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FEDERAL ENERGY  
REGULATORY COMMISSION UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

PPL Maine, LLC

Project Nos. 2403, 2534, 2666, 2710,  
2712, 2721, and 10981; and Docket  
No. DI97-10

PPL Great Works, LLC

Project No. 2312

Bangor Pacific Hydro Associates

Project No. 2600

**NOAA FISHERIES MOTION TO INTERVENE**

Pursuant to the Federal Energy Regulatory Commission's (hereinafter "Commission") *Notice of Comprehensive Settlement Accord and Soliciting Comments* of June 29, 2004 for the above referenced projects, *Notice of Application for Amendment of License and Soliciting Comments, Motions to Intervene, and Protests* of July 8, 2004 for the Veazie, Milford, Medway, Stillwater, and West Enfield Projects (FERC Nos. P-2403, P-2534, P-2666, P-2712, and P-2600) and *Notice of Application Tendered for Filing with the Commission, Soliciting Additional Study Requests, Waiving Three Stage Consultation, and Establishing an Expedited Schedule for Relicensing and Deadline for Submission of Final Amendments* of July 9, 2004 for the Orono Project (P-2710), the National Marine Fisheries Service, National Oceanographic and Atmospheric Administration, United States Department of Commerce (hereinafter collectively referred

to as "NOAA Fisheries") hereby move for intervention into the above captioned matter for all projects involved in the Comprehensive Settlement Accord including the Veazie, Milford, Medway, Stillwater, West Enfield, Orono, Howland (P-2721), and Great Works (P-2312) Projects pursuant to 18 CFR § 385.214. NOAA Fisheries states the following in support of its motion.

### **I. BACKGROUND**

The Penobscot River supports numerous anadromous fish species, providing habitat for Atlantic salmon, shortnose sturgeon, American shad, river herring, rainbow smelt, Atlantic tomcod, striped bass, and sea lamprey. The numerous dams and power generation facilities on the river, including the ten (10) hydroelectric projects involved in the present proceeding, affect anadromous fish populations in the Penobscot River. For instance, many of these anadromous fish species must negotiate fishways at the above referenced projects during upstream migrations to access suitable spawning habitat in the Penobscot River and its tributaries. Juvenile anadromous fish migrating downstream in the Penobscot River must locate and utilize downstream bypass facilities or face passage via spillways or through turbines. In addition, the dams alter instream flows, water temperature, water quality, sediment transport, and may inundate habitat under reservoirs -- all important habitat factors for anadromous fish.

On June 29, 2004, the Commission issued a Notice of Comprehensive Settlement Accord and Soliciting Comments. The Notice of Comprehensive Settlement Accord and Soliciting Comments was filed in response to the Comprehensive Settlement Accord which itself was filed for informational and reference purposes only. Pursuant to the terms of this Notice, the action forcing instruments are the following applications/requests that have been submitted to implement the initial phase of the Comprehensive Settlement: the Joint Request to suspend relicensing proceedings for the Howland and Great Works Projects, the license amendment applications for Veazie, Milford, Stillwater, Medway, and West Enfield, the application for new license for Orono, and the FWS Modified Prescriptions.

Here, the proposed Comprehensive Settlement Accord, and more specifically, the associated action forcing instruments, significantly affect anadromous habitat and passage in the Lower Penobscot River Basin. Under the proposed terms of the Comprehensive Settlement Accord, habitat and passage for anadromous fish will be significantly altered by removal of the Veazie, Great Works, and Howland<sup>1</sup> Projects. Proposed headpond increases, additional installed turbines, and reduced bypass flows at other projects involved in the Comprehensive Settlement Accord could also affect passage and habitat for anadromous fish. The signatories to the Comprehensive

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<sup>1</sup> The Comprehensive Settlement Accord seeks to construct a natural fishway around the Howland Dam before removal. If removal is selected, the Howland Project may be partially or entirely removed.

Settlement Accord expect these proposed actions to have a net beneficial affect to anadromous fish. However, NOAA Fisheries has statutory responsibilities and represents national public interests in matters affecting anadromous fish species as discussed below.

## II. ARGUMENT

NOAA Fisheries is a Federal agency with statutory interest in the involved proceedings. Specifically, NOAA Fisheries has jurisdiction over anadromous fish resources affected by the licensing, operation and maintenance of the involved hydroelectric projects. See Reorganization Plan No. 4 of 1970, 84 Stat. 2090, as amended; the Federal Power Act (FPA) at 16 U.S.C. §§803(j) and 811; the Fish and Wildlife Coordination Act (FWCA) at 16 U.S.C. §§ 661 and 662; the Sustainable Fisheries Act, 16 U.S.C. § 1801 et seq; and the Endangered Species Act (ESA) of 1973 as amended (16 U.S.C. 1531 – 1543). NOAA Fisheries has direct statutory concern about the potential for the proposed Comprehensive Settlement Accord to affect fish passage and flow conditions, habitat, water quality, and anadromous fish generally<sup>2</sup>.

