

FEDERAL ENERGY REGULATORY COMMISSION
Washington, D.C. 20426

OFFICE OF ENERGY PROJECTS

Project No. 4784-077 &-078--Maine
Pejepscot Project
Topsham Hydro Partners

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April 9, 2010

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Subject: Upstream and downstream fish passage issues

Dear Madam and Sirs:

We received two letters from the Friends of Kennebec Salmon and the Friends of Merrymeeting Bay (together, Friends), dated February 1, 2010, addressing fish passage operation to protect Atlantic salmon at the Pejepscot Project¹ on the Androscoggin River in Maine. The letters address the timing of upstream and downstream fish passage operation at the project. We received responses to these letters from a representative of Topsham Hydro Partners (licensee), and the Maine Department of Marine Resources (MDMR), dated February 26 and March 25, 2010, respectively. We then received another letter from Friends, dated March 25, 2010, concerning the listing of Atlantic salmon under the Endangered Species Act (ESA).²

Requirements and Status of Fish Passage

Pursuant to license article 34, a downstream fish passage facility at the project was approved in a Commission order issued July 29, 1986,³ following consultation with

¹ Order Issuing License (Major). 20 FERC ¶ 62,483 (1982).

² Friends' February 1 and March 25, 2010 letters also address issues at the Worombo Project (FERC No. 4784). These are being handled in a separate proceeding.

³ Order Approving Functional Design Drawings. 36 FERC ¶ 62,097 (1986).

the Maine Department of Marine Resources (MDMR), the Maine Department of Inland Fisheries and Wildlife (MDIFW), the U.S. Fish and Wildlife Service (FWS), and the Maine Atlantic Sea-Run Salmon Commission. Pursuant to article 15, a lift-type fishway was then installed for upstream passage, and became operational May 1, 1988.

Migratory fish restoration on the Androscoggin River has generally focused on alewife and American shad, due to the limited number of Atlantic salmon in the river, and the Commission has issued a series of orders regarding passage operations and efficiency studies. The July 29, 1986 order, in addition to approving the downstream passage facility, required passage operation plans and schedules, and plans to monitor passage effectiveness. Upstream and downstream passage effectiveness studies were performed in 1988, 1989, and 1990. With resource agency consultation, these studies, and studies in following years, focused primarily on alewife, and studies of salmon passage were suspended until sufficient numbers of salmon were available for study (see orders issued June 28, 1990,⁴ April 30, 1991,⁵ and May 13, 1992⁶). On April 28, 1997, the licensee filed the final results of downstream alewife passage studies conducted from 1991 through 1996. Both the MDMR and FWS commented that the study results fell short of a goal of 90 percent passage efficiency. The FWS requested that the licensee meet annually with the agencies to discuss anadromous fish runs and the need for further passage studies. The agencies provided recommendations concerning passage operation, which were adopted by the licensee and approved in an August 19, 1997 order.⁷ The order also required that annual summaries of consultation be filed with the Commission. The Commission reserved the right to require additional studies based on the annual reports.

Additional studies of upstream fish passage effectiveness using alewife, conducted in 1991 and 1992 pursuant to the April 30, 1991 order, found upstream passage met efficiency goals of 90 percent during periods of no spillage. A May 7, 1993 order reviewed the studies, and approved a proposal by the licensee to conduct further studies under spill conditions.⁸ On April 24, 1998, the licensee requested an extension for conducting further upstream passage studies because the necessary conditions had not yet occurred. The licensee requested postponement until a recommendation from the resource agencies was received. The agencies agreed, recommending that completion of

⁴ Order Requiring Fish Passage Monitoring. 51 FERC ¶ 62,319 (1990).

⁵ Order Approving Fish Passage Study Plan. 55 FERC ¶ 62,092 (1991).

⁶ Order Approving Fishway Monitoring Study Plans. 59 FERC ¶ 62,156 (1992).

⁷ Order Approving Modifications to the Downstream Fish Passage Facility and Operating Plan. 80 FERC ¶ 62,160 (1997).

⁸ Order Revising Fish Passage Study Plan. 63 FERC ¶ 62,136 (1993).

the studies be determined during the annual fish passage meetings. The postponement was approved in a May 8, 1998 Order Granting Extension of Time, requiring the licensee to provide a schedule when a schedule for further studies is determined with the agencies.

The licensee has filed annual reports pursuant to the August 19, 1997 order, summarizing meetings with the resource agencies and focusing on alewife and shad. The reports discuss annual passage operation and scheduling, and provide counts of fish by species, including counts taken at the downstream Brunswick Project (FERC No. 2284). The reports reflect agency agreement that further fish passage studies be delayed until proper conditions occur. The most recent report, dated April 22, 2009, indicates that the MDMR discussed the listing of Atlantic salmon under the ESA with the licensee, and how project operations might be affected.

Friends' Letters Regarding Fish Passage Schedules

In their February 1, 2010 letters, Friends review the licensee's annual reports for 1999 through 2008. Friends note that the MDMR only occasionally orders upstream passage operation after mid-July, with operation five to 8 weeks each year, which they indicate is less than 25 percent of the upstream migration season for adult salmon, July through November. Friends write that current operation penalizes dropdown salmon, which pass the project, move back downriver, and then try to return upstream.

Regarding downstream passage, Friends write that the MDMR requires downstream fishway operation to begin in early- to mid-June each year, but that records from the downstream Brunswick Project show that in most years at least some adult salmon pass the dams and presumably spawn, producing smolts and kelts which require downstream passage in April and May.

