

May 19, 2021

UNITED STATES OF AMERICA

BEFORE THE

FEDERAL ENERGY REGULATORY COMMISSION

KENNEBUNK LIGHT AND POWER DISTRICT

Project No. P-5362-021

MOTION OF THE MOUSAM RIVER COALITION TO INTERVENE AND SUBMIT
ON BEHALF OF ITS MEMBERS COMMENTS ON THE KENNEBUNK LIGHT AND
POWER DISTRICT LICENSE SURRENDER APPLICATION, P-5362-021

Pursuant to 18 C.F.R. 385.214(d) of the Rules of the Federal Energy Regulatory Commission (“FERC”), and the Commission’s Notice of April 21, 2021¹, in the above captioned docket, the Mousam River Coalition, consisting of Maine Rivers and the Mousam and Kennebunk Rivers Alliance (“MKRA”), moves to intervene in the above captioned proceeding. In addition, the Intervenor submits the views of the Coalition in opposition to the proposed surrender application.

INTRODUCTION

On March 29, 2017, the Kennebunk Light and Power District (“KLPD”), the existing licensee for the Lower Mousam Project, filed notice of its intent not to file an application for a subsequent license. Subsequently, KLPD filed an application to surrender in place the license for the Project which the Commission noticed for intervention and comment

¹ Accession No. 20210421-3019, April 21, 2021.

on April 21, 2021.² The Mousam River Coalition for the reasons set forth below, is vitally interested in the outcome of this proceeding and request approval of this Motion for Intervention in the surrender proceedings.

1. MOTION TO INTERVENE

In accordance with the Notice and the Commission’s Rules of Practice and Procedure, 18 CFR 385.210, 211 and 214, the Mousam River Coalition (consisting of Maine Rivers and the Mousam and Kennebunk Rivers Alliance), hereby moves to intervene in the above captioned proceeding and to comment on the Proposed Surrender Application of the Kennebunk Light and Power District (“KLPD”). The members of the Coalition have a vital interest in the proceeding and the participation of the Coalition in the proceeding will be in the public interest. Specifically:

A. Maine Rivers is a Maine Nonprofit Corporation, which is qualified under 501(c)(3) of the Internal Revenue Code, and whose mission is to protect, restore and enhance the ecological health of Maine’s river systems. Members of Maine Rivers reside throughout the State of Maine and many live within the area affected by the Mousam River Project. Those members have a direct interest in the outcome of this proceeding because many of them use the Mousam River for fishing, boating, bird watching and other recreational purposes. These members share the hope for a recovered Mousam River free of the dams at issue in this proceeding and the restoration of the River ecosystem and its traditional runs of American shad, alewives, and other diadromous fish species, as well as improved

² Ibid.

conditions for myriad other species of birds, fish, and wildlife, and improved water quality.

B. Maine Rivers has long been active in efforts to restore native fish populations in waterways across the State and has participated in numerous proceedings involving dams and hydropower regulation.³ For example, Maine Rivers is leading an undertaking to remove obstructions to alewife passage on the Outlet Stream that flows from China Lake to the Sebasticook River. Participation in Mousam River Coalition would be consistent with these activities in Maine and Maine Rivers' mission.

C. MKRA is an unincorporated association of individuals who reside in Kennebunk and surrounding areas which was founded in 2008 to improve the ecological health of the Mousam and Kennebunk River watershed - from the headwaters to the ocean – for birds, fish, wildlife and people. The MKRA has been focused on monitoring and improving water quality, restoring, and enhancing native fisheries, and encouraging people to appreciate the uniqueness and vitality of the local rivers. Most of the MKRA members use the Mousam River and the surrounding area for fishing, hunting, boating, recreation, hiking, bird watching and associated activities.

D. MKRA has taken an active interest in the future of the Mousam River and has followed these proceedings particularly since KLPD notified the Commission that it would not file an application for renewal of its license. Since then, MKRA has participated through intervention and the filing of comments in the ill-fated and failed effort of America First Hydro (“AFH”) to obtain an original license.⁴ MKRA members

³ See the Maine Rivers website at <https://mainerivers.org>.

⁴ See Application of America First Hydro and related proceedings in FERC Docket 14856.

work closely with Maine Rivers and share its vision of a free flowing Mousam River within the project area. Both members of the Coalition are represented before the Commission by the same counsel.

2. THE PROJECT

A. The lower Mousam Project consists of three dams:

(i) Kesslen, the first dam on the Mousam River, is located within the Town of Kennebunk, has a height of 15 feet including flashboards and creates an impoundment with a surface area of approximately 25 acres which extends approximately three miles upstream. The turbine and generator have been idle for at least two years. While the presence of substantial numbers of shad and alewives immediately below Kesslen Dam during the migration season is well documented,⁵ they are unable to pass the dam because there is no fishway. Because it is the first dam on the Mousam, Kesslen and the two other Project dams deny migratory fish access to more than nine miles of productive mainstem habitat.

