

122 FERC 61,053  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

John C. Jones

Project No. 6132-010

ORDER DENYING REHEARING

(Issued January 23, 2008)

1. The U.S. Department of the Interior, the National Marine Fisheries Service of the National Oceanic and Atmospheric Administration (NOAA Fisheries), and the Maine Atlantic Salmon Commission (Atlantic Salmon Commission) request rehearing of the Commission's June 18, 2004 order modifying the terms of the surrender of John C. Jones's exemption for the John C. Jones Project No. 6132 and finding the surrender effective.<sup>1</sup> For the reasons indicated in this order, we are denying rehearing.

**Background**

2. In 1982, Commission staff issued Jones an exemption for this 150-kilowatt project, which is located on the North Branch of Marsh Stream, in the Towns of Winterport and Frankfort, in Waldo County, Maine.<sup>2</sup> However, the generation of electricity ceased at the project in 2000, and Jones removed the single generating unit, main gate, and trashracks in 2001. By order issued June 28, 2002, we approved Jones's application to surrender the exemption and to remove the entire project, including the dam, the powerhouse, a fishway (whose baffles had already been removed, rendering it inoperable), and an asphalt parking area.<sup>3</sup> We authorized removal of the project facilities in accordance with a removal plan that was contained in the application, and Ordering

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<sup>1</sup> *John C. Jones*, 107 FERC ¶ 61,279 (2004) (June 2004 Order).

<sup>2</sup> *John C. Jones*, 19 FERC ¶ 62,538 (1982).

<sup>3</sup> *John C. Jones*, 99 FERC ¶ 61,372 (2002) (June 2002 Surrender Order). As noted in this surrender order, the exemption application had originally been filed by Facilitators Improving Salmonid Habitat (FISH), which had acquired the exemption from Jones but  
(continued...)

Paragraph (F) provided that the surrender of the exemption would become effective upon a Commission finding that project removal and other related actions had been satisfactorily completed.

3. In a subsequent order, we denied a request filed by the Towns of Winterport and Frankfort for a stay of the proceedings to enable them to acquire the project dam by eminent domain,<sup>4</sup> and the Commission's New York Regional Office authorized Jones to proceed with project removal. However, by letter of September 11, 2002, Commission staff temporarily rescinded the Regional Office's authorization, because the Towns' purported condemnation of a conservation easement that, according to the Towns, provided the property right to remove the dam, had called into question whether Jones held the necessary state property rights to proceed with dam removal. The staff indicated that it would be in a position to decide how to proceed once it had more information about recently initiated state legal processes regarding this property issue.

4. By letter of September 22, 2003, to Jones, Commission staff noted that, in the year following the rescission letter, the State and local ownership issues, including attempts by the Towns to acquire the dam by eminent domain, had not been resolved. Accordingly, staff rescinded the September 11, 2002 letter and reinstated the Regional Office's authorization to begin dam removal in accordance with the surrender order. However, staff cautioned Jones that he would have to possess the necessary property rights under state law to remove the project. Consistent with the provisions of the surrender order, staff stated that the surrender of the exemption would not become effective until the Commission determined that the approved actions had been satisfactorily completed. Jones did not take any action to remove the project facilities in response to this letter.

5. On January 6, 2004, the Towns filed with the Commission a settlement agreement entered into by Jones and the Towns. Under the agreement, the Towns agreed to cease efforts to take any property or interests of Jones by eminent domain, while Jones agreed not to remove the dam, allow it to be removed, or sell it without the prior written consent of the Towns. The agreement provided for Jones to petition the Commission to amend the previously granted surrender request to ask that the dam not be removed. In letters to

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later transferred it back to him. In the present order, we will refer to either Jones or the exemptee, depending on the context of the reference.

