

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION

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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

August 22, 2022

**In the Matter of
Bear Swamp Power Company, LLC**

**OADR Docket No. 2020-020
Florida, MA**

RECOMMENDED FINAL DECISION

I. Introduction

Bear Swamp Power Company, LLC (“Petitioner” or “Bear Swamp”) filed this appeal with MassDEP’s Office of Appeals and Dispute Resolution (“OADR”) to challenge the denial of a 401 Water Quality Certification (“WQC”) issued by the Massachusetts Department of Environmental Protection (“MassDEP”) with respect to Bear Swamp’s hydroelectric power stations on the Deerfield River in Rowe and Florida, Massachusetts. Following mediation, the Parties submitted a Settlement Agreement and proposed Water Quality Certification (“Proposed WQC”) for consideration and approval by MassDEP’s Commissioner pursuant to 310 CMR 1.01(8)(c) to resolve this appeal. That provision requires that the Commissioner approve, modify, or reject a proposed settlement agreement in an administrative appeal, based upon

whether the settlement agreement is consistent with law and other factors appropriately considered in the exercise of agency regulatory discretion.

After reviewing the Administrative Record of this appeal, including the Participants' comments on the Settlement Agreement and Proposed WQC, the Parties' responses to Participants' comments, and prior Rulings and Orders issued in the appeal, I recommend that the Commissioner issue a Final Decision approving the Settlement Agreement and Proposed WQC with one modification to insert the correct WQC application receipt date, March 27, 2019, which is misstated in paragraph 6 of the Settlement Agreement. I have made this recommendation because the Settlement Agreement and Proposed WQC are consistent with or proper under the governing environmental statute and regulations and serve the public interest.

II. Background

The Project

MassDEP received Bear Swamp's application for a 401 Water Quality Certification ("401 WQC Application") on March 27, 2019¹ in connection with a proceeding before the Federal Energy Regulatory Commission ("FERC") to relicense certain facilities under the Federal Power Act ("FPA"). Bear Swamp's project at issue in the FERC relicensing proceeding and the 401 WQC Application is comprised of Bear Swamp's hydroelectric power stations for the Bear Swamp Pumped Storage Development ("PSD") and the Fife Brook Development

¹ As Participants point out in their February 1, 2022 comments, the Settlement Agreement incorrectly lists the date as March 27, 2018, an error Bear Swamp acknowledged in its February 18, 2022 response to comments. The Administrative Record of this appeal makes clear that the application was filed on March 25, 2019, and receipt was acknowledged by MassDEP on March 27, 2019. See MassDEP Index of Basic Docs, Doc. # 167, MassDEP Acknowledgment of Receipt of Application. The Proposed WQC includes the correct date.

(“FBD”) located on or adjacent to the Deerfield River in Franklin and Berkshire Counties (the “Project”). The PSD (666 MW capacity) includes an upper reservoir and operates as a pumped storage facility producing electricity during the day with water pumped overnight from the lower reservoir of the FBD. The FBD (10 MW capacity) operates as a run-of-release system, and runs in response to regulated, peaking inflows from the Deerfield River No. 5 Development, immediately upstream.²

The Project is regulated under a FERC license issued on April 28, 1970 (“1970 FERC License”) that expired on March 31, 2020 and was administratively continued by FERC until conclusion of pending licensing proceedings before FERC. The Proposed WQC indicates that FERC issued an annual license on May 7, 2020 for the continued operation of the Project under the terms and conditions of the prior license.

The Deerfield River

The Project is located on a segment of the Deerfield River that is listed as a Category 4c waterbody is impaired due to “flow regime modification” relative to natural conditions.³ This segment is also classified under MassDEP’s Surface Water Quality Standards at 314 CMR 4.06 as a Class B waterway.⁴ Class B waterways can support a year-round population of cold water-

² Deerfield River Project is owned by Great River Hydro, LLC (“Great River Hydro”), a Participant in this appeal. The Proposed WQC indicates that the Deerfield River No. 5 Development was licensed after a FERC approved settlement in 1997 and holds WQCs from Massachusetts and Vermont that expire in 2037 and specify the minimum flows from Deerfield Station No. 5 Development to the FBD.

³ See Denial, page 6, which references the *Massachusetts’ Year 2016 Integrated List of Waters, Final Listing of the Condition of Massachusetts’ Waters Pursuant to Section s 305(b), 314 and 303(d) of the Clean Water Act*, dated December 2019.

⁴ Class B waters include those designated as habitat for fish, other aquatic life, and wildlife, including for their reproduction, migration, growth and other critical functions, and for primary and secondary contact reaction. Class B waters also must be suitable for irrigation and other agricultural uses and for compatible industrial cooling and process uses. These waters must have consistently good aesthetic value. See 314 CMR 4.05(3)(b)

adapted aquatic life, such as trout.⁵ In addition to Great River Hydro's Station No. 5

Development located immediately upstream of the Project, the Deerfield River supports several other hydroelectric projects, three more upstream and three more downstream.⁶

Relevant Resources

The Project results in large and rapid changes in flows and creates rapid increases in surface elevations that can be harmful to odonates (dragonflies) protected by the Massachusetts Endangered Species Act ("MESA"), G.L. c. 131A, including the riffle snaketail and ocellated darter. These changes also impact fish species, including brook trout and the state listed longnose sucker as well as stocked and naturalized brown and rainbow trout, and their life history requirements including downstream habitat. Flow modifications have also impacted natural movements of migratory fish which have been restricted by the lack of effective fish passage at hydropower developments downstream from the Project. The Deerfield River also supports recreation which is central to the Commonwealth's economic, environmental and community values, including water releases used for whitewater boating. Proposed WQC, pages 4-6.

