

149 FERC ¶ 61,037  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;  
Philip D. Moeller, Tony Clark,  
and Norman C. Bay.

Andrew Peklo III

Project No. 12790-002

ORDER ISSUING ORIGINAL LICENSE

(Issued October 16, 2014)

**Introduction**

1. On January 17, 2013, Andrew Peklo III (Mr. Peklo) filed an application for an original license, pursuant to Part I of the Federal Power Act (FPA),<sup>1</sup> to construct, operate, and maintain the proposed Pomperaug Hydro Project No. 12790 (Pomperaug Project). The 76-kilowatt (kW) project would be located at an existing dam on the Pomperaug River, in the town of Woodbury, Litchfield County, Connecticut.<sup>2</sup> The project would not occupy federal land.

2. As discussed below, this order issues an original minor license for the Pomperaug Project.

---

<sup>1</sup> 16 U.S.C. §§ 791a – 825r (2012).

<sup>2</sup> The Pomperaug Project will be located on the Pomperaug River, a tributary of the Housatonic River, a navigable waterway. *See Connecticut Light & Power Co. v F.P.C.*, 557 F.2d 349 (2nd Cir. 1977). Tributaries of navigable waterways are Commerce Clause streams within the meaning of section 23(b)(1) of the FPA. *See F.P.C. v. Union Electric Co.*, 381 U.S. 90, 94-96 (1965). Since the project is located on a stream over which Congress has jurisdiction under the Commerce Clause, affects interstate commerce through its connection to an interstate power grid, and will be constructed after 1935, it is required to be licensed by the Commission pursuant to section 23(b)(1) of the FPA. *See* 16 U.S.C. 817(1) (2012); *see also Habersham Mills v. FERC*, 976 F.2d 1381, 1384-85 (11th Cir. 1992).

## **Background**

3. On February 16, 2011, Mr. Peklo filed an application for an exemption from licensing for the Pomperaug Project No. 12790-001. On November 3, 2011, after Mr. Peklo cured the deficiencies in his application, Commission staff issued public notice accepting the exemption application, stating the application was ready for environmental analysis, and establishing December 5, 2011, as the deadline for filing motions to intervene, protests, comments, and terms and conditions.<sup>3</sup> The Connecticut Department of Energy and Environmental Protection (Connecticut DEEP) filed a timely notice of intervention.<sup>4</sup> The Citizens for the Preservation of Woodbury, Anne P. Delo and Rosemary E. Giulano, Sean E. Elwell, Ruby H. Hewitt, Leon F. Sherwood, Kerri M. Wolcott, and Dr. Paul Yoxon filed timely motions to intervene opposing the project.<sup>5</sup> Anne H. Casey and Thomas J. Greto, jointly, and David Sewall filed late motions to intervene,<sup>6</sup> which were granted March 8, 2012.<sup>7</sup> The U.S. Department of the Interior submitted comments, and terms and conditions.

4. Parties argued that the exemption application included misleading or inaccurate information and the project could adversely affect fish and wildlife, recreation, and aesthetic resources. Some commenters also alleged that Mr. Peklo did not have rights to all project lands, that local zoning restrictions would prevent the construction and operation of the proposed project, and that project construction and operation would negatively impact the value of nearby properties. Commission staff conducted a publically-noticed site visit and technical meeting on January 18, 2012, to view the proposed site, explain the exemption process, and address some of the issues raised in the proceeding. Commission staff included oral comments made at the public meeting in the record, and allowed written comments to be filed after the January 18 meeting.

---

<sup>3</sup> See 76 Fed. Reg. 70,433 (2011).

<sup>4</sup> Under Rule 214(a) of the Commission's Rules of Practice and Procedure, Connecticut DEEP became a party to the proceeding upon timely filing its notice of intervention. 18 C.F.R. § 385.214(a)(2) (2014).

<sup>5</sup> Timely, unopposed motions to intervene are granted by operation of Rule 214(c) of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214(c) (2014).

<sup>6</sup> See 18 C.F.R. § 385.214(d) (2014).

<sup>7</sup> See Secretary's notice of March 8, 2012 (unpublished).

5. Subsequently, Commission staff requested additional information needed to process the application<sup>8</sup> and informed Mr. Peklo that if he could not show that he had the necessary property interests in the entire project impoundment (or an option to obtain those interests) he could convert his exemption application to a license application.<sup>9</sup> On January 17, 2013, Mr. Peklo responded, submitting additional information and asking to convert his exemption application to an application for a minor license.<sup>10</sup>

6. On February 12, 2013, Commission staff notified Mr. Peklo that his license application was deficient and allowed him 30 days to provide the required information.<sup>11</sup> Mr. Peklo provided the information on March 14, 2013. On April 8, 2013, the Commission issued a public notice that was published in the *Federal Register*,<sup>12</sup> accepting the application for filing, indicating staff's intent to waive scoping, soliciting motions to intervene and protests, stating that the application was ready for environmental analysis, and soliciting comments, terms and conditions, recommendations, prescriptions, and requests for cooperating agency status.

7. The notice stated that all comments, motions to intervene, and protests filed under Project No. 12790-001 (exemption application) were incorporated into the Project

---

<sup>8</sup> See Commission staff letters dated May 3, 2012, and December 18, 2012. Mr. Peklo responded to the May 3 letter on October 31 and December 7, 2012.

<sup>9</sup> See Commission staff letter dated December 18, 2012. An exemption does not carry with it the right to acquire by eminent domain lands and waters necessary for a project, so an exemption applicant must provide evidence showing the rights to such lands. However, a licensee may acquire necessary property through eminent domain, *see* 16 U.S.C. § 814 (2012). Accordingly, an entity that initially applies for an exemption but cannot demonstrate that it holds the rights to necessary property may convert its exemption application to a license application. *See Nicholas E. Josten*, 117 FERC ¶ 61,140, at P 17 (2006).

<sup>10</sup> In converting his exemption application to a license application, the exemption application was deemed withdrawn, and the license application was docketed under Project No. 12790-002.

<sup>11</sup> Staff requested Mr. Peklo to provide verification that he had notified all adjacent landowners, federal and state agencies, and municipalities of his request to convert his exemption application to a license application. Staff also directed Mr. Peklo to file a revised Exhibit G map that shows a project boundary enclosing all project works, including the entire impoundment.

<sup>12</sup> 78 Fed. Reg. 21,921 (2013).

No. 12790-002 (license application) proceeding and did not need to be refiled. The notice also stated that the issues to be addressed in staff's Environmental Assessment had been adequately identified in comments filed under Project No.12790-001, which included the January 18, 2012 public meeting and site visit, and that staff did not intend to conduct additional scoping. By notice issued May 3, 2013, the Commission extended the comment deadline to June 4, 2013. Paul V. Nolan, Barbara E. Sherwood, and Theresa A. Sherwood filed timely motions to intervene. On May 23, 2013, Interior filed revised comments, and terms and recommendations. On June 19, 2013, Mr. Peklo filed reply comments stating that he did not object to Interior's recommendations.

8. A draft Environmental Assessment (EA) was prepared by Commission staff and issued on December 19, 2013, analyzing the impacts of the proposed project and alternatives to it.<sup>13</sup> Interior, Connecticut DEEP, Kerri M. Wolcott, Anne P. Delo and Rosemary E. Giuliano, Anne H. Casey and Thomas J. Greto, the Pomperaug River Watershed Coalition, Paul V. Nolan, and Mr. Peklo, filed comments on the draft EA. On March 28, 2014, Commission staff issued a final EA.<sup>14</sup>

9. The interventions, comments, and recommendations have been fully considered in determining whether, and under what conditions, to issue this license.<sup>15</sup>

## **Project Description**

### **A. Project Area**

10. The Pomperaug Project will be located on the Pomperaug River in the town of Woodbury, Connecticut. From the project area, the Pomperaug River generally flows south for approximately 6 miles before joining the Housatonic River. From the confluence with the Pomperaug River, the Housatonic River flows in a southerly direction for about 28 miles before flowing into Long Island Sound, which is connected to the Atlantic Ocean.

---

<sup>13</sup> The Commission published notice of the draft EA in the *Federal Register* on December 26, 2013. 78 Fed. Reg.78,349 (2013).

<sup>14</sup> The Commission published notice of the final EA in the *Federal Register* on April 4, 2014. 79 Fed. Reg. 18,903 (2014). References in this order to the EA are to the final EA, unless otherwise noted.

<sup>15</sup> All comments filed in the exemption and license application proceedings were considered in the EA.

**B. Project Facilities**

11. The Pomperaug Project will consist of an existing three-acre impoundment with minimal useable storage volume at a normal water surface elevation of 226.43 feet mean sea level (msl). The 15-foot-high, 90-foot-long granite block and masonry Pomperaug River Dam forms the impoundment and will be equipped with a new steppass fish ladder. When the project is operating, flows from the impoundment will pass through an existing 30-inch-high, 30-inch-wide gate and intake structure equipped with a new trashrack at the east end of the dam and then through an existing 42-inch-high, 50-inch-wide, 40-foot-long penstock. The penstock will connect to a new sound-insulated powerhouse. The powerhouse will be located in an existing mill building and will house a new 76-kW turbine generating unit. The hydraulic capacity of the turbine will range from 10 to 100 cubic-feet-per-second (cfs). Discharges from the powerhouse will enter a new 3.5-foot-diameter, 33-foot-long draft tube that will lead to the Pomperaug River. The project will also include three new step-up transformers and a new 135-foot-long, 208-volt transmission line connecting the turbine-generator unit to a utility pole, the point of interconnection with the regional grid. A more detailed project description is contained in ordering paragraph (B)(2).

12. The project will bypass approximately 35 feet of the river downstream of the dam. However, the bypassed reach will remain wetted during project operation due to spills over the crest of the dam and inundation from flows released from the draft tube.

**C. Project Boundary**

13. The proposed project boundary encloses all of the above project facilities except for a short segment of the proposed transmission line that will connect to the regional grid. The project has no recreational facilities and Mr. Peklo does not propose any recreational facilities. The project boundary is discussed further below.

**D. Proposed Project Operation**

14. The project will be operated in a run-of-river mode. When flows are less than 25 cfs, the project will not operate, 5 cfs will be released through a steppass fish ladder, and all remaining flow will pass over the spillway. When flows are between 25 cfs and 115 cfs, 5 cfs will be released to the steppass fish ladder, 10 cfs will be spilled over the dam to protect aesthetic resources, and the project will operate using the remaining 10 to 100 cfs. When flows are greater than 115 cfs, the project will operate at its maximum hydraulic capacity, 5 cfs will be released to the steppass fish ladder, and all remaining flows will spill over the dam crest. The estimated annual generation of the project is 264.4 megawatt-hours (MWh).

### **E. Proposed Environmental Measures**

15. Mr. Peklo proposes to: (1) install a new trashrack in the existing intake structure that has a clear spacing of 0.75 inches and an approach velocity of 1.5 feet per second (fps) or less to limit entrainment and mortality of fish; (2) design, construct, operate, maintain, and evaluate a steppass fish ladder;<sup>16</sup> (3) design, construct, operate, maintain, and evaluate an eel ladder; (4) develop a monitoring plan to identify any project effects on dissolved oxygen (DO) downstream of the dam; (5) allow public access to the project area for recreational use; and (6) refinish the mortar joints between the granite block crest of the dam to maximize sheet spill at low flow.

### **Summary of License Requirements**

16. As summarized below, this license authorizes 76 kW of renewable energy generation capacity and requires a number of measures to protect, mitigate impacts to, or enhance geology and soils, water quality, fish, wildlife, and aesthetic resources at the project.

17. To protect geology and soils, aquatic, and terrestrial resources, the license requires the conditions of the Connecticut DEEP water quality certification (discussed further below).

18. To further protect fish and aquatic resources in the Pomperaug River, the license requires a debris management plan (Article 403) to ensure that the trashrack and fish passage facilities operate effectively, that beneficial organic debris is passed downstream of the project dam to protect aquatic habitat, and that inorganic trash is removed and disposed of properly. Article 402 requires that the plan to manage and monitor run-of-river operation and impoundment refill procedures (required by certification condition 2) describe the mechanisms, structures, and procedures for monitoring compliance with the operational provisions of this license.