(ii) The Twine Mill Dam is located approximately two miles upstream of Kesslen. The impoundment has a surface area of approximately 12 acres. The original dam, consisting of a wood-crib spillway with concrete base and abutment, was breached around 1960, and reconstructed by KLPD in 1980-81 as a concrete gravity dam with a crest-type spillway. The dam does not currently generate electricity. There is no fishway.

⁵ See the comment of David Doubleday. FERC Document Accession # 20210507-5065, filed May 7, 2021, who states: "Because of the dams, fish and other water dependent life forms are unable to migrate. It is very disturbing to annually see masses of shad, herring, eels, and other fish trapped at the base of the first dam. There are three dams; none serve a useful purpose. They prevent fish migration, they limit human recreational uses, and they contribute to flooding."

(iii) The Dane Perkins Dam is located approximately 0.5 miles upstream of the Twine Mill dam and has an impoundment of approximately 25 acres. The original dam, consisting of a wood-crib spillway with concrete base and abutment was breached in 1977. The dam was reconstructed by KLPD with a concrete spillway in 1980-81. The dam does not currently generate electricity. There is no fishway.

3. STATEMENT OF THE POSITION OF THE MOUSAM RIVER COALITION

A. The Coalition and its members, MKRA and Maine Rivers, oppose the District's proposal to surrender the Lower Mousam Project in place. They instead submit that the public interest overwhelmingly favors the removal of all three of the Project dams.

Removal of these dams would permit the lower half of the Mousam River to revert to the free-flowing waterway that existed for millennia prior to the construction of these dams that prevent fish passage and that have significantly degraded water quality. Conditioning approval of the surrender application on removal would be consistent with the mandate of 16 USC 803(a)(1), which authorizes the Commission to impose conditions "for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses. . ."

B. Leaving the dams in place, as the KLPD draft plan proposes, would serve no beneficial public use. Just the contrary, it would perpetuate the violations of Maine's water quality standards resulting from low dissolved oxygen and poor biological conditions that exist in the dam impoundments. Indeed, KLPD's obligation to apply for a Water Quality Certificate which, if denied as seems likely, will require the Commission

to deny the surrender application or, which is the better alternative, condition approval on removal of the dams. Conditional approval would also address the fact that the dams per se are the reason that the lower Mousam is included on Maine's list of non-attainment waters compiled in accordance with the Federal Clean Water Act.⁶

C. Removal of the dams as a condition of surrender would restore water quality, once again permit full passage for anadromous, catadromous, and resident fish throughout a nine mile stretch of the river and several miles of tributaries above Kessler Dam; enhance the assimilative ability of the river relative to sewage treatment discharges by the Town of Kennebunk below the Kessler Dam; eliminate the adverse effects on aquatic life caused by the three impoundments; eliminate future public safety and maintenance concerns as well as costs associated with leaving the dams in place; and enhance existing and create new and more diverse recreational opportunities for paddling, angling, and bird and wildlife observation due to the restoration of a natural, free flowing river environment.

D. KLPD claims that decommissioning would have no environmental effects⁷ consist of little more than a history of the Mousam's degradation over centuries which KLPD has facilitated and done nothing to remedy. Moreover, this statement ignores the potential for flooding caused by the Kessler Dam particularly in light of past events which are described in detail later in these comments. And there is evidence of bank erosion above Kessler provided by a homeowner whose property is impacted by high water flows caused by the Kessler Dam.⁸ Remarkably, the Surrender Application is silent regarding

⁶ 33 USCA section 1315(b).

⁷ KLPD Surrender Application at 9.

⁸ See submission of Jennifer Shack, May 6, 2021., P-5362-021, Accession 20210506-5164.

the impact of ongoing climate change which is causing global warming and that contributes to volatile and destructive weather events and places increased pressures on native fish and other species as they seek refuge during these events.⁹ The Project dams are structures that have a destructive potential in times of flood and are therefore a public nuisance.