The Project boundary, including land and water is 1,305.3 acres. 168.7 acres from the prior license Project area is excluded, which area Bear Swamp states consists of mixed-use property not typically used by the public for recreation or any other purpose, the removal of which will not affect any existing or proposed shoreline access, recreational uses, or riverine habitat, or its ability to operate and maintain the Project. Proposed WQC, pages 6-7.

⁵ "Cold Water Fishery" is defined by MassDEP's Surface Water Quality Standards as waters in which the mean of the maximum daily temperature over a seven-day period generally does not exceed 68° (20° C) and, when other ecological factors are favorable (such as habitat), are capable of supporting a year-round population of cold water stenothermal aquatic life such as trout (Salmonidae). See 314 CMR 4.02.

⁶ Petitioner's Notice of Appeal, page 7.

The Denial

MassDEP denied Bear Swamp's application for a 401 WQC without prejudice on March 23, 2019, within one-year of Bear Swamp's filing of the application. The basis of the Denial was that MassDEP purportedly had insufficient information to determine pursuant to 40 CFR 121.2(a)(2)-(3) whether there was a reasonable assurance that the Project would operate in accordance with the Massachusetts Surface Water Quality Standards, 314 CMR 4.00, the MESA and its implementing regulations at 321 CMR 10.00, to adequately protect native brook trout and odonates, and their respective habitats.

The Appeal

Bear Swamp filed this appeal with OADR contesting MassDEP's denial of its 401 WQC Application, asserting that it had submitted sufficient information for MassDEP to make the necessary determinations for issuance of the WQC. Trout Unlimited, a cold fisheries environmental advocacy group, filed a Motion to Intervene in the appeal as a party pursuant 310 CMR 1.01(7)(a)-7(d), which was granted by the prior Presiding Officer in this appeal.⁷ No other person or entity sought to intervene in the appeal as a party. This fact is confirmed by the May 21, 2020 Pre-Hearing Conference Report and Order ("PHC Report and Order") which states that the only Parties in the appeal were Petitioner Bear Swamp, MassDEP, and Intervener Trout Unlimited. (collectively "the Parties").

American Whitewater ("AW"), Appalachian Mountain Club ("AMC"), New England Flow ("NE Flow"), Connecticut River Watershed Counsel, Inc. d/b/a River Conservancy ("CRC"), Great River Hydro, LLC ("Great River") (collectively "the Participants") all filed

⁷ The prior Presiding Officer is longer with OADR and I became the Presiding Officer in this appeal at the end of April 2022.

motions to participate in the appeal pursuant to 310 CMR 1.01(7)(e), which were granted by the prior Presiding Officer.⁸

One topic discussed at the PHC and documented in the PHC Report and Order was the appeal's potential for settlement.⁹ The Parties expressed a strong interest to resolve this appeal through alternative dispute resolution and at their request the appeal was stayed for sixty (60) days to allow them to mediate a resolution of the appeal with the assistance of Jane Rothchild, a mediator and OADR Presiding Officer ("Presiding Officer Rothchild").

⁸ The prior Presiding Officer's May 14, 2020 Order granting the Motion to Participate by AW, AMC and NE Flow states that "[p]ursuant to 310 CMR 1.01(7)(e), these participants have the right to argue orally at the close of the hearing and file a brief. These participants may also observe the Pre-Hearing Conference, which will be held via Zoom on May 21, 2020." Motions to Participate by Great River Hydro and CRC were allowed at the PHC.

⁹ The PHC Report and Order also identified the issues that would be adjudicated in an evidentiary adjudicatory hearing, "if it remain[ed] necessary," and included:

1. To what extent, if at all, is Bear Swamp able as a matter of fact and law to provide flow rates in excess of those provided in its WQC application?
 - a. Is that ability legally relevant to the WQC application?
2. Whether Bear Swamp submitted sufficient information [The allegedly deficient information includes a flow study using the Instream Flow Incremental Methodology ("IFIM") for a full range of winter flows for 4 primary trout spawning areas; an alternatives assessment to avoid and minimize adverse impacts to redds at the 4 primary trout spawning areas associated with winter minimum flows; and an alternatives assessment to avoid and minimize adverse impacts to state listed dragonflies] for MassDEP to determine pursuant to 40 CMR 121.2(a)(2)-(3) whether Bear Swamp has provided reasonable assurances that the project will be operated in a manner that satisfied 314 CMR 4.03(3)(b) and the Massachusetts Endangered Species Act, G.L. c. 131A and 321 CMR 10.00 by:
 - a. Protecting Aquatic Life, including native brook trout and Odonates and their habitats pursuant to 310 CMR 4.03(3);
 - b. Using all practical means and measures to avoid or minimize damage to such species and their habitats pursuant to 321 CMR 10.05.
3. To what extent, if at all, is MassDEP's denial for lack of information barred by the one year time frame for MassDEP to render a WQC determination under 33 U.S.C. § 1341(a)(1)?

The Mediation

On June 1, 2020, representatives of the Participants attended an initial settlement conference before the start of the confidential mediation among the Parties. Presiding Officer Rothchild reiterated the rights of Participants in the proceeding (i.e. to argue orally and file a brief at the conclusion of the hearing (if held to resolve the appeal) pursuant to 310 CMR 1.01(7)(e)) and since they were not Parties, explained that they had no role in the mediation. The Participants remained on OADR's Service List in the appeal and, as such, received copies of every Joint Status Report that the Parties subsequently filed in the appeal and every Order and Ruling that were subsequently issued in the appeal. Consistent with 310 CMR 1.10(8)(b)3 and G.L. c. 233, Section 23C the settlement discussions, however, remained confidential among the Parties and Presiding Officer Rothchild, as mediator, and were not shared with the Participants or the prior Presiding Officer.