<sup>4</sup> *John C. Jones*, 100 FERC ¶ 61,165 (2002). The Towns, as well as a number of local residents, opposed the removal of the project dam, based on concerns related primarily to loss of the impoundment.

the Commission dated January 19 and February 5, 2004, Jones stated that he had entered into the agreement to avoid the eminent domain action against his property, and that he could not consider withdrawing his request to remove the dam without assurances from affected state and federal agencies that no compliance responsibilities would be enforced against him, at his expense, regarding safety, liability, maintenance of the dam, and fish passage.

6. In our June 2004 Order modifying the surrender, we noted that we had authorized dam removal here because Jones had sought such authority and because our environmental assessment (EA) for the proposed action had found that dam removal would have beneficial effects, but we pointed out that exemptees, in seeking to surrender their exemptions, may pursue any course of action they wish with respect to exempted project works. We concluded that, by entering into an agreement that committed him to leave the dam in place, Jones had essentially given notice that he would not fulfill the dam removal condition of the exemption surrender. We stated that the consequence of this development was to prolong the retention of the project under Commission jurisdiction indefinitely, even though it was no longer generating electricity, because the dam removal condition would never be satisfied. To avoid this consequence, we determined that we would construe Jones's action as an implied withdrawal of the request for authorization to remove the project facilities. We modified the surrender to withdraw any project facilities removal conditions that had not yet been fulfilled, and we stated that the surrender would be effective as of the issuance date of our order.

### **Procedural Matters**

7. Before filing its surrender application, the exemptee consulted with appropriate federal, state, and local agencies about its proposal, pursuant to the exemption surrender regulations.<sup>5</sup> These agencies included Interior's U.S. Fish and Wildlife Service (FWS), NOAA Fisheries, and the Atlantic Salmon Commission, which, collectively, favored removal of the dam, since this would return the stream to a natural free-flowing condition, provide safe passage for migratory fish, and restore the watershed for anadromous fish species. However, after the application was filed with the Commission, only Atlantic Salmon Commission, among those three agencies, filed a motion to

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<sup>5</sup> 18 C.F.R. § 4.102 (b)(1)(2002).

intervene and became a party to the proceeding.<sup>6</sup> Under Rule 713 of the Commission's rules of practice and procedure, only parties to a proceeding are permitted to seek rehearing.<sup>7</sup>

8. The rehearing requests of Interior and NOAA Fisheries include motions to intervene in the proceeding. Interior explains that it seeks intervention now because of the Commission's unexpected decision to leave the dam in place, which had not been the exemptee's proposal. NOAA Fisheries argues that an implied amendment of the surrender proposal constituted a new action warranting a new opportunity to intervene. Both agencies emphasize that they were involved in the proceeding from its inception and expressed their positions on the proposal during consultation.<sup>8</sup>

9. Upon issuance of notice of an application, entities are provided an opportunity to seek intervention in accordance with an established procedural schedule. It is the responsibility of any entity that may have an interest in a proceeding to protect its position by filing a timely motion to intervene. When late intervention is sought after the issuance of an order disposing of an application, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for the granting of such late intervention.<sup>9</sup> Failure to seek timely intervention is not excused by the Commission's adoption of an action other than the one proposed, since the Commission has the flexibility to consider and adopt other alternatives in its environmental analysis.

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<sup>6</sup> Atlantic Salmon Commission is a Maine state agency. The Maine State Planning Office, which represents all Maine agencies, including for purposes of intervention in Commission proceedings, timely intervened in the proceeding.

<sup>7</sup> 18 C.F.R. § 385.713 (2007).

<sup>8</sup> In response to notice of the application, Interior expressed its support for dam removal in comments filed on September 6, 2001, while NOAA Fisheries filed no comments. Neither entity made any other filing prior to issuance of the June 2002 surrender order, although in March 2004 both entities submitted letters to the Commission expressing concern about Jones's agreement with the Towns.

<sup>9</sup> *Central Vermont Public Service Corporation*, 113 FERC ¶ 61,167 (2005).