NOAA Fisheries has jurisdiction over anadromous species affected by the Comprehensive Settlement Accord pursuant to the ESA. On March 11, 1967, shortnose

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<sup>2</sup> As noted in NOAA Fisheries comments on the proposed Comprehensive Agreement, NOAA Fisheries did not file Requests for Rehearing years ago on the involved projects, and therefore, could not technically be a party to the settlement of those disputes, which is what the Comprehensive Settlement purports to be. See Exhibit "A" (NOAA Fisheries letter to the Federal Energy Regulatory Commission dated 14 July 2004). The scope of that settlement, however, expands far beyond the metes and bounds of the Requests for Rehearing, therein necessitating NOAA Fisheries intervention.

sturgeon (*Acipenser brevirostrum*) were listed as endangered throughout its range.

NOAA Fisheries assumed jurisdiction for shortnose sturgeon under a 1974 government reorganization plan (38 FR 41370). According to the 1998 Recovery Plan for shortnose sturgeon, a population of this federally endangered fish is recognized to exist in the Penobscot River. On June 30, 1978, one shortnose sturgeon was captured in Northport, Maine in Penobscot Bay. As shortnose sturgeon can be expected to live for 30 to 40 years (Dadswell 1984), this capture indicates that a contemporary shortnose sturgeon population exists in the Penobscot River, as this capture occurred within the life span of a shortnose sturgeon. Archeological data suggesting that sturgeon from the Penobscot River were used by native peoples provides support for the conclusion that shortnose sturgeon historically occurred in this system. A directed survey for shortnose sturgeon was conducted during 1994 and 1995 in the Penobscot River at the head of tide. No shortnose sturgeon were captured in 409 net hours of gill net effort; however, this is much less effort than the 11,396 net hours expended to capture 25 shortnose sturgeon in the Merrimack River and far less than the 21,432 net hours of gill net effort expended to capture three shortnose sturgeon in the Cape Fear River. As a result, NOAA Fisheries believes that these surveys provide insufficient evidence to conclude that shortnose sturgeon are not likely present in the Penobscot River.

While these recent (1994 and 1995) directed studies to document whether shortnose sturgeon are present in this river system have been unsuccessful, the habitat in

*the Penobscot River is consistent with the preferred habitat of shortnose sturgeon* documented in other river systems. As such, NOAA Fisheries must take the conservative approach and assume that shortnose sturgeon are present in the river. The extent of this species' range in the Penobscot is likely from the lower estuary to the area downstream of the Veazie Dam. The northern extent of this species' range in the Penobscot River is most likely the area downstream of the Veazie Dam as this is the first obstacle to upstream passage. Therefore, NOAA Fisheries expects that shortnose sturgeon could be affected by the Comprehensive Settlement Accord. A previous Section 7 consultation for shortnose sturgeon in the Penobscot River was conducted by NOAA Fisheries as part of the Basin Mills Project (P-10981) licensing. In that consultation, we concluded that if project plans change or new information becomes available to the Commission that changes the basis for that determination, then consultation for shortnose sturgeon should be reinitiated. The proposed Comprehensive Settlement Accord will result in changes to project conditions not previously considered by the FERC or NOAA Fisheries thus the Commission is obligated to reinitiate consultation for shortnose sturgeon in the Penobscot River.

NOAA Fisheries has also identified one population of Atlantic salmon in the Penobscot River as a candidate species and another as endangered under the ESA of 1973. On July 14, 1997 (62 FR 37560), the Penobscot River run of Atlantic salmon was listed as candidates for possible protection under the ESA by NOAA Fisheries. A status

review of additional Atlantic salmon populations, including the Penobscot River population, is currently being conducted by a Biological Review Team led by NOAA Fisheries. On December 17, 2000 (65 FR 69459), the Gulf of Maine Distinct Population Segment (DPS) of Atlantic salmon was jointly listed by NOAA Fisheries and the U.S. Fish and Wildlife Service as endangered under the ESA. The Atlantic salmon DPS encompasses all naturally reproducing remnant populations of Atlantic salmon from the Kennebec River downstream of the former Edwards Dam site, northward to the mouth of the St. Croix River. The DPS includes the Dennys, East Machias, Machias, Pleasant, Narraguagus, Ducktrap, and Sheepscot Rivers, and Cove Brook. Cove Brook is a tributary of the Penobscot River and is located downstream of the projects involved in this action. Cove Brook salmon annually migrate upstream and downstream in the lower Penobscot River both as adults and juveniles (smolts). Thus, actions included in the Comprehensive Settlement Accord have the potential to affect listed Atlantic salmon populations and therefore consultation under the ESA is necessary.