The Parties, with the assistance of Presiding Officer Rothchild, proceeded with settlement discussions over approximately a year and a half, filing regular Joint Status Reports and Motions to Extend the Stay to allow continued active settlement discussions, each of which was granted by the prior Presiding Officer.¹⁰ The Parties' Eighth Joint Status Report and Motion to Extend filed on January 7, 2022 indicated that the Parties had reached settlement in principle and requested a final Stay until January 24, 2022 so that they could submit a proposed written Settlement Agreement and Proposed WQC for the Commissioner's review and approval. This motion was granted on January 10, 2022 by the prior Presiding Officer.

¹⁰ See also *Water Quality Certification Joint Status Report* filed with FERC on December 28, 2021 by Bear Swamp and MassDEP providing an update regarding the mediation. See www.elibrary.ferc.gov

Subsequently, on January 24, 2022 the Parties submitted a Joint Motion for Approval of Settlement Agreement requesting approval of the attached Settlement Agreement and Proposed WQC. Participants AW, CRC and NE Flow submitted comments on the Settlement Agreement and Proposed WQC on February 1, 2022. On February 18, 2022 Bear Swamp and MassDEP filed responses to those comments and Participant Great River filed comments on the Settlement Agreement and Proposed WQC.

On February 28, 2022 the prior Presiding Officer issued an Order for additional briefing for the Parties and Participants regarding the proposed Settlement Agreement and Proposed WQC.¹¹ By March 15, 2022 all Parties had filed additional comments and responses directed by the February 28, 2022 Order, as had most Participants.¹²

On June 24, 2022, Participant AW filed an additional brief titled, “American Whitewater’s Memorandum on Supplemental Authority on Appeal of Water Quality Certification for the Bear Swamp Hydroelectric Project,” which MassDEP moved to strike from the record. MassDEP also filed a Motion to Partially Strike Participant CRC’s March 15, 2022 comments as going beyond the scope of the prior Presiding Officer’s February 28, 2022 Order for additional briefing.

The February 1, 2022 comments of Participants AW, CRC, and NE FLOW included complaints regarding the mediation that resulted in the Settlement Agreement and Proposed WQC. On July 6, 2022, the Chief Presiding Officer, in his role as the head of OADR and

¹¹ The prior Presiding Officer’s February 28, 2022 Order directed: (1) the Participants to respond to the Parties’ Responses to Comments; (2) the Parties and Participants to respond to Great River’s Comments; and (3) Great River to respond to all comments and responses filed.

¹² Participant AW and CRC each filed reply comments. Participant NE Flow did not file additional comments and Participant AMC did not submit any comments or other response to the Order.

Presiding Officer Rothchild's supervisor, addressed and rejected the complaints in written Findings he issued in the appeal. The Findings concluded: (1) that contrary to their assertions, the Participants had not been promised an opportunity to review and comment on the settlement agreement prior to its being finalized by the Parties, (2) whether Bear Swamp had submitted sufficient information for MassDEP to make a decision on Bear Swamp's 401 Water Quality Certification application was the central issue in the appeal, and (3) that the mediation was appropriately conducted among the Parties and Presiding Officer Rothchild, as mediator, in accordance with law. *Chief Presiding Officer's Findings Regarding the Mediation Proceedings in Appeal*, July 6, 2022. ("Chief Presiding Officer's Findings") incorporated herein by reference.

Terms of the Settlement Agreement and Proposed Water Quality Certification

The Settlement Agreement would resolve the appeal by submitting the Proposed WQC for the Commissioner's approval. The Proposed WQC addresses the requirements of the Massachusetts Division of Fisheries and Wildlife ("MassWildlife") and its' Natural Heritage and Endangered Species Program ("NHESP"), MassDEP's biological experts regarding fisheries, wildlife, and state-listed species.¹³ All Parties joined the settlement and waived their right to appeal if the Proposed WQC was approved by Commissioner, with Bear Swamp reserving the right to appeal if the Commissioner modified the settlement.

The Parties state that the Proposed WQC modifies the Project to increase minimum flows from November 1 through April 15, for the overwintering protection of trout redds (nesting beds) and includes a flow regime protective of endangered odonate species that can be harmed by rapid

¹³ See *Settlement Agreement*, Exhibit A, MassWildlife correspondence approving the Proposed WQC, certain referenced plans and stating that its' prior requests for additional information are satisfied, dated January 14, 2022.

increases in water surface elevations associated with releases from the Project. The new flow regime will provide stable or diminishing flows at certain times to protect odonates, while not interfering with whitewater flow releases that provide recreational opportunities. The proposed WQC contains other conditions regarding odonate mitigation, invasive species, public access, and funding to be used for protection of aquatic resources in the Deerfield River. *See Joint Motion for Approval of Settlement Agreement*, Page 2.

III. Discussion

A. The Department's Authority to Issue WQCs Under Federal and Massachusetts Law

The federal Clean Water Act, 33 USC § 1341, provides States with the authority to issue a 401 WQC that a discharge to its waters complies with existing water quality requirements or waives the authority to do so by failing or refusing to act within a year after receipt of an application. Under § 401, a federal agency may not issue a license or permit to conduct any activity that may result in any discharge into waters of the United States, unless the state where the discharge would originate either issues a WQC finding compliance with existing water quality requirements or waives the certification requirement. Section 401(d) allows the certifying authority to include conditions to assure that the applicant will comply with enumerated CWA provisions and "other appropriate state law requirements. Under the applicable U.S.EPA certification regulations, MassDEP must certify that there is "reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards." 40 C.F.R. § 121.2(a)(2)-(3).