19. To minimize the effects of the project on the aesthetic character of the project site, the license requires Mr. Peklo to: (1) maintain a 10-cfs minimum year-round aesthetic flow over the crest of the dam (Article 406); (2) develop a plan to monitor project-related noise (Article 407); and (3) consider the aesthetic effects when preparing a public safety plan (Article 306).

---

<sup>16</sup> A steppass is a type of pre-manufactured, modular fish ladder with relatively steep sections and internal baffles to reduce water velocity within the fish ladder. This allows the fish ladder to be effective, but generally smaller and less expensive than other types of fish ladders.

20. To protect cultural resources, Mr. Peklo is required to notify the Commission and the Connecticut State Historic Preservation Office (SHPO) immediately if previously unidentified cultural resources are found during the course of constructing, maintaining, or developing project works (Article 408).

### **Water Quality Certification**

21. Under section 401(a)(1) of the Clean Water Act (CWA),<sup>17</sup> the Commission may not issue a license authorizing the construction or operation of a hydroelectric project unless the state water quality certifying agency either has issued water quality certification for the project or has waived certification by failing to act on a request for certification within a reasonable period of time, not to exceed one year. Section 401(d) of the CWA provides that the certification shall become a condition of any federal license that authorizes construction or operation of the project.<sup>18</sup>

22. On June 4, 2013, Mr. Peklo applied to Connecticut DEEP for water quality certification for the Pomperaug Project. On January 17, 2014, Connecticut DEEP issued the water quality certification for the Pomperaug Project. The certification contains 18 conditions, 9 of which are general or administrative and are not discussed further.<sup>19</sup>

23. The remaining 9 conditions require: (1) a run-of-river operation; (2) a plan for monitoring run-of-river operation and impoundment refills; (3) an erosion and sediment control plan; (4) a trashrack with a clear spacing of 0.75 inches and an approach velocity of 1.5 fps or less; (5) a post-operation water quality monitoring survey; (6) a water quality monitoring plan; (7) a plan for installing and monitoring the effectiveness of

---

<sup>17</sup> 33 U.S.C. § 1341(a)(1) (2012).

<sup>18</sup> 33 U.S.C. § 1341(d) (2012).

<sup>19</sup> The general terms and conditions include: (1) clarification that the certification does not convey or derogate property rights; (2) a requirement that the term of the certification is to be consistent with the term of the license; (3) compliance directives regarding the terms and conditions of the certification; (4) restrictions on transferring the certification without written consent from the Commissioner of Connecticut DEEP; (5) the need to modify the certification if the information in the 401 application proves to be false, deceptive, incomplete, or inaccurate; (6) the use of best management practices during project construction and maintenance to control storm water discharge and prevent pollution from chemical and oil; (7) the need to obtain the appropriate permits before conducting any other regulated activity; (8) the need to certify any documents submitted to the Connecticut DEEP; and (9) procedures for submitting documents to the Connecticut DEEP.

upstream and downstream fish passage facilities; (8) a plan for installing and monitoring the effectiveness of upstream and downstream passage facilities for American eel; and (9) various measures to protect the Eastern box turtle, wood turtle, and Jefferson salamander.

24. Conditions 7 and 8, which require upstream and downstream passage facilities for fish and American eels, are inconsistent with staff's recommendations in the EA. Certification condition 7 requires the installation of fish passage facilities to provide upstream and downstream passage for alewife, blueback herring, sea lamprey, sea-run brown trout, and resident trout<sup>20</sup> and is consistent with Mr. Peklo's proposal to construct a new steepass fish ladder. Staff did not recommend this measure in the EA because none of the targeted anadromous species currently have access to the project area or the Pomperaug River, and there is no evidence that there would be any benefit for resident trout.<sup>21</sup>

25. Certification condition 8 requires upstream and downstream fish passage facilities for American eel. The condition is consistent with Mr. Peklo's proposal to construct a ladder for upstream passage of American eel.<sup>22</sup> In the EA, staff did not recommend the upstream and downstream fish ladder included in condition 7 for downstream passage of American eel. Instead, staff identified other alternatives for providing downstream American eel passage that would be more effective and less costly, such as shutting down the project at night during the fall outmigration period, or creating a notch in the dam crest and excavating a plunge pool downstream of the dam, which would likely have similar passage effectiveness as the proposed steepass design.<sup>23</sup>

26. However, because the Connecticut DEEP's certification conditions are mandatory, all of the conditions, including conditions 7 and 8, must be included in the license. The

---

<sup>20</sup> See EA at 29.

<sup>21</sup> See EA at 29-30. Two impassable dams are located on the downstream Housatonic River and one on the Pomperaug River; therefore, in the EA, staff concluded that constructing fish passage facilities designed to provide upstream passage for anadromous fish would be unnecessary. Furthermore, despite Connecticut DEEP's suggestion that the fish passage facilities could enable resident trout to access cooler water and better habitat upstream, the EA concluded that the potential benefits to the resident trout are unclear. See EA at 84-85.

<sup>22</sup> See EA at 30.

<sup>23</sup> See EA at 32, 80.

certification conditions are set forth in Appendix A of this order and incorporated into the license by ordering paragraph (E).

### **Coastal Zone Management Act**

27. Under section 307(c)(3)(A) of the Coastal Zone Management Act (CZMA),<sup>24</sup> the Commission cannot issue a license for a project within or affecting a state's coastal zone unless the state CZMA agency concurs with the applicant's certification of consistency with the state's CZMA program, or the agency's concurrence is conclusively presumed by its failure to act within six months of receipt of the applicant's certification. Connecticut DEEP Coastal Management Program staff has stated that because the project is not within Connecticut's zone of potential effects on coastal resources, a coastal consistency review is not necessary.<sup>25</sup>

### **Section 18 Fishway Prescriptions**

28. Section 18 of the FPA<sup>26</sup> provides that the Commission require the construction, maintenance, and operation by a licensee of such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate.

29. In a letter filed May 23, 2013, the Secretary of the Interior requested that the Commission reserve authority to prescribe fishways. Consistent with Commission policy, Article 404 of this license reserves the Commission's authority to require fishways that may be prescribed by Interior for the Pomperaug Project.

### **Threatened and Endangered Species**

30. Section 7(a)(2) of the Endangered Species Act of 1973<sup>27</sup> requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of federally listed threatened and endangered species, or result in the destruction or adverse modification of their designated critical habitat.

---

<sup>24</sup> 16 U.S.C. § 1456(c)(3)(A) (2012).

<sup>25</sup> See July 16, 2013 record of telephone communication between Steve Kartalia (Commission staff) and Kate Brown (Connecticut DEEP, Coastal Management Program), placed in the record July 18, 2013.

<sup>26</sup> 16 U.S.C. § 811 (2012).

<sup>27</sup> 16 U.S.C. § 1536(a) (2012).

31. The EA found that no federally listed species or their habitats are known to occur in the proposed project area.<sup>28</sup> Therefore, the project will not affect federally listed threatened or endangered species or adversely modify any critical habitat, and no further action under the Endangered Species Act is required.

### **National Historic Preservation Act**

32. Under section 106 of the National Historic Preservation Act (NHPA) and its implementing regulations,<sup>29</sup> federal agencies must take into account the effect of any proposed undertaking on properties listed or eligible for listing in the National Register of Historic Places (defined as historic properties) and afford the Advisory Council on Historic Preservation a reasonable opportunity to comment on the undertaking. This generally requires the Commission to consult with the SHPO to determine whether and how a proposed action may affect historic properties, and to seek ways to avoid or minimize any adverse effects.

In a letter dated March 13, 2008, the Connecticut SHPO made a determination of “no effect on historic, architectural, or archaeological resources.”<sup>30</sup> In the EA, staff determined that the proposed action would not affect historic properties.<sup>31</sup> However, it is possible that unknown archaeological or cultural resources could be discovered during project construction, operation, or other project related activities that require land-disturbing activities. Therefore, staff recommended that Mr. Peklo notify the Commission and consult with the Connecticut SHPO if any previously unidentified archaeological or cultural artifacts are discovered. Article 408 requires Mr. Peklo to stop work and consult with the Connecticut SHPO if previously unidentified archaeological or cultural artifacts are discovered.

---

<sup>28</sup> See EA at 7.

<sup>29</sup> 16 U.S.C. § 470 *et seq.* (2012); 36 C.F.R. Part 800 (2014).

<sup>30</sup> See Connecticut Commission on Culture and Tourism’s March 13, 2008 letter, filed in February 16, 2011 exemption application at Appendix 20.

<sup>31</sup> See EA at 60-61.

**Recommendations of State and Federal Fish and Wildlife Agencies Pursuant to Section 10(j) of the FPA**

33. Section 10(j) of the FPA<sup>32</sup> requires the Commission, when issuing a license, to include conditions based on recommendations submitted by federal and state fish and wildlife agencies pursuant to the Fish and Wildlife Coordination Act,<sup>33</sup> to “adequately and equitably protect, mitigate damages to, and enhance fish and wildlife (including related spawning grounds and habitat)” affected by the project.

34. On May 23, 2013, in response to the public notice of the license application, Interior filed, on behalf of FWS, eight recommendations pursuant to section 10(j).

35. All of Interior’s eight recommendations are within the scope of section 10(j). Specifically, Interior recommends that the licensee: (1) operate the project in a run-of-river mode; (2) install a trashrack with an approach velocity of 1.5 fps or less, clear spacing of 0.75 inches or less, and that extends the full depth of the intake opening; (3) prepare a plan to conduct DO monitoring after commencement of project operations; (4) prepare a plan for maintaining and monitoring run-of-river operation and impoundment levels; (5) pass 90 percent of project inflow downstream during impoundment refill after maintenance or emergency; (6) design, construct, operate, and maintain, and evaluate upstream and downstream fish passage facilities in consultation with Interior; (7) design, construct, operate, maintain, and evaluate upstream American eel passage facilities, in consultation with Interior; and (8) prepare a plan for fish passage facilities operation and maintenance. All eight of Interior’s recommendations are required by the water quality certification conditions set forth in Appendix A of this order and incorporated into the license by ordering paragraph (E)

36. If the Commission believes that any such recommendation may be inconsistent with the purposes and requirements of Part I of the FPA or other applicable law, section 10(j)(2) requires the Commission and the agencies to attempt to resolve any such inconsistency, giving due weight to the recommendations, expertise, and statutory responsibilities of such agencies.<sup>34</sup> If the Commission still does not adopt a recommendation, it must explain how the recommendation is inconsistent with Part I of the FPA or other applicable law and how the conditions imposed by the Commission adequately and equitably protect, mitigate damages to, and enhance fish and wildlife resources.

---

<sup>32</sup> 16 U.S.C. § 803(j)(1) (2012).

<sup>33</sup> 16 U.S.C. §§ 661, *et seq.* (2012).

<sup>34</sup> 16 U.S.C. § 803(j)(2) (2012).

37. By letter dated December 19, 2013, (i.e., before Connecticut DEEP issued the project's water quality certification), Commission staff advised Interior of its preliminary determination of inconsistency between Interior's recommendation 6 (upstream and downstream fish passage facilities) and the FPA, as indicated in the draft EA. As explained above, a steep pass fish ladder would have no benefit to anadromous fish, because none of the targeted anadromous species currently have access to the project area or the Pomperaug River.<sup>35</sup> Interior believes however that fish passage likely will be needed at some point during the license term.<sup>36</sup>

38. FWS responded via email on January 8, 2014, that it did not wish to pursue a section 10(j) meeting to attempt to resolve the inconsistency.<sup>37</sup>

39. Although staff did not recommend that fish passage facilities be required,<sup>38</sup> these facilities are a condition of the water quality certification and therefore are required by this license.

### **Section 10(a)(1) of the FPA**

40. Section 10(a)(1) of the FPA<sup>39</sup> requires that any project for which the Commission issues a license be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce; for the improvement and utilization of waterpower development; for the adequate protection, mitigation, and enhancement of fish and wildlife; and for other beneficial public uses, including irrigation, flood control, water supply, recreation, and other purposes.

