

**COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

In the Matter of)

Bear Swamp Power Company LLC)

) Docket No. 2020-020

) Florida, MA
)
)
)
)

SETTLEMENT AGREEMENT

I. The Parties

1. The Department of Environmental Protection (“the Department”) is a duly constituted agency of the Commonwealth of Massachusetts, established pursuant to M.G.L. c. 21A, § 7, with a principal office located at One Winter Street, Boston, Massachusetts 02108.
2. Bear Swamp Power Company LLC (“BSPC”) is a Delaware limited liability corporation, with a principal place of business at 200 Liberty Street, 14th Floor, New York, NY 10281.
3. Trout Unlimited (“TU”) is a 501(c)(3) qualified Michigan corporation with a principal place of business at 1777 N. Kent Street, Arlington, VA 22209. TU is acting by and through its Deerfield River Watershed Chapter of Trout Unlimited, Inc., with a mailing address of Deerfield River Watershed Chapter of Trout Unlimited, Inc., c/o Michael Vito, 28 Beattie Drive, Florence MA 01062.
4. Collectively, the Department, BSPC, and TU will hereinafter be referred to as “the Parties.”
5. The Massachusetts Division of Fisheries and Wildlife (MassWildlife) and the Natural Heritage and Endangered Species Program (NHESP) acted as the Department’s biological experts regarding fisheries, wildlife, and state-listed species on the Water Quality Certificate that is the subject of this Settlement Agreement, but are not parties.

II. Background

6. On March 25, 2018, BSPC filed an application (Tr. No. X282682) with the Department requesting a Water Quality Certificate pursuant to Section 401 of the Federal Clean Water Act, 33 U.S.C. Section 1341, in connection with a proceeding before the Federal Energy Regulatory Commission (“FERC”) to relicense the Company’s Bear Swamp Project (“Project”) located in Florida, Massachusetts, under the provisions of the Federal Power Act (“FPA”).
7. On March 23, 2020, the Department denied BSPC’s application for a Water Quality Certification (“the “Denial”).
8. On April 13, 2020, BSPC timely appealed the Denial. The appeal was assigned Docket Number OADR 2020-20. TU timely filed a request to intervene, which the Presiding Officer granted. In a May 28, 2020 Prehearing Conference and Order, the Presiding Officer noted the Parties’ strong mutual desire to resolve the appeal through alternate dispute resolution, and stayed the appeal until August 26, 2020, which the Presiding Officer subsequently extended to October 30, 2020, January 29, 2021, April 30, 2021, July 31, 2021, September 30, 2021, November 30, 2021, January 7, 2022, and finally January 24, 2022.
9. The Parties intend this Settlement Agreement (“Agreement”) and the attached Section 401 Water Quality Certification (“401 WQC”) to resolve all issues in Docket Number OADR 2020-20, as well as to resolve any issues regarding the issuance or contents of a Section 401 Water Quality Certificate, and agree on the proposed 401 WQC for the Project that will be issued upon the Commissioner’s issuance of a Final Decision approving this Agreement and the 401 WQC.

10. The Parties acknowledge that portions of this Agreement and the 401 WQC are based on the current inflows to the Project from the immediately upriver hydroelectric facility, which BSPC does not currently own or control. Furthermore, the Parties acknowledge that the terms and conditions of this Agreement and the proposed 401 WQC are a comprehensive and integrated set of indivisible measures to address issues within the scope of Section 401 of the Clean Water Act.

III. Settlement Agreement

11. The Parties voluntarily enter into this Agreement because each has mutually agreed that settlement of this matter without costly and protracted litigation is in the best interest of the citizens of the Commonwealth of Massachusetts and of the Parties and that execution of this Agreement without such litigation is the most appropriate means of resolving this matter.
12. This Agreement settles and releases all claims of the Parties raised in Docket Number OADR 2020-20 or otherwise with respect to the 401 WQC, except as expressly provided herein.
13. BSPC agrees to comply with the applicable requirements of the Massachusetts Endangered Species Act (M.G.L. c. 131A) and its implementing regulations (321 CMR 10.00), collectively "MESA." The 401 WQC incorporates specific conservation measures (Paragraphs 5, 7, 8, 9 and 11) to address impacts to state-listed species, which MassWildlife has indicated are consistent with MESA. MassWildlife has provided to the Parties copies of an unsigned letter to BSPC confirming that no further MESA review will be required regarding the activities permitted by the 401 WQC provided that BSPC adheres to the conditions as drafted in this Settlement Agreement, the 401 WQC, and FERC's final license. MassWildlife has indicated to the Parties that, within 10 days of the signing by the Parties of this Agreement, MassWildlife will provide a signed copy of that letter to the Parties. The

Department will include the signed letter as Exhibit A to this Agreement when it submits the Agreement and the 401 WQC to the Office of Appeals and Dispute Resolution for approval pursuant to Paragraph 15 of this Agreement. This Agreement is contingent on the provision by MassWildlife of the signed letter and the inclusion of the letter when the Agreement is submitted to the Office of Appeals and Dispute Resolution for approval.