Under the Massachusetts Clean Waters Act ("MCWA"), G.L. c. 21, §§ 26-53, the Department has the "duty and responsibility ... to enhance the quality and value of water resources and to establish a program for prevention, control, and abatement of water

pollution." *Entergy Nuclear Generation Company v. Department of Environmental Protection*, 459 Mass. 319,323 (2011), citing, G.L.c. 21, § 27. MassDEP considers MassWildlife's enabling authorities, including but not limited to, MESA, to be "appropriate requirements of state law" for purposes of § 401 certification.

The Massachusetts Surface Water Quality Standards at 314 CMR 4.00 ("the Standards") create "designated uses" for different classes of surface waters and enumerate the criteria necessary to protect both existing and designated uses. *See* 314 CMR 4.05; *See also* 33 U.S.C. § 1313(c)(2)(A) (2006). For MassDEP to issue a Water Quality Certification for an activity regulated by FERC, instream "flows must be maintained or restored to protect the existing and designated uses" of the pertinent waterbody. *See* 314 CMR 4.03(3)(b). An applicant for a WQC from MassDEP is responsible for providing MassDEP with sufficient information to demonstrate compliance with the Standards and other appropriate requirements of state law.

B. OADR's Role to Resolve Administrative Appeals of Department Permit Decisions and Enforcement Orders

1. OADR as a quasi-judicial office within the Department

OADR is responsible for advising the Department's Commissioner in resolving all administrative appeals of Department permit decisions and enforcement orders in a neutral, fair, timely, and sound manner based on the governing law and the facts of the case. 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a), 1.01(14)(a), 1.03(7). Presiding Officers with OADR serve as neutral hearing officers, and are responsible for fostering settlement discussions between the Parties in administrative appeals, and to resolve appeals by conducting pre-hearing conferences with the Parties and evidentiary Adjudicatory Hearings and making Recommended Final Decisions on appeals to the Commissioner. 310 CMR 1.01(1)(a), 1.01(1)(b), 1.01(5)(a),

1.01(14)(a), 1.03(7). The Department's Commissioner, as the agency's final decision-maker, may issue a Final Decision adopting, modifying, or rejecting a Recommended Final Decision issued by a Presiding Officer in an appeal. 310 CMR 1.01(14)(b).

2. DeNovo Proceedings; MassDEP encouraged to look anew at facts/decisions

The appeal process at OADR is de novo, meaning that review will be anew, irrespective of any prior determination of the Department in issuing the Denial.¹⁴ Additionally, because these proceedings are de novo, the Department “is authorized to, and should change its position” on any issue for adjudication it had taken previously in issuing the Denial “if during the pendency of [the] appeal, ‘[it] becomes convinced’ based on [1] a different legal interpretation of applicable regulatory standards, [2] new evidence, [and/or] [3] error in its prior determination,” that a change in position is warranted.¹⁵ A fresh review of the evidence is therefore presumed, and in this case, the specific issue of whether there was sufficient information to issue the WQC was squarely identified as an issue for adjudication. *Chief Presiding Officer’s Findings*, No. 2.¹⁶

3. Mediation is confidential and was appropriately utilized to resolve the appeal through a Settlement Agreement and proposed 401 WQC

¹⁴ *In the Matter of Onset Bay II Corp.*, OADR Docket No. 2012-034, Recommended Final Decision (August 28, 2020), 2020 MA ENV LEXIS 79, at 39-40, adopted as Final Decision (September 23, 2020), 2020 MA ENV LEXIS 82, affirmed, June 8, 2022, Norfolk Superior Court (Joseph Leighton, J.)

¹⁵ *In the Matter of John Soursourian*, OADR Docket No. WET-2013-028, Recommended Final Decision (June 13, 2014), 2014 MA ENV LEXIS 49, at 34-36, adopted as Final Decision, 2014 MA ENV LEXIS 47 (June 19, 2014); *In the Matter of Francis P. and Debra A. Zarette, Trustees of Farm View Realty Trust*, 2018 MA ENV LEXIS 7, Recommended Final Decision (February 20, 2018), adopted by Final Decision (March 1, 2018), 2018 MA ENV LEXIS 6.

¹⁶ *Chief Presiding Officer’s Findings*, No. 2 provides as follows:

“Because Presiding Officer Rothchild is bound by the confidentiality of the mediation process, she could only inform me of the following. Among the issues for resolution in this appeal resulting from the pre-hearing conference that was conducted in the appeal by the prior Presiding Officer responsible for adjudicating the appeal, was whether the Petitioner/Applicant Bear Swamp Power Company, LLC (“Bear Swamp”) had submitted sufficient information for MassDEP to make certain determinations. In its appeal in this case, it is Presiding Officer Rothchild’s and my understanding that Bear Swamp contested MassDEP’s finding that it had not submitted sufficient information.”

The mediation conducted through OADR's ADR program is subject to the provisions of 310 CMR 1.01(8)(b) which provides that "...Upon agreement of the *parties*, a neutral person may facilitate resolution of some or all of the outstanding issues." (emphasis supplied) Pursuant to 310 CMR 1.01(b)5., mediation is subject to G.L. c. 233, § 23C, and as a result, is confidential process. The mediation among the Parties in this appeal was conducted in accordance with these requirements. The PHC Report and Order, which reported the granting of Participants' Motions to Participate, specifically informed them, consistent with the regulations that "[p] articipants are not Parties to this appeal, and the only Parties are Bear Swamp, MassDEP, and Intervenor Trout Unlimited." PHC Report/Order at 2.¹⁷ Participants assertion that they could not be excluded from the Parties' mediation was addressed by the Chief Presiding Officer:

"The settlement and terms of the 401 WQC were reached during a mediation conducted pursuant to 310 CMR 1.10(8)(b) and subject to the provisions of G.L. c. 233, § 23C. All the Participants were fully aware that the matter was going to mediation and they were fully aware that they had no right to participate in the mediation as Participants pursuant to 310 CMR 1.01(7)(e). 310 CMR 1.10(8)(b)3 provides in relevant part that "All parties must agree in writing...not to disclose any information gained solely from the mediation to persons not involved in the mediation." G.L. c. 233, § 23C provides in relevant part:

Any communication made in the course of and relating to the subject matter of any mediation and which is made in the presence of such mediator by any participant, mediator or other person shall be a confidential communication and not subject to disclosure in any judicial or administrative proceeding; provided, however, that the provisions of this section shall not apply to the mediation of labor disputes.