#### **A. Public Access**

41. Staff's analysis in the EA found that although there are no formal recreation facilities at the project, the public currently has access to the Pomperaug River at the project site for recreational uses, such as fishing and boating.<sup>40</sup> Mr. Peklo proposes to

---

<sup>35</sup> See EA at 31-32.

<sup>36</sup> See Interior's May 23, 2013 Comments at 5.

<sup>37</sup> Email from Melissa Grader (FWS) to Stephen Kartalia (Commission staff), dated and filed January 8, 2014.

<sup>38</sup> See *supra* P 24 and 25.

<sup>39</sup> 16 U.S.C. § 803(a)(1) (2012).

<sup>40</sup> See EA at 38-39.

continue to allow public access to most areas within the project boundary for recreational use.<sup>41</sup> Standard article 13 of this license requires Mr. Peklo to allow public access to the project area to utilize existing fish and wildlife resources.

42. However, to protect public safety and project features, public access will need to be restricted around the trashrack, intake structure, and powerhouse. Therefore, Article 306 of this license requires Mr. Peklo to develop a public safety plan. The plan must include an evaluation of public safety concerns at the project site and a description of all public safety devices and signage, as well as a map showing the location of all public safety measures. The plan must also consider aesthetics to minimize the visual impact of any safety measures.

### **B. Aesthetic Flows**

43. The Pomperaug River and Pomperaug River Dam are important aesthetic features to the rural residential area adjacent to Pomperaug Road.<sup>42</sup> The project will reduce flows over the crest of the dam when water is diverted for power generation. As proposed in the license application, no flow would pass over the dam approximately 58 percent of the time (or 212 days per year).<sup>43</sup> Mr. Peklo has stated that the flows over the project dam are not viewable by the general public, because the crest of the dam faces away from Pomperaug Road.<sup>44</sup> However, during the site visit, staff observed that water flowing over the crest of the dam was clearly visible from either end of Pomperaug Road Bridge. Moreover, in filings and in comments made at the technical meeting, numerous entities, including several of Mr. Peklo's neighbors, expressed concern that reducing flows over the crest of the dam would impact the visual and auditory character of the site.

44. To provide the information needed to evaluate project effects on the aesthetic character of the site, staff directed Mr. Peklo to document the visual and auditory characteristics of the Pomperaug River in the project area.<sup>45</sup> Mr. Peklo provided video

---

<sup>41</sup> Interior also recommends that Mr. Peklo permit access to the project area to allow for public use of fish and wildlife resources, with consideration of public safety and protection of project works. *See* Interior's May 23, 2013 Comments at 9.

<sup>42</sup> *See* EA at 39.

<sup>43</sup> *See* EA at 51.

<sup>44</sup> *See* February 16, 2011 Exemption Application, at 11.

<sup>45</sup> *See* May 3, 2012, Request for Additional Information and Study letter.

and sound recording data for eight flow levels between 5.9 cfs and 214 cfs.<sup>46</sup> Staff evaluated these data in the EA and found that as the Pomperaug River flows over the dam, it creates a small waterfall that can be viewed by the public from the Pomperaug Road Bridge, the mill building, an adjacent residence, and from the streambed several hundred feet downstream of the dam.<sup>47</sup> The EA evaluated the aesthetic characteristics provided by each of these flows, and found that a 10-cfs flow provides a nearly complete veil across the face of the dam that covers most of its downstream face and maintains some of the auditory qualities that occur under existing conditions.

45. In commenting on the draft EA, Mr. Peklo stated that an aesthetic flow is not needed because the spill is directed away from the public view at Pomperaug Road Bridge and would only provide a visual benefit for an adjacent neighbor.<sup>48</sup> Mr. Peklo also questions why the flow is required 24 hours a day, 365 days a year. In the EA, staff found that providing an aesthetic flow, at an estimated cost of \$5,846, and with only a nine percent reduction in annual generation, was reasonable to mitigate the visual and auditory impacts of the proposed project.<sup>49</sup> Accordingly, this license requires Mr. Peklo to release a continuous minimum aesthetic flow of 10 cfs or inflow, whichever is less (Article 406).

46. In the EA, staff also evaluated Mr. Peklo's proposal to modify the dam crest to maximize sheet spill at low flows. Staff found that although this proposal could enhance an aesthetic flow by evening out the distribution of flow along the crest of the dam, doing so might create an artificial look. Therefore, staff did not recommend, and this license does not authorize, modifying the crest of the dam to create an even sheet-flow.<sup>50</sup>

### **C. Noise Monitoring**

47. Mr. Peklo will install a double-regulated Kaplan turbine within the existing mill building and install three, approximately 30-kW transformers to connect the project to Connecticut Light and Power's existing distribution system. Several commenters

---

<sup>46</sup> See October 31, 2012 audio/visual study, supplemented on January 17, 2013. Public notice of the availability of the video and sound recording portion of the study was placed in the record on April 29, 2013.

<sup>47</sup> See EA at 39.

<sup>48</sup> See January 22, 2014 Letter, at 4.

<sup>49</sup> See EA at 83.

<sup>50</sup> See EA at 82.

expressed concern that the project's transformers and turbine could increase noise in their neighborhood. During the site visit, staff did not detect noise from the existing 15-kW transformers located at the project site.<sup>51</sup> Staff's analysis in the EA found that there should be no discernible change in noise from the operation of the three new 30-kW transformers because they are rated as having the same standard sound levels as the existing 15-kW transformers.<sup>52</sup>

48. Mr. Peklo will install soundproofing in the turbine unit housing to mitigate noise emitted by turbine operations. Also, the sound of water passing over the dam provided by the aesthetic flow will provide an additional buffer for any sound emitted from the turbine-generator unit.<sup>53</sup>

49. However, to confirm its findings in the EA, Commission staff recommended a noise monitoring plan. This plan would include: (1) methods for measuring projected-related noise levels near each residence that is within 200 feet of the powerhouse and transformers; (2) an explanation of how the data will be evaluated, including how any project-related noise increases will be determined; (3) a requirement to file a report detailing the results of the study; and (4) an implementation schedule.

50. Therefore, this license requires Mr. Peklo to develop a noise monitoring plan (Article 407).

#### **D. Debris Management**

51. In the EA, staff concluded that a debris management plan would ensure that: any trashrack and fish passage facilities operate effectively, beneficial organic debris is passed downstream of the project dam to improve aquatic habitat, and inorganic trash is removed and disposed of properly.<sup>54</sup> In addition, staff concluded that a debris management plan is needed because the accumulation of debris along the spillway crest would potentially reduce the benefit of releasing an aesthetic flow over the dam by breaking up the veil of water created by the 10-cfs minimum flow. Therefore, this license requires Mr. Peklo to develop a plan to manage and dispose of debris that accumulates on the trashrack, fish passage facilities, and dam crest (Article 403).

---

<sup>51</sup> See EA at 58.

<sup>52</sup> See EA at 58-59.

<sup>53</sup> See EA at 58.

<sup>54</sup> See EA at 33 and 81.

### **Exemption of the FERC Form 80 Recreation Report**

52. The FERC Form 80 Recreational Report (Form 80) collects recreation usage data on recreation facilities at projects through the term of their licenses. Since the Pomperaug Project will have no designated project recreation facilities, the licensee is exempt from filing the Form 80 during the term of its license (Article 405).

### **Other Issues**

#### **A. Property Rights and Local Zoning**

53. Several commenters have stated that Mr. Peklo does not have all the rights to lands within the project boundary that are needed to construct, operate, and maintain the project. Mr. Peklo disagrees and has stated that he has the necessary rights to all project lands. The disputes as to current property rights are not matters for the Commission. Rather, they must be resolved through the courts, if necessary. Moreover, if indeed a licensee does not have the necessary rights, it must acquire them through negotiation or, if that fails, through judicial proceedings.<sup>55</sup> The Commission does not interject itself in the process by which a licensee obtains requisite property rights.

54. In any event, a license applicant need not demonstrate that it has all the necessary property rights to develop the project at the time of licensing. Standard Article 5 of every license gives the licensee up to five years to acquire the rights its needs for the construction, maintenance, and operation of the project. In addition, we have included a condition in this license requiring Mr. Peklo to report to the Commission within four years on the status of the property rights he holds on the land within the project boundary (Article 204).

55. Commenters have also stated that the project would be located in the town of Woodbury in an area that is zoned for residential, not commercial, use. Generally, we expect our licensees to comply with all applicable local, state, and federal laws, where possible, including obtaining any necessary permits required to be obtained prior to project construction under local zoning classifications and ordinances. However, to the extent that state or local regulations make compliance with our orders impossible or unduly difficult, the FPA preempts such regulations.<sup>56</sup>

---

<sup>55</sup> Section 21 of the FPA, 16 U.S.C. § 814 (2012), allows the licensee to acquire the necessary property interests by right of eminent domain, if negotiations fail.

<sup>56</sup> See *Public Utility District No. 2 of Grant County, Washington*, 139 FERC ¶ 61,122, at P 10 (2012) (citing *PacifiCorp*, 115 FERC ¶ 61,194, at P 9 (2006)).

56. Furthermore, commenters have stated that if the project is licensed, residential property values in the project vicinity will be reduced as a result of the impact to aesthetic resources. As described above, to minimize any potential adverse impacts to the aesthetic resources in the project area, the license requires an aesthetic flow, noise monitoring, and debris management. Further, construction and operation of the project will only result in a few long-term visible changes to the project area, including: (1) reduced flows over the dam, (2) signs, fencing, or buoy lines as necessary for safety, and (3) construction of fish passage facilities. These changes should have a relatively minor effect on the overall appearance of the immediate area. Therefore, we have no reason to conclude that property values would be adversely affected.

### **B. Accuracy of Filed Information**

57. In separate filings, Sean E. Elwell, David Sewall, Ruby H. Hewitt, Anne P. Delo and Rosemary E. Giuliano, and Lee Sherwood, accuse Mr. Peklo of filing false and misleading information and maps. Specifically, Mr. Sewall, Ms. Delo and Ms. Giuliano allege that Mr. Peklo has violated 18 U.S.C. § 1001 (2012) by knowingly and willfully making materially false statements to the Commission regarding ownership of the lands within the project boundary and the filing of Exhibit G maps that fail to meet the Commission's regulations.<sup>57</sup>

58. We disagree. While there have been instances where Mr. Peklo provided deficient or incorrect information, either the information was not material to the proceeding or Mr. Peklo resolved the issue by providing the required information.<sup>58</sup> In any event, there is nothing to suggest that Mr. Peklo knowingly and willfully misled the Commission.

---

<sup>57</sup> See David Sewall's May 20, 2013 filing and Anne P. Delo and Rosemary E. Giuliano's June 4 and August 29, 2013 filings.

<sup>58</sup> Commenters allege that Mr. Peklo provided misleading information regarding property ownership, and his Exhibit G maps incorrectly depicted the location of Lot 9 and misrepresented the verification of the licensed surveyor's stamp. Regarding property ownership, as explained above, an application for an exemption from licensing must demonstrate ownership of project lands, but there is no similar requirement for license applications. Instead, a licensee has five years after license issuance to secure the rights it needs for the project. Regarding the sufficiency of the Exhibit G maps, the commenters are correct that Mr. Peklo initially filed an Exhibit G drawing that was deficient, in part because it was not stamped by a registered land surveyor. See 18 C.F.R. § 4.39(a) (2014). When notified of this deficiency, Mr. Peklo filed a revised Exhibit G drawing showing a licensed surveyor's stamp, but the surveyor verified only some of the required information. Subsequently, Mr. Peklo filed a corrected Exhibit G drawing that includes a stamp from a registered land surveyor showing proper verification. The  
(continued ...)

**C. Request for Formal Hearing**

59. On May 6, 2014, parties opposing the project filed a request for a hearing prior to the Commission issuing a license, but do not allege that there are material facts in dispute.<sup>59</sup> On May 6, 2014, Paul V. Nolan filed an opposition to the hearing request.