14. The Parties agree to submit this Agreement and 401 WQC for approval as required by 310 CMR 1.01(8)(c) and to the issuance of a Final Decision incorporating this Agreement and the proposed 401 WQC. If the Commissioner approves the Agreement and the 401 WQC, the Commissioner shall issue in writing a Final Decision incorporating the Agreement and 401 WQC. The Parties acknowledge that any Final Decision incorporating this Agreement and 401 WQC shall not be subject to 310 CMR 1.01(14)(b). If the Commissioner does not approve or modifies any part of the Agreement or 401 WQC, the Parties shall confer in good faith to assess the changes. Furthermore, BSPC retains its rights to challenge the 401 WQC (as modified by the Commissioner) notwithstanding anything in this Agreement to the contrary.
15. Upon the Commissioner's issuance of a Final Decision incorporating the Agreement and 401 WQC, the Parties hereby agree to waive whatever rights they have to further administrative review before the Department and not to appeal the Final Decision in OADR 2020-20 to any Court.
16. Although the 401 WQC, when issued by the Department, may be appealable by certain persons with standing, no Party will appeal the 401 WQC, nor shall they encourage others to do so, nor shall they participate in any proceeding on BSPC's current license application

before the FERC, or relating to the FERC process, in a manner inconsistent with this Agreement and the 401 WQC.

17. Communication of Recreational Flows and Recreation Safety. BSPC will comply with any conditions in its FERC license relating to Recreation Safety, including communication of flows to recreational users. The Parties may participate in the FERC process as it relates to the development of a Recreation Safety Plan.
18. No provision of this Agreement (including the 401 WQC) shall be construed to create, diminish or otherwise change (i) any legal or equitable right of the Department to enforce this Agreement or (ii) BSPC's legal or equitable rights to defend, oppose or otherwise participate in any matter or proceeding arising from the Department's enforcement of this Agreement under subparagraph (i) above.
19. This Agreement constitutes the entire understanding and agreement between the Parties with respect to the subject matter of this Agreement.
20. The provisions of this Agreement and any amendments hereto shall be binding upon the Parties and on their successors in interest.
21. This Agreement shall be construed and interpreted in accordance with the laws of the Commonwealth of Massachusetts.
22. This Agreement may be executed in counterparts, each of which when executed and delivered to the Department (in hard copy or as an electronic facsimile) shall be an original. All counterparts shall constitute one and the same instrument.
23. The Department does not assume any liability for any agreement or other binding obligation entered into by or on behalf of BSPC in performing the actions and undertaking the responsibilities assigned to BSPC by this Agreement.

24. Each signatory to this Agreement certifies by their signature below that they are duly authorized to execute this Agreement and legally bind their respective parties.

IN WITNESS WHEREOF, the Parties have duly executed this Agreement.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

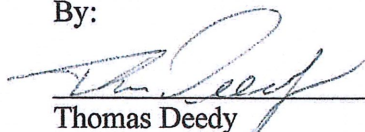
By:

Kathleen M. Baskin
Assistant Commissioner, Bureau of Water Resources

Date

BEAR SWAMP POWER COMPANY LLC

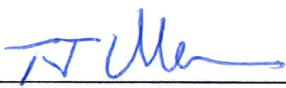
By:



Thomas Deedy
President

1-12-22

Date



Thomas Uncher
Vice President

1/12/22

Date

TROUT UNLIMITED

By:

Keith Curley
Vice President

Date

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DEPARTMENT OF ENVIRONMENTAL PROTECTION

By:

Kathleen M. Baskin
Assistant Commissioner, Bureau of Water Resources

Date

BEAR SWAMP POWER COMPANY LLC

By:

Thomas Deedy
President

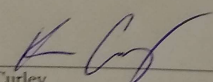
Date

Thomas Uncher
Vice President

Date

TROUT UNLIMITED

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Date

1/12/2022

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Assistant Commissioner, Bureau of Water Resources

1-12-2022

Date

BEAR SWAMP POWER COMPANY LLC

By:

