

[76 FERC - 101 FERC, 95 FERC ¶61,016, FPL Energy Maine Hydro, LLC, Project Nos. 2556-033, 2557-018 and 2559-017, \(Apr. 02, 2001\), \(Apr. 2, 2001\)](#)

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**FPL Energy Maine Hydro, LLC, Project Nos. 2556-033, 2557-018 and 2559-017  
[61,029]**

**[¶61,016]**

**FPL Energy Maine Hydro, LLC, Project Nos. 2556-033, 2557-018 and 2559-017  
Order Denying Rehearing**

**(Issued April 2, 2001)**

**Before Commissioners: Curt Hébert, Jr., Chairman; William L. Massey, and Linda Breathitt.**

On October 12, 2000, the Commission issued an order <sup>[1]</sup> granting FPL Energy Maine Hydro, LLC's (FPL Hydro) request for rehearing of an order issuing a new license for the Messalonskee Project No. 2556, located on Messalonskee Stream in Kennebec County, Maine. <sup>[2]</sup> The U.S. Department of the Interior filed a timely request for rehearing of the October 12 Order. <sup>[3]</sup> For the reasons stated below, we deny Interior's request for rehearing.

*Background*

The Messalonskee Project consists of four hydropower developments. Messalonskee Lake is a storage reservoir located at the head of Messalonskee Stream. Water released from the lake is used to generate electric power at FPL Hydro's other three hydropower developments, which, proceeding downstream, are the Oakland, Rice Rips, and Union Gas developments, as well as at the Kennebec Water District's Automatic Project No. 2555, located between the Rice Rips and Union Gas developments. <sup>[4]</sup>

On July 28, 1999, the Commission issued a new license for the Messalonskee Project. Under Section 10(j) of the Federal Power Act (FPA), the Commission is required, in issuing a license, to include conditions based on recommendations of federal and state fish and wildlife agencies, for the protection of, mitigation of damages to, and enhancement of, fish and wildlife, unless the Commission believes that the recommendations may be inconsistent with the purposes and requirements of Part I of the FPA or other applicable law. Reflecting recommendations submitted by Interior, the new license for the Messalonskee Project required a minimum flow of 100 cubic feet per second (cfs) or inflow, whichever is less, from the Messalonskee Lake dam and from each of the downstream developments, and a minimum flow of 25 cfs of that minimum flow into the bypass reach at the Rice Rips development. <sup>[5]</sup> Interior advanced these recommendations primarily to improve habitat for brown trout below the Union Gas dam and in the Rice Rips bypass reach.

In its request for rehearing of the order issuing the new license, FPL Hydro argued that the required minimum flows were not supported by substantial evidence, <sup>[6]</sup> because there had been no demonstration that those flows would produce any measurable benefit, beyond FPL Hydro's own proposed flows, in providing habitat or meeting the management goals for the brown trout fishery. FPL Hydro also argued that the minimum flows in the license order were inconsistent with the comprehensive development standard of Section 10(a)(1) of the FPA, <sup>[7]</sup> in that any benefits that might

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result from the higher minimum flows were considerably outweighed by the loss of generation that would result from the higher flows and by the costs to the licensee of that lost generation.

In our October 12 Order on rehearing, we agreed that the recommended flows that we had adopted as minimum flow requirements were not supported by substantial evidence. We also concluded that, lacking substantial evidence, the recommended flows were also inconsistent with the comprehensive development standard, because there was no justification for imposing the costs of lost generation from those flows if there were no demonstrable benefits to outweigh those costs. Accordingly, we modified the license to require a minimum flow of 15 cfs from Messalonskee Lake dam and each of the downstream developments and a 15-cfs minimum flow in the Rice Rips bypass reach. These were the flows proposed by Central Maine Power Company (Central Maine), FPL Hydro's predecessor, in the license application, and both the Draft and Final Environmental Impact Statements (EIS) prepared by Commission staff for this proceeding found that those flows would provide an acceptable degree of habitat for brown trout. [\[8\]](#)

Interior argues on rehearing that the 100-cfs and 25-cfs minimum flows are supported by substantial evidence. In particular, it contends that we improperly rejected the methodology that supported the recommended flows, arbitrarily substituted our own opinion for Interior's recommendations with regard to fishery management goals, and failed to meet Section 10(a)(1) requirements in that the project is not best adapted to the State of Maine's comprehensive plan for managing brown trout.

