



DEPARTMENT ORDER

IN THE MATTER OF

BROOKFIELD WHITE PINE HYDRO LLC Skowhegan, Fairfield, Clinton, Benton Kennebec and Somerset Counties SHAWMUT HYDROELECTRIC PROJECT L-019751-33-I-N (DENIAL WITHOUT PREJUDICE)	MAINE WATER QUALITY PROGRAM CLEAN WATER ACT  WATER QUALITY CERTIFICATION
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Pursuant to the provisions of 38 M.R.S. §§ 464 *et seq.*, Section 401 of the Clean Water Act (CWA), 33 U.S.C. § 1341, and Department Rules, including 06-096 CMR Chapter 2, the Department of Environmental Protection (Department) has considered the application of BROOKFIELD WHITE PINE HYDRO LLC (Applicant or Brookfield) with all supporting data, agency review comments, public review comments, and other related materials in the administrative record. Based on the record evidence, and the Department's procedural rules and professional judgment and expertise, the Department makes the following findings of fact, determinations, and conclusions:

1. APPLICATION SUMMARY

A. Application

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

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

The Department further finds the following. Since Brookfield filed its most recent request for WQC in October of 2021, the Department has become aware of both: 1) additional forthcoming sources of information and analysis relevant to the Project and WQC that are necessary to the Department's review and consideration of any Project WQC application; and 2) the potential for significant material changes to Brookfield's Federal Energy Regulatory Commission (FERC) relicensing proposal as well as pending federal actions that may result in a materially different relicensing proposal.

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<sup>1</sup> The Department also notes and finds the following background facts with respect to prior WQC efforts: Brookfield previously filed an application for WQC for the Project on August 28, 2020, but withdrew that request on August 18, 2021, following the Department's issuance of a draft denial of WQC on August 11, 2021, under Department project number L-019751-33-H-N.

Most notably, the National Marine Fisheries Service (NMFS) is still working with Brookfield to develop its Biological Opinion analyzing Project effects on federally listed Atlantic salmon. On July 14, 2022, NMFS requested an additional 90-day extension, until October 13, 2022, to complete the Biological Opinion, and FERC granted that extension request on August 8, 2022. NMFS' July 14, 2022 extension request and FERC's August 8, 2022 approval letter state that the extension was based on "information and analysis related to downstream passage studies that was not included in the Biological Assessment, the Species Protection Plan, or the Environmental Assessment," and that "emerged as a result of discussions between [NMFS] and the licensee related to addressing effects of the action on Atlantic salmon." The Applicant has not provided any of this additional information and analysis to the Department, nor has it kept the Department apprised of its ongoing discussions with NMFS related to its various proposals for fisheries mitigation measures. The Department finds and concludes that this information and analysis, which will be addressed in the forthcoming Biological Opinion, is relevant to the State WQC process and necessary for the Department to review and consider any Project WQC application.

Moreover, in response to this ongoing federal activity, Brookfield staff were reported as publicly acknowledging that the NMFS review could require changes to Brookfield's proposed fish passage measures.<sup>2</sup> Additionally, FERC is in the process of preparing a multi-project supplemental Environmental Impact Statement (EIS) that will analyze the combined effects on fisheries resources of four hydroelectric projects on the Kennebec River, including the Shawmut Project. The Department finds and concludes that this information will also be relevant to the State WQC process and the Department's review and consideration of a Project WQC application. The Department further finds, based on Brookfield's reported statements on Project changes as described above, as bolstered by the statements in the NMFS and FERC filings on the Biological Opinion extension also described above, that fish passage or other changes to the applicant's proposal are likely the subject of ongoing discussion and consideration at the federal licensing level.

In addition to these federal actions themselves, the Department expects that there will be additional related sources of new information and analysis generated in response to the forthcoming actions. For instance, the Department expects Brookfield, State agencies, and others to comment on the forthcoming federal actions and analyses, and such comments, like the underlying NMFS biological opinion and FERC EIS, would be relevant to the State WQC process and necessary for the Department's review and consideration of any Project WQC application. The Department finds and concludes that neither of the federal actions discussed above will be completed in time for the Department to adequately take those actions (and related information, analyses, and comments) into account for WQC purposes prior to expiration of the current one-year WQC deadline on October 18, 2022.