10. We think that grounds to allow late intervention exist in this instance. We have stated that, when a license order is final and unappealable, an entity may seek to intervene and appeal an order issued in a post-licensing proceeding if the post-licensing order entails material changes in the development plan of the project or in the terms and conditions of the license, such that the Commission should have issued notice of, and entertained requests for intervention in, the post-issuance proceeding.<sup>10</sup> Here we are concerned with a surrender proceeding, not a post-licensing proceeding, and our exclusion of dam removal as a surrender condition was an action that we could have taken in our June 2002 Surrender Order. Nevertheless, our June 2004 Order modified the surrender terms that were specified in the surrender order, which was final and unappealable. We think the situations are sufficiently similar to warrant granting late intervention to Interior and NOAA Fisheries.

### **Discussion**

11. Interior and NOAA Fisheries argue that to characterize Jones's actions as seeking to withdraw the request for authorization to remove the project facilities ignores Jones's actual expressions of his position and intent. These agencies point to Jones's January 19 and February 5, 2004 letters to the Commission, noted above, and an additional letter filed March 31, 2004, as indicating clearly that Jones had no intention of amending his surrender application to request that the dam not be removed in the absence of assurances that he would have no further liability with respect to it.

12. Interior and NOAA Fisheries misstate our findings. As reflected in our June 2004 Order, we were aware of the position Jones took in his letters to the Commission. In construing Jones's agreement with the Towns as an implied withdrawal of the request for authorization to remove the dam, we were not suggesting that Jones had actually made such a request or amended his application but rather were acknowledging that Jones no longer intended to comply with the dam removal condition. We do not regard Jones's post-agreement letters declining to amend the surrender application as sufficient to overcome Jones's clear intention to refrain from removing the dam, in accordance with the agreement.

13. We have, in other circumstances, implied an action on the part of an entity regulated by this Commission in the absence, or even in contravention, of that entity's expressed intent. Notably, when a licensee, by action or inaction, has clearly indicated its intent to abandon a project, such as by abandoning project property or selling the

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<sup>10</sup> *Pacific Gas and Electric Company*, 40 FERC ¶ 61,035 (1987).

property without Commission authorization, we have deemed the licensee to have impliedly surrendered its license, even though it has not submitted a surrender application. In those circumstances, we have found that the key element is the licensee's failure to live up to the obligations of its license, and we have implied surrender even where the licensee has expressed an interest in continuing to operate the project.<sup>11</sup> In the present situation, Jones has made it clear, through his agreement with the Towns, that he will not fulfill the dam removal condition of his exemption surrender. In both this situation and the above license surrender situations, implying an action on the part of the entity authorized to operate the project is necessary to avoid the continuation of operational authority under Commission jurisdiction where it is clear that the entity will neither continue to operate the project nor take the necessary action that would allow the Commission to terminate its jurisdiction.

14. Interior and NOAA Fisheries challenge several procedural aspects of our June 2004 Order. Interior argues that the Commission's regulations, at 18 CFR § 4.102(b)(2), require public notice of the "amended petition" that the Commission "construes into existence" and an opportunity for new interventions.<sup>12</sup> NOAA Fisheries argues that the "inferred amendment" is in fact a new application that must be filed with the Commission if the exemptee wants a different result, since final agency action on the surrender application has already occurred and the surrender proceeding is closed. Alternatively, if the original application is considered implicitly amended, NOAA Fisheries asserts that Rule 216 of the Commission's procedural rules allows a party to oppose, contest, or otherwise comment on the amended application.<sup>13</sup> NOAA Fisheries adds that notice is warranted especially because, in reliance on Jones's letters to the Commission, parties had good cause to believe that Jones had not yet amended his application.

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<sup>11</sup> *Fourth Branch Associates (Mechanicville) v. Niagara Mohawk Power Corporation*, 89 FERC ¶ 61,194 at 61,597-98 (1999) and cases cited therein, *reh'g denied* 90 FERC ¶ 61,250 (2000).

