

**ORAL ARGUMENT IS SCHEDULED FOR APRIL 21, 2005**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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**No. 04-1105**

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**S.D. WARREN COMPANY,  
PETITIONER,**

**v.**

**FEDERAL ENERGY REGULATORY COMMISSION,  
RESPONDENT.**

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**ON PETITION FOR REVIEW OF ORDERS OF THE  
FEDERAL ENERGY REGULATORY COMMISSION**

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**BRIEF FOR RESPONDENT  
FEDERAL ENERGY REGULATORY COMMISSION**

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**FEBRUARY 18, 2005**

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## GLOSSARY

cfs	cubic feet per second
DEIS	draft environmental assessment
DO	dissolved oxygen
Dundee Order	<i>S.D. Warren Co.</i> , 105 FERC ¶61,009 (2003)
FEIS	final environmental assessment
FPA	Federal Power Act
FWS	Fish and Wildlife Service
Gambo Order	<i>S.D. Warren Co.</i> , 105 FERC ¶61,010 (2003)
Interior	Department of Interior
Little Falls Order	<i>S.D. Warren Co.</i> , 105 FERC ¶61,012 (2003)
Mallison Falls Order	<i>S.D. Warren Co.</i> , 105 FERC ¶61,011 (2003)
MDEP	Maine Department of Environmental Protection
Rehearing Order	<i>S.D. Warren Co.</i> , 106 FERC ¶ 61087 (2004)
Saccarappa Order	<i>S.D. Warren Co.</i> , 105 FERC ¶61,013 (2003)
S.D. Warren	Petitioner S.D. Warren Company
SMP	shoreline management plan
WQC	Maine's water quality certificate

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**BRIEF OF RESPONDENT  
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**STATEMENT OF THE ISSUES**

1. Whether, consistent with Federal Power Act (“FPA”) Section 18, 16 U.S.C. §811, the Commission appropriately conditioned Petitioner’s licenses to operate and maintain its projects on the prescriptions submitted by the Secretary of the Interior.
2. Whether, consistent with Clean Water Act Section 401, 33 U.S.C. §1341, the Commission appropriately conditioned Petitioner’s licenses to operate and



maintain its projects on the terms of the water quality certificate issued by the State of Maine.

3. Whether the Commission appropriately determined that Petitioner should prepare shoreline management plans for two of the five projects at issue.
4. Whether the Commission appropriately determined that, because recreational use at the projects was expected to increase, Petitioner should monitor and report on recreational use at its projects.
5. Whether the Commission appropriately determined, under its graduated license term policy, that a 40-year term was justified by the moderate amount of construction and enhancement mitigation measures required by the conditions on Petitioner's licenses.

### **STATUTORY AND REGULATORY PROVISIONS**

The pertinent statutory and regulatory provisions are contained in the Appendix to this Brief.

### **STATEMENT OF THE CASE**

#### **I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW**

In 1999, Petitioner S.D. Warren Company ("S.D. Warren") filed applications for new licenses for its Saccarappa, Mallison Falls, Little Falls, Gambo and Dundee hydroelectric projects. R. 1-5. During the relicensing proceedings, the Department of Interior ("Interior") filed FPA §18 fishway

prescriptions requiring S.D. Warren: to install anadromous fish passage facilities at its projects if fish passage downstream of the projects is no longer blocked and specified numbers of fish pass into the project area; to install upstream eel ladders at each project dam; and to shut down its generation for eight hours per night for eight weeks to allow for downstream eel passage. R. 256 at 16, 19-21, 24-41, JA 274, 277-79, 282-99.

Additionally, the State of Maine filed water quality certificate (“WQC”) conditions requiring: upstream eel passage facilities at each project; generation shutdowns at each project for four hours per night for four weeks; installation of anadromous fish passage facilities at the projects if fish passage downstream of the projects is no longer blocked and specified numbers of fish pass into the project area; specified minimum flows at the Dundee, Gambo, and Mallison Falls projects; spillage in addition to minimum flows under certain conditions at the Dundee and Gambo projects to meet Class B dissolved oxygen standards; and specified minimum recreational facility enhancements at each project. R. 318 Transmittal Letter at 2-3, JA 738-39; R. 318 WQC at 28, 29, 37-39, JA 770, 771, 779-81.

Following this Court’s holdings that it was required to do so, the Commission included Interior’s fishway prescriptions and Maine’s WQC conditions as conditions in the licenses. *S.D. Warren Co.*, 105 FERC ¶ 61,013 (2003) (“Saccarappa Order”) at ¶¶ 23, 25, 34, JA 900, 901.

The Commission also conditioned the licenses, based on recommendations from its final environmental assessment of the projects and the Fish and Wildlife Service (“FWS”), on S.D. Warren monitoring and reporting on recreational use at each project and preparing shoreline management plans for the two major (Gambo and Dundee) projects. Saccarappa Order at ¶¶56, 64-66, n.17, and Article 409, JA 904, 905-06, 913-14; *S.D. Warren Co.*, 105 FERC ¶61,010 at ¶¶24-28 (2003) (“Gambo Order”), JA 822; *S.D. Warren Co.*, 105 FERC ¶61,009 at ¶¶32-36 (2003) (“Dundee Order”), JA 796.

Finally, consistent with its policy, the Commission determined that, because the conditions in the licenses would require only a moderate amount of construction, environmental mitigation, and enhancement measures, the licenses should be issued for 40-year terms. Saccarappa Order at ¶¶50-51, JA 903.

## **II. STATEMENT OF FACTS**

### **A. Statutory And Regulatory Background**

It is unlawful for any person to operate or maintain a hydroelectric project on navigable waters except in accordance with the terms of a license issued under the FPA. FPA §23(b)(1), 16 U.S.C. §817(1). FPA §4(e), 16 U.S.C. §797(e), grants FERC jurisdiction to issue licenses for the construction, operation, and maintenance of hydroelectric projects on federal lands and on waterways that are subject to congressional regulation under the Commerce Clause. Before issuing a

license, FERC must assure that, in its judgment, an approved project “will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-powered development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including . . . recreational . . . .” FPA § 10(a), 16 U.S.C. § 803(a)(1). Thus, “in addition to the power and development purposes for which licenses are issued,” the Commission must “give equal consideration to the purposes of . . . the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.” FPA § 4(e); *Department of Interior v. FERC*, 952 F.2d 538, 544, 545 (D.C. Cir. 1992).