D.1. There is considerable evidence that climate change is altering traditional weather patterns. This was evidenced in the 2006 and 2007 Patriot's Day and Mother's Day storms, respectively. These storms caused extensive flooding and damage to areas adjacent to the Mousam River that was aggravated by delay in opening the dams to mitigate the flood flows. But according to Sharon Staz (then general manager of KLPD) "even if KPL had opened the dams earlier, it might have only delayed the flooding six to eight hours, nor prevented it altogether."¹⁰ This frank observation confirms the conclusion that the dams standing in place leave the surrounding areas vulnerable to overflows and flooding when there are major rain events compared to a situation where the dams are removed and reduce upstream flood levels. Moreover, "None of the dams in the Mousam watershed have large flood-release gates that would allow for increases of flow during a flood event appreciably above the flow that would occur naturally during a high-flow event, once the spillway was overtopped."¹¹

D.2. Removal of the three KLPD dams will serve to better prepare the community to avoid the dangers of future flooding during the increasing number of storms events

⁹ See generally Scientific Assessment of Climate Change and its Effects in Maine, Maine Climate Council Scientific and Technical Subcommittee, GOPIF_sts_Report_09232.pdf.

¹⁰ See Idolce@seacoastonline.com, April 26, 2007, hereinafter "Dolce Report."

¹¹ Dolce Report, Page 2.

associated with climate change. Preparing for these storm events to mitigate the effects of flooding must be seen as another key public benefit that would result from dam removal.

D.3. Another benefit of removal was described by Jennifer Shack, a riparian owner above the Kesslen Dam who informed the Commission that “removing the dams should narrow the river behind our home. This would likely improve the stability of our bank. We live on a high, steep bank that gets scoured from below when the river runs high, bringing down trees from time to time and eating into the bank. With a narrower river, that scouring should be less likely to occur, leading to less of a threat of erosion.”¹²

E. The case for removal is buttressed by the fact that KLPD has for many years been publicly subsidized as a result of the free use of the river for the generation of electricity that is sold to customers in the District’s service area. The flow of the river, which is a public asset, has been used by KLPD without charge to fuel its generating equipment.¹³ It now proposes to remove the generation equipment, leaving the dams in place and the river degraded, with only a vague commitment regarding future operational oversight and maintenance. The public interest demands otherwise, particularly as the removal of the dams would have significant positive benefits for the public.

F. We also emphasize that requiring removal of the dams would not cause long term hardship to KLPD, which is a tax-exempt entity, regulated by the Maine Public Utility Commission. While KLPD is not permitted to earn a profit on the sale or transmission of purchased energy, it is permitted to realize profit on delivery and similar charges. Indeed,

¹² Comment of Jennifer Shack, May 6, 2021, FERC Document Accession # 20210506-5164.

¹³ Without the free use of the river flow, KLPD would have had to purchase natural gas or coal to operate its generation equipment. Free river flow is clearly a subsidized input.

for the fiscal year ended December 31, 2020, KLPD had unrestricted assets of \$1,881,434 and projected a net gain from operations, without hydropower generation, in 2021 of \$255,973.¹⁴ Recourse to these assets to pay for dam removal, and the consequent benefits to the Intervenor and the public in the region is equitable. KLPD, having benefitted from a subsidy in the form of free use of the River in past years should now, as a condition of surrender, be required to remove the dams, two of which were reconstructed after their acquisition by KLPD.

While KLPD does not particularize a commitment to maintenance of idle dams if the surrender should be approved, the cost of such maintenance will likely be substantial. The cost to maintain idle structures for the indefinite future would undoubtedly go far to cover the cost of their removal.

4. THE KLPD “PUBLIC BENEFIT” CLAIM IS WITHOUT MERIT

A. The sole public benefit cited by KLPD in the application for surrender¹⁵, is an erroneous claim that the impoundments behind the dams are used by the Kennebunk Fire Department for firefighting. This is a false claim. In fact, the Chief of the Kennebunk Fire Department states that the impoundments are not used as a source of water for firefighting nor are there any plans to use them for that purpose in the future.¹⁶

B. As a last resort, KLPD claims that the voters of Kennebunk want the dams to remain in place, citing a 2016 referendum.¹⁷ However, the results of that referendum are of

¹⁴ See info@klpd.org, Financial Statements for the years ended December 31, 2020 and 2019.

¹⁵ Surrender Application, page 13.

¹⁶ Statement of Kennebunk Fire Chief in conversation with Bill Grabin, a member of MKRA, on March 3, 2021.