60. The Commission has substantial discretion in deciding whether to hold a trial-type, evidentiary hearing and requires such hearings only where there are material issues of fact that cannot be resolved on the basis of the written record.<sup>60</sup> The parties have raised no issues of material fact that cannot be resolved on the basis of the written record in this proceeding. We find that all interested parties have had a full opportunity to present their views through multiple written submissions. Therefore, the request is denied.

**Administrative Provisions****A. Annual Charges**

61. The Commission collects annual charges from licensees for administration of the FPA, and Article 201 provides for the collection of these charges. Under the regulations currently in effect, projects with an authorized installed capacity of less than or equal to 1,500 kW, like this project, will not be assessed an annual charge.

**B. Exhibit F and G Drawings**

62. The Exhibit F drawings filed on February 16, 2011, October 12, 2011, and October 31, 2012, are approved and made part of the license (ordering paragraph (C)). The Commission requires licensees to file sets of approved project drawings in electronic file format. Article 202 requires the filing of these drawings.

63. Mr. Peklo filed an Exhibit G map on July 15, 2013, that does not enclose within the project boundary the entire proposed transmission line to the point of interconnection with the regional distribution grid. In addition, the shape-file provided with the Exhibit G

---

remaining deficiencies in the Exhibit G can be corrected post licensing.

<sup>59</sup> The request for hearing was submitted by Kerri Wolcott, Anne P. Delo, Anne Casey, Rosemary E. Giuliano, Theresa Sherwood, David Sewall, Lee Sherwood, Thomas Greto, Barbara Sherwood, Ruby Hewitt, Sean Elwell, and Thomas Hewitt on behalf of the Citizens for the Preservation of Woodbury.

<sup>60</sup> See *Duke Energy Carolinas, LLC*, 137 FERC ¶ 62,090, at P 80 (2011) (citing *Citizens for Allegan County v. F.P.C.*, 414 F.2d 1125 (D.C. Cir. 1969)).

cannot be merged with the Exhibit G drawing because the locations of the known reference points (i.e., GPS-A through GPS-F) are incorrect. For these reasons, the Exhibit G map is not approved. Article 203 requires the licensee to file, within 90 days of issuance date of this license, a revised Exhibit G that encloses within the project boundary all principal project works necessary for operation and maintenance of the project, including the proposed step-up transformers and the transmission line to the point of interconnection with the regional distribution grid and to provide accurate locations for three known reference points.<sup>61</sup>

### **C. Project Land Rights Progress Report**

64. Standard Article 5 set forth in Form L-15 requires the licensee to acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of the project, within five years. In order to monitor compliance with Standard Article 5, Article 204 requires the licensee to file no later than four years after license issuance, a report detailing its progress on acquiring title in fee or the necessary rights to all lands within the project boundary. The report shall include specific documentation on the status of the rights that have been acquired as of the filing date of the progress report, and a plan and schedule to acquire all remaining land prior to the five-year deadline.

### **D. Project Financing**

65. To ensure that there are sufficient funds available for project construction, operation, and maintenance, Article 205 requires the licensee to file for Commission approval documentation of project financing for construction, operation, and maintenance of the project at least 90 days before starting any construction associated with the project.

### **E. Use and Occupancy of Project Lands and Waters**

66. Requiring a licensee to obtain prior Commission approval for every use or occupancy of project land would be unduly burdensome. Therefore, Article 409 allows the licensee to grant permission, without prior Commission approval, for the use and occupancy of project lands for such minor activities as landscape planting. Such uses

---

<sup>61</sup> Section 4.41(h) of the Commission's regulations requires that Exhibit G drawings contain three known reference points and show the latitude and longitude coordinates or state plane coordinates of each reference point. 18 C.F.R. § 4.41(h) (2014). Information about preparing Exhibit drawings can be found in the *Managing Hydropower Project Exhibits* Guidance Document on the Commission website at <http://www.ferc.gov/industries/hydropower/gen-info/guidelines/drawings-guide.pdf>.

must be consistent with the purposes of protecting and enhancing the scenic, recreational, and environmental values of the project.

**F. Start of Construction**

67. Article 301 requires the licensee to commence construction of the project works within two years from the issuance date of the license and complete construction of the project within five years from the issuance date of the license.

**G. Review of Final Plans and Specifications**

68. Article 302 requires the licensee to provide the Commission's Division of Dam Safety and Inspection New York Regional Office (D2SI-NYRO) with final contract drawings and specifications—together with a quality control and inspection program, a temporary construction emergency action plan, the erosion and sediment control plan required by condition 3 of the water quality certification issued by Connecticut DEEP, and a supporting design report consistent with the Commission's engineering guidelines.

69. Article 303 requires the licensee to provide the Commission's D2SI-NYRO with cofferdam construction drawings.

70. Where new construction or modifications to the project are involved, the Commission requires licensees to file revised drawings of project features as-built. Article 304 provides for the filing of these drawings.

71. Article 305 requires the licensee to provide the Commission's D2SI-NYRO with a structural analysis for the project's water retaining features.

72. Article 306 requires the licensee to provide the Commission's D2SI-NYRO with a public safety plan.

73. Article 307 requires the licensee to coordinate with the Commission's D2SI-NYRO on any modifications that may affect project works or operation resulting from license environmental requirements.

**H. Commission Approval of Resource Plans, Notification, and Filing of Amendments**

74. In Appendix A there are certain certification conditions that either do not require the licensee to file plans with the Commission for approval; do not provide for consultation with the appropriate agencies during plan development; or require agency, but not Commission, notification of emergencies and other activities. Therefore, Article 401 requires the licensee to: consult with appropriate agencies during plan development; file the plans with the Commission for approval; notify the Commission of emergencies or other activities; and file amendment applications, as appropriate.

### **State and Federal Comprehensive Plans**

75. Section 10(a)(2)(A) of the FPA<sup>62</sup> requires the Commission to consider the extent to which a project is consistent with federal or state comprehensive plans for improving, developing, or conserving a waterway or waterways affected by the project.<sup>63</sup> Under section 10(a)(2)(A), federal and state agencies filed (19) comprehensive plans that address various resources in Connecticut. Of these, the staff identified and reviewed six comprehensive plans that are relevant to the Pomperaug Project.<sup>64</sup> No inconsistencies were found.

### **Safe Management, Operation, and Maintenance of the Project**

76. Staff reviewed Mr. Peklo's preliminary plans to build the project as described in the license application. Staff concluded, and we agree, that the project works will be safe when constructed, operated, and maintained in accordance with the Commission's standards and oversight and the provisions of this license.

### **Need for Power**

77. To assess the need for power, staff looked at the needs in the operating region in which the project is located. Project power will be used to meet regional electrical demand. The project will be located in the Northeast Power Coordinating Council (NPCC) region of the North American Electric Reliability Council (NERC). NERC annually forecasts electrical supply and demand nationally and regionally for a 10-year period. According to NERC's 2013 forecast, summer peak demand in the NPCC region is expected to grow at an annual rate of 0.84 percent from 2014 through 2023. The project's power and contribution to the region's diversified generation mix will help meet a need for power in the region.

### **Project Economics**

78. In determining whether to issue a license for a hydroelectric project, the Commission considers a number of public interest factors, including the economic benefits of project power. Under the Commission's approach to evaluating the economics of hydropower projects, as articulated in *Mead Corp.*,<sup>65</sup> the Commission uses

---

<sup>62</sup> 16 U.S.C. § 803(a)(2)(A) (2012).

<sup>63</sup> Comprehensive plans for this purpose are defined at 18 C.F.R. § 2.19 (2014).

<sup>64</sup> The list of applicable plans can be found in section 5.5 of the EA for the project.

<sup>65</sup> 72 FERC ¶ 61,027 (1995).

current costs to compare the costs of the project and likely alternative power with no forecasts concerning potential future inflation, escalation, or deflation beyond the license issuance date. The basic purpose of the Commission's economic analysis is to provide a general estimate of the potential power benefits and the costs of a project, and of reasonable alternatives to project power. The estimate helps to support an informed decision concerning what is in the public interest with respect to a proposed license.

79. In applying this analysis to the Pomperaug Project, staff considered three options: no action, Mr. Peklo's proposal, and the project as licensed herein. Under the no action alternative, the project would not be built. Under Mr. Peklo's alternative, the project would have an installed capacity of 76 kW, and would generate an average of 300 MWh of electricity annually. The average annual project cost would be about \$61,987, or \$206.62/MWh. When we multiply our estimate of average generation by the alternative power cost of \$164.22/MWh,<sup>66</sup> we get a total value of the project's power of \$49,266 in 2014 dollars. To determine whether the proposed project would be economically beneficial, we subtract the project's cost from the value of the project's power. Therefore, the project would cost \$12,721 or \$42.40/MWh, more to produce power than the likely alternative cost of power.

80. As licensed herein with mandatory conditions and staff measures, the levelized annual cost of operating the project will be about \$63,317 or \$239.47/MWh.<sup>67</sup> The proposed project will generate an average of 264.4 MWh of energy annually. When we multiply our estimate of average generation by the alternative power cost of \$164.22/MWh, we get a total value of the project's power of \$43,420 in 2014 dollars. Therefore, in the first year of operation, project power will cost \$19,897, or \$75.25/MWh, more than the likely cost of alternative power.

81. Although our staff's analysis shows that the project as licensed herein will cost more to operate than our estimated cost of alternative power, it is the applicant who must decide whether to accept this license and any financial risk that entails.

82. Although we do not explicitly account for the effects inflation may have on the future cost of electricity, the fact that hydropower generation is relatively insensitive to inflation compared to fossil fueled generators is an important economic consideration for power producers and the consumers they serve. This is one reason project economics is

---

<sup>66</sup> The alternative power cost of \$164.22 per MWh is based on Connecticut Light and Power Company's Zero Emissions Renewable Energy Credit Program.

<sup>67</sup> The economic data in this order differs from the EA because it includes revised estimates of annual costs as licensed.

only one of the many public interest factors the Commission considers in determining whether or not, and under what conditions, to issue a license.

### **Comprehensive Development**

83. Sections 4(e) and 10(a)(1) of the FPA<sup>68</sup> require the Commission to give equal consideration to the power development purposes and to the purposes of energy conservation; the protection, mitigation of damage to, and enhancement of fish and wildlife; the protection of recreational opportunities; and the preservation of other aspects of environmental quality. Any license issued shall be such as in the Commission's judgment will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for all beneficial public uses. The decision to license this project, and the terms and conditions included herein, reflect such consideration.

84. The EA for the project contains background information, analysis of effects, and support for related license articles. Based on the record of this proceeding, including the EA and the comments thereon, licensing the Pomperaug Project as described in this order would not constitute a major federal action significantly affecting the quality of the human environment. The project will be safe if operated and maintained in accordance with the requirements of this license.

85. Based on our independent review and evaluation of the Pomperaug Project, recommendations from the resource agencies and other stakeholders, and the no-action alternative, as documented in the EA, we have selected the proposed Pomperaug Project, with the staff-recommended measures, and find that it is best adapted to a comprehensive plan for improving or developing the Pomperaug River.

86. We selected this alternative because: (1) issuance of an original license will serve to provide a beneficial and dependable source of electric energy; (2) the required environmental measures will protect and enhance fish and wildlife resources, water quality, aesthetic resources, and historic properties; and (3) the 76 kW of electric capacity comes from a renewable resource that does not contribute to atmospheric pollution.

### **License Term**

87. Section 6 of the FPA<sup>69</sup> provides that original licenses for hydropower projects shall be issued for a period not to exceed 50 years. The Commission's general policy is to establish 30-year terms for projects with little or no redevelopment, new construction,

---

<sup>68</sup> 16 U.S.C. §§ 797(e) and 803(a)(1) (2012).

<sup>69</sup> 16 U.S.C. § 799 (2012).

new capacity, or environmental mitigation and enhancement measures; 40-year terms for projects with a moderate amount of such activities; and 50-year terms for projects with extensive measures.<sup>70</sup>

88. This license requires a moderate amount of new construction, including a powerhouse and upstream and downstream passage facilities for fish and the American eel. Consequently, a 40-year license for the Pomperaug Project is appropriate.