¹⁷ See also, 310 CMR 1.01(7)(e) Participants. A person affected by an adjudicatory proceeding shall be permitted to participate. A motion to participate shall be filed prior to the prehearing conference, absent good cause shown for a later filing. *Permission to participate shall be limited to the right to argue orally at the close of the hearing and the right to file a brief. Permission to participate, unless otherwise stated, shall not be deemed to constitute an expression that the person allowed to participate is a party in interest who may be aggrieved by any final decision.* Persons who moved to intervene and who were allowed only to participate may participate without waiving their right to judicial review of the denial of the motion to intervene. (emphasis supplied).

Every person involved in the mediation in this appeal signed a confidential mediation agreement, and MassDEP agency and EEA Secretariat personnel who were not personally involved in the mediation sessions but whose input was necessary to the resolution also signed the confidential mediation agreement. The Parties were reminded of the confidential nature of the mediation throughout its duration.”

See Chief Presiding Officer’s Findings, No. 3.

4. The Role of Participants is limited and Participants Were Provided With the Opportunity to Participate That Exceeded the Clear Limits of 310 CMR 1.01(7)(e)

As stated in the *Chief Presiding Officer’s Findings*,

“It is also important to note that while the Participants AW, CRC, and NEFLOW timely moved to participate, not intervene, their opportunity to participate in this appeal has exceeded the clear limits that 310 CMR 1.01(7)(e) places on scope of participation in an appeal. As noted above, their ability to participate in this appeal has gone beyond being able “to argue orally at the close of the hearing and . . . file a brief.” *See Chief Presiding Officer’s Findings, No. 3.*

Moreover, the threshold for granting a person’s or entity’s request to be participant in an appeal is low by being available to those persons or entities who *may be* affected by an administrative appeal. *In the matter of Eastern Minerals, Inc., Eastern Salt Company, Inc., S.M.P. Trust*, DEP Docket No. 2005-152, 2005 MA ENV LEXIS 35 at 5, (Participants are those persons who may be affected by a proceeding, “not a difficult standard to meet”). As a result, the limited scope of participation is long established. *See In the Matter of Town of Danvers, et al.*, DEP Docket No. 2003-006, et al., Ruling on Legal Issues, *1 n1. (March 25, 2004)(“Participants play a limited role in adjudicatory appeals.”); *In the Matter of Horacio’s Welding and Sheet Metal, Inc.*, DEP Docket No. 2004-301, Opinion, 2006 MA ENV LEXIS 68 (participants role is to offer argument and brief not to present scientific and technical standards); *In the Matter of Boston Environmental Corporation*, OADR Docket No. 2013-041, Recommended Final Decision (February 10, 2015), 2015 MA ENV LEXIS 11, adopted by Final

Decision (March 19, 2015), 2015 MA ENV LEXIS 5 (participant's status is provided in 310 CMR 1.01(7)(e)).

In the context of a settlement, where there is no opportunity for oral argument, the participant's role is further limited. *In the Matter of Town of Marion*, OADR Docket No. 2017-007, Recommended Final Decision (November 15, 2019), 2019 MA ENV LEXIS 150, adopted by Final Decision, (December 9, 2019), 2019 MA ENV LEXIS 146 (where appeal is resolved in settlement entered between MassDEP and Applicant, Participant is afforded the opportunity to file brief in response). Consistent with *In the Town of Marion*, the Participants were afforded the opportunity to comment on the Settlement Agreement after it was filed. In addition, the Participants were afforded a second opportunity for comment and briefing pursuant to the prior Presiding Officer's February 28, 2022 *Order for Additional Briefing Concerning Proposed Settlement Agreement and 401 Water Quality Certification*. While within the discretionary powers of the prior Presiding Officer, and therefore included in the administrative record along with the Parties' responses, as concluded in the *Chief Presiding Officer's Findings*, this opportunity exceeded the limited role to which they were entitled.

Nonetheless, Participants AW, CRC and NE FLOW asserted in their first set of comments, dated February 1, 2022 that they had been denied an opportunity to review the settlement agreement asserting, among other things, that the proceedings lacked transparency and that they were told they could "review and comment on any proposed settlement prior to its being finalized." Relative to this allegation, the *Chief Presiding Officer's Findings* concluded that:

"Notwithstanding these clear limits that 310 CMR 1.01(7)(e) places on the scope of participating in an appeal, all the Participants in this appeal were informed that they would have an opportunity to comment on any proposed settlement *after* it was filed with OADR. This opportunity that was provided to the Participants: (1) respected the

confidentiality of the mediation process that resulted in the Parties' proposed Settlement Agreement; and (2) respected the Participants' interest to opine on the settlement. Simply stated, the Participants were provided with the opportunity to participate in this appeal that exceed the clear limits that 310 CMR 1.01(7)(e) places on the scope of participation in an appeal, and accordingly, the claims by the Participants AW, CRC, and NEFLOW that they have been treated unfairly in this appeal have no reasonable basis."