¹⁷ Surrender Application at 13.

questionable value. More relevant are the comments made recently in a public hearing conducted on ZOOM by KLPD in April 2021, in which there was overwhelming support for dam removal. Susan Bloomfield, a Kennebunk resident, described the public response at that meeting in a communication to the Commission as follows:

At a recent KLPD public meeting on the subject, twenty-six speakers, most of them Kennebunk residents, similarly advocated for removing the dams to allow the river to run naturally. Representatives from the Maine Department of Marine Resources, the Sebago (Me) Chapter of Trout Unlimited, the National Marine Fisheries Service, and the US Fish and Wildlife Service spoke either in favor of dam removal or offered technical assistance to KLPD to pursue that possibility.¹⁸

Ms. Bloomfield concluded by writing: “The removal of these dams will eventually return the Mousam to some semblance of ecological balance without impediments and impoundments. It could become a beautiful river, offering exceptional passive recreational opportunities.”¹⁹

C. Finally, removal of the dams and the reversion to a free-flowing river, would have no adverse effect on riparian property owners some of whom would in fact gain substantial land as the impoundments are drawn down. This assertion is confirmed by a letter to the KLPD Trustees from Bates College Professor Lynn Lewis dated November 16, 2015, which states that:

I am writing to provide comments on the economic impacts of dams and dam removal on local property values. There is now a fairly extensive body of literature that supports the claim that environmental amenities such as clean, free-flowing rivers provide positive value, including to local property values. Conversely, locations in proximity to environmental disamenities such as dirty rivers, landfills, etc., reduce property values.²⁰

¹⁸ See Letter to FERC from Susan Bloomfield, May 10, 2021, Project 5362-021, Accession # 20210510-5059.

¹⁹ Ibid.

²⁰ Original in possession of KLPD.

Professor Lewis concluded that a “free -flowing Mousam River with a robust riparian corridor will be an appealing landscape with increasingly vibrant fish and wild-life populations, all of which can benefit nearby property values.”²¹

C.1. Professor Lewis also estimated the impacts of dams on property values on the Kennebec and Penobscot Rivers and found from house sales data that there was a sizeable penalty for living near a dam site which disappeared after the dam was removed. She also cited a study by William Provecher and colleagues who found that “shoreland frontage along small impoundments confers no increase in residential property values compared to frontage along free-flowing streams and that non frontage residential property located in the vicinity of a free-flowing stream is more valuable than similar non frontage property in the vicinity of a small impoundment.”²²

D. In sum, there is absolutely no positive public benefit that would flow from KLPD’s proposal to leave standing idle dams that have no function to justify their existence.²³ In these circumstances, the broad public interest standard applied by the Commission in license surrender decisions justifies the requirement that, as a condition of surrender, KLPD remove the three dams that comprise the Lower Mousam Project. See, for example, the Order Accepting Surrender re Duke Energy Carolinas, LLC’s Dillsboro Project, 120 FERC 61,054, July 19, 2007.

5 KLPD MUST APPLY FOR A WATER QUALITY CERTIFICATE

A. Section 401(a)(1) of the Clean Water Act (“CWA”) requires that an applicant for a federal license or permit to conduct activities, including, but not limited to, the

²¹ Ibid.

²² Ibid.

²³ The impoundments are not a source of water for firefighting.

construction or operation of facilities, which may result in any discharge into navigable waters, shall provide the licensing or permitting agency, a certification from the state in which the discharge originates ...” that any such discharge will comply with the applicable provisions of 33 USC 1341(a)(1). If the originating state denies a 401(a)(1) certificate, then FERC may not issue a license (or authorization). See *Alabama Rivers Alliance v. F.E.R.C.*, 325 F.3d 290 (D.C. Cir. 2003).

B. The Commission has held that a Water Quality Certificate (“WQC”) is required in connection with an application for surrender of a licensed hydroelectric project if it may result in a discharge into navigable waters. See *Pacific Gas and Electric*, 170 FERC 61,232 (2020). Moreover, section 401(d) of the Clean Water Act further provides that a WQC and the conditions contained therein become conditions of any authorization issued by FERC. In other words, an applicant for surrender of a hydropower license has to file an application with the Maine Department of Environmental Protection (“DEP”) for a WQC if approval of the application may result in a “discharge” into navigable waters. KLPD has given no indication that it intends to file for a WQC, which is normally filed after the Commission determines that the application is ready for environmental analysis.²⁴ As demonstrated below, a WQC is legally mandated before further action on the surrender application can be taken because the FERC order, if granted, will result in a discharge.

C. The KPLD Surrender proposals if implemented will result in a discharge. The definition of what constitutes a discharge was settled by the Supreme Court decision in

²⁴ The Burnham Creek Hydroelectric Project, 155 FERC 62,085 (2016), is not applicable here because the project was entirely on land owned by the applicant, everything would be left as it was, so that the surrender would not change any flows and the project environment would not change. These circumstances are not present in the KPLD application for surrender.

S.D. Warren v. Environmental Protection Agency et al, 547 U.S. 370 (2006). The unanimous decision was announced in an opinion by Justice Souter which states, “The issue in this case is whether operating a dam to produce hydroelectricity may result in any discharge into the navigable waters of the United States. If so, a federal license under section 401 of the Clean Water Act requires state certification that water protection laws will not be violated.” In conclusion, Justice Souter clarified that discharge “means any limitation of river flow including, for example, the creation of impoundments or the release of water through turbines.”