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<sup>2</sup> Brookfield's September 22, 2022 filing modifying its WQC application contains additional fish passage measures that it asserts are significant enough to warrant Department approval. As noted elsewhere in this order, this late-stage filing underscores the Department's need for additional analysis and the uncertainty of Brookfield's proposal with respect to the pending federal activities described above.

Additionally, and regrettably, Brookfield staff previously represented to Department staff that they did not intend to provide additional information to the Department and did not anticipate further modifications to its WQC request. The Department finds that such Brookfield statements to Department staff are contradicted by its prior public representations, as reported, and are also inconsistent with the NMFS and FERC filings recognizing that there is additional relevant information currently being developed related to the anticipated Biological Opinion. Such Brookfield statements are also contradicted by the Applicant's recent late-stage submission of new information and changes to its WQC application, as described below in the section entitled Comments on the Draft Order and Additional Submissions, which is expected to be subject to additional federal review and analysis by NMFS and FERC. Thus, in addition to the Department's need for the forthcoming new sources of relevant information discussed above, the Department finds and concludes that the added uncertainty surrounding the nature of Brookfield's relicensing proposal at the federal level and its WQC application also places the Department in an untenable position with respect to the processing of any potential State WQC action based on the evolving information currently before it.

Absent a denial without prejudice, the Department is faced with the prospect of potentially issuing a substantive decision under the approaching October 18, 2022, deadline for the current WQC application that is not yet aligned with federal NMFS and FERC actions and related information, which as events have shown, continues to be in a state of flux. The Department finds that issuing such a substantive WQC decision under such circumstances could create unnecessarily conflicting or redundant requirements between a WQC and federal requirements, and result in a WQC based on outdated or incomplete biological information and analyses. The Department finds and concludes that this is both a realistic and increasingly likely possibility at this stage of the proceedings based on developments at the federal level, and without the benefit of the anticipated federal actions by NMFS and FERC and related information that has yet to be supplied to the Department and is required for the processing of the WQC application. This finding is further reinforced by the Applicant's late-stage submission of new information and changes to its WQC application, as well as the many responsive comments received by the Department on such new information, as described below.

This denial without prejudice addresses such concerns by finally acting on the pending WQC application in a way that allows Brookfield an opportunity to submit another subsequent and updated WQC application reflecting its latest information and changes. This will also allow the Department to consider, and the WQC process to benefit from, the forthcoming NMFS Biological Opinion and related information and analysis expected to be submitted pursuant to the extended FERC deadline, and additional federal information and analysis resulting from the anticipated FERC EIS.

## 2. SECTION 401 OF THE CLEAN WATER ACT

### A. Requirement to “Act” on Request for Certification

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

### B. Denial Without Prejudice

This Department denial without prejudice under the Clean Water Act is not based on any judgment of the technical merits of the Applicant’s pending WQC request. Instead, this denial without prejudice is appropriate when, as here, the Applicant’s request lacks sufficient documentation or the Applicant’s request has materially changed since it was initially filed. Given the Clean Water Act’s one-year deadline for action on a WQC application, it is appropriate for the Department to deny the request for WQC without prejudice because it lacks sufficient documentation; otherwise, the Department would be in an untenable position of being forced to either grant WQC without relevant and necessary information or forced to waive its WQC authority. Additionally, in situations such as this one where the Department finds that the Applicant is continuing to develop and refine its relicensing proposal at the federal level and through late-stage submissions and changes to its state WQC application, and where there are reasonably foreseeable but not yet developed sources of information related to those processes, it is appropriate for the Department as the State certifying agency to act on such request by issuing a denial without prejudice. Thus, this denial without prejudice, while a final action on the current WQC application, allows the Applicant to submit a subsequent WQC application once it has fully developed its application proposal. This allows the Department an opportunity to further act on a WQC request based on the most accurate and complete version of an Applicant’s request and proposal, and based on the best and most up to date sources of available information.

In summary, and based on the above, the Department finds that the Applicant’s current WQC application 1) lacks sufficient documentation for the Department to meaningfully process it at this stage; and 2) is in the process of undergoing or being evaluated for potentially material changes since the application was initially filed. The Department concludes that denial without prejudice under these circumstances is appropriate under the Clean Water Act and related State law, including because the Department has not received all information necessary to process the WQC application or to allow the Applicant to carry its burden of proof.<sup>3</sup>

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<sup>3</sup> See, e.g., 06-096 C.M.S. ch. 2, § 11(B), (F).