*Discussion*

Interior's principal criticism of our October 12 Order is that we failed to treat the results of Central Maine's Instream Flow Incremental Method (IFIM) studies as substantial evidence to support Interior's flow recommendations. Central Maine conducted these studies on the Rice Rips bypass reach and the Union Gas tailwater as the result of pre-filing consultation. Interior states that, during consultation, Central Maine did not identify any other studies as necessary, that the Commission requested no further studies before determining that the license application was complete, and that neither the Commission nor FPL Hydro can now reject the validity of those studies.

We did not reject the IFIM methodology or the results of the IFIM studies in our October 12 Order. An IFIM study shows the relationship between the amount of flow in a stream and the amount of habitat that will exist for selected species. In this case, the studies showed the amount of the habitat that would exist for adult brown trout over a range of flows. The studies showed that a 100-cfs flow in the Union Gas tailwater and a 27-cfs flow in the Rice Rips bypass reach would produce the maximum habitat for adult brown trout in the respective reaches. [\[9\]](#) In our October 12 Order, we agreed that the studies "accurately determined the extent of habitat that would be produced if these flows were available." [\[10\]](#)

However, an IFIM study does not necessarily produce all of the evidence needed to support a flow recommendation. As we noted in the order, the Maine Department of Inland Fisheries and Wildlife (Maine DIFW) manages the Union Gas tailrace and the Rice Rips bypass reach to maximize fishing opportunity for brown trout at particular times of the year. Specifically, Maine DIFW seeks to maximize fishing opportunity in the Union Gas tailrace from May 1 through June 15 and for the latter half of September; brown trout stocked by Maine DIFW are probably present in the Rice Rips bypass reach from May to mid-June and from mid-September through October. [\[11\]](#) We concluded: [\[12\]](#)

The record demonstrates that fisheries have in fact developed in these reaches under existing flow conditions. Recreational use of the fishery appears to be limited, as use of unimproved recreation sites at both Union Gas and Rice Rips are [is] at 25 percent or less capacity on weekends during the recreational season. The establishment of the existing

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fishery and the limited use of the fishery suggest that the modest additional habitat that would be produced under Interior's flow regime is not warranted [footnote omitted].

In addition, the record did not indicate why any benefits from increased habitat would occur during those months in which Maine DIFW does not manage the reaches to maximize the fishing opportunity. Thus, our finding on substantial evidence did not relate to the validity of the studies but to the lack of evidence that any benefit to the brown trout fishery would be produced by the modest gains in habitat to be achieved by requiring Interior's recommended flows rather than those proposed by the applicant. <sup>[13]</sup> The IFIM studies, while substantial evidence of the relationship between flows and potential available habitat, do not address the area in which we found substantial evidence to be lacking.

Interior's criticism is not so much that we considered the IFIM studies insufficient evidence of the relationship between flows and habitat availability, but that we did not find that those studies, standing alone, constituted substantial evidence to support its recommended flows. <sup>[14]</sup> Interior argues that, because no need for studies other than the IFIM studies was identified during prefiling consultation, neither the license applicant nor the Commission may now claim that further evidence of fishery benefits is required. Interior asserts that it was the responsibility of the license applicant, in support of its application, to conduct any necessary additional investigations to determine the extent of fishery benefits that would result from discharges identified through the IFIM studies. Similarly, it asserts that it was the Commission's responsibility to ensure that the application included all information necessary for the Commission, in issuing a license, to meet its requirement under Section 4(e) of the FPA to give equal consideration to the protection, mitigation of damages to, and enhancement of, fish and wildlife, and to permit a Section 10(a)(1) public interest determination.

Interior confuses the responsibilities of the license applicant and of the Commission with its own responsibility. The license applicant's responsibility to provide sufficient evidence in support of its application does not extend to collecting evidence that might support future recommendations of resource agencies. Nor is the Commission obligated to request additional evidence from the license applicant in anticipation of such recommendations.