D. According to the surrender application, KLPD plans to take the following actions with respect to the project dams:

(i) Kesslen: remove flash boards, disable floodgates, permanently close penstock, disable runners, and remove trash racks.

(ii) Twine Mill: remove flash boards, remove trash racks, fill penstock, and remove tailrace steel.

(iii) Dane Perkins: remove flash boards, remove trash racks, fill penstock, and fill bypass gates.

E. These actions, alone or in combination, clearly cause a discharge under the teaching of the Supreme Court in the S.D. Warren decision, to wit:

(i) By closing of the penstocks and floodgates, all downstream flow would be directed over the dams all the time during low flow conditions even in midsummer, resulting in a significant increase in the discharge of warmer water from the surface of the impoundments flowing downstream.

(ii) Under existing dam conditions, with penstocks or gates open, little or no water flows over the tops of the dams. Instead, the flow is drawn through the penstocks and gates that source at lower levels in the water column where temperatures are cooler.

(iii) Closing the flood gates and penstocks permanently is a significant redirection of flow that is likely to result in a drop in water quality downstream by way of higher water discharge temperatures, resulting in lower oxygen levels and more stress on aquatic species.

(iv) The higher temperatures due to this change in the direction of flow may also adversely impact the water quality at and below the discharge of the Kennebunk Sewer District down river from Kesslen due to increased temperatures and lower oxygen content, potentially impacting the entire Mousam River estuary.

(v) Permanently closing the penstocks will result in higher water elevations and flooding at impoundments during moderate and high flows. This could lead to bank erosion and added sediment to the river.

F. In sum, these actions suffice to constitute a discharge and trigger the Commission's obligation to require a WQC and to deny the surrender application or condition approval on the removal of the three dams. Indeed, failure to meet standards requisite to obtaining a WQC certificate from Maine DEP requires FERC to mandate dam removal as the only feasible mitigation measure.

6. DEP'S ILLOGICAL PROPOSAL REGARDING PENSTOCKS

A. During the public “consultation” with the resource agencies on March 2, 2021,²⁵ Kathy Howatt of Maine DEP referenced the DEP letter to AFH which concluded that based on AFH testing the impoundments at Dane Perkins and Twine Mill were not attaining Class B standards because of the failure to meet the DO standard. (We note that the DO problem is a consequence of the increased depth and volume resulting from the impoundment caused by the dams and the consequent accumulation of organic matter and the resulting increased residence time of the water, reduced aeration in the impoundments, and increased temperature creating metabolic demand on available oxygen.)

B. Ms. Howatt noted that the draft surrender plan calls for removal of the flash boards and closure of the penstocks at each of the dams and asked whether KLPD had considered leaving the flash boards in place and not closing the penstocks. Mr. David Cluff, the KLPD Board of Trustees President who chaired the consultation, indicated he was not aware of the reasons for the inclusion as to those items in the draft and indicated that KLPD would consider changing the draft plan as suggested by Ms. Howatt, who in her letter of March 10th stated that this change “**may** also have a positive impact on the downstream aquatic habitat and the macroinvertebrate community there.”²⁶

C. The use of the word “may” reveals that her proposal to revise the surrender plan to keep the penstocks open would not make any difference. The AFH tests examined by DEP were done when the penstocks were open, and that led to the DEP finding of non-attainment. Therefore, leaving the penstocks open after decommissioning will not

²⁵ The ZOOM call was initiated by KLPD on March 2, 2021; No public comment was permitted.

²⁶ Letter to Kimberly Bose, Secretary, FERC, from Kathy Howatt, Hydropower Coordinator, Maine DEP, March 10, 2021, FERC Accession # 20210310-5081.

improve DO over what the AFH tests revealed. In other words, it is illogical to assume that leaving the penstocks open would make any difference in DO as they were open when the tests were conducted by AFH and DO found deficient.

D. Should KLPD pursue Ms. Howatt's suggestion, it should be done in the context of a formal application for a 401 certificate to replace the original 1982 certificate given the subsequent changes in Maine law. In that connection, the Commission is reminded that AFH made no studies of the water quality in the Kesslen impoundment.