The Commission orders:

(A) This license is issued to Andrew Peklo III (licensee), for a period of 40 years, effective the first day of the month in which this order is issued, to construct, operate and maintain the Pomperaug Project. This license is subject to the terms and conditions of the Federal Power Act (FPA), which is incorporated by reference as part of this license, and subject to the regulations the Commission issues under the provisions of the FPA.

(B) The project consists of:

(1) All lands, to the extent of the licensee's interests in these lands, described in the project description and the project boundary discussion of this order.

(2) Project works consisting of: (1) the existing 15-foot-high, 90-foot-long granite block and masonry Pomperaug River dam; (2) an existing 30-inch-high, 30-inch-wide slide gate at the west end of the dam; (3) an existing 48-inch-high, 60-inch-wide drain gate near the middle of the dam; (4) an existing 30-inch-high, 30-inch-wide east gate and intake structure at the east end of the dam that would include a new trashrack with 0.75-inch clear bar spacing; (5) a new steeppass fish ladder; (6) an existing 3-acre impoundment with a normal water surface elevation of 226.43 feet above mean sea level; (7) an existing 42-inch-high, 50-inch-wide, 40-foot-long stone-lined penstock; (8) a new 10-foot-wide, 25-foot-long sound-insulated powerhouse and 76-kilowatt turbine-generating unit located in an existing mill building; (9) a new 3.5-foot-diameter, 33-foot-long draft tube to direct water from the turbine back into the river downstream of the dam; (10) three new approximately 30-kW step-up transformers and a 208-volt, 135-foot-long transmission line; and (11) appurtenant facilities.

---

<sup>70</sup> See *City of Danville, Virginia*, 58 FERC ¶ 61,318, at 62,020 (1992).

The project works generally described above are more specifically shown and described by those portions of Exhibits A and F shown below:

Exhibit A: The following sections of Exhibit A filed on February 16, 2011, October 31, 2012, and January 17, 2013, respectively:

Page 3, entitled “Existing Facilities”;

Page 10, entitled “Proposed Facilities”; and

Page 7, entitled “Exhibit A Description of Project and Mode of Operation.”

Exhibit F: The following Exhibit F drawing numbers 8, 9, 10, and 11 filed on February 16, 2011, Exhibit F drawing number 12, filed on October 12, 2011, and Exhibit F drawing number 17, filed on October 31, 2012:

<u>Exhibit F Drawing</u>	<u>Licensee’s Drawing Number</u>	<u>FERC No. 12790-</u>	<u>Description</u>
F-1	8	1	Project and Fish Passage Lower Level Plan
F-2	9	2	Project and Fish Passage Upper Level Plan
F-3	10	3	Project Section A
F-4	11	4	Fish Passage Elevation
F-5	12	5	Dam/Gate Plan and Elevation
F-6	17	6	Existing Dam and Gates, Dam/Gate Elevation

(3) All of the structures, fixtures, equipment or facilities used to operate or maintain the project, all portable property that may be employed in connection with the project, and all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project.

(C) The Exhibits A and F described above are approved and made part of this license. The Exhibit G drawing filed as part of the application for license does not conform to the Commission’s regulations and is not approved.

(D) The following sections of the FPA are waived and excluded from the license for this minor project:

4(b), except the second sentence; 4(e), insofar as it relates to approval of plans by the Chief of Engineers and the Secretary of the Army; 6, insofar as it relates to public notice and to the acceptance and expression in the license of terms and conditions of the Act that are waived here; 10(c), insofar as it relates to depreciation reserves; 10(d); 10(f); 14, except insofar as the power of condemnation is reserved; 15; 16; 19; 20; and 22.

(E) This license is subject to the conditions submitted by the Connecticut Department of Energy and Environmental Protection under section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1) (2012), as those conditions are set forth in Appendix A to this order.

(F) This license is also subject to the articles set forth in Form L-15 (Oct. 1975), entitled “Terms and Conditions of License for Unconstructed Minor Project Affecting the Interests of Interstate or Foreign Commerce” (*see* 54 F.P.C. 1799, *et seq.*), as reproduced at the end of this order, and the following additional articles:

Article 201. Administrative Annual Charges. The licensee must pay the United States the following annual charges, as determined in accordance with provisions of the Commission’s regulations in effect from time to time: effective as of the date of commencement of project construction, to reimburse the United States for the cost of administration of Part 1 of the Federal Power Act. The authorized installed capacity for that purpose is 76 kilowatts (kW). Under the regulations currently in effect, projects with an authorized installed capacity of less than or equal to 1,500 kW will not be assessed an annual charge.

Article 202. Exhibit F Drawings. Within 45 days of the date of issuance of this license, as directed below, the licensee must file the approved exhibit drawings in electronic file format on compact disks (CD).

(a) Digital images of the approved Exhibit drawings must be prepared in electronic format. Prior to preparing each digital image, the FERC Project-Drawing Number (i.e., P-12790-1 through P-12790-6) must be shown in the margin below the title block of the approved drawing.

The licensee must file two sets of Exhibit drawings in electronic format on CD with the Secretary of the Commission, ATTN: OEP/DHAC.

(b) The Exhibit F drawings must be identified as Critical Energy Infrastructure Information (CEII) under 18 C.F.R. § 388.113(c) (2014). Each drawing must be a separate electronic file and the file name must include: FERC Project-Drawing Number,

FERC Exhibit, Drawing Title, date of this license, and a file extension in the following format [P-12790-1, F-1, Description, MM-DD-YYYY.TIF]. All digital images of the Exhibit drawings must meet the following format specification:

IMAGERY – black & white raster file  
FILE TYPE – Tagged Image File Format (TIFF), CCITT Group 4  
RESOLUTION – 300 dots per inch (dpi) desired (200 dpi minimum)  
DRAWING SIZE FORMAT – 24” X 36” (minimum), 28” X 40”  
(maximum)  
FILE SIZE – less than 1 megabyte desired

Article 203. Exhibit G Drawings. Within 90 days of the date of issuance of this license, the licensee must file, for Commission approval, a revised Exhibit G drawing enclosing within the project boundary all principal project works necessary for operation and maintenance of the project, including the three new step-up transformers and the new primary transmission line to its point of interconnection with the regional distribution grid. In addition, the licensee must provide accurate locations for three known reference points on the Exhibit G drawing. The Exhibit G drawing must comply with sections 4.39 and 4.41 of the Commission’s regulations, as those regulations were modified.<sup>71</sup>

Article 204. Project Land Rights Progress Report. No later than four years after license issuance, the licensee must file a report with the Commission describing the status of acquiring title in fee or the rights for all the lands within the project boundary. The report must provide an overview map of each parcel and summary table identifying the licensee’s rights over each parcel within the project boundary. The report must also include specific supporting documentation showing the status of the land rights on all parcels of land within the project boundary that: (1) have been acquired up to the date of filing of the report, including pertinent deeds, lease agreements, and/or bill of sale information that specifically verify the licensee’s rights; and (2) the licensee’s plan and schedule for acquiring all remaining project lands prior to the five-year deadline, including a history of actions taken, current owner information, the type of ownership to be acquired whether in fee or by easement, and the timeline for completing property acquisition.

Article 205. Documentation of Project Financing. At least 90 days before starting construction, the licensee must file with the Commission, for approval, the licensee’s documentation for the project financing. The documentation must show that the licensee has acquired the funds, or commitment for funds, necessary to construct the

---

<sup>71</sup> See *Format and Dimensions of Maps and Drawings Required by the Commission’s Hydropower Program*, 79 Fed. Reg. 42,973 (July 24, 2014).

project in accordance with this license. The documentation must include, at a minimum, financial statements, including a balance sheet, income statement, and a statement of actual or estimated cash flows over the license term which provide evidence that the licensee has sufficient assets, credit, and projected revenues to cover project construction, operation, and maintenance expenses, and any other estimated project liabilities and expenses.

The financial statements must be prepared in accordance with generally accepted accounting principles and signed by an independent certified public accountant. The licensee must not commence project construction associated with the project before the filing is approved.

Article 301. *Start of Construction.* The licensee must commence construction of the project works within two years from the issuance date of the license and must complete construction of the project within five years from the issuance date of the license.

Article 302. *Contract Plans and Specifications.* At least 60 days prior to the start of any construction, the licensee must submit one copy of its plans and specifications and supporting design document to the Commission's Division of Dam Safety and Inspections (D2SI)-New York Regional Engineer, and two copies to the Commission (one of these must be a courtesy copy to the Director, D2SI). The submittal to the D2SI-New York Regional Engineer must also include as part of preconstruction requirements: a Quality Control and Inspection Program, Temporary Construction Emergency Action Plan, and the erosion and sediment control plan required by condition 3 of the water quality certification issued by Connecticut Department of Energy and Environmental Protection. The licensee may not begin construction until the D2SI-New York Regional Engineer has reviewed and commented on the plans and specifications, determined that all preconstruction requirements have been satisfied, and authorized start of construction.

Article 303. *Cofferdam Construction Drawings and Deep Excavations.* Before starting construction, the licensee must review and approve the design of contractor-designed cofferdams and deep excavations and must make sure construction of cofferdams and deep excavations is consistent with the approved design. At least 30 days before starting construction of the cofferdam, the licensee must submit one copy to the Commission's Division of Dam Safety and Inspections (D2SI)-New York Regional Engineer and two copies to the Commission (one of these copies shall be a courtesy copy to the Commission's Director, D2SI), of the approved cofferdam construction drawings and specifications and the letters of approval.

Article 304. *As-built Drawings.* Within 90 days of completion of construction of the facilities authorized by this license, the licensee must file for Commission approval,

revised Exhibits A, F, and G, as applicable, to describe and show those project facilities as built. A courtesy copy must be filed with the Commission's Division of Dam Safety and Inspections (D2SI)-New York Regional Engineer, the Director, D2SI, and the Director, Division of Hydropower Administration and Compliance.

Article 305. Structural Analysis. Within six months of the date of issuance of this license, the licensee must submit one copy to the Commission's Division of Dam Safety and Inspections (D2SI)-New York Regional Engineer and two copies to the Commission (one of these copies must be a courtesy copy to the Commission's Director, D2SI), of a Stress and Stability Analysis for the project's water retaining features. The analysis must be performed according to Chapter 3 of the Commission's Engineering Guidelines.

Article 306. Public Safety Plan. Within 60 days from the date of issuance of this license, the licensee must submit one copy to the Commission's Division of Dam Safety and Inspections (D2SI)-New York Regional Engineer and two copies to the Commission (one of these copies must be a courtesy copy to the Commission's Director, D2SI) of a Public Safety Plan. The plan must include an evaluation of public safety concerns at the project site and assess the need for the installation of safety devices or other safety measures. The submitted plan must include a description of all public safety devices and signage, as well as a map showing the location of all public safety measures. The plan must also consider project site aesthetics and describe any measures used to minimize the visual impact of any public safety measures. For guidance on preparing public safety plan the licensee should review the *Guidelines for Public Safety at Hydropower Projects* on the FERC website.

Article 307. Project Modification Resulting from Environmental Requirements. If environmental requirements under this license require modification that may affect the project works or operations, the licensee must consult with the Commission's Division of Dam Safety and Inspections–New York Regional Engineer. Consultation must allow sufficient review time for the Commission to ensure that the proposed work does not adversely affect the project works, dam safety, or project operation.

Article 401. Commission Approval and Filing of Amendments. Various conditions of this license found in the Connecticut Department of Energy and Environmental Protection's (Connecticut DEEP) water quality certification (Appendix A) require the licensee to file plans and reports for approval by the Connecticut DEEP and do not require prior Commission approval or specify a due date for filing. Additionally, some conditions of the certification contemplate changes to project operation or facilities that would require amendment applications. Each such plan and report must be submitted to the Commission for approval and listed below.