Section 10(j)(1) of the FPA, 16 U.S.C. §803(j)(1), requires that each license include conditions for the protection, mitigation, and enhancement of fish and wildlife affected by the project. While such conditions shall be based on recommendations received from specified state and federal resource agencies, the Commission may determine not to adopt or to modify those recommendations after giving them due weight. FPA §10(j)(2), 16 U.S.C. §803(j)(2); *see also American Rivers v. FERC*, 201 F.3d 1186, 1202 (9<sup>th</sup> Cir. 1999).

In contrast, FPA §18, 16 U.S.C. §811, provides that FERC “shall require the construction, maintenance, and operation by a licensee at its own expense of . . . such fishways as may be directed by the Secretary of the Interior . . . .” This Court has determined that “FPA §18 mandates inclusion of the Secretary’s fishway prescriptions as a condition of the Commission’s license.” *Wisconsin Power & Light Co. v. FERC*, 363 F.3d 453, 460 (D.C. Cir. 2004).

Similarly, sections 401(a) and (d) of the Clean Water Act, 33 U.S.C. §§ 1341(a) and (d), require “an applicant for a FERC hydropower license to obtain a state water quality certification before FERC may approve a license,” and require FERC to make any terms and conditions of such certification terms and conditions of the license. *Interior*, 952 F.2d at 548. Accordingly, this Court has determined that “FERC may not alter or reject conditions imposed by the states through section 401 certificates.” *Id.*; *Alabama Rivers Alliance v. FERC*, 325 F.3d 290, 292-93 (D.C. Cir. 2003).

## **B. Events Leading To The Challenged Orders**

### **1. S.D. Warren’s Applications**

Original licenses for the five S.D. Warren’s hydroelectric projects, located on the Presumpscot River in Maine, were issued between 1979 and 1981. *See* Saccarappa Order at ¶¶ 1, 2, 12, JA 897, 898. On January 22, 1999, S.D. Warren

filed applications for new licenses for the five projects. R. 1-5; *see* Saccarappa Order at ¶ 13, JA 898.

In its license applications, S.D. Warren proposed to take certain measures to protect and enhance fisheries, water, and recreational resources at the projects. For example, S.D. Warren proposed the following:

(a) Eel Passage:

- to install upstream eel passage improvements at the Dundee project (R. 5 at E.2-45, JA 23);
- to study the need for upstream eel passage improvements at the Saccarappa, Gambo, Mallison Falls, and Little Falls projects (R. 1 at E.2-34, JA 2; R. 2 at E.2-42, JA 6, R. 3 at E.2-43, JA 12; R. 4 at E.2-33, JA 18); and
- to provide safe downstream passage for eels by shutting down each project station for four hours per night for a four-week period during the peak run of silver eels in the Presumpscot River (R. 1 at E.2-35, JA 3; R. 2 at E.2-42, E.2-64, JA 6, 7; R. 3 at E.2-44, JA 13; R. 4 at E.2-34, JA 19; R. 5 at E.2-45, JA 23).

(b) Recreational Enhancements:

- Saccarappa project: to establish parking and a formal take-out site that will double as a car-top boat access to the impoundment (R. 1 at E.2-58, JA 4);
- Gambo project: to enhance recreational fishing opportunities and existing portage by establishing a formal trail, providing walk-in angler access to the bypass reach, and adding parking (R. 2 at E.2-75 – E.2-77, JA 8-10);
- Mallison Falls project: to establish a formal portage trail, to provide car-top boat access and parking, and to investigate opportunities for angler access to the bypass reach (R. 3 at E.2-79, JA 16);

- Little Falls project: to establish a formal portage trail, parking and car-top boat access (R. 4 at E.2-59, JA 20); and
- Dundee project: to reroute the trail at the take-out to facilitate easier access, to provide angler access to the bypass reach, and to investigate easement alterations to allow for fish stocking (R. 5 at E.2-76 – E.2-77, JA 24-25);

(c) Minimum Flows (to enhance habitat and support the put and take coldwater fishery management objectives for the Presumpscot River):

- Gambo project: to provide 40 cfs minimum flows into the Gambo bypassed reach during April, May and September, and 30 cfs minimum bypassed flows during the remainder of the year (R. 2 at E.2-42, JA 6);
- Mallison Falls project: to provide 40 cfs minimum flows into the Mallison Falls bypassed reach during April, May and September, and 20 cfs minimum bypassed flows during the remainder of the year (R. 3 at E.2-43, E.2-66 – E.2-67, JA 12, 14-15); and
- Dundee project: to provide 30 cfs minimum flows into the Dundee bypassed reach during April, May and September, and 20 cfs minimum bypassed flows during the remainder of the year (R. 5 at E.2-44 – E.2-45, JA 22-23).

Notice of the applications was published on April 23, 1999, and, on December 4, 2000, notice issued seeking comments, recommendations, and terms and conditions. *See* Saccarappa Order at ¶ 16, JA 899. Interior, FWS, and the State of Maine, among others, filed comments, recommendations, and terms and conditions. *Id.*

## **2. Fish and Wildlife Service Recommendations**

On February 2, 2001, FWS filed FPA §10(j) recommendations for the projects. R. 168 Att. A, JA 140-42. Those recommendations included:

(a) Recreational Use Monitoring and Reporting for each project:

- S.D. Warren should be required to monitor recreational use at each project “to determine whether existing access facilities are meeting demands for public use of fish and wildlife resources” and to file a report regarding that use every six years. R. 168 Att. A at 2, JA 141; Saccarappa Order at n.17, JA 904.

(b) Shoreline Management Plans for each project:

- S.D. Warren should be required to “develop a detailed shoreline management plan for licensee-owned lands abutting project waters within 500 feet of the high water elevation that are determined to be needed for project-related purposes, such as fish and wildlife habitat protection, providing public access for recreation or protecting sensitive, unique, or scenic areas.” R. 168 Att. A at 2, JA 141; *see also* Saccarappa Order at ¶¶ 57, 64 JA 904, 905.

