

UNITED STATES OF AMERICA 79 FERC ¶61,009  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Elizabeth Anne Moler, Chair;  
Vicky A. Bailey, James J. Hoecker,  
William L. Massey, and Donald F. Santa, Jr.

New England Power Company                    )                    Project No. 2669-004

ORDER AMENDING LICENSE

(Issued April 4, 1997)

New England Power Company (New England Power), in an Offer of Settlement (Settlement) filed with the Commission on October 6, 1994, in the relicensing proceeding for its Deerfield River Project No. 2323, proposes changes to its Bear Swamp Pumped Storage Project No. 2669. 1/ For the reasons discussed below, we are construing the Settlement as a proposal by New England Power to amend the terms of the Bear Swamp license, and are amending the license accordingly.

BACKGROUND

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1/ Concurrently with this order, we are issuing an order approving the Settlement and issuing a new license for the Deerfield River Project No. 2323. Our approval of the Settlement is premised on implementation of the proposed changes in the operation of the Bear Swamp Project, as described in this order.

The 610-megawatt Bear Swamp Pumped Storage Project is located on the Deerfield River in Franklin and Berkshire Counties, Massachusetts. 1/ Fife Brook Dam, which impounds the lower reservoir for and is part of the Bear Swamp Project, is located on the Deerfield River between the Deerfield No. 5 and Deerfield No. 4 developments of the Deerfield River Project No. 2323, which has 8 developments.

On October 6, 1994, New England Power filed with the Commission a settlement agreement covering a wide range of issues in the Project No. 2323 relicensing proceeding and signed by New England Power and twelve parties in that proceeding, including federal and state resource agencies and various environmental and recreational citizens groups. The settlement included measures that New England Power agreed to implement at its Bear Swamp Project. These conditions require: (1) an increase in the minimum flow release from Fife Brook Dam to 125 cubic feet per second (cfs), with flows guaranteed from storage; (2) whitewater releases from Fife Brook Dam on 50 weekend days and 56 weekdays annually; (3) implementation of New England Power's Comprehensive Recreation Plan filed with the Commission on September 30, 1993, in the Deerfield River Project No. 2323 relicensing proceeding, as it applies to the Bear Swamp Project; and (4) grants of conservation easements to protect scenic, forestry, and natural resources on 1,056 acres of land currently included in the Bear Swamp Project boundary and on 201 acres of land down river from the Fife Brook Dam that New England Power would add to the Bear Swamp Project boundary.

On June 14, 1996, the Commission issued notice that the Settlement conditions concerning the Bear Swamp Project would be considered a request by New England Power to amend the license for that project. In its response to the notice, filed July 26, 1996, New England Power requested that the notice be rescinded. New England Power argued that it had not applied to amend the Bear Swamp license, and argued that an amendment is unnecessary for implementation of the Settlement. New England Power stated that the 125 cfs minimum flow release from Fife Brook Dam exceeds the minimum flow required by Article 45 of the Bear Swamp license, and that nothing in the license restricts New England

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2/ New England Power was issued the license for the Bear Swamp Project on April 28, 1970. 43 FPC 568 (1970).

Power's ability to voluntarily release flows in excess of the present requirements. It also contended that recreation improvements could be handled through the filing of a revised Exhibit R (recreation plan) for Bear Swamp.

New England Power also argued that a license amendment for Bear Swamp would place burdens and costs on it beyond those agreed to in the Settlement, in that any programmatic agreement for protection of cultural resources will result in unanticipated costs

The U.S. Department of the Interior filed a timely motion to intervene in this proceeding, stating that it fully supports the proposed amendment. American Rivers, American Whitewater Affiliation, Appalachian Mountain Club, Conservation Law Foundation, Deerfield River Compact, Deerfield River Watershed Association, and Trout Unlimited jointly filed a timely motion to intervene. These citizens groups do not oppose the Commission's proposal to amend the Bear Swamp license to reflect the specific elements of the Settlement, but support the licensee in its objection to being required to undertake a programmatic agreement in any such amendment.

The proposed changes to the Bear Swamp Project were examined in the Deerfield River Basin final Environmental Impact Statement (EIS), issued August 23, 1996, which is incorporated herein by reference.