Chief Presiding Office's Findings, No. 1.

Participants made no filing to intervene under 301 CMR 1.01(7)(d), which if granted, would have given them full party status.¹⁸ They were permitted to attend the initial settlement conference, prior to the start of mediation, at which they were reminded of their limited role.

The Participants made no effort to gain party status as intervenors and cannot now claim to have been wrongly excluded from the mediation among the Parties.

5. MassDEP's Motion to strike American Whitewater's Memorandum of Supplemental Authority is Granted.

On June 24, 2022 Participant AW filed a document titled, *American Whitewater's Memorandum on Supplemental Authority on Appeal of Water Quality Certification for the Bear Swamp Hydroelectric Project*. The Participant's memorandum argues that a draft water quality certification rule, proposed for public comment by the United States Environmental Protection Agency ("USEPA") on June 9, 2022, should be applied in the present case. AW acknowledges that the proposed regulation has not been finalized. AW also acknowledges that "the law does not favor generally retroactivity" and cites no authority for the application of a draft, proposed, regulation in the present case. MassDEP filed a Motion to Strike the memorandum arguing, that as a participant, AW has no right to make such a filing, as discussed above. MassDEP argues further USEPA's proposed regulations do not provide an additional basis for AW's brief,

¹⁸ If such filing is made and denied, the persons who moved to intervene and who were allowed only to participate may do so without waiving their right to judicial review of the denial of the motion to intervene. 310 CMR 1.01(7)(e). That is not the case here.

procedurally or substantively. As AW acknowledges, there is no legal basis to apply draft regulations to the Proposed WQC, and as MassDEP notes, AW has no procedural right to file additional briefings as a Participant in this appeal. *MassDEP's Motion to Strike American Whitewater's Memorandum On Supplemental Authority* is **granted**.

6. MassDEP's Motion to Partially Strike Participant CRC's Filing is Granted

On March 15, 2022, Participant CRC filed, *Reply and Comments of Connective River Conservancy on Settlement Agreement and Proposed 401 Water Quality Certificate* in response to the prior Presiding Officer's February 28, 2022 Order. MassDEP filed a Motion to Strike pages 1-5 of CRC's Reply and Comments arguing that they are outside the scope of the filings allowed by its Participant status and the prior Presiding Officer's Order for Additional Briefing and that allowing the material into the record would be prejudicial to the Parties and contrary to public policy favoring settlements. On Pages 1-5 of its March 15, 2022 Comments, CRC claimed that it sought to address "additional elements" and proceeded to reference studies not in the record and issues not identified for adjudication. As discussed above, Participants limited role does not include submittal of testimony or factual information. *See Horacio's Welding and Sheet Metal* Nor does the Participant's role allow for the addition of issues after the issuance of the PHC Report and Order. *See* 310 CMR 1.01((6)(k), 310 CMR 1.01(9)(a)b. ¹⁹ Allowing CRC to insert "additional elements" to these proceedings after more than two years would unduly prejudice the Parties and is contrary to public policy which favors settlement. *See LePage v.*

¹⁹ The same regulation applies to AW's comments urging evaluation of issues not identified in the PHC Report and Order. *See American Whitewater's Reply to Comments by Massachusetts Department of Environmental Protection, Bear Swamp Power Company, LLC, and Trout Unlimited on Settlement Agreement and Proposed 401 Water Quality Certification for the Bear Swamp Hydroelectric Project*, March 9, 2022.

Bumila, at 166. For these reasons, page 1 through the paragraph title “summary” on page 5, of CRC’s March 15, 2022 filing is stricken.

7. The Joint Settlement Agreement and Proposed WQC Is Accepted By All Parties

Settlement, as part of the appeal process, is encouraged and the adjudicatory appeal regulations provide that “[i]f a party will not sign a stipulation, settlement, or consent order that the Department agrees to sign, the burden of going forward to establish why the agreement is inconsistent with law may be placed on that party by the Presiding Officer or designee of the Commissioner.” 310 CMR1.01(8)(c).²⁰ As MassDEP points out in its Motion to Partially Strike CRC’s second set of comments, public policy favors settlement over litigation. See *LePage v. Bumila*, 407 Mass.163, 166 (1990), quoting *Anonik v Ominsky*, 261 Mass. 65, 66-68 (1927). See also *Matter of Onset Bay II Corp.*, OADR Docket No. 2012-034, Recommended Final Decision at *56 (Aug.28, 2020), 2020 MA ENV LEXIS 79, (The settlement is consistent with the general rule that settlements are favored over litigation.), adopted by Final Decision (Sept. 23, 2020), 2020 MA ENV LEXIS 82; *Matter of National Amusements, Inc.*, DEP Docket No. 98-043, Ruling on Motion to Dismiss and Order to Show Cause (Dec. 11, 1998) (purpose of MassDEP policy to provide clarity, encouraging settlements and diminishing litigation).

The regulations provide that if a *party* opposes a settlement agreement, they have the burden of showing that the settlement agreement is “inconsistent with law” and thus should not be approved by the MassDEP Commissioner. See 310 CMR 1.01(8)(c). See *In the Matter of Point Independence Yacht Club*, Docket No. 2012-033, Recommended Final Decision (August 15, 2013), adopted by Final Decision (August 19, 2013). However, as all Parties in this appeal have joined in the Settlement Agreement, this provision is not reached. As discussed previously,

²⁰ As discussed above, the regulations provide no role for a Participant when a settlement is reached.

a person or entity in an administrative appeal who is a participant pursuant to 310 CMR 1.01(7)(e) has no role in settlement of the appeal.