## a) Requirement to File Plans for Commission Approval.

<b>Connecticut DEEP Certification Condition No.</b>	<b>Plan Name</b>	<b>Date Due to Commission</b>
2	Run of River and Impoundment Refill Operation Monitoring Plan	Within 6 months of license issuance and at least 60 days prior to start of project operation
3	Erosion and Sediment Control Plan	Within 12 months of license issuance and at least 60 days prior to the start of any ground disturbing activities
6	Water Quality Monitoring Plan	Within 12 months of license issuance and at least 60 days prior to operation of the project
7	Plan to design, construct, operate, maintain, and evaluate upstream and downstream passage facilities for anadromous and resident fish	Within 12 months of license issuance and at least 60 days prior to commencing construction of the passage facilities
8	Plan to design, construct, operate, maintain, and evaluate upstream and downstream passage facilities for American eel	Within 12 months of license issuance and at least 60 days prior to commencing construction of upstream and downstream American eel passage facilities

The licensee must include with each plan filed with the Commission documentation that the licensee developed the plan in consultation with the Connecticut DEEP and the U.S. Fish and Wildlife Service (FWS) and has received approval from the Connecticut DEEP and FWS, as appropriate. The Commission reserves the right to make changes to any plan submitted. Upon Commission approval, the plan becomes a requirement of the license, and the licensee must implement the plan, including any changes required by the Commission.

(b) Requirement to File Reports.

Condition 6 of the Connecticut DEEP's certification requires the licensee to file annual reports of water quality monitoring data with Connecticut DEEP, FWS, and the National Marine Fisheries Service. These reports document compliance with requirements of this license and may have bearing on future actions. Each such report must also be submitted to the Commission by December 31 of each year in which water quality monitoring occurs.

The licensee must submit to the Commission documentation of any consultation with the aforementioned entities, and copies of any comments and recommendations made by any consulted entity in connection with each report. The Commission reserves the right to require changes to project operations or facilities based on the information contained in the report and any other available information.

(c) Requirement to File Amendment Applications.

Some of the conditions in Appendix A contemplate the Connecticut DEEP ordering unspecified, long-term changes to project operation or facilities based on new information or results of studies or monitoring required by the certification, but do not appear to require Commission approval for such changes (e.g., operational changes to mitigate for effects on water quality). Such changes may not be implemented without prior Commission authorization granted after the filing of an application to amend the license.

Article 402. Operation Compliance Monitoring. The plan for managing and monitoring run-of-river operation, including impoundment refill procedures, required by certification condition 2 of Appendix A, must include the following additional provisions:

(1) a description of the mechanisms, structures, and procedures that will be used to operate, maintain, and monitor compliance with certification condition 2 of Appendix A and the minimum aesthetic flow required by Article 406 of this license; and

(2) a description of the methods for recording and maintaining operation data (impoundment level, inflow, outflow, and flow over the dam) for inspection by the Connecticut Department of Energy and Environmental Protection (Connecticut DEEP), U.S. Department of the Interior's Fish and Wildlife Service (FWS), and the Commission.

The licensee must include with the plan, documentation of consultation with the Connecticut DEEP and FWS, copies of comments and recommendations on the

completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee must allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing must include the licensee's reasons, based on project-specific information. The Commission reserves the right to require changes to the plan. Upon Commission approval, the licensee must implement the plan, including any changes required by the Commission.

Article 403. Debris Management Plan. At least 90 days prior to commencement of project operation, the licensee must file with the Commission, for approval, a debris management plan that addresses the disposal and management of organic debris and inorganic trash collected from the dam crest, trashrack, and fish passage facilities.

The plan must include, but not necessarily be limited to, the following:

- (1) procedures for separation of organic and inorganic trash;
- (2) procedures for off-site disposal of inorganic material;
- (3) procedures for reintroducing organic debris to the Pomperaug River downstream of the dam, as appropriate; and
- (4) an implementation schedule.

The licensee must prepare the plan after consultation with the Connecticut Department of Energy and Environmental Protection and U.S. Department of the Interior's Fish and Wildlife Service. The licensee must include with the plan, documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee must allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing must include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. Project operation must not begin until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee must implement the plan, including any changes required by the Commission.

Article 404. Reservation of Authority to Prescribe Fishways. Authority is reserved to the Commission to require the licensee to construct, operate, and maintain, or to provide for the construction, operation, and maintenance of such fishways as may be prescribed by the Secretary of the Interior pursuant to section 18 of the Federal Power Act.

Article 405. FERC Form 80 Exemption. Upon the effective date of the license, the licensee is exempt from section 18 C.F.R. § 8.11, the filing of the FERC Form 80 recreation report, for the Pomperaug Hydro Project.

Article 406. Minimum Aesthetic Flow. The licensee must provide a minimum aesthetic flow of 10 cubic-feet-per-second or inflow (whichever is less) over the dam crest at all times. The minimum aesthetic flow may be temporarily modified if required by operating emergencies beyond control of the licensee, or by prior approval from the Commission. If the flow is so modified, the licensee must notify the Commission as soon as possible, but no later than 10 days after each such incident, and must provide the reason for the modified flow.

Article 407. Noise Monitoring Plan. At least 90 days before commencing project operation, the licensee must file for Commission approval, a noise monitoring plan. This plan must include:

- (1) the methods to be used to measure noise levels near any residence that is within 200 feet of the powerhouse and transformers. Measurements must include, at a minimum, when the project is not operating and river flow is approximately 10 cubic feet per second (cfs); and when the project is operating and 10 cfs is being released over the crest of the dam;
- (2) an explanation of how the data will be evaluated, including how any project-related noise increases will be determined;
- (3) a requirement to file a report detailing the results of the study, including, but not limited to, presentation of the data collected during the surveys, comparisons of measured noise levels and any incremental project-related noise increases to pre-project ambient noise levels, identification of the source of any noise increase, a description of the noise; and
- (4) an implementation schedule.

The Commission reserves the right to require changes to the plan. Implementation of the plan must not begin until the licensee is notified by the Commission that the plan is

approved. Upon Commission approval, the licensee must implement the plan, including any changes required by the Commission.

Article 408. Protection of Undiscovered Cultural Resources. If the licensee discovers previously unidentified cultural resources during the course of constructing, maintaining, or developing project works or other facilities at the project, the licensee must stop all land-clearing and land-disturbing activities in the vicinity of the resource and consult with the Connecticut State Historic Preservation Office (Connecticut SHPO) to determine the need for any cultural resource studies or measures. If no studies or measures are needed, the licensee must file with the Commission documentation of its consultation with the Connecticut SHPO immediately.

If a discovered cultural resource is determined to be eligible for the National Register of Historic Places (National Register), the licensee must file for Commission approval a Historic Properties Management Plan (HPMP) prepared by a qualified cultural resource specialist after consultation with the Connecticut SHPO. In developing the HPMP, the licensee must use the Advisory Council on Historic Preservation's and the Federal Energy Regulatory Commission's *Guidelines for the Development of Historic Properties Management Plans for FERC Hydroelectric Projects*, dated May 20, 2002. The HPMP must include the following items: (1) a description of each discovered property, indicating whether it is listed in or eligible to be listed in the National Register; (2) a description of the potential effect on each discovered property; (3) proposed measures for avoiding or mitigating adverse effects; (4) documentation of consultation; and (5) a schedule for implementing mitigation and conducting additional studies. The Commission reserves the right to require changes to the HPMP.

The licensee must not resume land-clearing or land-disturbing activities in the vicinity of a cultural resource discovered during construction, until informed by the Commission that the requirements of this article have been fulfilled.

Article 409. Use and Occupancy. (a) In accordance with the provisions of this article, the licensee must have the authority to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain types of use and occupancy, without prior Commission approval. The licensee may exercise the authority only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project. For those purposes, the licensee must also have continuing responsibility to supervise and control the use and occupancies for which it grants permission, and to monitor the use of, and ensure compliance with the covenants of the instrument of conveyance for, any interests that it has conveyed, under this article. If a permitted use and occupancy violates any condition of this article or any other condition imposed by the licensee for protection and enhancement of the project's scenic, recreational, or other environmental values, or if a covenant of a conveyance made under the authority of this article is violated, the licensee must take any lawful action necessary

to correct the violation. For a permitted use or occupancy, that action includes, if necessary, canceling the permission to use and occupy the project lands and waters and requiring the removal of any non-complying structures and facilities.

(b) The type of use and occupancy of project lands and waters for which the licensee may grant permission without prior Commission approval are: (1) landscape plantings; (2) non-commercial piers, landings, boat docks, or similar structures and facilities that can accommodate no more than 10 water craft at a time and where said facility is intended to serve single-family type dwellings; (3) embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline; and (4) food plots and other wildlife enhancement. To the extent feasible and desirable to protect and enhance the project's scenic, recreational, and other environmental values, the licensee must require multiple use and occupancy of facilities for access to project lands or waters. The licensee must also ensure, to the satisfaction of the Commission's authorized representative, that the use and occupancies for which it grants permission are maintained in good repair and comply with applicable state and local health and safety requirements. Before granting permission for construction of bulkheads or retaining walls, the licensee must: (1) inspect the site of the proposed construction, (2) consider whether the planting of vegetation or the use of riprap would be adequate to control erosion at the site, and (3) determine that the proposed construction is needed and would not change the basic contour of the impoundment shoreline. To implement this paragraph (b), the licensee may, among other things, establish a program for issuing permits for the specified types of use and occupancy of project lands and waters, which may be subject to the payment of a reasonable fee to cover the licensee's costs of administering the permit program. The Commission reserves the right to require the licensee to file a description of its standards, guidelines, and procedures for implementing this paragraph (b) and to require modification of those standards, guidelines, or procedures.

(c) The licensee may convey easements or rights-of-way across, or leases of project lands for: (1) replacement, expansion, realignment, or maintenance of bridges or roads where all necessary state and federal approvals have been obtained; (2) storm drains and water mains; (3) sewers that do not discharge into project waters; (4) minor access roads; (5) telephone, gas, and electric utility distribution lines; (6) non-project overhead electric transmission lines that do not require erection of support structures within the project boundary; (7) submarine, overhead, or underground major telephone distribution cables or major electric distribution lines (69-kV or less); and (8) water intake or pumping facilities that do not extract more than one million gallons per day from a project impoundment. No later than January 31 of each year, the licensee must file three copies of a report briefly describing for each conveyance made under this paragraph (c) during the prior calendar year, the type of interest conveyed, the location of the lands subject to the conveyance, and the nature of the use for which the interest was conveyed.

(d) The licensee may convey fee title to, easements or rights-of-way across, or leases of project lands for: (1) construction of new bridges or roads for which all necessary state and federal approvals have been obtained; (2) sewer or effluent lines that discharge into project waters, for which all necessary federal and state water quality certification or permits have been obtained; (3) other pipelines that cross project lands or waters but do not discharge into project waters; (4) non-project overhead electric transmission lines that require erection of support structures within the project boundary, for which all necessary federal and state approvals have been obtained; (5) private or public marinas that can accommodate no more than 10 water craft at a time and are located at least one-half mile (measured over project waters) from any other private or public marina; (6) recreational development consistent with an approved report on recreational resources of an Exhibit E; and (7) other uses, if: (i) the amount of land conveyed for a particular use is five acres or less; (ii) all of the land conveyed is located at least 75 feet, measured horizontally, from project waters at normal surface elevation; and (iii) no more than 50 total acres of project lands for each project development are conveyed under this clause (d)(7) in any calendar year. At least 60 days before conveying any interest in project lands under this paragraph (d), the licensee must file a letter with the Commission, stating its intent to convey the interest and briefly describing the type of interest and location of the lands to be conveyed (a marked Exhibit G map may be used), the nature of the proposed use, the identity of any federal or state agency official consulted, and any federal or state approvals required for the proposed use. Unless the Commission's authorized representative, within 45 days from the filing date, requires the licensee to file an application for prior approval, the licensee may convey the intended interest at the end of that period.

(e) The following additional conditions apply to any intended conveyance under paragraph (c) or (d) of this article:

(1) Before conveying the interest, the licensee must consult with federal and state fish and wildlife or recreation agencies, as appropriate, and the State Historic Preservation Officer.