<sup>[15]</sup> The Commission has a responsibility under Section 10(a)(1) to ensure that a licensed project will be best adapted to a comprehensive plan for developing the waterway for a variety of beneficial public purposes, including the protection and enhancement of fish, and, under Section 4(e), to give equal consideration to fisheries. The Commission's responsibility to ensure that its comprehensive development finding will be supported by substantial evidence in the record does not alleviate the responsibility of any party recommending the inclusion of a condition in a license to support its recommendation with substantial evidence. <sup>[16]</sup>

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Interior argues that, since Central Maine, as the original license applicant, agreed to the IFIM methodology during prefiling consultation, FPL Hydro, as the transferee of the license and of the new license application, was bound by Central Maine's position. However, while Central Maine did not contest the IFIM methodology, it did dispute the necessity of maximizing brown trout habitat, as Interior itself acknowledges. Similarly, FPL Hydro, in its rehearing request, did not challenge the IFIM methodology but only the evidentiary support for the need for flows that would maximize habitat.

Interior claims that our determination not to consider the IFIM studies as substantial evidence of fishery benefits is inconsistent with our reliance on such studies in other proceedings. However, IFIM studies simply provide evidence of what flows potentially provide what fishery habitat; they do not, by themselves, guarantee incremental fishery benefits. In any proceeding, there must be a basis in the record for the Commission to conclude that recommended flows will produce not only a certain amount of potential habitat but also demonstrable benefits over alternative flow proposals to the fishery resource. Here, the IFIM studies show the extent of brown trout habitat that would be available at particular flows, but they do not demonstrate that Interior's recommended flows could always be attained during the periods for which the stream reaches are managed for a brown trout fishery, nor do they demonstrate that the limited seasonal fishery in those reaches would benefit even when the maximum habitat would be attained. <sup>[17]</sup>

As stated above, Section 10(a)(1) requires the Commission to find that a licensed project is best adapted to a comprehensive plan for developing the waterway for a variety of beneficial public purposes, including the protection and enhancement of fish. Interior asserts that comprehensive plans for the protection and enhancement of fish are developed by state and federal resource agencies, and that its fishery management goals for Messalonskee Stream were consistent with those of Maine DIFW and that agency's comprehensive plan for expanding brown trout habitat in the Kennebec River Basin. Interior argues that we were required to license the project in a manner best adapted to that management plan, and that we erred in substituting our own opinion for the accomplishment of Maine's fishery goals.

Interior confuses Sections 10(a)(1) and 10(a)(2)(A) of the FPA. Section 10(a)(1) requires the Commission, based on the record developed in a proceeding, to make a public interest determination which balances the various, and often competing, interests that will be affected by the project. [\[18\]](#) In making this determination, the Commission is also required, under Section 10(a)(2)(A), to consider the extent to which the project is consistent with any comprehensive plans filed by state or federal agencies. [\[19\]](#) In contrast to the comprehensive plan referred to in Section 10(a)(1), these state and federal plans are not required to balance all public interest uses of a waterway, and usually they do not. These plans are thus separate and distinct from the public interest balancing requirement of Section 10(a)(1). Moreover, the Commission is not required to ensure that licensing a project is consistent with Section 10(a)(2)(A) plans as long as it has given due consideration to all recommendations from relevant agencies, reconciled inconsistencies between those agencies' recommendations and the Commission's plans to the extent possible, and explained its reasons for departing from the agencies' recommendations. [\[20\]](#)

Interior is also incorrect in contending that the minimum flows established in our October 12 Order do not meet Maine's fishery management goals for Messalonskee Stream. Maine's management plan for the Kennebec River Basin [\[21\]](#)

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promotes the goal of establishing a brown trout sport fishery in the river basin, but it does not follow that brown trout habitat must be maximized everywhere, and at all times, in the basin. The record in this proceeding indicates that Maine DIFW manages the waters of the Messalonskee Project primarily for a seasonal brown trout fishery. [\[22\]](#) As we have already noted, seasonal fisheries have become established in the Union Gas tailrace and Rice Rips bypass reach under existing flow conditions, and the fisheries appear adequate to satisfy recreational uses. [\[23\]](#) The license applicant's proposed 15-cfs minimum flows, which we have adopted, are equal to or greater than existing leakage flows at these developments. In its water quality certification issued for the project, the Maine Department of Environmental Protection found that the proposed minimum flows would be adequate to achieve and maintain suitability of the project waters for fishery habitat. [\[24\]](#) Moreover, Maine's comprehensive plan for the river concludes that licensing the Messalonskee Project as proposed by the applicant represents an appropriate balance of resources and uses and conforms with state policy. [\[25\]](#) For these reasons, we find no inconsistency between the flow requirements we have adopted and Maine's fishery management goals. [\[26\]](#)

Interior asserts, correctly, that, if the Commission does not accept a Section 10(j) recommendation, it must, under Section 10(j)(2), explain why the conditions it selects comply with Part I of the FPA or other applicable law. [\[27\]](#) We believe that both our October 12 Order and the present order adequately explain why the minimum flows we adopted will be best adapted to the comprehensive development of Messalonskee Stream for beneficial public purposes, including both water power development and the protection and enhancement of fish, and why there is substantial evidence to support the requirement that those flows be released. [\[28\]](#)

For the reasons stated above we deny Interior's request for rehearing.