However, only for the sake of argument, I have considered whether Participants' comments objecting to the proposed Settlement Agreement have satisfied the burden that they would have had under 310 CMR 1.01(8)(c) if they had been parties to demonstrate that the settlement is "inconsistent with law" and should be rejected. As discussed further below, the Participants' comments failed to meet that burden.

C. The Proposed WQC is consistent with or proper under the statutes and regulations and is in the public interest

1. The Proposed WQC Maintains or Restores Flows to Protect the Existing or Designated Uses As Required Under 314 CMR 4.03(3)(b)

The Massachusetts Surface Water Quality Standards require that in issuing a WQC for an activity regulated by FERC, instream flows shall be maintained or restored to protect existing and designated uses. See 314 CMR 4.03(3)(b). The Proposed WQC modifies the Project to increase minimum flows from November 1 through April 15, for the overwintering protection of trout redds (nesting beds) and includes a flow regime protective of endangered odonate species that can be harmed by rapid increases in water surface elevations associated with releases from the Project. The new flow regime will provide stable or diminishing flows at certain times to protect odonates, while not interfering with whitewater flow releases that provide recreational opportunities. The Proposed WQC contains other conditions regarding odonate mitigation, invasive species, public access, and funding to be used for protection of aquatic resources in the Deerfield River. These conditions satisfy the statutory and regulatory requirements.

2. The Proposed WQC is Appropriately Proposed as Part of the Settlement Agreement and No New Application is Required

The Participants raise a litany of tangential issues in their comments, none of which substantially challenge/demonstrate that the Proposed WQC is inconsistent with law.²¹ First, issuance of a permit is an expected outcome of an adjudicatory appeal, whether by settlement or issuance of a decision approving or modifying a decision on an application. *See in the Matter of Marion* (settlement agreement resulting in WQC adopted/approved by Commissioner's Final Decision); *In the Matter of Tennessee Gas* (after hearing, WQC adopted/approved by Commissioner's Final Decision). Whether sufficient information had been submitted to issue a WQC was an issue identified for adjudication in the PHC Report and Order. The Chief Presiding Officer also addressed this issue in Finding No. 2. See Footnote 17.

Contrary to Participants' assertion, issuance of the Proposed WQC does not expand the scope of this appeal, but is central to it. In its response to comments, MassDEP argues that to conclude that settlement discussions, conducted in the course of an appeal, cannot result in a proposed WQC is nonsensical. Participants' assertion, that a Settlement Agreement in an adjudicatory appeal cannot result in a Proposed WQC is made without out any substantive support and is without merit.

3. There is no right to public comment on the Proposed WQC

²¹ See *Comments of American Whitewater, Connecticut River Conservancy, and New England Flow On Settlement Agreement Proposed 401 Water Quality Certification*, February 1, 2022 ("February 1, 2022 Comments"); *American Whitewater's Reply to Comments by Massachusetts Department of Environmental Protection, Bear Swamp Power Company, LLC and Trout Unlimited on Settlement Agreement and Proposed 401 Water Quality Certification for the Bear Swamp Hydroelectric Project*, March 9, 2022 ("AW March 9, 2022 Comments"); *Reply and Comments of Connecticut River Conservancy on Settlement Agreement and Proposed 401 Water Quality Certificate*, March 15, 2022.

Second, as MassDEP and Trout Unlimited point out in their responses to Great River Hydro's comments, MassDEP takes public comments on WQC *applications*. See 314 CMR 9.05(3). All Participants assert that they provided comments on the application, and no Party asserts otherwise. Great River Hydro cites to 314 CMR 2.06(5)(d) as requiring that the Proposed WQC be issued as a draft with a new comment period. However, the Proposed WQC is not subject to the cited regulatory provision which addresses public notice and comment processes applicable to other permits. While AW acknowledges that MassDEP is not required to issue a draft WQC or hold additional public comments, it asserts that MassDEP has the discretion to do so, but cites no legal authority for its argument. Whether MassDEP has that discretion or not, it cannot be required to exercise discretion. Further, MassDEP must follow its regulations, which in this case establishes a process for public comment on applications, in which all Participants acknowledge they participated. See *Northbridge v. Natick; Department of Social Services*, 394 Mass 70, 76 (1985) (agency must follow its own regulations).

4. A New WQC Application is Not Required

Third, AW, CRC and NE FLOW's argument that Bear Swamp should refile the Proposed WQC as a new application and begin the process again, is unsupported by any legal authority²² In fact, the very cases these Participants cite as relevant reject such "withdraw-and-resubmit" scenarios. As MassDEP points out in its response to Participants' comments, forcing an applicant to reapply is "the very type of activity the Participants warn might trigger waiver of state 401 authority."²³

²² See AW March 9, 2022 Comments, page 10.

²³ See MassDEP Reply to Comments of American Whitewater, Connecticut River Conservancy, and New England FLOW on Settlement Agreement and Proposed 401 Water Quality Certification, February 18, 222.

5. Participants Comments Require No Substantive Change

Finally, the Participants raise no substantive objections demonstrating that the Proposed WQC is inconsistent with law. Specifically, Great River Hydro comments relate to how it will interact with Bear Swamp's operations given their proximity on the Deerfield River and existing interactions between their operations.²⁴ As MassDEP's response to comments notes, previously Bear Swamp and Great River Hydro operated the under a private agreement, now expired, which detailed their coordination of water management and releases to ensure compliance with their FERC licenses.²⁵ The owner of Great River Hydro filed a Motion to Intervene in the FERC proceedings that recommends that they and Bear Swamp enter into a new agreement for that purpose.²⁶ MassDEP argues that such private company operations are not appropriately included in the WQC for one of those companies. Great River Hydro comments cite to no legal authority for MassDEP to impose operating conditions on Bear Swamp outside its own implementation of the Proposed WQC, and relative to the Proposed WQC Great River Hydro states that it's comments not result in any substantive changes.²⁷ CRC's comments conclude by stating "CRC has no objections to the provisions laid out in the Settlement Agreement or proposed WQC."²⁸

²⁴ See *Comments of Great River Hydro, LLC on Settlement Agreement and Proposed 401 Water Quality Certificate*, February 18, 2022 and *Comments of Great River Hydro, LLC*, March 15, 2022.

