



JANET T. MILLS
GOVERNOR

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION



MELANIE LOYZIM
COMMISSIONER

MEMORANDUM

TO: Interested Parties

FROM: Kyle Olcott
Hydropower Coordinator
Maine Department of Environmental Protection

DATE: July 29, 2022

SUBJECT: Draft Order, Brookfield White Pine Hydro LLC, L-019751-33-I-N

Attached is a draft Departmental Order for the application referenced above.

Any comments on the draft Order should be sent to: ShawmutWQC.DEP@maine.gov

Comments are due by Friday, August 5, 2022, at 5pm.

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DEPARTMENT ORDER

IN THE MATTER OF

BROOKFIELD WHITE PINE HYDRO LLC Skowhegan, Fairfield, Clinton, Benton Kennebec and Somerset Counties SHAWMUT HYDROELECTRIC PROJECT L-019751-33-I-N (DENIAL WITHOUT PREJUDICE)	MAINE WATER QUALITY PROGRAM CLEAN WATER ACT WATER QUALITY CERTIFICATION
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Pursuant to the provisions of 38 M.R.S. §§ 464 *et seq.*, Section 401 of the Clean Water Act (CWA), 33 U.S.C. § 1341, and Department Rules, including 06-096 CMR Chapters 579-581, the Department of Environmental Protection (the Department) has considered the application of BROOKFIELD WHITE PINE HYDRO LLC (Applicant or Brookfield) with all supporting data, agency review comments, public review comments, and other related materials in the administrative record. Based on the record evidence and the Department's professional judgment and expertise, the Department makes the following findings of fact, determinations, and conclusions:

1. APPLICATION SUMMARY

A. Application

On October 18, 2021, the Applicant submitted an application to the Department for Water Quality Certification (WQC) pursuant to Section 401 of the CWA for the proposed federal relicensing and continued operation of the existing Shawmut Hydroelectric Project, P-2322 (Project), located on the Kennebec River in the Towns of Skowhegan, Fairfield, Clinton and Benton, Kennebec and Somerset Counties, Maine.¹

B. Anticipated Changes to Applicant's Proposal and Reasonably Foreseeable Future Actions

Since Brookfield filed its most recent request for certification in October of 2021, the Department has become aware of the potential for significant material changes to Brookfield's Federal Energy Regulatory Commission (FERC) relicensing proposal as well as pending federal actions that will likely result in a materially different relicensing proposal. Specifically, the National Marine Fisheries Service (NMFS) is still working with Brookfield to develop its Biological Opinion analyzing Project effects on federally

¹ Brookfield previously filed a request for certification for the Project on August 28, 2020, and withdrew its request on August 18, 2021, following the Department's issuance of a draft denial of certification on August 11, 2021, under Department project number L-019751-33-H-N.

listed Atlantic salmon. On July 14, 2022, NMFS requested an additional 90-day extension, until October 13, 2022, to complete the Biological Opinion. In response to this federal activity, Brookfield staff have publicly acknowledged that the NMFS review could require changes to proposed fish passage measures. Additionally, FERC is in the process of preparing a multi-project supplemental Environmental Impact Statement that will analyze the combined effects on fisheries resources of four hydroelectric projects on the Kennebec River, including the Shawmut Project. The Department expects Brookfield and State agencies to comment on these federal actions and these comments would assist the Department in evaluating the WQC application. Neither of these federal actions will be completed in time for the Department to make a timely decision on certification prior to the one-year certification waiver deadline on October 18, 2022.

2. SECTION 401 OF THE CLEAN WATER ACT

A. Requirement to “Act” on Request for Certification

Section 401 of the federal Clean Water Act requires the Department to “act” on a request for certification within one year. If the Department does not “act” within one year, then the certification is waived. Acting on the request for certification can take one of the following forms: 1) approval, 2) approval with conditions, 3) denial, or 4) denial without prejudice.

B. Denial Without Prejudice

A denial without prejudice is not based on any judgement of the technical merits of an Applicant’s request. Instead, a denial without prejudice is appropriate when an Applicant’s request lacks sufficient documentation or if an Applicant’s request has materially changed since it was initially filed. Due to the Clean Water Act’s one-year waiver period, it is appropriate for the Department to deny a request for certification without prejudice because a request lacks sufficient documentation, otherwise the Department would be in an untenable position of being forced to either grant certification without the necessary information or forced to waive its certification authority. Therefore, in situations where the Applicant continues to develop and refine its relicensing proposal, or if there are reasonably foreseeable but not yet developed sources of information, then it is appropriate for the Department to act on such request by issuing a denial without prejudice. A denial without prejudice allows an Applicant to request certification once it has fully developed its request and allows the Department to further act on the most accurate and complete version of an Applicant’s request using the best available information.

3. DECISION AND ORDER

THEREFORE, the Department DENIES WITHOUT PREJUDICE the water quality certification of the Applicant BROOKFIELD WHITE PINE HYDRO LLC pursuant to Section 401 (a) of the Clean Water Act. This denial without prejudice should not be interpreted as either a positive or a negative judgement of the merits of Brookfield's proposal. Brookfield should file an updated request for certification once it has fully developed its final proposal, and following the reasonably foreseeable future federal actions described above that will provide the Department with valuable sources of information.

DONE AND DATED IN AUGUSTA, MAINE, THIS ____ DAY OF _____, 2022.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BY: _____

For: Melanie Loyzim, Commissioner

PLEASE NOTE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES.

KO/L-019751-33-I-N/ATS 88255

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