(2) Before conveying the interest, the licensee must determine that the proposed use of the lands to be conveyed is not inconsistent with any approved report on recreational resources of an Exhibit E; or, if the project does not have an approved report on recreational resources, that the lands to be conveyed do not have recreational value.

(3) The instrument of conveyance must include the following covenants running with the land: (i) the use of the lands conveyed must not endanger health, create a nuisance, or otherwise be incompatible with overall project recreational use; (ii) the grantee must take all reasonable precautions to ensure that the

construction, operation, and maintenance of structures or facilities on the conveyed lands will occur in a manner that will protect the scenic, recreational, and environmental values of the project; and (iii) the grantee must not unduly restrict public access to project waters.

(4) The Commission reserves the right to require the licensee to take reasonable remedial action to correct any violation of the terms and conditions of this article, for the protection and enhancement of the project's scenic, recreational, and other environmental values.

(f) The conveyance of an interest in project lands under this article does not in itself change the project boundaries. The project boundaries may be changed to exclude land conveyed under this article only upon approval of revised Exhibit G drawings (project boundary maps) reflecting exclusion of that land. Lands conveyed under this article will be excluded from the project only upon a determination that the lands are not necessary for project purposes, such as operation and maintenance, flowage, recreation, public access, protection of environmental resources, and shoreline control, including shoreline aesthetic values. Absent extraordinary circumstances, proposals to exclude lands conveyed under this article from the project must be consolidated for consideration when revised Exhibit G drawings would be filed for approval for other purposes.

(g) The authority granted to the licensee under this article must not apply to any part of the public lands and reservations of the United States included within the project boundary.

(G) The request for a formal hearing is denied.

(H) The licensee must serve copies of any Commission filing required by this order on any entity specified in the order to be consulted on matters relating to that filing. Proof of service on these entities must accompany the filing with the Commission.

This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days from the date of its issuance, as provided in section 313(a) of the FPA, 16 U.S.C. § 825*l* (2012), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2014). The filing of a request for

rehearing does not operate as a stay of the effective date of this license or of any other date specified in this order. The licensee's failure to file a request for rehearing shall constitute acceptance of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

**Form L-15**  
(October, 1975)

**FEDERAL ENERGY REGULATORY COMMISSION  
TERMS AND CONDITIONS OF LICENSE FOR UNCONSTRUCTED  
MINOR PROJECT AFFECTING THE INTERESTS  
OF INTERSTATE OR FOREIGN COMMERCE**

**Article 1.** The entire project, as described in this order of the Commission, shall be subject to all of the provisions, terms, and conditions of the license.

**Article 2.** No substantial change shall be made in the maps, plans, specifications, and statements described and designated as exhibits and approved by the Commission in its order as a part of the license until such change shall have been approved by the Commission: Provided, however, That if the Licensee or the Commission deems it necessary or desirable that said approved exhibits, or any of them, be changed, there shall be submitted to the Commission for approval a revised, or additional exhibit or exhibits covering the proposed changes which, upon approval by the Commission, shall become a part of the license and shall supersede, in whole or in part, such exhibit or exhibits theretofore made a part of the license as may be specified by the Commission.

**Article 3.** The project works shall be constructed in substantial conformity with the approved exhibits referred to in Article 2 herein or as changed in accordance with the provisions of said article. Except when emergency shall require for the protection of navigation, life, health, or property, there shall not be made without prior approval of the Commission any substantial alteration or addition not in conformity with the approved plans to any dam or other project works under the license or any substantial use of project lands and waters not authorized herein; and any emergency alteration, addition, or use so made shall thereafter be subject to such modification and change as the Commission may direct. Minor changes in project works, or in uses of project lands and waters, or divergence from such approved exhibits may be made if such changes will not result in a decrease in efficiency, in a material increase in cost, in an adverse environmental impact, or in impairment of the general scheme of development; but any of such minor changes made without the prior approval of the Commission, which in its judgment have produced or will produce any of such results, shall be subject to such alteration as the Commission may direct.

Upon the completion of the project, or at such other time as the Commission may direct, the Licensee shall submit to the Commission for approval revised exhibits insofar as necessary to show any divergence from or variations in the project area and project boundary as finally located or in the project works as actually constructed when

compared with the area and boundary shown and the works described in the license or in the exhibits approved by the Commission, together with a statement in writing setting forth the reasons which in the opinion of the Licensee necessitated or justified variation in or divergence from the approved exhibits. Such revised exhibits shall, if and when approved by the Commission, be made a part of the license under the provisions of Article 2 hereof.

**Article 4.** The construction, operation, and maintenance of the project and any work incidental to additions or alterations shall be subject to the inspection and supervision of the Regional Engineer, Federal Energy Regulatory Commission, in the region wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall cooperate fully with said representative and shall furnish him a detailed program of inspection by the Licensee that will provide for an adequate and qualified inspection force for construction of the project and for any subsequent alterations to the project. Construction of the project works or any features or alteration thereof shall not be initiated until the program of inspection for the project works or any such feature thereof has been approved by said representative. The Licensee shall also furnish to said representative such further information as he may require concerning the construction, operation, and maintenance of the project, and of any alteration thereof, and shall notify him of the date upon which work will begin, as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of work for a period of more than one week, and of its resumption and completion. The Licensee shall allow said representative and other officers or employees of the United States, showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties. The Licensee shall comply with such rules and regulations of general or special applicability as the Commission may prescribe from time to time for the protection of life, health, or property.

**Article 5.** The Licensee, within five years from the date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction, maintenance, and operation of the project. The Licensee or its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights of occupancy and use; and none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written approval of the Commission, except that the Licensee may lease or otherwise dispose of interests in project lands or property without specific written approval of the Commission pursuant to the then current regulations of the Commission. The provisions of this article are not intended to prevent the abandonment or the

retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear; and mortgage or trust deeds or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article.

**Article 6.** The Licensee shall install and thereafter maintain gages and stream-gaging stations for the purpose of determining the stage and flow of the stream or streams on which the project is located, the amount of water held in and withdrawn from storage, and the effective head on the turbines; shall provide for the required reading of such gages and for the adequate rating of such stations; and shall install and maintain standard meters adequate for the determination of the amount of electric energy generated by the project works. The number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, shall at all times be satisfactory to the Commission or its authorized representative. The Commission reserves the right, after notice and opportunity for hearing, to require such alterations in the number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, as are necessary to secure adequate determinations. The installation of gages, the rating of said stream or streams, and the determination of the flow thereof, shall be under the supervision of, or in cooperation with, the District Engineer of the United States Geological Survey having charge of stream-gaging operations in the region of the project, and the Licensee shall advance to the United States Geological Survey the amount of funds estimated to be necessary for such supervision, or cooperation for such periods as may be mutually agreed upon. The Licensee shall keep accurate and sufficient records of the foregoing determinations to the satisfaction of the Commission, and shall make return of such records annually at such time and in such form as the Commission may prescribe.

**Article 7.** The Licensee shall, after notice and opportunity for hearing, install additional capacity or make other changes in the project as directed by the Commission, to the extent that it is economically sound and in the public interest to do so.

**Article 8.** The Licensee shall, after notice and opportunity for hearing, coordinate the operation of the project, electrically and hydraulically, with such other projects or power systems and in such manner as the Commission may direct in the interest of power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing of benefits by the Licensee as the Commission may order.

**Article 9.** The operations of the Licensee, so far as they affect the use, storage and discharge from storage of waters affected by the license, shall at all times be controlled by such reasonable rules and regulations as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest

practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes, and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Commission may prescribe for the purposes hereinbefore mentioned.

**Article 10.** On the application of any person, association, corporation, Federal agency, State or municipality, the Licensee shall permit such reasonable use of its reservoir or other project properties, including works, lands and water rights, or parts thereof, as may be ordered by the Commission, after notice and opportunity for hearing, in the interests of comprehensive development of the waterway or waterways involved and the conservation and utilization of the water resources of the region for water supply or for the purposes of steam-electric, irrigation, industrial, municipal or similar uses. The Licensee shall receive reasonable compensation for use of its reservoir or other project properties or parts thereof for such purposes, to include at least full reimbursement for any damages or expenses which the joint use causes the Licensee to incur. Any such compensation shall be fixed by the Commission either by approval of an agreement between the Licensee and the party or parties benefiting or after notice and opportunity for hearing. Applications shall contain information in sufficient detail to afford a full understanding of the proposed use, including satisfactory evidence that the applicant possesses necessary water rights pursuant to applicable State law, or a showing of cause why such evidence cannot concurrently be submitted, and a statement as to the relationship of the proposed use to any State or municipal plans or orders which may have been adopted with respect to the use of such waters.

**Article 11.** The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance, and operation of such reasonable facilities, and comply with such reasonable modifications of the project structures and operation, as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after notice and opportunity for hearing.

**Article 12.** Whenever the United States shall desire, in connection with the project, to construct fish and wildlife facilities or to improve the existing fish and wildlife facilities at its own expense, the Licensee shall permit the United States or its designated agency to use, free of cost, such of the Licensee's lands and interests in lands, reservoirs, waterways and project works as may be reasonably required to complete such facilities or such improvements thereof. In addition, after notice and opportunity for hearing, the Licensee shall modify the project operation as may be reasonably prescribed by the Commission in order to permit the maintenance and operation of the fish and wildlife facilities constructed or improved by the United States under the provisions of this article.

This article shall not be interpreted to place any obligation on the United States to construct or improve fish and wildlife facilities or to relieve the Licensee of any obligation under this license.

**Article 13.** So far as is consistent with proper operation of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the purpose of full public utilization of such lands and waters for navigation and for outdoor recreational purposes, including fishing and hunting: Provided, That the Licensee may reserve from public access such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property.

**Article 14.** In the construction, maintenance, or operation of the project, the Licensee shall be responsible for, and shall take reasonable measures to prevent, soil erosion on lands adjacent to streams or other waters, stream sedimentation, and any form of water or air pollution. The Commission, upon the request or upon its own motion, may order the Licensee to take such measures as the Commission finds to be necessary for these purposes, after notice and opportunity for hearing.

**Article 15.** The Licensee shall consult with the appropriate State and Federal agencies and, within one year of the date of issuance of this license, shall submit for Commission approval a plan for clearing the reservoir area. Further, the Licensee shall clear and keep clear to an adequate width lands along open conduits and shall dispose of all temporary structures, unused timber, brush, refuse, or other material unnecessary for the purposes of the project which results from the clearing of lands or from the maintenance or alteration of the project works. In addition, all trees along the periphery of project reservoirs which may die during operations of the project shall be removed. Upon approval of the clearing plan all clearing of the lands and disposal of the unnecessary material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission and in accordance with appropriate Federal, State, and local statutes and regulations.

**Article 16.** If the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms of the license and the lawful orders of the Commission mailed to the record address of the Licensee or its agent, the Commission will deem it to be the intent of the Licensee to surrender the license. The Commission, after notice and opportunity for hearing, may require the Licensee to remove any or all structures, equipment and power lines within the project boundary and to take any such other action necessary to restore the project waters, lands, and facilities remaining within the project boundary to a condition satisfactory to the United States agency having jurisdiction over its lands or the

Commission's authorized representative, as appropriate, or to provide for the continued operation and maintenance of nonpower facilities and fulfill such other obligations under the license as the Commission may prescribe. In addition, the Commission in its discretion, after notice and opportunity for hearing, may also agree to the surrender of the license when the Commission, for the reasons recited herein, deems it to be the intent of the Licensee to surrender the license.

**Article 17.** The right of the Licensee and of its successors and assigns to use or occupy waters over which the United States has jurisdiction, or lands of the United States under the license, for the purpose of maintaining the project works or otherwise, shall absolutely cease at the end of the license period, unless the Licensee has obtained a new license pursuant to the then existing laws and regulations, or an annual license under the terms and conditions of this license.

**Article 18.** The terms and conditions expressly set forth in the license shall not be construed as impairing any terms and conditions of the Federal Power Act which are not expressly set forth herein.