Under the ESA, the FERC is obligated to consult with NOAA Fisheries on this action for effects to endangered shortnose sturgeon and Atlantic salmon. Additionally, the entire Penobscot River and many of its tributaries have been designated as Essential Fish Habitat (EFH) for Atlantic salmon under the Magnuson-Stevens Fishery Conservation and Management Act (MSA). Under the 1996 Amendments (PL 104-267) to the MSA (16 U.S.C § 1801 et seq. (1998)), the Commission is required to consult with

NOAA Fisheries if the Commission's action or proposed action that it funds, permits, or undertakes, may adversely impact any EFH. The Amendments broadly define EFH as "waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity". Downstream of the Veazie Dam in the Penobscot River estuary, EFH has been designated for over two dozen federally managed species. Under the MSA, the Commission is obligated to consult with NOAA Fisheries concerning this matter.

Pursuant to these authorities, NOAA Fisheries has a federal statutory authority for protection, mitigation and enhancement of anadromous fish resources that will be directly affected by the potential amendments to the involved hydroelectric projects. The Federal Power Act, Fish and Wildlife Coordination Act, Endangered Species Act, and Magnuson-Stevens Fishery Conservation and Management Act confer upon NOAA Fisheries a specific right to participate in this proceeding. The interests of NOAA Fisheries as a regulatory agency with jurisdictional responsibility for the protection, mitigation and enhancement of affected anadromous fish resources are not adequately represented by any other party in this proceeding. By carrying out its statutory responsibilities under the Federal Power Act, Fish and Wildlife Coordination Act and other authorities cited above, NOAA Fisheries acts in the public interest. In addition, NOAA Fisheries is obligated to satisfy its tribal trust responsibilities in the exercise of its statutory authorities affecting tribal interests and tribal treaty obligations.

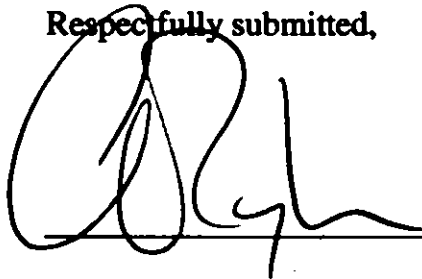


### III. CONCLUSION

For the aforementioned reasons, NOAA Fisheries respectfully requests that it be allowed to intervene in all the involved hydroelectric projects affected by the Comprehensive Settlement Accord.

Signed this 14<sup>th</sup> day of July 2004 on behalf of NOAA Fisheries.

Respectfully submitted,

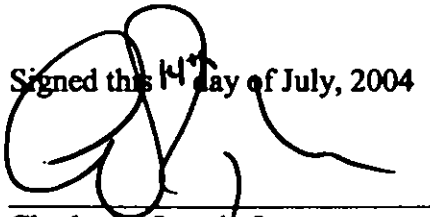
A handwritten signature in black ink, appearing to read 'CLynch', written over a horizontal line.

Charles N. Lynch, Jr.  
Office of General Counsel  
National Oceanic and Atmospheric Administration  
One Blackburn Drive  
Gloucester, MA 01930  
(978) 281-9342

**CERTIFICATE OF SERVICE**

I, Charles N. Lynch, Jr., hereby certify that on this day I served by first class mail NOAA Fisheries Motion to Intervene on the Secretary of the Federal Energy Regulatory Commission and upon each person or entity designated on the official service list compiled by the Commission on the so named PPL Maine, LLC filing, Project Nos. 2403, 2534, 2666, 2710, 2712, 2721 and 10981; and Docket No. D197-10; and the PPL Great Works, LLC filing, Project No. 2312, and the Bangor Pacific Hydro Associates filing, Project No. 2600.