<sup>12</sup> The cited regulation provides that public notice of a petition for surrender of an exemption will be given if construction has begun.

<sup>13</sup> Rule 216 is not apt. NOAA Fisheries apparently meant to cite Rule 215, which provides that a person who has filed a timely motion to intervene may file a motion opposing the acceptance of an amendment. 18 C.F.R. § 385.215(c) (2007).

15. It is not our position that Jones has sought to amend his surrender application. Our finding of an implied withdrawal of the initial request to remove the project facilities derives from Jones's assertion, through the agreement, of his intention not to remove the dam, an action that carries more weight than Jones's reservations about submitting any formal request to amend the surrender conditions. In any event, Interior and NOAA Fisheries have had actual notice of our action, as evidenced by their requests for rehearing.

16. Interior contends that the EA did not consider the option of allowing surrender with the dam remaining in place, and that, therefore, our decision to delete the dam removal condition is unsupported by any environmental analysis of the effects of this action. Interior's references are to the EA issued by the Commission staff in October 2001. However, the final EA issued with, and attached to, the June 2002 Surrender Order revised certain aspects of the earlier EA. In particular, it analyzed, as a staff-identified action alternative, surrender of the exemption with the dam and reservoir left in their existing condition, which is to say, with the main gate and trashracks removed and the reservoir fluctuating about 8 to 10 feet.<sup>14</sup> In determining that deleting the dam removal condition would be environmentally acceptable, we considered the EA's findings regarding the environmental effects of this alternative on various resources.<sup>15</sup> Therefore, contrary to Interior's assertions, our decision was not taken in the absence of an environmental analysis.

17. NOAA Fisheries argues that we should perform a new environmental analysis on the "inferred amendment." It contends that our reliance on the June 2002 EA to support our deletion of the dam removal condition is illogical in light of the EA's conclusion that dam removal would have biological benefits, and it asserts that the environmental baseline would have changed between the issuance of that EA and our June 2004 Order. We did not assert that leaving the dam in place is the option with the greatest environmental benefits. Rather, we determined, based on the EA's findings, that leaving the dam in place would not have significant environmental consequences. There is nothing in the National Environmental Policy Act of 1969 or the regulations of the Council on Environmental Quality that requires us to select the alternative with the greatest environmental benefits; it is sufficient that we analyze the environmental effects

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<sup>14</sup> 99 FERC ¶61,372 at 62,583-89.

<sup>15</sup> 107 FERC ¶ 61,279 at P 10.

of the alternative we select and explain our rationale for our selected alternative.<sup>16</sup> In addition, NOAA Fisheries provides no basis for its assertion that the environmental baseline has changed, such that a new analysis is necessary.

18. Interior points out that, under our regulations, at 18 CFR § 4.102(d), exemptions may be surrendered only upon fulfillment of such conditions with respect to the disposition of project works as may be determined by the Commission and the federal and state fish and wildlife agencies. But neither Interior nor NOAA Fisheries submitted such conditions when they had the opportunity to intervene and comment on the surrender application. It is not sufficient that these agencies expressed their support for the exemptee's proposal during consultation or in comments, nor is it relevant that we have now modified the surrender conditions; the agencies should have submitted any conditions that they considered important in response to the application that was filed.

19. NOAA Fisheries states that the Magnuson-Stevens Fishery Conservation Management Act, 16 U.S.C. § 1801 *et seq.*, requires federal agencies to consult with it on all actions that may adversely affect essential fish habitat.<sup>17</sup> NOAA Fisheries complains that we never consulted with it on essential fish habitat, despite the fact that the dam impedes the passage of anadromous fish, including Atlantic salmon. It argues that, even if such consultation had occurred, reinitiation of consultation would be necessary here under the implementing regulations,<sup>18</sup> because we substantially revised our plan for an action.