**DISCUSSION**

The Settlement negotiated by New England Power and 12 state and federal resource agencies and non-government organizations, provides the terms and conditions for the resolution of issues regarding fisheries, fish passage, wildlife, water quality, project lands management and control, recreation, and aesthetic resources raised by the parties in the Deerfield River Project No. 2323 relicensing proceeding. The proposed changes in operation of the Bear Swamp Project, particularly the increase in minimum flows and the whitewater releases, are integral and significant components of the Settlement, on which the Commission has relied in its decision to grant a new license to the Deerfield River Project. In this circumstance, while the Bear Swamp project license may not preclude New England Power from carrying out the Bear Swamp aspects of the settlement agreement, those aspects must become license conditions, in order that the Commission can enforce this component of the public interest/comprehensive development determination that it made when approving the settlement.

The amendment will not affect historic properties. The conservation easements will not involve ground-disturbing activity, and the recreation plan may not be implemented until after the Commission approves it. To ensure protection for any historic properties that may be discovered during implementation of the recreation plan, we are including Article 403 in the license. Article 403 requires the licensee to take action only if previously unidentified historic properties, such as archeologic sites, are discovered in the course of constructing or improving recreational facilities at the Bear Swamp Project.

The Commission orders:

(A) The following articles are added to the license for the Bear Swamp Pumped Storage Project No. 2669:

Article 401. The Licensee shall release from the Fife Brook Dam into the Deerfield River a minimum flow of 125 cubic feet per second (cfs) as measured below the dam, for the protection and enhancement of fishery resources of the Deerfield River. The Licensee shall release water from reservoir storage, if necessary, to ensure that the minimum flow of 125 cfs is met.

This flow may be temporarily modified if required by operating emergencies beyond the control of the Licensee, or for short periods upon agreement between the Licensee and the Massachusetts Division of Fisheries and Wildlife. If the flow is so modified, the Licensee shall notify the Commission as soon as possible, but not later than ten days after each such incident.

Article 402. The Licensee shall, within 180 days of the issuance date of this order, file with the Commission, for approval, a supplement to the Comprehensive Recreation Plan filed with the Commission on September 30, 1993, in the Deerfield River Project No. 2323 relicensing proceeding, as it applies to the Bear Swamp Pumped Storage Project.

The supplemental plan shall include: (1) appropriate erosion and sediment control measures and measures for revegetation for land-clearances and ground-disturbances associated with improvements to existing and construction of any new recreational facilities; and (2) provisions for regularly-scheduled monitoring and maintenance for all recreational use areas at the project.

The Licensee shall prepare the supplemental plan after consultation with the National Park Service, the Massachusetts Department of Environmental Management, Vermont Agency of Natural Resources, and the National Resources Conservation Service. The Licensee shall include with the supplemental plan documentation, consultation, copies of comments and recommendations on the supplement after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the supplement to the Comprehensive Recreation Plan. The Licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the supplemental plan with the Commission. If the Licensee does not adopt a recommendation, the filing shall include the Licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the supplemental plan. No land-disturbing or land-clearing activities for recreation facilities shall begin until the Licensee is notified by the Commission that the supplemental plan is approved. Upon Commission approval, the Licensee shall implement the supplemental plan, including any changes required by the Commission.

Within six months from the completion of these facilities, the Licensee shall file with the Commission, for approval, the as-built drawings, which shall include the identity of the entity responsible for operation and maintenance of the facilities.

Article 403. If the Licensee discovers previously unidentified historic (e.g., archeological) properties during the course of constructing or improving recreational facilities at

the Bear Swamp Pumped Storage Project which result from the proposals contained in the Offer of Settlement for the Licensee's Deerfield River Project No. 2323, filed October 6, 1994, the Licensee shall stop all land-clearing and land-disturbing activities in the vicinity of the properties and consult with the State Historic Preservation Officer (SHPO).

Following such consultation with the SHPO, the Licensee shall file for Commission approval a cultural resources management plan prepared by a qualified cultural resource specialist. The plan shall include the following items:

- (1) a description of each discovered property indicating whether it is listed in or eligible to be listed in the National Register of Historic Places;
- (2) a description of the potential effect on each discovered property;
- (3) proposed measures for avoiding or mitigating effects;
- (4) documentation of the nature and extent of consultation; and
- (5) a schedule for mitigating effects and conducting additional studies.