### 3. COMMENTS ON THE DRAFT ORDER AND ADDITIONAL SUBMISSIONS

On July 29, 2022, the Department issued a draft Order denying, without prejudice, WQC for the continued operation of the existing Shawmut Hydroelectric Project. The deadline for comments was 5:00 P.M. on August 5, 2022.

The Department received comments on the draft order from the Applicant and the Maine State Chamber of Commerce. Sappi provided comments to the Department after the deadline.

On September 22, 2022, less than a month before the expiration of the 1-year WQC deadline of October 18, 2022, and despite its prior claims that no additional information would be provided to the Department, the Applicant filed additional information modifying its WQC application, including new information related to its proposed fish passage measures and additional proposed measures that it had not filed with the Department previously. On September 23, 2022, the Department issued a public notification requesting comments on the Applicant's additional information. The deadline for comments was 5:00 PM on September 30, 2022.

The Department received comments from a group of Maine legislators, the Kennebec Coalition and Conservation Law Foundation, United Steelworkers Local 4-9, Sappi, and the Applicant.

The fact of the Applicant's late-stage submission and the many responsive comments received by the Department has been noted in and addressed by this final order. But the substance of the Applicant's new information and changes, as well as the responsive comments, have yet to be analyzed by NMFS, FERC, and ultimately the Department. The Department finds that, collectively, such submissions further support this denial without prejudice at this late stage of the pending WQC proceeding as they reflect new information and changes to the Applicant's evolving WQC application, including purported changes to proposed fish passage measures, as well as responsive comments on such new information and changes. This underscores the Department's need for further analysis by NMFS and FERC in their forthcoming federal reviews, and then by the Department, all of which cannot occur prior to the 1-year deadline of October 18, 2022, with respect to the pending WQC application. As noted above, a denial without prejudice addresses this situation by allowing Brookfield an opportunity to submit another WQC application reflecting its latest information and changes to its proposal on a timeline that allows the Department to consider such information and the forthcoming federal reviews by NMFS and FERC before issuing a final substantive WQC decision. This will benefit the WQC process and add certainty with respect to any eventual final WQC decision.

A more detailed Department response to the comments submitted by the Applicant on the draft order was issued by letter dated October 12, 2022, which is incorporated into this portion of the Order by reference.

## 4. DECISION AND ORDER

THEREFORE, the Department DENIES WITHOUT PREJUDICE the water quality certification of the Applicant BROOKFIELD WHITE PINE HYDRO LLC pursuant to Section 401 (a) of the Clean Water Act. This denial without prejudice should not be interpreted as either a positive or a negative judgement of the merits of Brookfield's proposal. If Brookfield wishes to further seek WQC for the Shawmut Hydroelectric Project from the Department, then Brookfield must file a new and updated request for WQC reflecting its latest information and proposals, and that allows for consideration of forthcoming federal actions such as the NMFS Biological Opinion and FERC EIS, and related information, analyses and responsive comments, as well as any modifications to Brookfield's licensing proposal made or required at the federal level.

DONE AND DATED IN AUGUSTA, MAINE, THIS 12<sup>th</sup> DAY OF OCTOBER 2022.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BY:   
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For: Melanie Loyzim, Commissioner

PLEASE NOTE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES.

KO/L19751IN/ATS88255

**FILED**  
October 12<sup>th</sup>, 2022  
State of Maine  
Board of Environmental Protection



# DEP INFORMATION SHEET

## Appealing a Department Licensing Decision

**Dated: August 2021**

**Contact: (207) 314-1458**

### **SUMMARY**

This document provides information regarding a person's rights and obligations in filing an administrative or judicial appeal of a licensing decision made by the Department of Environmental Protection's (DEP) Commissioner.

Except as provided below, there are two methods available to an aggrieved person seeking to appeal a licensing decision made by the DEP Commissioner: (1) an administrative process before the Board of Environmental Protection (Board); or (2) a judicial process before Maine's Superior Court. An aggrieved person seeking review of a licensing decision over which the Board had original jurisdiction may seek judicial review in Maine's Superior Court.