20. Although the surrender application did not seek to leave the dam in place, surrender without dam removal was always a possible outcome of the surrender proceeding. At no point in the proceeding did NOAA Fisheries indicate that essential fish habitat might be affected by our disposition of the surrender application, and it does not identify any pertinent essential fish habitat in its rehearing request. In any event, in authorizing surrender without dam removal, we are not taking an action that would adversely affect essential fish habitat, because the dam will remain in its existing condition, as it would have if the surrender application had not been filed. The effect of

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<sup>16</sup> See, e.g., *New England Coalition on Nuclear Pollution v. United States Nuclear Regulatory Commission*, 582 F.2d 87, 95 (1<sup>st</sup> Cir. 1978).

<sup>17</sup> 16 U.S.C. § 1855(b)(1)(D) contains the provision cited by NOAA Fisheries.

<sup>18</sup> 50 C.F.R. § 600.920(1).

our action is the relinquishment of operating authority unaccompanied by any physical changes at the site.

21. Interior objects to our having approved surrender without any measures for fish passage and asks us to revoke our June 2004 Order. NOAA Fisheries asks us to rescind the order; issue notices of an amended application and of the readiness of the application for environmental review; provide an opportunity for the filing of fishway prescriptions, recommendations, and comments, under sections 18, 10, and 4 of the Federal Power Act (FPA), respectively; and conduct a new environmental review. Alternatively, NOAA Fisheries ask us to retain dam removal as a condition of the surrender. Atlantic Salmon Commission asks us to revise the order to include fish passage as a condition of the surrender. The agencies fail to appreciate the limitations on the actions available to us in this proceeding and to recognize that their recommendations would not produce the results they seek.

22. In respect to the surrender of licenses, we have stated:<sup>19</sup>

in those instances where the licensee cannot fulfill the conditions placed on a surrender grant, the Commission has two basic options: refuse to make the surrender effective, or give the surrender effect, at which point the site will be under the jurisdiction of the state or a federal land management agency, as pertinent.

We went on to note that, in our experience

the public interest is not served by our refusing to accept a surrender pending an insolvent licensee's fulfillment of remaining obligations thereunder. The passage of time rarely alters the state of affairs. Therefore, while we will continue to explore feasible ways in which such situations can be avoided or ameliorated, under the current statutory scheme . . . our options in these cases are limited. [footnotes omitted]

23. That we are dealing here with surrender of an exemption rather than of a license, and that Jones may not be insolvent, does not alter this evaluation. If dam removal were to remain a condition of the surrender, and Jones were to decline to remove the dam, as

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<sup>19</sup> *Sayles Hydro Associates*, 86 FERC ¶ 61,101 at 61,373-74 (1999).

the record indicates is the case, the surrender would simply never become effective, and the dam would remain in its present state indefinitely.<sup>20</sup>

24. If dam removal were to remain an unfulfilled condition of the surrender, the situation would differ from that resulting from our June 2004 Order only in that the project would remain under Commission jurisdiction, but continuation of Commission jurisdiction would not further the agencies' goals. To require the exemptee to make repairs to the fishway or otherwise to provide fish passage under a continuation of the exemption would likely be unproductive, since the project is no longer generating electricity or income, and since the expense of maintaining and repairing the facilities at this uneconomical project prompted the filing of the surrender application in the first place.<sup>21</sup> Moreover, it would not be appropriate for us to retain jurisdiction indefinitely over a project that is no longer generating electricity for the sole purpose of ensuring fish

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<sup>20</sup> As we noted earlier, we authorized dam removal here because the exemptee specifically requested us to do so. In the surrender order, we stated that we would "authorize the removal of the project facilities in accordance with the removal plan contained in the application, subject to any revisions that might be required by the Commission's New York Regional Office." 99 FERC ¶ 61,372 at P 13. Therefore, although Ordering Paragraph (E) required removal of the project facilities in accordance with the removal plan, and Ordering Paragraph (F) made surrender effective upon a finding that all of the approved actions had been satisfactorily completed, the emphasis in these paragraphs was on ensuring that dam removal be accomplished in the manner proposed to the Commission, not on requiring that the dam be removed.