*The Commission orders:*

The request for rehearing filed by the U.S. Department of the Interior in this proceeding on November 13, 2000, is denied.

**-- Footnotes --**

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**Footnotes**

1 [93 FERC ¶61,047](#).

2 [88 FERC ¶61,122](#) (1999).

3 On January 13, 2001, FPL Hydro filed a request for permission to file a brief, accompanied by the brief, addressing the issues raised by Interior in its request for rehearing. We will grant the request and consider the brief in the interest of further informing our decision-making.

4 The Oakland, Rice Rips, and Union Gas developments of the Messalonskee project were originally licensed as separate projects, Project Nos. 2559, 2557, and 2556. Messalonskee Lake was included in the Oakland Project. The developments were consolidated into one project in the order issuing new license. All three project numbers are listed in the title of this order, because the requests for rehearing were filed in all three dockets. A subsequent license for the Automatic Project was issued on July 28, 1999. [88 FERC ¶61,117](#).

5 A more detailed background and procedural history of the issues relating to minimum flows at the Messalonskee Project is contained in the October 12, 2000 Order.

6 Section 313(b) of the FPA requires Commission findings to be supported by substantial evidence.

7 Section 10(a)(1) requires that licensed projects:

shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways

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for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public purposes including irrigation, flood control, water supply, and recreational and other purposes referred to in Section 4(e). . . .

8 Nevertheless, in the Final EIS, staff recommended adoption of Interior's flows because it could not find them inconsistent with applicable law.

9 FEIS at p. 4-78 (Union Gas) and p. 4-73 (Rice Rips).

10 [93 FERC at p. 61,107](#).

11 The Kennebec River is stocked annually, and trout from that stock migrate to the base of Union Gas dam. The Rice Rips bypass reach is stocked only on an "as-available" basis, meaning that it receives only surplus brown trout stock not needed for annually stocked locations. Summary of staff technical conference, filed October 30, 1998, at p. 2.

12 [93 FERC at p. 61,107](#).

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13 That any gain in habitat from Interior's recommended flows in comparison to the applicant's proposed flows would, in fact, be modest is supported by the record. Although the IFIM studies showed that Interior's proposed flows would provide roughly 100 percent of the available brown trout habitat in the two reaches, they also showed that the license applicant's proposed 15-cfs minimum flows, roughly equivalent to the existing leakage flows at each development, would provide about 76 percent of the maximum brown trout habitat in the Union Gas tailwater (FEIS at pp. 4-78, pp. 80-81) and about 94 percent of the maximum habitat in the Rice Rips bypass reach (FEIS at pp. 4-73). In addition, for much of the period in which Maine DIFW manages these

reaches for the brown trout fishery, flows actually occurring in Messalonskee Stream would be either too high (FEIS at pp. 4-80) or too low (FEIS pp. 4-73, p. 81) to permit achievement of the maximum brown trout habitat.

14 As Interior itself concedes, the results of the IFIM studies were the sole evidentiary basis for its minimum flow recommendations. Request for rehearing, p. 10.

15 In *City of Centralia v. FERC*, 213 F.3d 742 (D.C. Cir. 2000), the court stated, at p. 749:

FERC is certainly empowered to require an applicant to conduct a study when there is some evidence of a problem and a study is necessary to determine the extent of the harm. But not even FERC is suggesting that an applicant has a duty to determine if a problem exists.

As to the IFIM studies in this proceeding, as we have stated, Central Maine acted pursuant to agreement reached among it and the agencies during prefiling consultation, not because it had an obligation, as the applicant, to determine whether such studies would be necessary.