7. KLPD'S PRIOR WQC CONTAINS AN UPDATE CLAUSE

A On February 22, 1982, Maine DEP, in response to a request from Kennebunk Light and Power, considered an application for a water quality certification for the three existing hydroelectric power plants operated by KLPD on the lower Mousam River pursuant to Section 401 of the Act. Having observed that the Mousam River was at that time classified B-2 under then applicable Maine Water Quality standards (1982), the Department granted certification that the continued operation of the project would not violate then applicable standards.²⁷ However, and highly relevant in this proceeding, the 1982 certification specifically provides: "This certification is conditional upon the applicant's **continuing** compliance with all laws, statutes and regulations of the State of Maine . . .relating to protection of the environment." Paragraph 2, page 3. (Emphasis added.)

B. The proviso in the 1982 WQC is of decisional significance here, because after the certificate was issued, the classification of the Mousam River was changed from Class

²⁷ See FERC Accession # 19820226-032, February 22, 1982.

B-2 to Class B.²⁸ That change is important because during the brief AFH new license proceedings it submitted to the Commission the results of certain water quality studies requested by DEP. On January 9, 2020, DEP sent comments on the studies to AFH which stated:

Based on the results provided by the applicant in its Draft Water Quality Monitoring Report, the Department concludes that the applicant has provided sufficient information regarding [dissolved oxygen] DO in the Project area for the Department to conclude that the Dane Perkins and Twine Mill impoundments are not in attainment of Maine's Class B water quality standards for the designated use of habitat for fish and other aquatic species which requires sufficient habitat for indigenous species, including dissolved oxygen concentrations equal to or greater than 7.0 ppm. . . .No DO monitoring was conducted downstream of the Kesslen dam and so no determinations can be made that DO concentrations in those waters meet Maine's water quality criteria."²⁹ However, DEP did find from the data submitted by AFH that "Results of the modeling indicate that the benthic macroinvertebrate community downstream of the Twine Mill dam does not meet Class B aquatic life and habitat criteria."³⁰

C. In consideration of these findings, it is imperative that the Commission require that KLPD request a WQC from Maine DEP and assuming it is denied, the only permissible action is to condition any approval of the surrender application on the removal of the three dams. This is an equitable result because KLPD constructed the two dams that created the impoundments (Twine Mill and Dane Perkins) that failed to meet the current water quality standards around the date of the 1982 WQC. Removal is the most equitable remedy.

²⁸ See 38 MRSA 464-468. The new Class B requires among other criteria that oxygen levels attain 7 ppm, that the river support all indigenous species and that the river attain new aquatic life criteria.

²⁹ Letter to Ian Clark, AFH, from Kathy Howatt, Hydropower Coordinator, Maine Department of Environmental Protection, January 9, 2020, FERC Document Accession # 20200122-5036, at pages 3-4.

³⁰ Id. at 4. According to Susan Davies, Board Member, Maine Rivers and who served as Water Quality Standards and 305(b) Coordinator for the Maine Department of Environmental Protection from 2004-2010: "In fact, aquatic life standards are stand-alone criteria for purposes of 303(d) listing, the aquatic life criteria are not simply a surrogate for assessing attainment of DO criteria."

8. THE TWINE MILL AND DANE PERKINS DAMS AND SECTION 303(d)

A. The Mousam River above Kesslen is listed on Maine's section 303(d) list of nonattainment waters (Category 4-C) because it does not support aquatic life uses as required by Class B standards, 38 section 465.3.C. The presence of dams and the lack of fish passage is cited in the listing as a cause of non-attainment.³¹ Surrender standing in place as proposed by KLPD would perpetuate these documented violations of water quality standards. It is contrary to the public interest to perpetuate documented violations when there is an alternative to cure the problem as there is here. It would be arbitrary and capricious to fail to adopt the cure which is clearly evident: order the dams to be removed!

B. It is also significant that the Clean Water Act imperative to attain water quality standards should rest on KLPD since the standards would otherwise have to be achieved by imposing more restrictions on development upriver from the dams. Thus, the cost of attainment will not fall on KLPD, where it should, but on upriver homeowners and businesses. This can be averted by requiring removal of the dams and allowing the River to revert to free-flowing river conditions that would improve the water quality of the river. For example, removal and reversion to free flow would reduce the effects of the three impoundments such as warming the impounded water and adversely affecting dissolved oxygen; the aquatic insect community would no longer be impaired and anadromous fish species would be able to migrate throughout the entire project area.

³¹ See 2016 Integrated Water Quality Monitoring and Assessment Report, Appendices, "Category 4-C: Rivers and Streams with Impairment Not Caused by a Pollutant," page 116.

9. THE MOUSAM WITHOUT DAMS WOULD BE ACCESSABLE TO FISH

A. The draft Surrender plan argues that the fact that the project dams have been in place for many years is evidence that the surrender would have no environmental impact.³² We disagree because surrender in place would perpetuate the existence of a degraded environment. We submit that federal action that “perpetuates” a degraded environment that results from previous human activities would be unacceptable under NEPA as illustrated by the teaching of *American Rivers and Alabama River Alliance v. FERC*, No 16-1195 (D.C, Cir.2018).