Thomas Deedy
President

Date

Thomas Uncher
Vice President

Date

TROUT UNLIMITED

By:

Keith Curley
Vice President

Date

EXHIBIT A



MASSWILDLIFE

DIVISION OF FISHERIES & WILDLIFE

1 Rabbit Hill Road, Westborough, MA 01581

p: (508) 389-6300 | f: (508) 389-7890

[MASS.GOV/MASSWILDLIFE](https://www.mass.gov/masswildlife)

January 14, 2022

Thomas Uncher
Bear Swamp Power Company, LLC
399 Big Bay Road
Queensbury, NY 12804

Applicant: Bear Swamp Power Company, LLC ("BSPC")
Project Location: Along the Deerfield River in Berkshire and Franklin Counties, Bear Swamp Pumped Storage Project and FERC Project Area
Project Description: FERC Relicensing of Bear Swamp Hydroelectric Project, Deerfield River ("Project"), FERC P-2669
NHESP Tracking No.: 14-33730

Dear Mr. Uncher:

The Natural Heritage & Endangered Species Program of the Massachusetts Division of Fisheries & Wildlife ("MassWildlife") received a MESA Review Checklist and supporting documentation for review pursuant to the Massachusetts Endangered Species Act ("MESA"; M.G.L. c. 131A and implementing regulations 321 CMR 10.100) for the Bear Swamp Power Company Project on March 26, 2019. In response, MassWildlife requested additional information on April 25, 2019.

After MassWildlife issued its April 25, 2019 letter, BSPC has worked with the Massachusetts Department of Environmental Protection ("MassDEP") toward issuance of a Section 401 Water Quality Certificate for the Project (DEP Office of Appeals and Dispute Resolution Docket No. 2020-020) pursuant to M.G.L. c. 21, § 27(3). MassWildlife reviewed, approves, and will not appeal or otherwise challenge the Settlement Agreement signed on January 12, 2022 and accompanying Section 401 Water Quality Certificate to be submitted by MassDEP, BSPC and Trout Unlimited to the Office of Appeals and Dispute Resolution's Presiding Officer. MassWildlife also reviewed, approves, and will not appeal or otherwise challenge the following plans (collectively, "Management Plans") consistent with BSPC's Final License Application ("FLA") filed with the Federal Energy Regulatory Commission ("FERC") on March 30, 2018 and the recommendations in the Final Environmental Assessment dated July 31, 2020: State-listed Bat Management Plan, Bald Eagle Management Plan, Invasive Plant Species Monitoring and Management Plan, Invasive Aquatic Wildlife Species Monitoring and Management Plan, and the State-Listed Rare Plants Management Plan.

In addition, the Settlement Agreement as signed on January 12, 2022, and the accompanying Section 401 Water Quality Certificate (to be submitted to the Presiding Officer) and Management Plans collectively satisfy MassWildlife's April 25, 2019 request for additional information. The Project may proceed without further review or approval (including but not limited to a Conservation and Management Permit) provided that BSPC adheres to the conditions contained in the aforementioned documents, as well as FERC's Final License and provided that there are no changes in the final Section 401 Water Quality Certificate issued by MassDEP from the version of the Section 401 Water Quality Certificate accompanying the Settlement Agreement signed on January 12, 2022. Should FERC's Final License change any conditions of the aforementioned documents

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relating to MESA, MassWildlife reserves the right to reassess whether the Project can still proceed without further review. Upon issuance of the Final License, MassWildlife will continue to coordinate with BSPC during implementation of the Management Plans.

We note that filings with MassWildlife pursuant to MESA are required for certain projects or activities involving future, physical work within *Priority Habitat*. Examples include, but are not limited to, ground disturbance/blasting, tree cutting, right of way or other utility-related operations and maintenance, construction of recreational facilities or enhancements, and expansion or maintenance of existing recreation trails or facilities. Some projects or activities may be exempt pursuant to 321 CMR 10.13 and 10.14 and should follow the standards therein.

If you have any questions regarding this letter, please contact Jesse Leddick, Chief of Regulatory Review, at (508) 389-6386 (jesse.lednick@mass.gov).

Sincerely,

A handwritten signature in black ink, reading "Everose Schlüter". The signature is fluid and cursive, with the first name "Everose" and last name "Schlüter" clearly distinguishable.

Everose Schlüter, Ph.D.
Assistant Director

cc: Massachusetts Office of Appeals and Dispute Resolution, In the Matter of Bear Swamp Power
Company LLC, OADR Docket No. 2020-020.
 Town of Florida Conservation Commission
 Town of Rowe Conservation Commission

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