP wishes to consider comments by the State agencies and BWPH on the BiOp and the EIS, but also states that it is waiting for these federal actions to be "completed" without clarification as to whether this means the EIS and/or BiOp must be in draft or final form. Denial at 2, Section 1(B).

We note that, previously, the Department has *not* made applicants wait until a final EIS or BiOp has been issued before acting on a certification request. The Denial does not explain why the Shawmut Project should be an exception to DEP's customary process for independently evaluating certification applications. To the extent that the Denial requires BWPH to wait until

¹ Specifically, the following statements also should be deleted from the Denial:
"*In response to this federal activity, Brookfield staff have publicly acknowledged that the NMFS review could require changes to proposed fish passage measures.*"
"*... an Applicant's request has materially changed since it was initially filed.*"
"*... in situations where the Applicant continues to develop and refine its relicensing proposal.*"

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the EIS and/or the BiOp are issued in final form, this delay is arbitrary and capricious.² In any event, the Denial should be revised to clarify this issue.

4. The Department's delay in acting on the certification request is arbitrary and capricious.

A FERC license cannot be issued until a water quality certification has been issued.³ It is common for new measures to be incorporated into a FERC license following issuance of a state certification, such as through prescriptions imposed by federal agencies. Maine has never made an issue of this timing previously. It is disingenuous for the Department to now insist that it will, in effect, defer acting on a water quality certification request because of potential new measures that might be incorporated as a result of subsequent processes. By that logic, the Department could never issue a water quality certification for any FERC-related application. The Department's novel delay tactics demonstrate that it is acting arbitrarily and capriciously.

5. The Denial will result in the Department waiving its certification authority under Section 401 of the Clean Water Act.

While a denial "without prejudice" may be appropriate in some circumstances, it is not appropriate as a raw political maneuver or when illegal under state law. As explained above, the Denial is illegal under state law because it is based on speculation, not facts. It is therefore distinguishable from recent denials without prejudice that were upheld by FERC and then the courts. *See, e.g. Turlock Irrigation Dist. v. FERC*, 36 F.4th 1179 (D.C. Cir. 2022). If this Denial becomes final, and an appeal continues through October, the Department will have failed to act *lawfully* on BWPH's request for certification within one year of receiving the request and shall be deemed to have waived its authority to grant or deny water quality certification. *See* 33 U.S.C. § 1341(a)(1).

Please feel free to contact me should you have any questions.

Very truly yours,



Sharon G. Newman

SGN:bh

² Moreover, this is inconsistent with FERC regulations, which require a license applicant to file, within 60 days following the date FERC issues notice that the application is ready for environmental analysis: a copy of the water quality certification; a copy of the request for certification; or evidence of the state's waiver thereof. 18 C.F.R. § 5.23(b).

³ 33 U.S.C. § 1341(a)(1).