²⁵ Before the expired agreement, Great River Hydro and Bear Swamp operated under the same ownership. See *MassDEP Response to Comments of Great River Hydro, LLC on Settlement Agreement and Proposed 401 Water Quality Certification*, March 15, 2022, at page 4.

²⁶ See MassDEP Index of Basic Documents, Doc. # 173f.

²⁷ *Comments of Great River Hydro, LLC On Settlement Agreement and Proposed 401 Water Quality Certificate*, February 18, 2022, page 5.

²⁸ *Reply and Comments of Connecticut River Conservancy on Settlement Agreement and Proposed 401 Water Quality Certificate*, March 15, 2022, page 7.

D. MassDEP has not waived its right to issue the certification pursuant to FCWA Section 401(a)(1), 33 USC 1431(a)(1).

Finally, contrary to the Participant AW's suggestion waiver "could" occur, the Department has not waived its authority to issue the Proposed WQC.^{29 30} The relevant provision of the Clean Water Act provides that where "*the State ... fails to act* on a request for certification within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such federal application." (emphasis supplied). See 33 U.S.C. § 1341(a)(1). The legislative history of this section indicates that the U.S. Congress intended the provision to prevent states from effectively denying an approval by simply sitting on their hands and doing nothing, and instead requires that the state take affirmative action to on an application. *See Hoopa Valley Tribe v FERC*, 913 F3d 1099, 1104 (D.C. U.S. Court of Appeals 2019); See also *In the Matter of Tennessee Gas Pipeline Company, LLC*, OADR Docket No., 2016-20, Recommended Final Decision (March 22, 2017), 2017 MA ENV LEXIS 34, *24 adopted by Final Decision, (March 27, 2022), 2017 MA ENV LEXIS 38, (unreasonable to conclude that appeal of the WQC to OADR put the Department's action beyond one year).

Section 401 does not dictate what the state action must be, just that there must be action within a year. Denial of the application is a state action, as distinguished from the lack of action.³¹ *See Millennium Pipeline Co. v. Seggos*, 860 F3d 696, 701 (D.C. Cir. 2017) (NYDEC

²⁹ AW comment March 9, 2022 comments, page 4.

³⁰ Bear Swamp takes no position on whether waiver has already occurred or if waiver could or would occur under federal law without a new application in this specific appeal. *See Bear Swamp Power Company, LLC's Response to the Comments of American Whitewater, Connecticut River Conservancy, and New England Flow on Settlement Agreement and Proposed 401 Water Quality Certification, February 18, 2022.*

³¹ AW, CRC and New England Flow, agree that MassDEP did "act" within the one-year deadline. *See February 1, 2022 Comments*, page 4.

failed to act on an application it asserted was incomplete resulting in waiver of its section § 401 authority); *See also Alcoa Power Generating, Inc v. FERC*, 643 F.3d 963, 973 (D.C. Ct. of Appeals 2011)(issued certification was the “act” required by Section 401 irrespective of whether further action was required of applicant under conditions in the certification).

The Department’s action on the WQC application is not final until the appeal period ends with no appeal, or the adjudicatory hearing process initiated by the appeal is concluded by a Final Decision, issued by the Commissioner pursuant to 310 CMR 1.01(14)(b). FERC has expressly concluded that, “Section 401 of the Clean Water Act does not mandate ‘final action’ by a state, but rather provides that a state must “act on a certification request within one year (emphasis added by FERC).” *Duke Energy Carolinas, LLC*, 147 FERC 61,037 (2014). *See FPL Energy Me. Hydro LLC v. Dept of Env’tl. Prot.*, 926 A.2d 1191 (Maine 2007), cert. denied, 552 U.S. 1100 (2008)(court agreed with FERC that the Department did not waive certification by failing to complete an appeal of a WQC); *See also In the Matter of Tennessee Gas Pipeline Company, supra*.

IV. Conclusion

The Settlement Agreement and Proposed WQC satisfy the regulatory requirement that MassDEP issue a WQC that maintains or restores instream flows to protect the existing and designated uses of the pertinent waterbody. The Proposed WQC increases minimum flows seasonally for the overwintering protection of trout redds and odonates implementing a new

flow regime that will provide stable or diminishing flows, while not interfering with whitewater flow releases that provide recreational opportunities. The Proposed WQC contains other conditions regarding odonate mitigation, invasive species, public access, and funding to be used for protection of aquatic resources in the Deerfield River. In sum, I recommend that the Commissioner issue a Final Decision approving the Settlement Agreement and Proposed WQC with one modification to insert the correct WQC application receipt date, March 27, 2019, which is misstated in paragraph 6 of the Settlement Agreement. I have made this recommendation because the Settlement Agreement and Proposed WQC are consistent with or proper under the governing environmental statute and regulations and serve the public interest.

Date: August 22, 2022



Margaret R. Stolfa
Presiding Officer

NOTICE- RECOMMENDED FINAL DECISION

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for his Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(d), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this Recommended Final Decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in his sole discretion, directs otherwise.

SERVICE LIST

In The Matter Of:

Bear Swamp Power Company, LLC

Docket No. 2020-020

File No. BRP WW10, Tr. No. X282682
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INTERVENOR

Trout Unlimited, Inc.

DEPARTMENT

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Connecticut River Conservancy

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