A judicial appeal of final action by the Commissioner or the Board regarding an application for an expedited wind energy development ([35-A M.R.S. § 3451\(4\)](#)) or a general permit for an offshore wind energy demonstration project ([38 M.R.S. § 480-HH\(1\)](#)) or a general permit for a tidal energy demonstration project ([38 M.R.S. § 636-A](#)) must be taken to the Supreme Judicial Court sitting as the Law Court.

### **I. ADMINISTRATIVE APPEALS TO THE BOARD**

#### **LEGAL REFERENCES**

A person filing an appeal with the Board should review Organization and Powers, [38 M.R.S. §§ 341-D\(4\)](#) and [346](#); the Maine Administrative Procedure Act, 5 M.R.S. § [11001](#); and the DEP's [Rule Concerning the Processing of Applications and Other Administrative Matters \(Chapter 2\)](#), 06-096 C.M.R. ch. 2.

#### **DEADLINE TO SUBMIT AN APPEAL TO THE BOARD**

Not more than 30 days following the filing of a license decision by the Commissioner with the Board, an aggrieved person may appeal to the Board for review of the Commissioner's decision. The filing of an appeal with the Board, in care of the Board Clerk, is complete when the Board receives the submission by the close of business on the due date (5:00 p.m. on the 30<sup>th</sup> calendar day from which the Commissioner's decision was filed with the Board, as determined by the received time stamp on the document or electronic mail). Appeals filed after 5:00 p.m. on the 30<sup>th</sup> calendar day from which the Commissioner's decision was filed with the Board will be dismissed as untimely, absent a showing of good cause.

#### **HOW TO SUBMIT AN APPEAL TO THE BOARD**

An appeal to the Board may be submitted via postal mail or electronic mail and must contain all signatures and required appeal contents. An electronic filing must contain the scanned original signature of the appellant(s). The appeal documents must be sent to the following address.

Chair, Board of Environmental Protection  
c/o Board Clerk  
17 State House Station  
Augusta, ME 04333-0017  
[ruth.a.burke@maine.gov](mailto:ruth.a.burke@maine.gov)

The DEP may also request the submittal of the original signed paper appeal documents when the appeal is filed electronically. The risk of material not being received in a timely manner is on the sender, regardless of the method used.

At the time an appeal is filed with the Board, the appellant must send a copy of the appeal to: (1) the Commissioner of the DEP (Maine Department of Environmental Protection, 17 State House Station, Augusta, Maine 04333-0017); (2) the licensee; and if a hearing was held on the application, (3) any intervenors in that hearing proceeding. **Please contact the DEP at 207-287-7688 with questions or for contact information regarding a specific licensing decision.**

#### **REQUIRED APPEAL CONTENTS**

A complete appeal must contain the following information at the time the appeal is submitted.

1. *Aggrieved status.* The appeal must explain how the appellant has standing to bring the appeal. This requires an explanation of how the appellant may suffer a particularized injury as a result of the Commissioner's decision.
2. *The findings, conclusions, or conditions objected to or believed to be in error.* The appeal must identify the specific findings of fact, conclusions of law, license conditions, or other aspects of the written license decision or of the license review process that the appellant objects to or believes to be in error.
3. *The basis of the objections or challenge.* For the objections identified in Item #2, the appeal must state why the appellant believes that the license decision is incorrect and should be modified or reversed. If possible, the appeal should cite specific evidence in the record or specific licensing criteria that the appellant believes were not properly considered or fully addressed.
4. *The remedy sought.* This can range from reversal of the Commissioner's decision on the license to changes in specific license conditions.
5. *All the matters to be contested.* The Board will limit its consideration to those matters specifically raised in the written notice of appeal.
6. *Request for hearing.* If the appellant wishes the Board to hold a public hearing on the appeal, a request for hearing must be filed as part of the notice of appeal, and it must include an offer of proof regarding the testimony and other evidence that would be presented at the hearing. The offer of proof must consist of a statement of the substance of the evidence, its relevance to the issues on appeal, and whether any witnesses would testify. The Board will hear the arguments in favor of and in opposition to a hearing on the appeal and the presentations on the merits of an appeal at a regularly scheduled meeting. If the Board decides to hold a public hearing on an appeal, that hearing will then be scheduled for a later date.
7. *New or additional evidence to be offered.* If an appellant wants to provide evidence not previously provided to DEP staff during the DEP's review of the application, the request and the proposed supplemental evidence must be submitted with the appeal. The Board may allow new or additional evidence to be considered in an appeal only under limited circumstances. The proposed supplemental evidence must be relevant and material, and (a) the person seeking to add information to the record must show due diligence in bringing the evidence to the DEP's attention at the earliest possible time in the licensing process; or (b) the evidence itself must be newly discovered and therefore unable to have been presented earlier in the process. Requirements for supplemental evidence are set forth in [Chapter 2 § 24](#).