(c) Minimum Flow Requirements for the Mallison Falls, Gambo, and Dundee Projects:

- S.D. Warren should be required to have year-round minimum flows of: 63 cubic feet per second (“cfs”) for the Mallison Falls bypassed reach; 40 cfs for the Gambo bypassed reach; and 57 cfs for the Dundee bypassed reach. R. 168 Att. A at 1, JA 140; *see also* Saccarappa Order at ¶ 57, JA 904; *S.D. Warren Co.*, 105 FERC ¶61,011 at ¶23 (2003) (“Mallison Falls Order”), JA 848; Gambo Order at ¶ 21, JA 821; Dundee Order at ¶ 24, JA 795.

## **3. Interior Fishway Prescriptions**

Interior filed final fishway prescriptions for the five projects on February 7, 2002. R. 256, JA 254-311; Saccarappa Order at ¶¶ 33-44, Appendix B, JA 901-02,



921-26. Based on its fish restoration objectives regarding American eel and anadromous fish species (Atlantic salmon, American Shad, and river herring) at all five projects, Interior's fishway prescriptions required:

(a) conditional anadromous fish passage:

- *if* successful anadromous fish passage is achieved at the Smelt Hill and Cumberland Mills dams located downstream of the projects at issue, either through dam removal or installation of fishways, thereby eliminating the existing barrier to fish access to the projects, S.D. Warren must install upstream and downstream anadromous fish passage facilities at each of the five projects in a phased-in process under which S.D. Warren's obligation to install fishways is not triggered unless specified growth levels in anadromous fish populations at each project is attained (R. 256 at 16, 19-21, 24-41, JA 274, 277-79, 282-99; Saccarappa Order at ¶ 35 and App. B, JA 901, 921-26).

(b) Eel Passage:

- installation of upstream eel ladders at each project dam (R. 256 at 19 n.30, 20, 29-30, JA 277, 278, 287-88; Saccarappa Order at ¶ 42 and App. B, JA 902, 921-26); and
- 8-hour-per-night shutdowns for eight weeks (September through October) to allow for downstream eel passage (R. 256 at 20, 30-31, JA 278, 288-89; Saccarappa Order at ¶ 43 and App. B, JA 902, 921-26).

#### **4. FERC's Environmental Assessment**

The Commission's draft environmental assessment for the projects ("DEIS") issued in September 2001, R.208, and its final environmental assessment ("FEIS") issued in June 2002, R. 279.

a. Minimum Flows

The DEIS recommended the following minimum flows (in cfs):

	Jan-Mar	April	May-Sept	October	Nov-Dec
Dundee	20	30	57	30	20
Gambo	30	40	40	40	30
Mallison Falls	20	40	60	40	20

JA 191. On January 4, 2002, S.D. Warren accepted and agreed to provide the seasonally adjusted minimum flows recommended in the DEIS. R. 240 at 11, JA 253); *see also* R. 279 at 13, JA 538.

Staff's FEIS minimum flow recommendations for the Dundee project remained unchanged from its DEIS recommendations. R. 279 at 84, JA 579. However, because the FWS and the Maine Department of Environmental Protection ("MDEP") recommended year-round minimum flows of 40 and 60 cfs, respectively, for the Gambo project, and no instream flow data were available at Staff's previously recommended 30 cfs minimum flows, the FEIS amended the Gambo project minimum flow recommendation to 40 cfs year-round. R. 279 at 87, 258-59, JA 582, 644-45. The FEIS explained that 40 cfs minimum flows would cost the same as 30 cfs flows because leakage flows at the Gambo project are 41 cfs. R. 279 at 259, JA 645.

Similarly, the FEIS minimum flow recommendation for the Mallison Falls project increased from 20 to 40 cfs for November through March "[t]o be consistent with the flow recommendations at the other projects, in consideration

that the Mallison Falls bypassed reach is the second longest of the three projects, and in deference to the recommendations of MDEP [40 cfs] and FWS [63 cfs].” R. 279 at 89-90, JA 584-85. “Minimum flow[s] of 40 cfs for the over-winter period (instead of 20 cfs) . . . would provide a higher habitat value more similar to that at Dundee, plus it can be provided at a relatively low additional cost of \$530.” *Id.* at 259, JA 645.

b. Conditional Anadromous Fish Passage:

The FEIS found that:

Continued operation of the five projects as proposed by S.D. Warren would continue to obstruct the upstream and downstream passage of anadromous species that may gain access to the project reaches, should the downstream Smelt Hill dam be removed and S.D. Warren install fish passage facilities at its non-[FERC] jurisdictional Cumberland Mills dam. No anadromous species currently have access to the project reaches [because of the presence of the Smelt Hill and Cumberland Mills dams]. As previously noted, there is [a] high likelihood that Smelt Hill dam will be removed . . . . S.D. Warren, however, has not proposed fish passage at Cumberland Mills dam.

R. 279 at 101, 104, JA 596, 599; *see also id.* at 157, JA 614; Saccarappa Order at ¶ 20, JA 899. Thus, while fish passage facilities at the projects “would be warranted in the future, when the fish passage issues at the two lowermost dams on the Presumpscot River are resolved . . . , since fish passage at S.D. Warren’s projects would depend on somewhat uncertain future events (fish passage and anadromous fish population growth in downstream reaches),” the FEIS determined it “would be

premature to recommend or require the design of specific passage measures at this time.” R. 279 at 261, JA 647.

Nonetheless, consistent with resource agency recommendations and the Interior prescription, the FEIS recommended that:

construction of fish passage facilities occur at the projects when fish passage is resolved at the downstream dams (probable removal of Smelt Hill dam, and provision of fish passage at Cumberland Mills). Once fish passage occurs at Cumberland Mills, we recommend phased development of fish passage at the project dams, beginning with Saccarappa and extending upstream to Dundee dam. Development of fish passage at a specific dam would be contingent upon the successful passage of fish at the next downstream dam, as measured by specific trigger numbers.

R. 279 at 157-58, JA 614-15.

The FEIS pointed out further contingencies that would affect possible development of the recommended fish passage:

The eventual timing of any fish passage development would depend on the rate of success for passive re-seeding of the basin by remnant stocks, or whether or not the agencies (or private organizations) implement any active restoration programs involving the stocking of adult or juvenile fish. Active programs typically speed up the restoration timetable, compared to passive programs. No agencies or private organizations, however, have yet committed to any active restoration programs for the Presumpscot River.