Signed this 14<sup>th</sup> day of July, 2004



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Charles N. Lynch, Jr.  
NOAA – Office of General Counsel  
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# **EXHIBIT**

**“A”**



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE  
NORTHEAST REGION  
One Blackburn Drive  
Gloucester, MA 01930-2298

JUL 14 2004

Magalie R. Salas  
Secretary  
Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, D.C. 20426

Re: Comments on the Lower Penobscot River Multiparty Comprehensive Settlement Agreement, Joint Request and Modified Fishway Prescription  
Project Nos. 2403, 2312, 2534, 2721, 2710, 2712, 10981, 2600, and 2666; Docket No. DI97-10

Dear Secretary Salas:

The National Marine Fisheries Service (NOAA Fisheries) has reviewed the Lower Penobscot River Basin Comprehensive Settlement Accord ("Comprehensive Settlement") and the Joint Request as submitted on June 25, 2004 by PPL Maine, LLC and PPL Great Works, LLC (together referred to as "PPL"), the Department of the Interior<sup>1</sup> (DOI), the Penobscot Indian Nation (PIN), Maine State Agencies<sup>2</sup>, Conservation Interests<sup>3</sup>, and the Penobscot River Restoration Trust (collectively "Parties"). The Comprehensive Settlement includes the Lower Penobscot River Multiparty Settlement Agreement (MPA), The Lower Penobscot River Option Agreement, and the Comprehensive Settlement Agreement between the Penobscot Indian Nation, PPL Maine, LLC, and the Bureau of Indian Affairs of the Department of the Interior. Restoration of the lower Penobscot River through actions outlined in the MPA provides a singular opportunity to address fish passage and habitat issues while maintaining energy production and creating potential economic prospects. Options outlined in the agreement could represent tremendous potential to benefit aquatic habitat quality and a wide array of species, primarily alewife, blueback herring, Atlantic salmon, and shad. No less significant is the potential savings in time, effort, and economics to the Commission, resource agencies, and the hydro-developers which would otherwise be spent on relicensing procedures. The MPA, in association with all

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<sup>1</sup>U.S. Fish and Wildlife Service, Bureau of Indian Affairs, and National Park Service

<sup>2</sup>Maine State Planning Office, Maine Atlantic Salmon Commission, Maine Department of Inland Fisheries and Wildlife, and Maine Department of Marine Resources

<sup>3</sup>American Rivers, Inc., Atlantic Salmon Federation, Maine Audubon Society, Natural Resources Council of Maine, Trout Unlimited, and Penobscot River Restoration Trust



aspects of the Comprehensive Settlement, will resolve licensing concerns at Veazie, Great Works, Milford, and other projects operated by PPL on the Penobscot River and tributaries.

As a step in allowing the Comprehensive Agreement to move forward, the Parties have filed a Joint Request to suspend relicensing proceedings at Great Works and Howland and to extend requirements of PPL Maine to install an additional turbine/generating unit at Milford and to submit a final recreation plan for Veazie until the option for purchasing the designated facilities has been exercised, expired, or terminated.

NOAA Fisheries supports the restoration of free flowing riverine corridors and enhancement of long dormant diadromous fish habitat. Further, the agency recognizes the substantial efforts made by the parties directly involved, and tentatively supports the intent of the agreements to resolve pending rehearing requests and their associated issues on a grand scale. As you are aware, NOAA Fisheries did not file Requests for Rehearing years ago on the involved projects and, therefore, could not technically be a party to the settlement of those disputes, which is what the MPA purports to be. Accordingly, the agency was not in a position to sign the agreement or the Joint Requests. The scope of that settlement, however, expands beyond the scope of the pending Requests for Rehearing, and as a result, NOAA Fisheries will seek to be involved in the Federal Energy Regulatory Commission (FERC) application review process for each of the associated licensing actions as outlined in the MPA. In developing our comments and Section 18 fishway prescription and prescription modifications, NOAA Fisheries will take into full consideration objectives of the MPA and actions proposed therein. However, the agency presently finds it difficult to give blanket approval to all statements made within the MPA. Of particular concern are proposed limitations to Department of Commerce (DOC) Section 18 fishway prescription authority, assurances pertinent to Endangered Species Act (ESA), and select fish passage requirements.

Relative to the limitation of fishway authority issue, the Comprehensive Settlement's Explanatory Statement, Part III, Overview of the Comprehensive Settlement, Additional Provisions (p.27) states "...the Parties have agreed that any use by the Secretary of DOI or the Department of Commerce (DOC) of the authority reserved to them in the licenses to prescribe fishways in the future pursuant to Section 18 of the FPA should be limited to prescriptions consistent with the MPA." Similar language is contained within PPL's license article amendment applications. It should almost go without saying that NOAA Fisheries would, of course, object to any limitation of its fishway prescriptive authority based upon an agreement that it neither negotiated nor signed. Of course, it is certainly possible that NOAA Fisheries' prescriptions will be substantially similar, perhaps even identical, to those described in the MPA. Please note in a letter to PPL dated March 12, 2004, that NOAA Fisheries indicated our intent to review the license article amendments through the FERC process and to take into consideration the substance of the MPA. Accordingly, NOAA Fisheries is obviously not bound by the MPA, and the agency trusts that the Commission will similarly conclude that any finding to the contrary would be untenable both in practice and as a matter of law.