B. There is another point that refutes the KLPD claim. When KLPD purchased the Twine Mill and Dane Perkins sites, the dams were breached and had been for many years. Therefore, the reconstruction of those dams by KLPD without fishways created the impoundments and the obstruction to a free-flowing river that created the conditions that led to the findings of non-attainment by DEP when it examined the AFH study results and the State of Maine determination to place the lower Mousam River on the 303(d) listing. Thus, from a baseline perspective, KLPD is responsible for the degradation of the Twine Mill and Dane Perkins impoundments and should bear the cost of removal.

10. THERE IS NO NATURAL BARRIER TO MIGRATING FISH

A. The record is clear that anadromous fish are present below the man-made barrier—the Kesslen dam—that blocks their migration into the spawning grounds that lie upstream. This is well summarized in the comments filed by Commissioner Keliher of the Maine Department of Marine Resources on March 12, 2021: “studies conducted by the Rachael

³² Draft Surrender Plan at 9-12.

Carson National Wildlife Refuge have documented the presence of six species of anadromous fish (alewife, blueback herring, American shad, rainbow smelt, Atlantic tomcod, and striped bass) and one catadromous species (American eel) in the Mousam River downstream of the Kesslen Dam. Historic habitat for most, if not all of these species extends past the most upstream project.”³³

B. The KLPD Draft application nowhere mentions this potential, but implicit in its arguments, and referenced by the Howatt March 10th letter, is the claim that ”KLPD’s environmental report indicates that the three Project dams were constructed on natural falls which blocked navigation and fish passage.”³⁴ This argument, that migratory fish could not access freshwater habitat if the dams were removed, is speculative and conclusively rebutted by historic documents and town histories.

C. Edward E. Bourne’s 1831 work is considered the most comprehensive early history of the Town of Kennebunk. He writes (p. 61):

Until (sic) as late as the year 1760, salmon had been very abundant in this river. Immense quantities of them were taken on their passage up the stream in the spring. They were never taken on their return in autumn, as they were then so poor as to be entirely unfit for consumption. As business began to increase on the river, and dams were built, without fish-ways, the salmon found it necessary to seek some other place of resort. Bass and shad were also very plenty in this stream. In the early ages of the town, great quantities were taken in weirs which were prepared in different places. The most noted place of taking them, was near the mouth of the river a few rods above what are called Harts rocks. The bass, after the settlement here began to increase, found that it was not very safe to attempt to navigate the Mousam, and discontinued their visits to it. But the shad, possessing more spirit, and a more deep rooted, and invincible attachment to the waters in which their ancestors had basked, perhaps from the fifth day of creation, have not even yet been quite drove off the ground, though they have had to maintain it, through trials, perils and difficulties.)³⁵

³³ Letter to Kimberly D. Bose, Secretary, FERC, from Patrick C Keliher, Commissioner Maine Department of Marine Resources, March 12, 2021, at 2 (filed in P-5362).

³⁴ Howatt letter at page 2.

³⁵ Bourne, Edward E., Ancient History of Kennebunk, Star Press Inc, 1970

D. To continue Bourne's study of the historical evidence of upstream access,

“The Mousam is eminently a salmon stream.” So begins the assessment of the Mousam River in the First Report of the Commissioners of Fisheries of the State of Maine, published in 1867 (p. 26-7). The report continues: “When unobstructed its whole extent nearly, must have been suitable spawning ground for salmon... The natural aspect of the river promises salmon, and tradition accords with it.”

E. In the History of Sanford, Maine, the author notes controversy over a petition to establish fish passage on the Mousam (p. 170). The text includes a communication from an old resident published in the Sanford News some years ago, in which he says that in his boyhood days, when fishing in the river between the mills and Butler's bridge, “once in a while, I used to catch what ' we boys ' called a ' red-meated shiner.' They were usually about a foot long, bright light color, meat red as a cherry, and would weigh from a pound to a pound and a half. At that time, I had never, that I know of, seen a salmon ; but since then, having seen them by the hundreds just as they came out of the water, I have become entirely satisfied the 'red-meated shiners' we used to catch were nothing more or less than young salmon. This opinion is backed up by other boys of Sanford.”³⁶

G. Another report published in Maine Naturalist states that “John Josselyn, who lived in Massachusetts and in Wells, Maine, prior to 1670, reported that ‘basse’ were taken when they came up the rivers to spawn” and cites the Mousam River as one of the rivers from

³⁶ Edwin Emery and William Morrill Emery, The History of Sanford, Maine. 1661-1900, The Salem Company, Salem , Massachusetts, 1901)

Cape Cod to Maine that had sizeable runs of striped bass during the Spring spawning time.”³⁷

H. These reports then refute the implication that anadromous fish would not be able to migrate up the River if the dams at the Project were removed.