R. 279 at 158, JA 615.

c. Eel Passage

(1) Upstream

The FEIS agreed that the Interior prescription requiring “installation of upstream eel passage at all five facilities would provide a net benefit to the American eel, due to increased access to upstream habitats.” R 279 at 94-96, JA 589-91. Thus, the FEIS recommended that S.D. Warren design and install “relatively low cost”<sup>1</sup> upstream eel passage facilities not only at the Dundee project as S.D. Warren had proposed, but at all five projects. R. 279 at 96, JA 591; Saccarappa Order at ¶ 20, JA 899.

(2) Downstream

As to the level and timing of generation shutdowns necessary to provide safe downstream passage for eels, the FEIS found S.D. Warren’s proposal of four hours per night for a four week period during the peak run of silver eels adequate. R. 279 at 100, JA 595. Interior’s prescription mandating shutdowns for eight-hours per night for eight weeks was not “necessary to protect most of the downstream migrating eels. An 8-week shut down period . . . would likely protect most of the migrants, but there would also be periods of spillage, of perhaps one or more weeks, when no eels would be present to pass.” R. 279 at 99, JA 594; *see also id.*

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<sup>1</sup> The FEIS “estimate[d] the annualized cost of providing upstream eel passage to be about \$5,790 at the Dundee project and \$4,850 at each of the four remaining dams.” R. 279 at 263, JA 649.

at 263, JA 649 (“We believe that an 8-week shutdown period may be excessive, in that [Maine Department of Marine Resources] eel weir data indicate the peak of the outmigration typically occurs over a much shorter time period.”).

Recognizing, however, that the Interior prescription was mandatory and would have to be included in the licenses, the FEIS determined that the annualized costs for Interior-mandated shutdown would be \$39,270 for Dundee; \$24,700 for Gambo; \$27,520 for Little Falls; \$23,270 for Mallison Falls; and \$25,670 for Saccarappa. R. 279 at 263, JA 649.

d. Shoreline Management Plans

As the FEIS explained, a shoreline management plan (“SMP”) “is a comprehensive plan to manage the multiple resources and uses of the project’s shorelines in a manner consistent with license requirements and project purposes.” R. 279 at A-34, JA 664. “Licensees have a responsibility to ensure that shoreline development activities that occur within project boundaries are consistent with project license requirements, purposes, and operations[, and] [a] comprehensive plan such as an SMP can assist the licensee in meeting its responsibilities throughout the term of its license.” *Id.*

The FEIS “agree[d] with the FWS that protection of currently undeveloped shoreline would maintain the recreational experience of anglers and boaters who use the project lands and waters,” but recommended that S.D. Warren develop an

SMP only for the Dundee and Gambo projects because most recreational use occurs in those project areas. R. 279 at 263-64, JA 649-50; *see also* R. 279 at A-35, JA 665 (“because considerable recreation use occurs at the Dundee and Gambo projects . . . , we conclude that the establishment of a shoreline buffer zone at these two projects is warranted.”).

Further, consistent with FERC precedent, the FEIS concluded that, rather than the FWS-recommended 500 foot shoreline buffer zone, maintenance of a buffer zone “up to 200 feet of the normal high water level at the Dundee and Gambo projects would be adequate to protect these projects’ visual resources and future recreational access.” R. 279 at 263-64, JA 649-50. Commission Staff found “no demonstrated need to expand project boundaries to include additional lands outside of the Commission’s standard 200-foot buffer zone for project purposes,” as “[d]emands for recreation and public use are not expected to extend beyond 200 feet from the impoundments.” *Id.* (citing *Great Northern Paper, Inc.*, 77 FERC ¶61,068 (1996); *Central Maine Power Co.*, 81 FERC ¶61,251 (1997); 18 C.F.R. § 4.51(h)(i)(B)); *id.* at A-36; *see also id.* at 175, JA 619 (“we conclude that a buffer zone on licensee-owned lands within the project boundary up to 200 feet from the normal high water mark at Dundee and Gambo, where most of the project-related recreation occurs, would help to preserve the undeveloped character

of the shoreline. The effects of project operation and increased access generally occur within 200 feet of the edge of the impoundment.”).

The estimated annualized cost for this recommendation was about \$350 per project. R. 279 at 264, JA 650.

e. Recreational Use Monitoring and Reporting

On the issue of whether, as recommended by FWS, recreational use monitoring and reporting should be required, the FEIS found:

a study of recreation use levels would be beneficial in determining the adequacy of the recreational facilities at the projects. The recreational enhancements proposed by S.D. Warren involve formalizing access sites and portage routes that are currently used on an informal basis. Therefore, it would be reasonable to determine the level of recreational use of the facilities after these sites have been formalized and facilities for parking and access have been constructed. This initial estimate of use at the projects should occur after construction of the recreational enhancements and in conjunction with the Form 80 filings for the Dundee and Gambo projects. The study could then be used to determine the adequacy of the recreational enhancements, including public walk-in access to the bypassed reaches and car-top boat access, to meet current demand. It would be reasonable for S.D. Warren to meet with state agencies to update and report the annual recreation use figures to the Commission every 12 years, thereafter, occurring with every other Form 80 filing.

R. 279 at 182, JA 620. *See also id.* at 264-65, JA 650-51 (“Given the likelihood that angling and boating use would increase with the improved facilities and access, we agree with the FWS that S.D. Warren should monitor recreation use.”).

“[R]ecreational use pressures on the entire system are high, and . . . a recreational use monitoring study should be implemented at all five projects.” R.



279 at A-32, JA 662. “The intent of the recreational use monitoring plan . . . is to further investigate the amount of use that occurs at all five projects and to develop the appropriate enhancements.” R. 279 at A-31, JA 661. “[R]ecreational monitoring . . . will enable the Commission to determine if there is a need for additional facilities due to overuse.” R. 279 at A-31, JA 661. “Based on the recreation use assessment, the Commission would be able to determine whether or not additional recreational enhancements are necessary.” R. 279 at A-32, JA 662.