#### **OTHER CONSIDERATIONS IN APPEALING A DECISION TO THE BOARD**

1. *Be familiar with all relevant material in the DEP record.* A license application file is public information, subject to any applicable statutory exceptions, and is made accessible by the DEP. Upon request, the DEP will make application materials available to review and photocopy during normal working hours. There may be a charge for copies or copying services.



2. *Be familiar with the regulations and laws under which the application was processed, and the procedural rules governing the appeal.* DEP staff will provide this information upon request and answer general questions regarding the appeal process.
3. *The filing of an appeal does not operate as a stay to any decision.* If a license has been granted and it has been appealed, the license normally remains in effect pending the processing of the appeal. Unless a stay of the decision is requested and granted, a licensee may proceed with a project pending the outcome of an appeal, but the licensee runs the risk of the decision being reversed or modified as a result of the appeal.

### **WHAT TO EXPECT ONCE YOU FILE A TIMELY APPEAL WITH THE BOARD**

The Board will acknowledge receipt of an appeal, and it will provide the name of the DEP project manager assigned to the specific appeal. The notice of appeal, any materials admitted by the Board as supplementary evidence, any materials admitted in response to the appeal, relevant excerpts from the DEP's administrative record for the application, and the DEP staff's recommendation, in the form of a proposed Board Order, will be provided to Board members. The appellant, the licensee, and parties of record are notified in advance of the date set for the Board's consideration of an appeal or request for a hearing. The appellant and the licensee will have an opportunity to address the Board at the Board meeting. The Board will decide whether to hold a hearing on appeal when one is requested before deciding the merits of the appeal. The Board's decision on appeal may be to affirm all or part, affirm with conditions, order a hearing to be held as expeditiously as possible, reverse all or part of the decision of the Commissioner, or remand the matter to the Commissioner for further proceedings. The Board will notify the appellant, the licensee, and parties of record of its decision on appeal.

## **II. JUDICIAL APPEALS**

Maine law generally allows aggrieved persons to appeal final Commissioner or Board licensing decisions to Maine's Superior Court (see [38 M.R.S. § 346\(1\)](#); 06-096 C.M.R. ch. 2; [5 M.R.S. § 11001](#); and M.R. Civ. P. 80C). A party's appeal must be filed with the Superior Court within 30 days of receipt of notice of the Board's or the Commissioner's decision. For any other person, an appeal must be filed within 40 days of the date the decision was rendered. An appeal to court of a license decision regarding an expedited wind energy development, a general permit for an offshore wind energy demonstration project, or a general permit for a tidal energy demonstration project may only be taken directly to the Maine Supreme Judicial Court. See 38 M.R.S. § 346(4).

Maine's Administrative Procedure Act, DEP statutes governing a particular matter, and the Maine Rules of Civil Procedure must be consulted for the substantive and procedural details applicable to judicial appeals.

### **ADDITIONAL INFORMATION**

If you have questions or need additional information on the appeal process, for administrative appeals contact the Board Clerk at 207-287-2811 or the Board Executive Analyst at 207-314-1458 [bill.hinkel@maine.gov](mailto:bill.hinkel@maine.gov), or for judicial appeals contact the court clerk's office in which the appeal will be filed.

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**Note: This information sheet, in conjunction with a review of the statutory and regulatory provisions referred to herein, is provided to help a person to understand their rights and obligations in filing an administrative or judicial appeal. The DEP provides this information sheet for general guidance only; it is not intended for use as a legal reference. Maine law governs an appellant's rights.**

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