NOAA Fisheries has jurisdiction over anadromous species affected by the Comprehensive Settlement pursuant to the Endangered Species Act, 16 U.S.C. § 1531 et seq. Atlantic salmon is jointly listed by the U.S. Fish and Wildlife Service (USFWS) and NOAA Fisheries. A status

review of additional Atlantic salmon populations, including the Penobscot River population, is currently being conducted by a Biological Review Team led by NOAA Fisheries. In the event of a listing, future projects and federal actions on the Penobscot River will require ESA Section 7 consultation. Stipulated in the MPA are assurances by DOI for which an appropriate instrument under ESA regulations will be negotiated, such as an incidental take permit, and if the project options are exercised, no further actions under Section 7 will be required of PPL at their other facilities or by Bangor Pacific Hydro Associates (BPHA) at West Enfield (MPA, Sect IX(a), page 23). Atlantic salmon is a jointly managed species under the ESA and therefore any agreement or assurances provided to PPL would require NOAA Fisheries involvement and approval. It is important to note that the MPA does not address ESA concerns for already listed species including an analysis of potential impacts on ESA listed Cove Brook Atlantic salmon and shortnose sturgeon. Assurances agreed to within the MPA may or may not be appropriate to address all ESA concerns. Therefore, NOAA Fisheries cannot at this time support these MPA stipulations, and as stated earlier, the agency does not consider itself bound by assurances not made by it. Agency staff are willing to work through the process with PPL, BPHA, and US Fish and Wildlife Service to address all ESA concerns.

Fish passage requirements and DOI fishway prescription modifications are provided in the MPA for each project. The primary modifications outlined in Attachment A to the MPA provide for upstream eel passage and the fish lift at the Milford project. The modifications should improve conditions for passage of eels, Atlantic salmon, and other species. With one exception, there are no criteria for establishing objectively defining successful passage. Page A-7 of Attachment A indicates "Target Efficiency: 95% upstream passage efficiency (as measured by passage at Stillwater of marked fish of each target species, released at or above the Orono dam). Similar criteria could be established for upstream and downstream passage at each facility affected by the MPA. NOAA Fisheries would prefer to include criteria for defining effective and efficient passage similar to that proposed for the Stillwater project.

Contemporaneous to filing the MPA, PPL filed applications to amend the licenses for Projects Nos. 2403, 2534, 2712, 2666, and 2600, and an application for issuance of a new license on Project No. 2710 consistent with the MPA and PIN Agreements. The USFWS separately filed preliminary fishway prescription modifications and a preliminary fishway prescription for projects affected by the Comprehensive Settlement. NOAA Fisheries has statutory responsibilities and represents national public interest in matters affecting anadromous species and habitat. NOAA Fisheries will file a motion to intervene which encompasses all projects affected by the Comprehensive Settlement, and, as appropriate, file preliminary fishway prescriptions in the usual course of Commission review and analysis.

Again, NOAA Fisheries fully supports the intent of the Comprehensive Agreement. Actions proposed within have great potential for restoring fish passage and habitat value in the lower Penobscot River Basin. As an important step toward reaching the goals of the Comprehensive Agreement, NOAA Fisheries supports the Joint Request to suspend relicensing at Great Works and Howland projects and extend requirements of PPL Maine at Milford and Veazie. As discussed earlier, NOAA Fisheries was not part of the negotiations nor a party to the agreement. As a result, details within the document may or may not address all the agency's concerns pertaining to safe and efficient fish passage and ESA concerns for Atlantic salmon and shortnose

sturgeon. Topics outlined above represent the agency's more general concerns with the Comprehensive Agreement and, more specifically, the MPA. NOAA Fisheries intends to be a part of the FERC review process and to provide more detailed comments on the individual license amendment applications and submit preliminary Section 18 fishway prescriptions as appropriate in the future during the Commission application review process. Please contact Sean McDermott (978-281-9113) or Jeff Murphy (207-866-7379) of my staff if you have any questions related to these comments.

Sincerely,

  
Patricia A. Kurkul  
Regional Administrator

cc: Service List  
Pat Kurkul, F/NE  
Mary Colligan, PRD