The estimated annualized cost of the recommended recreational use monitoring study is about \$840 per project. R. 279 at 265, JA 651.

f. License Term

In its responsive comments to the DEIS, S.D. Warren requested that a 50-year license term be granted for each project. *See* R. 279 at A-4, JA 660. The FEIS explained, however, that “[t]he Commission typically specifies a 40-year license term when moderate construction or significant enhancement is required.” *Id.*

**5. Maine’s Water Quality Certificate Conditions**

After the FEIS issued, Maine filed its final water quality certificate on April 30, 2003. R. 318; Saccarappa Order at Appendix A, JA 916-21. Maine certified the projects as “meeting applicable water quality standards, subject to the following special conditions.” R. 318 Transmittal Letter at 2, JA 738.

a. Minimum Flows

The WQC specified the following minimum flow releases into the bypass reaches:

- Dundee project: 60 cfs from May 1 through October 31; 40 cfs from November 1 through April 30;
- Gambo project: 60 cfs year-round; and
- Mallison Falls project: 60 cfs from May 1 through October 31; 40 cfs from November 1 through April 30

R. 318 Transmittal Letter at 2, JA 738; R. 318 WQC at 28, JA 770.

Furthermore, the WQC requires S.D. Warren to prepare a study regarding the effectiveness of minimum bypass flows in providing habitat for Atlantic salmon:

within 6 months after notification from the Atlantic Salmon Commission on initiation of active Atlantic salmon restoration activities in the Presumpscot River, or upon such other schedule as established by FERC, [S.D. Warren must] submit plans for a study to evaluate the effectiveness of minimum bypass flows . . . in providing habitat for Atlantic salmon . . . .

R. 318 WQC at 29 ¶G, JA 771; Saccarappa Order at Appendix A ¶ 1.G, JA 916-17.

b. Upstream Eel Passage

Within two years of license issuance, S.D. Warren is required to install upstream eel passage facilities at all five projects. R. 318 Transmittal Letter at 2, JA 738.

c. Downstream Eel Passage

The WQC requires generation to be suspended “at each project for at least 4 hours per night for at least four one-week periods during the downstream eel migration period.” R. 318 Transmittal Letter at 2, JA 738. In addition, S.D. Warren must “conduct a study to determine the exact timing of the required generation shutdown.” *Id.*

d. Conditional Anadromous Fish Passage Facilities

Just like Interior’s prescription, the WQC included a conditional anadromous fish passage facilities requirement. S.D. Warren must:

install and operate specified upstream and downstream anadromous fish passage facilities at the projects in phases, beginning with the . . . Saccarappa Project, to be operational no later than 2 years after passage is available at the downstream Cumberland Mills Dam. The installation of upstream passage facilities at the dams above the Saccarappa Project is contingent upon the passage of specified numbers of fish at the Saccarappa Project and a future decision to initiate anadromous fish restoration efforts above the Gambo Project. The applicant shall conduct studies to determine the effectiveness of all required anadromous fish passage facilities.

R. 318 Transmittal Letter at 3, JA 739.

e. Dissolved Oxygen Spillage

The WQC also required S.D. Warren to “institute the spillage of 50 cfs at Dundee Dam and 100 cfs at Gambo Dam, or [to] take equivalent measures, to meet Class B dissolved oxygen (“DO”) standards in the river below the Dundee Project. Spillage must occur whenever the river temperatures exceed 22 degrees Celsius at

the Gambo Dam, and shall be in addition to the required minimum bypass flows.”

R. 318 Transmittal Letter at 3, JA 739.

f. Recreational Facilities Enhancement

Finally, the WQC required S.D. Warren to “develop and implement a Recreational Facility Enhancement Plan for each project, which shall include specific measures for maintaining and/or enhancing recreational access and use in the project areas.” R. 318 Transmittal Letter at 3, JA 739. The certificate listed specific minimum recreational facility enhancements for each project. R. 318 WQC at 37-39, JA 779-81.

**C. The Challenged Orders**

**1. The License Orders**

a. WQC Requirements

As “[s]ection 401(d) of the [Clean Water Act], 33 U.S.C. §1341(d), provides that state certification shall become a condition of any federal license,” the Commission made the WQC conditions applicable to each project part of the license and attached the WQC as Appendix A to each license order. Saccarappa Order at ¶¶ 23, 25, JA 900. S.D. Warren’s contention that the WQC was not yet effective because it was pending appeal failed as “the WQC became effective upon issuance and remains in effect in the absence of a request for a stay.” Saccarappa Order at n.7, JA 900. Thus, as required, the Commission “incorporate[d] the WQC

conditions into the licenses, even though S.D. Warren’s appeal remain[ed] pending.” *Id.*

b. Section 18 Prescriptions

Likewise, “[b]ecause Section 18 is mandatory, the prescriptions [from Interior] applicable to each project [were] made conditions of the license for that project,” and the Commission appended as Appendix B to each license order the general and specific prescriptions applicable to that project. Saccarappa Order at ¶ 34, Ordering ¶ (E), JA 901, 909.

c. Recreational Use Monitoring and Reporting

The Commission also included in the licenses a less burdensome version of the FWS’ recommendation that S.D. Warren monitor and report on recreational use at the projects. Saccarappa Order at ¶ 56 and n. 17, JA 904. Although FWS recommended that a report be filed every six years, the Commission found sufficient and, therefore, adopted the FEIS’ recommendation that S.D. Warren be required to file an initial report in 2009 and then every 12 years thereafter. Saccarappa Order at ¶ 56, n. 17, and Article 409, JA 904, 913-14.

d. Shoreline Management Plans

Although the Commission rejected as unsupported and unnecessary FWS’ recommendation that S.D. Warren be required to develop and implement for each project an SMP, including a 500-foot buffer zone, the Commission found

appropriate and included in the licenses a modified version of that recommendation. Saccarappa Order at ¶¶ 64-66, JA 905-06. Finding no need for an SMP related to S.D. Warren’s minor projects (Saccarappa, Mallison Falls, and Little Falls), the Commission restricted the SMP requirement to the major Gambo and Dundee projects. Saccarappa Order at ¶¶ 64, 66, JA 905-06; Mallison Falls Order at ¶¶ 31, 33, JA 849-50; *S.D. Warren Co.*, 105 FERC ¶61,012 at ¶¶22, 24 (2003) (“Little Falls Order”), JA 875.

For those two projects, the Commission determined that the SMP must include only a 200-foot, rather than a 500-foot, buffer zone. Gambo Order at ¶¶ 24-28, JA 822; Dundee Order at ¶¶ 32-36, JA 796.

Because most of the project-related recreation occurs within 200 feet of the edge of the project impoundment, a 200-foot buffer zone would be sufficient to preserve the undeveloped character of the shoreline. A 200-foot buffer zone would promote the protection of wetland habitats, as well as aesthetic resources and future recreational opportunities.<sup>2</sup> In addition, lands included in a buffer zone would provide additional buffering capacity against adjacent land disturbances in ecologically sensitive areas, and would help protect riparian corridors.

