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Hydro News does not address all requirements that may apply to any particular hydropower development, and should not be acted upon without specific legal advice developed on a facility-specific basis.

If you have any questions about any of these developments, please contact Matt Manahan at mmanahan@pierceatwood.com or 207-791-1189, or Sarah Verville at sverville@pierceatwood.com or 207-791-1371.

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American Eel Passage Issues Continue To Gain Momentum

Endangered Species Listing Petition

In December we reported that on November 18, 2004, a petition to list the American eel as an endangered species under the Endangered Species Act had been filed with NOAA Fisheries and the U.S. Fish and Wildlife Service. Theoretically, the agencies had 90 days from the date of filing the petition to issue a finding on whether listing the American eel as threatened or endangered may be warranted, and they have one year to decide whether to propose a rule to provide endangered species protection for American eel. Needless to say, the deadline for the "90-day finding" has long passed. Recently, we have learned that USFWS, which is taking the administrative lead on the ESA petition, anticipates issuing its "90-day" finding in July.

ASMFC Recommendations

In the meantime, the American Eel Technical Committee of the Atlantic States Marine Fisheries Commission has recommended that the American eel should require eel passage facilities, including the possibility of suspension of hydropower operations for downstream passage, as a condition of relicensing hydroelectric projects. The recommendation is contained in ASMFC's Public Information Document, which can be found at www.asmfc.org. ASMFC has requested public comment on the PID. Public comments are due by June 10.

In a discussion on the issue of American eel passage at hydro projects at ASMFC's February meeting, a representative from USFWS stated that if the American eel is listed as endangered, then USFWS would have to work with other federal agencies to reduce the take of American eel to the maximum extent practicable. "The dams won't necessarily disappear, but they may change in their features," said that USFWS representative.

Benton Falls Project

The Friends of Merrymeeting Bay organization in Maine is continuing to push FERC to order turbine shutdowns at the Benton Falls Project on the Sebasticook River from dusk to dawn for the period September 15 to November 15. On April 19, 2005, Maine Congressman Tom Allen wrote FERC on FOMB's behalf, urging a response from FERC.

D.C. Circuit Decision

On May 10, in an unpublished decision, the U.S. Court of Appeals for the District of Columbia Circuit Court denied S.D. Warren Company's petition for review of USFWS's Section 18 prescription requiring installation of upstream eel passage at Warren's projects on the Presumpscot River in Maine and shutdown of the projects' turbines for an eight-week period every fall to protect downstream eel migration. Warren had challenged the

sufficiency of the evidence in the record to support USFWS's Section 18 prescriptions. With little discussion or detailed review of the record, the D.C. Circuit found that there was sufficient record evidence to support the prescriptions.

In a Split Decision, FERC Refuses to Take a Stand on Section 401 Water Quality Certification

On April 19, in a 2-1 decision, FERC refused to find that the Maine Department of Environmental Protection had waived water quality certification for FPL Energy's Flagstaff Project. FERC issued a new license for the Project in March 2004. In July 2004, while a request for rehearing on a minor and unrelated issue was pending, however, FERC stayed the effectiveness of the new license because the Maine Board of Environmental Protection had overturned the water quality certification for the Project. FPLE has filed suit in state court challenging the Board's reversal.

FPLE requested rehearing of FERC's stay of the license, requesting FERC to find, among other things, that MDEP had waived water quality certification because it had failed to act within one year, as required by the Clean Water Act. The company argued that while the MDEP Commissioner had issued a water quality certification within one year, the MDEP Board's reversal of the certification after the one-year deadline resulted in waiver of certification because the MDEP failed to take final action within the one-year deadline. FERC ruled that the MDEP Commissioner's initial certification within the one-year deadline was sufficient to avoid waiver, and FERC stated that it was up to state courts to rule on the impact of the Board's revocation of the water quality certification after the one-year deadline.

In a strongly worded dissent, Chairman Wood stated that FERC's decision makes "a mockery of the one-year deadline." Wood noted that FPLE filed and withdrew its certification request seven times, "presumably under threat that if it did not do so, the Maine board would deny the request."

Commissioner Kelliher also lamented Maine's delay in denying certification. Unfortunately, however, Kelliher nonetheless voted to uphold the stay of FERC's license.

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