As we stated earlier, the EA considered surrender both with dam removal and with leaving the dam in place. The EA found that the latter option would have "insignificant effects with regard to erosion, historic resources, visual and cultural resources, fire-fighting, and flooding," only a "minor adverse effect on recreation," and no significant long-term effect on fisheries resources, despite the obstacle to upstream fish migration. The EA concluded that surrender without dam removal would not have significant adverse environmental effects. 107 FERC ¶ 61,279 at P 10.

<sup>21</sup> See surrender application at 2. We note that, in its October 26, 2000 letter to the exemptee during consultation, Interior stated that the uneconomic nature of the project would likely make it difficult for an exemptee to maintain the fishway in proper working order.

passage at the site.<sup>22</sup> We see no grounds for continuing to subject an exemptee to our jurisdiction under those circumstances, especially when, as here, it is clear that he wishes to surrender his exemption.

25. On the other hand, instituting a new proceeding to consider surrender without dam removal would also serve no purpose. Even if we were to provide such an additional opportunity for participation by the agencies, we would not solicit section 18 fishway prescriptions or filings under the other FPA sections cited by NOAA Fisheries, since these sections apply only to the licensing of projects, not to the surrender of licenses or exemptions. Neither would we modify the surrender to condition it on the provision of fish passage at the dam. We do not require a licensee or exemptee to install or operate fish passage facilities as a condition of surrendering its license or exemption, because we are unable to require their continued operation after the surrender becomes effective and

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<sup>22</sup> Interior notes that the exemption contained mandatory requirements for safe passage of migratory fish, cites its authority to require fish passage measures under section 18 of the FPA, and complains that, under our June 2004 Order, the dam will continue to exist without fish passage and Interior will have lost its authority to require it. During the exemption proceeding, on June 18, 1982, Interior submitted comments in which it recommended that the exemptee be required to construct, operate, and maintain fish passage facilities when requested by the appropriate fish and wildlife agency. Jones did in fact install a fishway, now inoperable, at the project, although the record is unclear as to when, or under what circumstances, he did so. During consultation on the surrender application, Interior, in its letter of October 26, 2000, noted that it had never reviewed the final design of the fishway, and no Commission or staff order appears ever to have amended the exemption to incorporate the fishway into the project.

In any event, any fish passage requirements for this exemption would not have derived from the mandatory fishway prescription authority of section 18 of the FPA, since the order issuing the exemption for this project exempted the project from all of the requirements of the FPA, including licensing. *John C. Jones*, 19 FERC ¶ 62,538 at 63,915. Rather, they would have derived from standard exemption article 2, at 18 C.F.R. § 4.106 (1980), which provided that an exempt project must comply with terms and conditions that federal and state fish and wildlife agencies, in their comments on the exemption application, determine to be appropriate to prevent loss of, or damage to, fish or wildlife resources.

our jurisdiction is terminated.<sup>23</sup> And if, pursuant to the Commission's regulations, Interior and NOAA Fisheries were to submit conditions specifying removal of the dam, the public interest would not justify including them if Mr. Jones were unable to implement them, since the result of doing so would likely be the indefinite extension of the Commission's jurisdiction over a non-operating project.<sup>24</sup>

26. Under these circumstances, it is not clear what the agencies expect would be accomplished by rescinding our June 2004 Order or by treating the implied withdrawal of the dam removal request as an amendment of the application and instituting a new proceeding. There is no public interest to be served by the continued exercise of Commission jurisdiction over this site. As we noted in that order, our modification of the surrender does not itself preclude dam removal or the provision of fish passage at the project site but simply defers decisions on these matters to a state forum.<sup>25</sup> This is an appropriate result, given that the project has ceased generation and that the dam, whose existence predated issuance of the exemption, might serve other purposes best evaluated by state or local authorities.