11. BENEFIT COST ANALYSIS IRREFUTABLY FAVORS DAM REMOVAL

A. The Commission traditionally utilizes benefit cost analysis in the relicensing procedure. We submit that BCA is equally applicable in the assessment of surrender applications ³⁸ and that in this proceeding there is clearly zero benefit that would result in the event the Commission were to grant the stand in place proposal of KLPD, but by the same token there would be an enormous cost to the public interest which would be alleviated by conditioning approval of the surrender application on removal of the three dams. While those benefits are not readily quantifiable, their value is sufficiently obvious that it must be taken into account. The benefits include:

B. The economic value of increased alewife and blueback herring (collectively “river herring”) populations that will result from dam removal. River herring are known to readily populate spawning grounds made accessible by dam removal. Following removal of the Fort Halifax dam on the Sebasticook River just above the confluence with the Kennebec River, the river herring migration past the former dam site increased from zero to the millions in just a few years.³⁹ On the Mousam, river herring access to the water

³⁷ Little, Michael J., “A Report on the Historic Spawning Ground of the Striped Bass, Maine Naturalist 1995, pages 107-113.

³⁸ See Rethinking Hydropower: The Economics and Politics of Privately Owned Hydropower in the United States, Lynne Y. Lewis, Department of Economics, Bates College, <https://doi.org/10.1093/acrefore/9780199389414.013.691>, 17 December 2020.

³⁹ Maine Rivers Alewife Map; www.mainerivers.org.

shed above the Kesslen dam would provide a source of lobster bait of significant value, not to mention the ecological value of these diadromous fish to the quality of the water.

C. KLPD's application dismisses the sport fishing opportunities in the impoundments, but clearly a free running riverine environment would support and restore a substantially increased population of American shad in the spring migration (they are present in large numbers below Kesslen at present). FERC's recreation staff has recently begun to utilize the economics of recreation associated with FERC hydro regulation.⁴⁰ In the case of the Mousam which is located in a major tourist market, a viable sport fishery would be of obvious value and benefit. According to Jonathan Larrabee, Kennebunk, Maine; "As a registered Maine Guide and a manufacturer of fly-fishing equipment in Biddeford, there is nothing more that I would like to do than take clients to the Mousam River and fish for sea-run trout, striped bass or shad if the habitat can be restored."⁴¹ Already, the Mousam is a popular destination for striped bass, shad, and sea-run trout angling downstream of the Kesslen dam.⁴²

D. Property values, as indicated in the previous section of this comment, would likely increase as a result of dam removal.

E. Another benefit would be the potential for delisting from the section 303(d) nonattainment listing and the avoidance of costs to upstream property owners and businesses.

⁴⁰ Lewis, note 17 *supra*.

⁴¹ Comment of Jonathan Larrabee, FERC Accession # 20210518-5020, May 18, 2021.

⁴² See Comment of Kenneth DeCoster, FERC Accession # 20210518-05/18/2021: "Economic benefits [of removal] would include more commercial bait fish and sport fishing as well as recreational kayaking."

12. KLPD'S COST OF DAM REMOVAL ARE NOT GERMANE TO BCA

As we have emphasized, KLPD has had the free use of the Mousam River flow as the primary “raw material” in the production of electricity for a number of years. Without that flow, the generating equipment and dam structures would have been valueless as a source of electricity. An apt analogy would be a sawmill without trees to cut into lumber unless it purchases timber at market prices. But unlike a sawmill operator, KLPD has not had to pay for the input it used to produce electricity pursuant to an exclusive license granted by FERC. Moreover, and again unlike a sawmill operator, KLPD has been exempt from all taxes on its profitable operations.⁴³

SUMMING UP

The Benefit Cost Analysis is clear: there are zero public benefits and large, indeed enormous, benefits to dam removal and that makes imperative the conditioning of approval of the surrender application on the removal of all three dams and deferring final action on the application pending certification of removal.

Respectfully Submitted,

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FOR ADDITION TO SECRETARY'S SERVICE LIST

⁴³ See note 14, supra (KLPD Financials)

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.CERTIFICATE OF SERVICE

I hereby certify that I Have caused the foregoing document to be sent electronically to each person on the service list compiled by the Secretary and to tfrisets@preti.com on May 19, 2021

/S/ Charles Owen Verrill, Jr.