Gambo Order at ¶ 26, JA 822; Dundee Order at ¶ 34 JA 796. This was consistent with “the Commission’s policy . . . to require no more than a 200-foot shoreline buffer for SMPs, unless additional lands are determined to be necessary for project

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<sup>2</sup> The Commission noted that, “[a]s outlined in Section 4.3.5 of the FEIS, multiple recreational opportunities are available at the [Dundee and Gambo] Project[s].” Gambo Order at n.9, JA 822; Dundee Order at n.15, JA 796.

purposes. FWS did not provide any . . . information . . . to justify the need to expand the shoreline buffer zone to 500 feet to protect fish and wildlife, including rare plants.” Gambo Order at ¶ 27, JA 822; Dundee Order at ¶ 35 JA 796.

As “S.D. Warren does not own significant lands around the Dundee impoundment,” Dundee Order at ¶ 36 JA 796 (citing FEIS, R. 279 at 173, JA 618), and “S.D. Warren appears to own no land around the Gambo impoundment outside of the project boundary,” Gambo Order at ¶ 28 JA 822 (citing FEIS, R. 279 at 173, JA 618), the Commission found that “restricting the SMP to licensee-owned lands within 200 feet of the high-water elevations could provide only limited protection for lands in the buffer zone,” Dundee Order at ¶ 36 JA 796; Gambo Order at ¶ 28 JA 822.

To offset this, the Commission required S.D. Warren “in preparing the SMP, to identify other lands within 200 feet of the high-water elevation that *might* warrant licensee acquisition and protection.” Dundee Order at ¶ 36 JA 796 (emphasis added); Gambo Order at ¶ 28 JA 822 (emphasis added). This “would assist S.D. Warren in meeting its responsibility of managing recreational opportunities at the project, and preserving other resources and beneficial uses of the project’s shorelines in a manner that is consistent with license requirements and project purposes. For these reasons, this measure is consistent with FPA Section 10(j)(1).” Gambo Order at ¶ 28, JA 822; Dundee Order at ¶ 36, JA 796.

#### e. License Term

In determining the term for which licenses should be issued, the Commission's policy "establishes 30-year terms for projects with little or no proposed redevelopment, new construction, new capacity, or environmental mitigation and enhancement measures; 40-year terms for projects with a moderate amount thereof; and 50-year terms for projects with an extensive amount thereof." Saccarappa Order at ¶85, JA 907-08. Because S.D. Warren's obligation under the licenses to construct anadromous fish passage facilities would be triggered, if at all, only as fish passage downstream of the projects is possible and specific numbers of fish pass into the project area, the Commission excluded costs related to constructing those facilities in making its license term determination. Saccarappa Order at ¶86, JA 908. As the remaining conditions in the licenses required only a moderate amount of construction, environmental mitigation, and enhancement measures, FERC issued the licenses for a 40-year term. *Id.*

S.D. Warren petitioned for rehearing. R. 345, JA 952-89.

### **2. The Order On Rehearing**

#### a. Section 18 Prescriptions and WQC Conditions

Despite S.D. Warren's urging that the Commission revise or eliminate the license requirements for minimum bypass flows and the related salmon study, dissolved oxygen spillage, upstream and downstream eel passage measures,



anadromous fish passage plans and facilities, and recreational facilities enhancements, those requirements were mandated by Interior's FPA §18 prescriptions and/or WQC conditions. As it had no discretion to grant S.D. Warren's request that it revise or remove those requirements from the licenses, the Commission denied rehearing on those points. *S.D. Warren Co.*, 106 FERC ¶ 61,087 (2004) ("Rehearing Order") at ¶¶3, 4, 7, 11-14, 16, and nn.7-8, 13 (citing *American Rivers*, 201 F.3d 1186), 17, JA 999-1002.

b. Recreational Use Monitoring and Reporting

Additionally, the Commission reaffirmed the necessity for recreational use monitoring and reporting for each project, finding that the filing of a standard Form 80, *see* 18 C.F.R. § 141.14, will not satisfy the monitoring and reporting needs under the circumstances here. Rehearing Order at ¶¶ 15-18, JA 1002. Based on FWS's recommendation, the FEIS determined that recreational use monitoring and reporting beyond that required by Form 80 was needed to assess the impact of the improved recreational facilities and access required by the licenses, which likely will increase angling and boating use at the projects. Rehearing Order at ¶16 and nn. 18-19, JA 1002. Because Form 80 monitoring and reporting would not satisfy the more specific monitoring and reporting necessary here, the license requirements were appropriate and not redundant. Rehearing Order at ¶16, JA 1002.

c. Shoreline Management Plans

Turning to S.D. Warren’s complaints about the requirement for an SMP, the Commission explained that:

In the EIS, the Commission staff recommended that the licensee establish a 200-foot buffer zone around the Dundee and Gambo reservoirs to maintain the current shoreline, protect visual resources, and, in the case of Dundee, protect the federally threatened small whorled pogonia. Because the licensee owns almost no land around the Dundee impoundment and none around the Gambo impoundment, we required the licensee, in preparing the shoreline management plans, to identify lands within the 200-foot buffer zone that *might* warrant acquisition and protection. Neither project has an extensive shoreline,<sup>[3]</sup> and the requirement does not necessarily anticipate extensive land acquisition. Upon submission of the plans, the Commission staff will determine how much land the licensee will have to acquire and include in the project boundaries. This determination will be based on a balancing of beneficial public use factors under Section 10(a)(1) of the FPA, including the benefits to the public of including the land and the reduction of the projects’ energy benefits due to land acquisition costs.<sup>[4]</sup>

Rehearing Order at ¶20, JA 1003 (emphasis added).

d. License Terms

Next, the Commission reaffirmed its finding that, because the licenses would require only a moderate amount of construction and enhancement if the triggers for anadromous fish passage are not achieved, 40-year licenses would be issued for the

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<sup>3</sup>Noting that “[t]he Dundee Project has a 1.7-mile impoundment, and the Gambo Project has a 3.3-mile impoundment.” Rehearing Order at n. 21, JA 1003.