27. Interior argues that deleting the dam removal condition allows the Towns to dictate the conditions of the surrender, despite the Commission finding that the dam should be removed. Interior argues that Jones and the Towns may not by contract supersede the authority of the Commission. Interior asserts that, by treating the agreement between the Towns and Jones as removing the property rights necessary for Jones to satisfy the dam removal condition, we are establishing a model for licensees to

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<sup>23</sup> *FPL Energy Maine Hydro, LLC*, 106 FERC ¶ 61,038 at n.18 (2004), *reh'g denied* 107 FERC ¶ 61,120 at P 11 (2004), *aff'd sub nom Save Our Sebasticook v. FERC*, 431 F.3d 379 (D.C. Cir. 2005).

<sup>24</sup> We may waive the provision for conditioning surrenders of exemptions when appropriate, since it is not statutory.

<sup>25</sup> Atlantic Salmon Commission emphasizes the importance of opening up Atlantic salmon habitat in the Marsh Stream watershed above the dam. Our deletion of the dam removal condition without additional provision for fish passage at the dam was not done with indifference to the environmental benefits of opening up fish habitat but in recognition that we could not compel either dam removal or the provision of fish passage by other means after the surrender became effective.

circumvent Commission-imposed conditions by entering with other entities into agreements forbidding particular licensee actions.

28. While we have questioned whether Jones has retained the property rights necessary to remove the dam, we did not treat the agreement as having removed any of Jones's property rights; we only construed it as establishing Jones's intention not to remove the dam. As to Interior's programmatic concern, we would not consider agreements between licensees and other parties as excusing a failure to comply with license conditions. Licensees are required by standard license Article 5 to obtain and retain rights in all property necessary to fulfill project purposes. If a licensee fails to obtain or retain those rights, the Commission can take appropriate action. We do not foresee that licensees will enter into agreements or purposely seek to alienate property rights to avoid compliance with Commission conditions.

29. Interior contends that, by failing to exercise our authority, we have failed to provide Jones with the assurances he sought regarding absolution of responsibility for maintenance of the dam and have left him with burdensome obligations to the Towns to maintain the dam and impoundment. In our June 2004 Order, we indicated that Jones would have no further responsibilities to the Commission after effectiveness of the surrender but indicated that he might have continued responsibilities to the state of Maine with regard to the project facilities. It is beyond our authority to give Jones assurances regarding his responsibilities to other entities following surrender of the exemption. Further, we have no authority over property rights and lack the ability to prevent the taking of an exemptee's property rights by others. Section 21 of the FPA provides some protection to licensees by authorizing them to acquire property necessary for project purposes by eminent domain if that property cannot be otherwise obtained, but exemptees have no such authority. Thus, the exemption furnishes Jones no vehicle under the FPA for retaining project property or resisting the legitimate taking of that property by others under state law.<sup>26</sup>

30. Finally, the Commission has received several recent letters that warrant discussion in this order. By letter filed September 5, 2007, Jones requested Commission action on

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<sup>26</sup> Whether such a legitimate taking occurred here is not for us to determine. However, we would point out that, unlike with licenses, the transfer of which must be approved by the Commission, exemptions are transferred with the underlying project property. Therefore, if the Towns were to obtain title to the project property, they would become the exemptees and would be liable to the Commission for the project as long as it remained under Commission jurisdiction.

the rehearing requests to resolve the uncertainty surrounding his project. Jones's letter attached correspondence between him and the FWS Maine field office. The letter and attached correspondence, referring to council meetings of the Towns in which Jones and FWS participated, intimated that the Towns might not pursue further action to retain the dam if the Commission were to issue an order restoring the dam removal condition of the surrender. In addition, in response to questions posed by the field office, Jones stated that he would prefer dam removal as an outcome and that he had not intended, in his 2004 letters to the Commission, to modify his original application to surrender the project and remove the dam. The FWS Maine field office and the NOAA Fisheries Northeast Region office then filed letters (October 2 and 11, 2007, respectively) reiterating the statements in the Jones letter and attachments about the positions of Jones and the Towns and asserting that, in light of those positions, the Commission could now resolve the situation by reinstating the original surrender conditions.