## APPENDIX A

On January 17, 2014, the Connecticut Department of Energy and Environmental Protection issued a section 401 water quality certification containing the following conditions:

### SPECIAL CONDITIONS

1. The permittee shall operate the project in an instantaneous run-of-river mode.
2. The permittee shall, within six (6) months from the effective date of the Federal Energy Regulatory Commission ("FERC") "Pomperaug Hydro Project, Project No. 12790-002- CT" license issuance, prepare a plan that outlines how it will manage and monitor such run-of-river operation including an Impoundment Refill Procedure (in cases where the impoundment must be drawn down for maintenance or emergency purposes) that includes the instantaneous downstream conveyance of 90% of the impoundment inflow and the headpond is refilled on the remaining 10% of inflow to the project.
3. Within six (6) months from the effective date of the FERC permittee issuance concerning "Pomperaug Hydro Project, Project No. 12790-002-CT," the licensee shall file for Commissioner approval and develop an erosion and sediment control plan, which structures shall be in place before dewatering and construction. Erosion and sediment control structures shall be removed within one year after construction is complete and site is stabilized.
4. The permittee shall install trashracks. The trashracks shall be installed and operational concurrent with project start-up. Trashracks shall be required to be kept free of debris and maintained to design specifications. The trashracks shall meet the following criteria:
  - a. Have an approach velocity  $< 1.5$  fps (as measured six inches in front of the racks);
  - b. Have clear spacing  $3/4$ -inch or less; and
  - c. Extend full depth.
5. The permittee shall conduct a post-operation water quality monitoring survey. The survey protocol shall be developed in consultation with, and require approval by, the Department of Energy and Environmental Protection (DEEP) and the U.S. Fish and Wildlife Service (FWS). Data shall be collected over a minimum of three (3) years, and shall be initiated during the first low-flow season after project start-up. Results of the post-operation survey will be compared to Class A water quality criteria. If results indicate that the project is not meeting State standards, mitigation measures may be required (e.g., releasing additional flow over the dam for recreation).

6. Within six (6) months from the effective date of the FERC license issuance concerning "Pomperaug Hydro Project, Project No. 12790-002-CT," the licensee shall file for DEEP approval, a water quality monitoring plan, consistent with the requirement stated in condition number five (5) above. The plan shall include, but not necessarily be limited to:

- a. A description of locations, time period, methods, equipment, maintenance, and calibration procedures to monitor dissolved oxygen concentrations and water temperature at a location in the Pomperaug River immediately upstream of the dam and west gate and in the Pomperaug River downstream of the tail race;
- b. Description of the protocol for annually reporting water quality monitoring data to the DEEP, FWS, and National Marine Fisheries Service (NMFS), including any recommendations for modifications to project operations or facilities, and any other enhancement measures that are proposed by the licensee if the water quality constituents monitored in project-affected waters fall below state water quality standards; and
- c. An implementation schedule.

7. The permittee shall be responsible for constructing, operating, maintaining and evaluating upstream and downstream fish passage facilities at the project. The design of the facilities shall be developed by the permittee in consultation with, and require approval by DEEP and FWS. The facilities shall generally adhere to the design elements depicted in the illustrations labeled as "Attachment G" of the application. The passage facilities shall be installed and operational concurrent with project start-up. All plans, schedules and an Operations and Maintenance Plan associated with the design, construction, and evaluation of any prescribed fishways shall be developed by the permittee in consultation with, and require approval by DEEP and FWS. The fishways shall be operated and maintained in accordance with the Operations and Maintenance Plan approved by the agencies.

8. The permittee shall be responsible for constructing, operating, maintaining and evaluating upstream and downstream fish passage facilities for American eel. The exact design and placement of all eel ramps and/or passes shall be decided in consultation with, and require approval by DEEP and FWS. The eel ramp and/or passes shall be installed and operational the first passage season after project start-up unless delays are specifically authorized by DEEP. All plans and schedules associated with the design, construction, operation, maintenance and evaluation of any required eel passage shall be developed by the permittee in consultation with, and require approval by, DEEP and FWS. The installation of 3/4" intake grates (see 4-b) and the provision of an alternative means of egress shall be an accepted alternative to nightly project shutdowns as a means of protecting down-running American eels.

9. Species of Special Concern – DEEP records indicate the following extant populations of species of special concern: the Eastern box turtle (*Terrapene Carolina Carolina*) and wood turtle (*Glyptemys insculpta*). The following precautions should be taken to protect these species of special concern:

- a. Silt fencing should be installed around the work area prior to activity;
- b. After silt fencing is installed and prior to work being conducted, a sweep of the work area should be conducted to look for turtles;
- c. Workers should be apprised of the possible presence of turtles, and provided a description of the species ([www.ct.gov/deep](http://www.ct.gov/deep));
- d. Any turtles that are discovered should be moved, unharmed, to an area immediately outside of the fenced area and position in the same direction that it was walking;
- e. Work conducted during early morning and evening hours should occur with special care not to harm basking or foraging individuals; and
- f. All silt fencing should be removed after work is completed and soils are stable so that reptile and amphibian movement between uplands and wetlands is not restricted.

DEEP records also show extant populations of the Jefferson salamander "complex" (*Ambystoma jeffersonianum*) south of the work site. Upon review of maps, there appears to be similar habitat adjacent to the work site. The following precautions should be taken to protect the Jefferson salamander complex:

- g. Best management practices around the breeding pools should be used; and
- h. Any canopy cover around the pools should be maintained, if possible, to ensure suitable habitat.

## GENERAL TERMS AND CONDITIONS

1. **Rights.** This certificate is subject to and does not derogate any present or future property rights or other rights or powers of the State of Connecticut, and conveys no property rights in real estate or material nor any exclusive privileges, and is further Subject to any and all public and private rights and to any federal, state, or local laws or regulations pertinent to the property or activity affected hereby. This certification does not comprise the permits or approvals as may be required by Chapters 440, 446i, 446j and 446k of the Connecticut General Statutes.

2. **Expiration of Certificate.** This certificate shall expire upon the expiration of the Federal Energy Regulatory Commission permit no. P-12790 for the same activity.

3. **Compliance with Certificate.** All work and all activities authorized herein conducted by the permittee at the site shall be consistent with the terms and conditions of this certificate. Any regulated activities carried out at the site, including but not limited to, construction of any structure, excavation, fill, obstruction, or encroachment, that are not specifically identified and authorized herein shall constitute a violation of this certificate and may result in its modification, suspension, or revocation. In carrying out the certified discharge(s) authorized herein, the permittee shall not store equipment or construction material, or discharge any material including without limitation, fill, construction materials or debris in any wetland or watercourse on or off site unless specifically authorized by this certificate. Upon initiation of the activities authorized herein, the permittee thereby accepts and agrees to comply with the terms and conditions of this certificate.

4. **Transfer of Certificate.** This authorization is not transferable without the written consent of the Commissioner.

5. **Reliance on Application.** In evaluating the permittee's application, the Commissioner has relied on information provided by the permittee. If such information subsequently proves to be false, deceptive, incomplete or inaccurate, this certificate may be modified, suspended or revoked.

6. **Best Management Practices.** In constructing or maintaining the activities authorized herein, the permittee shall employ best management practices, consistent with the terms and conditions of this certificate, to control storm water discharges and erosion and sedimentation and to prevent pollution. Such practices to be implemented by the permittee at the site include, but are not necessarily limited to:

- a. Prohibiting dumping of any quantity of oil, chemicals or other deleterious material on the ground;
- b. Immediately informing the Commissioner's Oil and Chemical Spill Response Division at (860) 424-3338 (24 hours) of any adverse impact or hazard to the environment, including any discharges, spillage, or loss of oil or petroleum or chemical liquids or solids, which occurs or is likely to occur as the direct or indirect result of the activities authorized herein;
- c. Separating staging areas at the site from the regulated areas by silt fences or straw/hay bales at all times;
- d. Prohibiting storage of any fuel and refueling of equipment within twenty-five (25) feet from any wetland or watercourse;
- e. Preventing pollution of wetlands and watercourses in accordance with the document "Connecticut Guidelines for Soil Erosion and Sediment Control" as revised. Said controls shall be inspected by the permittee for deficiencies at least once per week and immediately after each rainfall and at least daily

during prolonged rainfall. The permittee shall correct any such deficiencies within 48 hours of said deficiencies being found;

- f. Stabilizing disturbed soils in a timely fashion to minimize erosion. If a grading operation at the site will be suspended for a period of thirty (30) or more consecutive days, the permittee shall, within the first seven (7) days of that suspension period, accomplish seeding and mulching or take such other appropriate measures to stabilize the soil involved in such grading operation. Within seven (7) days after establishing final grade in any grading operation at the site the permittee shall seed and mulch the soil involved in such grading operation or take such other appropriate measures to stabilize such soil until seeding and mulching can be accomplished.
- g. Prohibiting the storage of any materials at the site which are buoyant, hazardous, flammable, explosive, soluble, expansive, radioactive, or which could in the event of a flood be injurious to human, animal or plant life, below the elevation of the five hundred (500) year flood. Any other material or equipment stored at the site below said elevation by the permittee or the permittee's contractor must be firmly anchored, restrained or enclosed to prevent flotation. The quantity of fuel stored below such elevation for equipment used at the site shall not exceed the quantity of fuel that is expected to be used by such equipment in one day.
- h. Immediately informing the Commissioner's Inland Water Resources Division at (860) 424-3019 of the occurrence of pollution or other environmental damage resulting from construction or maintenance of the authorized activity or any construction associated therewith in violation of this certificate. The permittee shall, no later than 48 hours after the permittee learns of a violation of this certificate, report same in writing to the Commissioner. Such report shall contain the following information:
  - i. the provision(s) of this certificate that has been violated;
  - ii. the date and time the violation(s) was first observed and by whom;
  - iii. the cause of the violation(s), if known;
  - iv. if the violation(s) has ceased, the duration of the violation(s) and the exact date(s) and times(s) it was corrected;
  - v. if the violation(s) has not ceased, the anticipated date when it will be corrected;
  - vi. steps taken and steps planned to prevent a reoccurrence of the violation(s) and the date(s) such steps were implemented or will be implemented; and
  - vii. the signatures of the permittee and of the individual(s) responsible for actually preparing such report, each of whom shall certify said report in accordance with section 7 of this certificate.

For information and technical assistance, contact the Inland Water Resources Division at (860) 424-3019.

7. **Other Regulated Activities.** Should you wish to conduct any regulated activity in the future which requires the issuance of a permit from the department, you must obtain the appropriate permit(s) prior to conducting such activity. Please be aware that performing an activity without a permit required by Title 22a of the General Statutes may subject you to an injunction and penalties.

8. **Certification of Documents.** Any document, including but not limited to any notice, which is required to be submitted to the Commissioner under this certificate shall be signed by the permittee, a responsible corporate officer of the permittee, a general partner of the permittee, or a duly authorized representative of the permittee and by the individual or individuals responsible for actually preparing such document, each of whom shall certify in writing as follows:

"I have personally examined and am familiar with the information submitted in this document and all attachments and certify that based on reasonable investigation, including my inquiry of those individuals responsible for obtaining the information, the submitted information is true, accurate and complete to the best of my knowledge and belief, and I understand that any false statement made in this document or its attachments may be punishable as a criminal offense in accordance with Section 22a-6 under Section 53a-157 of the Connecticut General Statutes."

9. **Submission of Documents.** The date of submission to the Commissioner of any document required by this certificate shall be the date such document is received by the Commissioner. Except as otherwise specified in this certificate, the word "day" as used in this certificate means the calendar day. Any document or action which falls on a Saturday, Sunday, or legal holiday shall be submitted or performed by the next business day thereafter. Any document or notice required to be submitted to the Commissioner under this certificate shall, unless otherwise specified in writing by the Commissioner, be directed to:

Director  
Department of Energy and Environmental Protection  
Office of the Commissioner  
Planning & Program Development  
79 Elm Street, Third Floor  
Hartford, Connecticut 06106-5127

Issued by the Commissioner of the Department of Energy and Environmental Protection on this 17<sup>th</sup> day of January 2014.