<sup>4</sup>Citing, *e.g.*, *Great Northern Paper, Inc.*, 77 FERC ¶ 61,066 at 61,247-48 (1996).

projects. Rehearing Order at ¶23, JA 1003. Omitting the costs related to anadromous fish passage was appropriate as the Cumberland Mills dam was not FERC-jurisdictional, and the record did not indicate that any efforts to attain fish passage were being undertaken or even planned there, making the eventuality that S.D. Warren would have to build fish passage facilities at the five licensed projects speculative. Rehearing Order at ¶4 and n.9, ¶23, JA 1000, 1003. The Commission explicitly provided, however, that “[i]f, in the future, anadromous fish passage facilities are required at the projects, the licensee could request an extension of the license terms.” Rehearing Order at ¶23, JA 1003.

This petition for review followed.

### **SUMMARY OF ARGUMENT**

The Court should summarily affirm the Commission’s inclusion of Interior’s FPA §18 fishway prescriptions and Maine’s WQC conditions in Petitioner’s licenses. This Court has determined that FERC may not alter or reject those prescriptions and conditions, and that FERC must include them in an issued license.

Additionally, the Commission appropriately adopted the FEIS recommendation for recreational use monitoring and reporting. Because recreational enhancements at the projects are expected to place high recreational use pressures on the entire project system, specialized recreational use monitoring

and reporting beyond that required for Form 80 filings was necessary for the Commission to determine whether further recreational enhancements are required at the projects. Including this requirement was consistent with and satisfied the Commission's FPA § 10(a) obligation to assure that the approved projects are best adapted to a comprehensive plan for improving the Presumpscot waterway for, among other things, recreational use purposes. Moreover, by requiring reporting only every 12 years rather than every six as FWS had recommended, the Commission minimized, to the extent possible, the burden of this requirement to S.D. Warren.

FERC's determination to adopt the FEIS recommendation for SMPs, including a 200-foot buffer zone, for only the Dundee and Gambo projects was also appropriate. Again, this requirement was based on, but substantially narrowed, an FWS recommendation (for a 500-foot buffer zone at all five projects).

Because S.D. Warren owns almost no land around the Dundee impoundment and none around the Gambo impoundment, acquisition of lands around those two projects' reservoirs *might* be required to maintain the current shoreline, protect visual resources, and, in the case of Dundee, to protect the federally threatened small whorled pogonia. Thus, it was necessary for the SMPs to identify lands within the 200-foot buffer zone that might warrant acquisition and protection. The

Commission will use that information to determine, based on a balancing of beneficial public use factors under FPA § 10(a)(1), whether it will be necessary for S.D. Warren to acquire any lands.

Finally, the Commission appropriately determined that the licenses should be issued for 40-year terms as only a moderate amount of construction and enhancement is required. It would be inappropriate to include the conditional fishway requirements in a present license-term determination because it was speculative whether those requirements would ever be triggered. If, however, the requirements are triggered in the future, the Commission will consider those costs if Petitioner seeks a license extension.

## **ARGUMENT**

### **I. The Commission's Inclusion Of The FPA § 18 Fishway Prescriptions And The Water Quality Certificate Conditions In The Licenses Should Be Summarily Affirmed.**

Petitioner challenges: the inclusion of requirements for conditional anadromous fish passage facilities at each project; upstream eel passage facilities at each project; 8-hour-per-night shutdowns for eight weeks at each project to allow for downstream eel passage; specified recreational enhancements at each facility; minimum flow releases into the bypassed reaches of the Dundee, Gambo and Mallison Falls projects and plans for a study to evaluate the effectiveness of minimum bypass flows in providing habitat for Atlantic salmon; and spillage

above minimum flow requirements at Dundee and Gambo dams in specified circumstances. Br. at 13-38, 39-40. As all those requirements were Interior FPA § 18 prescriptions and/or Maine WQC conditions, however, FERC was mandated to include them in the licenses without modification. *Wisconsin Power & Light*, 363 F.3d at 460; *cf. Bangor Hydro-Electric Company v. FERC*, 78 F.3d 659, 662 and n.2 (D.C. Cir. 1996); *Interior*, 952 F.2d at 548; *Alabama Rivers*, 325 F.3d at 292-93.

FERC acted in accordance with the Court's interpretation of FPA §18 and the CWA by including Interior's fishway prescriptions and the WQC conditions as conditions in the licenses. FERC's action should, therefore, be summarily affirmed.

## **II. The Commission's Licensing Determinations Were Appropriate And Well Reasoned**

### **A. Standard of Review**

Judicial review of the Commission's licensing decisions is limited to determining whether the Commission's action was arbitrary and capricious, and whether the factual findings underlying the decision were supported by substantial evidence. *Alabama Rivers*, 325 F.3d at 296; *North Carolina v. FERC*, 112 F.3d 1175, 1189 (D.C. Cir. 1997). Those standards require that FERC examine the relevant data and provide a "reasoned explanation supported by a stated connection between the facts found and the choice made." *Id.*

**B. FERC Appropriately Adopted the FEIS Recommendation For Recreational Use Monitoring and Reporting**

In its rehearing petition, Petitioner argued that the recreational use monitoring and reporting requirement adds an unnecessary cost to the projects. R. 345 at 26, JA 977. In Petitioner's view:

The Commission already has in place the requirement that a Form 80 surveying recreational facilities be filed for the Dundee and Gambo Projects. These projects are in close proximity to the remaining Projects. No compelling need has been shown for additional recreational use studies. Therefore, such studies should be removed from the License Orders.

R. 345 at 26, JA 977; *see also* Rehearing Order at ¶ 15, JA 1002.

The Commission found otherwise, adopting the FEIS finding that the recreational use monitoring and reporting requirement, which had an estimated annualized cost per project of only \$840, is necessary to determine whether the enhanced project facilities are meeting recreational use demands. Saccarappa Order at n.17, ¶ 84(7), Art. 409, JA 904, 907, 913-14; Rehearing Order at ¶¶ 16-18 and nn. 18-19, JA 1002; R. 168 Att. A at 2, JA 141; R. 279 at 182, 264-65, A-32, JA 620, 650-51, 662. Because recreational enhancements at the projects likely would increase angling and boating and place high recreational use pressures on the entire project system, specialized recreational use monitoring and reporting beyond that required for Form 80 filings was necessary for the Commission to determine whether further recreational enhancements are required at the projects.

Rehearing Order at 16-18, JA 1002; R. 279 at 182, 264-65, A-32, JA 620, 650-51, 662.