31. In response to the issues raised by these letters, Commission staff, on November 20, 2007, sent letters to Jones and each of the Towns asking them to clarify their positions on dam removal. In the letter to Jones, staff asked whether he would be willing and able to remove the dam in accordance with the removal plan contained in the surrender application, including whether he now had the funding and necessary property right to accomplish dam removal. In the letters to the Towns, staff asked whether their concerns about removal of the dam had been alleviated, whether they held any property rights in the project property, and whether they would take further actions to block dam removal if it were reinstated as a surrender condition.

32. On December 5, 2007, Jones replied, stating that, if dam removal were approved, he would be prepared to go forward as previously planned, that funding "would need to be addressed," and that he had the property rights to the dam and surrounding land "except as affected by" the agreement he signed with the Towns. No reply has been received from the Towns. However, on October 30, 2007, the Town of Winterport filed a letter, which had not come to staff's attention before staff issued its letters, addressing an "incorrect assumption" in the fisheries agencies' letters to the Commission. The Town indicated that, although individual council members were not inclined to commit further expenditures in legal actions over dam removal, this could not be construed as a decision by the Town in the absence of a vote of residents at a town meeting.

33. None of the letters submitted over the past few months provide any reason for us to change the positions we articulated earlier in this order. That Jones would prefer to remove the dam and had not intended to amend his surrender application to withdraw the dam removal request is not new information. It has always been clear that Jones would prefer to remove the dam if there were no obstacles to that action, and, as we have already explained, our construction of an implied withdrawal of the request for

authorization to remove project facilities was based not upon any specific written request from Jones to that effect but on his commitment, through his agreement with the Towns, to leave the dam in place. It is still unclear whether the Towns ever acquired a property right that would interfere with Jones's ability to remove the dam, and the Towns have made no binding or enforceable commitment to refrain from further actions that could interfere with dam removal. It is not evident either that Jones has the financial resources to remove the dam or that he would be willing to remove the dam in contravention of his agreement, since any order reinstating the dam removal condition would not relieve Jones of any contractual liability he might have incurred.

34. The exemption Jones received in 1982 was granted under sections 405 and 408 of the Public Utility Regulatory Policies Act of 1978,<sup>27</sup> which authorized the Commission to grant exemptions from Part I of the FPA for hydropower projects with an installed capacity of 5 megawatts or less if the projects were located at the site of an existing dam. By definition, dams at exempted projects, such as this one, have been constructed and maintained for other purposes before their use for generation. In granting Jones's request to surrender his exemption, we authorized removal of the dam because he requested it and because it was consistent with the environmental record. However, we do not believe that we have an obligation to ensure the removal of preexisting dams at exempted projects, particularly where, as here, obstacles to the implementation of authorized dam removal cause a project to remain indefinitely under Commission jurisdiction contrary to the purposes of the surrender application and the surrender order. There is no reason why any decisions on retention or removal of this dam cannot and should not be made on a state or local level without the further involvement of this Commission.

35. For all of the above reasons, we will deny rehearing and let stand our modification of the surrender terms and the termination of this exemption.

The Commission orders:

(A) The motions of the U.S. Department of the Interior and the National Marine Fisheries Service for late intervention in this proceeding are granted.

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<sup>27</sup> 16 U.S.C. §§ 2705 and 2708.

(B) The requests filed by the U.S. Department of the Interior, the National Marine Fisheries Service, and the Maine Atlantic Salmon Commission for rehearing of our June 18, 2004 Order modifying the terms of the surrender of the exemption for the John C. Jones Project and finding the surrender effective are denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.