The Commission reserves the right to require changes to the plan. The Licensee shall not resume land-clearing or land-disturbing activities in the vicinity of an historic property discovered during construction or improvement until informed by the Commission that the requirements of this article have been fulfilled.

Article 404. The Licensee shall, within 180 days of the issuance date of this order, file with the Commission, for approval, a plan to implement the releases from Fife Brook Dam for whitewater boating agreed to in the October 6, 1994 Offer of Settlement in the Deerfield River Project No. 2323 relicensing proceeding.

The plan shall provide for whitewater releases from the dam at a minimum flow level of 700 cubic feet per second, for a duration of at least three continuous hours starting any time between the hours of 9:30 a.m. and 12:00 p.m., accordingly to the following monthly schedule, for 50 weekend days and 56 weekdays from April 1 to October 31 annually:

Month

Allocation

|           |                                                                                                                                                     |
|-----------|-----------------------------------------------------------------------------------------------------------------------------------------------------|
| April     | 3 weeks of Wednesday through Sunday releases.                                                                                                       |
| May       | 2 weeks of Wednesday through Sunday releases, plus<br>2 weeks of Saturday and Sunday releases.                                                      |
| June      | 2 weeks of Wednesday through Sunday releases, plus<br>2 weeks of Saturday and Sunday releases.                                                      |
| July      | 3 weeks of Wednesday through Sunday releases, plus<br>1 week of Saturday and Sunday releases.                                                       |
| August    | 4 weeks of Thursday through Sunday releases.                                                                                                        |
| September | 3 weeks of Wednesday through Sunday releases.                                                                                                       |
| October   | 3 weeks of Wednesday through Sunday releases.                                                                                                       |
| Holidays  | May be substituted for weekend days upon agreement<br>between the Licensee and the citizens groups<br>specified below, before April 1 of each year. |

The plan shall include provisions for: the Licensee to meet with representative citizens groups, including New England FLOW, before January 1 of each year to cooperatively develop the whitewater release schedules for the coming summer; issuance of the annual schedule by April 1 of each year following further consultation with these citizens groups; and cooperation between the Licensee and these citizens groups to disseminate the release schedule to the public.

The plan shall include provisions for a flow information telephone line providing recorded river flow information, including current conditions and anticipated release schedules, to be updated at least daily by the Licensee during the whitewater boating season.

The plan shall include provisions for reduction in whitewater flow releases due to natural low conditions, including the Licensee's consultation with representative citizens groups to cooperatively arrive at a reduced schedule, notification to the public of any such change in the schedule, and rescheduling of canceled release dates as additional release dates over the next two years.

The Commission reserves the right to require changes to the plan. Upon Commission approval, the Licensee shall implement the plan, including any changes required by the Commission.

**Article 405.** The Licensee shall, within 90 days from the issuance date of this order, file with the Commission for approval a detailed plan for the License's participation in the conservation easement program set forth in Section V of the October 6, 1994 Offer of Settlement in the Deerfield River Project No. 2323 relicensing proceeding, for the protection of scenic, forestry, and natural resources on 1,056 acres of land currently included in the Bear Swamp Pump Storage Project boundary and on 201 acres of land downriver of the Fife Brook dam that the Licensee shall add to the Bear Swamp Pump Storage Project boundary, as shown on the map attached as Appendix B to the Offer of Settlement. The plan shall include a revised Exhibit K showing the new project boundary.

The plan shall provide for the continued use of the property for forestry, educational, non-commercial recreation, open space, and electric transmission and generation purposes; and for timber management by the Licensee on the conservation easements in accordance with the Forest Management Guidelines attached as Appendix C to the Offer of Settlement.

The Commission reserves the right to require changes to the plan. Upon Commission approval, the Licensee shall implement the plan, including any changes required by the Commission.

(B) This order is final unless a request for rehearing is filed within 30 days of the date of issuance of this order, pursuant to Section 313 of the Federal Power Act.

By the Commission.

( S E A L )

Lois D. Cashell,  
Secretary.