This approach is consistent with the statute. In making a licensing determination, the FPA explicitly requires the Commission to consider recreational use in the project area. Rehearing Order at n. 18, JA 1002. Under FPA § 10(a), the Commission must assure that an approved project will be best adapted to a comprehensive plan for improving a waterway for, among other things, recreational use purposes. Rehearing Order at n. 18, JA 1002.

Moreover, the required recreational use monitoring and reporting was based on, but lessened the burden to S.D. Warren of, an FWS recommendation. Rehearing Order at n. 18, JA 1002. While FWS recommended that S.D. Warren report on recreational use at the projects every six years, R. 168 Att. A at 2, JA 141; Saccarappa Order at n.17, JA 904, the Commission required reporting only every 12 years, Saccarappa Order at n.17 and Art. 409, JA 904, 913.

Thus, there is no merit to Petitioner's assertion on brief (at 39-40) that "[w]ith the addition of substantial requirements in the Prescription and the 401 Certificate, the Commission should have recognized that further requirements on the Projects were not in the public interest and should not have imposed the additional requirements." To the contrary, assessing recreational use of enhanced



project facilities through monitoring and reporting furthers one of the enumerated “beneficial public uses” under FPA §10(a).

**C. FERC Appropriately Adopted the FEIS Recommendation For Shoreline Management Plans For The Dundee And Gambo Projects**

Petitioner challenges the SMP requirement on several grounds. Br. at 38-39. First, Petitioner complains that it “does not own or control lands that the Commission would include in the 200-foot buffer zone.” Br. at 39. As the Commission explained, however, under the specific circumstances here, where S.D. Warren owns almost no land around the Dundee impoundment and none around the Gambo impoundment, acquisition of lands within a 200-foot buffer zone around the Dundee and Gambo reservoirs *might* be required to maintain the current shoreline, protect visual resources, and, in the case of Dundee, to protect the federally threatened small whorled pogonia. Rehearing Order at ¶ 20, JA 1003. Thus, by “identify[ing] lands within the 200-foot buffer zone that might warrant acquisition and protection,” the SMPs will provide essential information as to whether further conditions are appropriate. *Id.* After the SMPs are filed, the Commission will determine, “based on a balancing of beneficial public use factors under Section 10(a)(1) of the FPA, including the benefits to the public of including the land and the reduction of the projects’ energy benefits due to land acquisition costs,” whether S.D. Warren will be required to acquire any lands. *Id.* Petitioner’s

related complaint (Br. at 39) that “there is no clear evidence that future uses of these additional areas is safe, appropriate or necessary,” is therefore, premature.

Petitioner’s next claim (Br. at 39), that “generally Commission-mandated Shoreline Management Plans are primarily intended to benefit applicant-owned lands in the Project boundaries where there are resources that warrant protecting (such as endangered species, critical habitats, or unique scenic features),” takes a far too narrow view of resources that warrant protection. A shoreline management plan has a much broader purpose than Petitioner posits: it “is a comprehensive plan to manage the multiple resources and uses of the project’s shorelines in a manner consistent with license requirements and project purposes.” R. 279 at A-34, JA 664. That includes, as was found relevant here, “preserv[ing] the undeveloped character of the shoreline[,] . . . promot[ing] the protection of wetland habitats, as well as aesthetic resources and future recreational opportunities[,] . . . provid[ing] additional buffering capacity against adjacent land disturbances in ecologically sensitive areas, and protect[ing] riparian corridors.” Gambo Order at ¶ 26, JA 822; Dundee Order at ¶ 34 JA 796; Rehearing Order at ¶ 20, JA 1003; *see also* R. 279 at 263-64, JA 649-50 (FEIS agrees with FWS that a shoreline management plan to “protect[] . . . currently undeveloped shoreline would maintain the recreational experience of anglers and boaters who use the project lands and waters.”); *id.* at A-35, JA 665 (finding establishment of a 200-foot buffer zone at the Dundee and

Gambo projects necessary because of the considerable recreation use at those projects). As these are all encompassed within the “beneficial public uses” to be balanced under FPA §10(a), FERC was well within its statutory bounds in requiring the SMP.

Finally, Petitioner contends that, “given the extensive other requirements contained in the License Orders, and the fragile economics of these Projects, the Commission should remove the Shoreline Management Plan as particularly inappropriate.” Br. at 39. While the Commission substantially narrowed SMP requirements from including a 500-foot buffer zone at all five projects as recommended under FPA § 10(j) by FWS to a much narrower 200-foot buffer zone only at the Dundee and Gambo projects, the revised requirements were the minimum necessary and consistent with FPA §10(j)(1) and Commission precedent. Saccarappa Order at ¶¶ 64-66, JA 905-06; Gambo Order at ¶¶ 24-28, JA 822; Dundee Order at ¶¶ 32-36, JA 796. As the SMP requirements have an estimated annualized cost at each of the two projects of only \$350, the Commission was appropriately sensitive to the “fragile economics of these Projects.”

**D. FERC Appropriately Granted 40-Year Terms, Given That Only A Moderate Amount Of Construction And Enhancement Is Required.**

Petitioner does not challenge FERC’s policy of setting 40-year license terms where moderate construction and enhancement is required. Rather, Petitioner

contends that, in determining the license terms, the Commission should have considered the construction associated with the conditional anadromous fish passage facility requirements. Br. at 41-43. But, as the Commission found, it would be inappropriate to include those requirements in a present license-term determination because it is speculative whether those requirements will ever be triggered.<sup>5</sup> Saccarappa Order at ¶¶ 50-51, JA 903; Rehearing Order at ¶ 4 and n.9, ¶23, JA 1000, 1003. The Commission explicitly provided, however, for changed circumstances: “[i]f, in the future, anadromous fish passage facilities are required at the projects, the licensee could request an extension of the license terms.” Rehearing Order at ¶23, JA 1003. Thus, even though the Commission could not now appropriately consider costs associated with those speculative requirements, the Commission will consider those costs in the future if they become real and Petitioner seeks a license extension.

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<sup>5</sup> In large part, Petitioner controls whether this requirement will be triggered as it controls the non-FERC jurisdictional Cumberland Mills dam. Unless Petitioner builds a fishway at or removes the Cumberland Mills dam, the condition at issue here will not become operative.

## CONCLUSION

For the foregoing reasons, the petition for review should be denied as it relates to FERC.

Respectfully submitted,

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