16 See *Interior v. FERC*, 952 F.2d 538, 544 (D.C. Cir. 1992), in which the court stated [emphasis in the original]:

Nothing in the statute requires *FERC* to conduct the studies that the fish and wildlife agencies deem necessary to the Section 10(j) process. Section 10(j) requires the Commission to consider recommendations “received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. §661 *et seq.*)” [16 U.S.C. §803 \(j\)\(1\)](#). Under the Coordination Act, agency recommendations are made “based on surveys and investigations *conducted by* the United

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States Fish and Wildlife Service and such state agenc[ies].”

17 Interior contends that, according to Commission guidance, the substantial evidence standard should generally be met by an agency’s Section 10(j) recommendations without difficulty and should be used only in limited circumstances. Interior’s cite for this statement is an internal staff document, which cannot bestow on an agency recommendation a basis of substantial evidence that is not there.

Interior also argues that the record here is different from that in *City of Centralia v. FERC*, 213 F.3d 742 (D.C. Cir. 2000), which we cited in our October 12 Order. Interior states that, in *Centralia*, unlike here, the resource agency recommendation was inconsistent with a significant record that indicated that the recommendation was unnecessary, costly, and likely to achieve little benefit. However, the court in *Centralia* concluded that the recommendation in question should be rejected for lack of substantial supporting evidence, independent of the additional factor that there was substantial evidence in support of the opposition to the recommendation. See *City of Centralia*, 213 F.3d at 749.

18 *Interior v. FERC*, *supra*, at 545; *LaFlamme v. FERC*, 385 F.2d 389 (9th Cir. 1988); *Udall v. FPC*, 347 U.S. 428 (1967).

19 The definition of a comprehensive plan in this context is set forth at [18 C.F.R. §2.19](#) (2000).

20 *Friends of the Ompompanoosuc v. FERC*, 968 F.2d 1549, 1554 (2nd Cir. 1992).

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21 Kennebec River Resource Management Plan: Balancing Hydropower Generation and Other Uses. State of Maine Comprehensive Rivers Management Plan, Volume 5 (February 1993).

22 Kennebec River Resource Management Plan at pp. 124-25.

23 Interior criticizes our reliance on the underuse of the existing fishery in finding that the proposed flows would provide adequate brown trout habitat. Interior argues that, under existing project conditions, a successful brown trout population could not be expected to thrive, the public would not come to fish, and the existing recreational facilities would not be expected to experience high use. This argument ignores the fact that a successful brown trout population has in fact been established under existing conditions. Given that the existing fishery is underused, we see no basis to assume that more extensive fishing opportunities would result from marginally greater habitat.

- 24 See Maine Department of Environmental Protection Water Quality Certification, issued August 28, 1995, p. 12. Under Maine law, Maine's water quality certification represents the state's position on all license conditions, including those involving fish and wildlife. Subsequently, in a May 13, 1996, letter to the Commission, Maine Department of Environmental Protection stated that it did not object to Interior's higher flow regime, but it continued to consider the proposed minimum flows adequate.
- 25 Kennebec River Resource Management Plan at p. 38. Interior cites Maine's management goals, as stated on p. 111 of this plan, as maintaining optimum population levels of freshwater fishes and associated aquatic species; maintaining optimum quality, quantity, and diversity of habitat; and providing for optimum and diverse uses of freshwater fishes for sport fishing and other uses. These are general goals for the management of inland fisheries throughout the basin, not specifically for Messalonskee Stream, and, in any event, the observance of these goals does not dictate the adoption of Interior's flow recommendations.
- 26 Pursuant to Section 10(a)(2)(A), we find that there is no inconsistency between the project as licensed with the adopted flows and Maine's comprehensive plan for the Kennebec River Basin or any of the other comprehensive plans listed in our order *issuing the Messalonskee Project license*, [88 FERC ¶¶61,122](#), at n.41.
- 27 However, Interior also claims that the Commission must find that its adopted alternative provides equal or greater protection for fisheries than the rejected recommendation. Section 10(a)(2) contains no such requirement.
- 28 Interior asserts that, having no basis to reject its recommendations for lack of substantial evidence, we were required to support our action based on inconsistency with Sections 10(a)(1) and 4(e) of the FPA, and it purports to demonstrate why the recommendations should not have been rejected under those sections as well. Because we do not accept Interior's premise that we erred in rejecting the recommendations for lack of substantial evidence, Interior's analysis of the recommendations' validity under Sections 10(a)(1) and 4(e) is moot and need not be addressed.