Friends request that the Commission require operation of the upstream fishway every day during the 2010 Atlantic salmon migration season, and, in following years, from when the first migratory fish passes the Brunswick Project until November 30. Friends request that the licensee begin monitoring and reporting daily usage of the upstream fishway by salmon, to gain information on run timing and passage effectiveness. Friends request that the Commission require operation of the downstream facilities annually from April 1 through December 31 to protect salmon.

Licensee's Response Regarding Fish Passage Schedules

In a letter dated February 26, 2010, the licensee responded to the issues raised by Friends, writing that the start and end dates for operation of the fish passage facilities at the Pejepscot Project are established by the MDMR.

The licensee included a copy of a June 18, 2009 letter from the MDMR discussing Atlantic salmon in the Androscoggin River and operation of the project passage facilities. The MDMR wrote that the current strategy for salmon restoration in the river is passive. The returns of adult Atlantic salmon to the river have historically been small, and mostly comprised of stray, hatchery-origin fish from active restoration programs on other rivers. However, several returning adults had recently been determined to be wild fish likely from the Androscoggin system. The MDMR therefore requested operation of the project's downstream passage April 1 through June 30 for smolts and kelts, and October 15 through December 31 for kelts. The MDMR wrote this was consistent with recommendations at other projects in Maine. The MDMR also noted that it understood that river conditions could prevent safe fishway operation on some dates. The MDMR considers existing upstream passage operation schedules adequate for Atlantic salmon.

Maine Department of Marine Resources' Response Regarding Fish Passage Schedules

The MDMR provided a March 25, 2010 response to the issues raised by Friends' February 1, 2010 letters, outlining its position on Atlantic salmon passage at the project.⁹ The March 25 letter generally expands on the information in the June 18, 2009 letter to the licensee regarding the restoration program and passage operation for salmon. The MDMR wrote that it is comfortable with the current coordination and passage operations outlined in its letter to the licensee, given the current status of the salmon population, and that it will continue to review operations and changes based on the salmon population.

Friends' Letter Regarding the Federal Listing of Atlantic Salmon Under the ESA

In their letter of March 25, 2010, Friends write that anadromous Atlantic salmon in the Androscoggin are now listed as endangered under the ESA as part of the Gulf of Maine Distinct Population Segment (DPS), which includes salmon born in the Androscoggin and salmon of hatchery origin used in restoration activities in other Gulf of Maine DPS rivers that swim up the Androscoggin. Friends write that the Androscoggin River at the Pejepscot Project has been identified as Critical Habitat for salmon.

Friends understand the operation of the upstream fishway to be based on the passage of alewife, rather than Atlantic salmon, which may migrate upstream from April to November. They request that this be corrected in 2010. They also assert that the issue of dropdown salmon has not been adequately addressed.

Friends disagree that the downstream fishway should be closed June 30 and then reopened October 15, because it would be inconsistent with passage operation on other

⁹ The MDMR letter also addresses fish passage at the Worumbo Project.

Gulf of Maine DPS rivers, and also questions the MDMR's statement in its June 18, 2009 letter that it understands that conditions may prevent operation of the fishway on some dates. Friends assert that, without an Incidental Take Permit issued under the ESA, safe downstream passage for the salmon must be provided at all times.

Friends note that, in its August 19, 1997 order, the Commission reserves the right to require additional study based on the licensee's annual reports. Friends also cite standard article 15 of the project license, which requires the licensee to construct, maintain, and operate facilities, and comply with modifications, as ordered by the Commission for the conservation and development of fish and wildlife resources. They request that the Commission: (1) order downstream passage studies for Atlantic salmon in 2010; (2) instruct the licensee to operate the upstream fishway every day during the 2010 salmon migration season, and in following years beginning when the first migratory fish is passed at the Brunswick Dam, then until November 30; (3) instruct the licensee to operate the downstream fishway April 1 through December 31; and (4) instruct the licensee to cease project generation after April 1, 2010, until full-depth screens are installed at the project intake.

Discussion and Conclusions

We have carefully reviewed the issues raised by Friends regarding passage of Atlantic salmon at the Pejepscot Project, particularly in light of the listing of Atlantic salmon Gulf of Maine DPS. We have also reviewed the project license and subsequent orders, and the licensee's annual fish passage reports. We have also had the opportunity to review the responses provided by the licensee and the MDMR.

The upstream and downstream passage facilities at the Pejepscot Project are being operated in accordance with guidance from the MDMR. The licensee's annual reports, and the March 25, 2010 letter from the MDMR, indicate that passage operation has provided satisfactory protection for Atlantic salmon that may use the Androscoggin River. However, the MDMR has requested downstream passage operation from April 1 to June 30 and from October 15 to December 31, to help ensure safe passage of any naturally-reared salmon, and will continue to review passage operations based on the salmon population. Because of the ongoing involvement of the MDMR, including the consideration of further effectiveness studies, we do not believe that we need to pursue additional measures at this time. However, we continue to reserve the rights identified in the project license articles and orders regarding changes in passage facilities and operation, construction of additional facilities, and fish passage effectiveness studies.

Regarding any need for Commission action produced by the recent listing of the Atlantic salmon Gulf of Maine DPS, we again defer to direction provided by the resource

agencies. Representatives of agencies including the FWS have been involved in the annual fish passage consultation meetings. We urge the licensee to ensure that meetings are scheduled so that representatives of the FWS, as well as the NMFS and other agencies, can be present.

We welcome resource agency input regarding the issues in this letter, either through consultation with the licensee or directly in response to this letter. Any questions should be directed to B. Peter Yarrington at (202) 502-6129 or peter.yarrington@ferc.gov.

Sincerely,



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