

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**FirstLight MA Hydro LLC
Northfield Mountain LLC**

)
)

**Project No. 1889-085
Project No. 2485-071**

**RESPONSE OF FIRSTLIGHT MA HYDRO LLC AND NORTHFIELD
MOUNTAIN LLC TO COMMENTS ON RECREATION SETTLEMENT
AGREEMENT**

July 25, 2023

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TABLE OF CONTENTS

| | | |
|------|---|----|
| I. | BACKGROUND | 1 |
| II. | RESPONSE TO COMMENTS | 3 |
| | A. Relationship to Flows and Fish Passage Settlement Agreement..... | 3 |
| | B. Seasonal Minimum Flow in the Upper Bypass Reach..... | 5 |
| | C. License Term..... | 5 |
| | D. Recreation Advisory Group and Recreation Management Plan | 5 |
| | E. Recreation Implementation Schedule | 7 |
| | F. Flow and Water Notification Website..... | 8 |
| | G. Cabot Woods Fishing Access..... | 8 |
| | H. Recreation Fees..... | 9 |
| | I. Invasive Aquatic Plants..... | 9 |
| | J. Continuation of Programming | 10 |
| | K. Outdoor Accessibility..... | 10 |
| | L. Tribal Issues | 11 |
| III. | CONCLUSION..... | 14 |

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Pursuant to Rule 602(f) of the Federal Energy Regulatory Commission’s (“FERC” or “Commission”) Rules of Practice and Procedure (“Rules”),¹ and in accordance with the Commission’s June 20, 2023 Notice of Settlement Agreement and Soliciting Comments, FirstLight MA Hydro LLC, owner and operator of the Turners Falls Hydroelectric Project (“Turners Falls Project”), and Northfield Mountain LLC, owner and operator of the Northfield Mountain Pumped Storage Project (“Northfield Mountain Project”) (collectively, “FirstLight”), hereby respond to comments filed on the June 2023 Recreation Settlement Agreement.²

I. BACKGROUND

The Recreation Settlement Agreement was negotiated and signed by FirstLight and the National Park Service, Massachusetts Department of Conservation and Recreation, Town of Erving, Massachusetts, Town of Gill, Massachusetts, Town of Montague, Massachusetts, Town of Northfield, Massachusetts, American Whitewater,

¹ 18 C.F.R. § 385.602(f) (2022).

² Recreation Settlement Agreement and Explanatory Statement, Project Nos. 1889-085 and 2485-071 (filed June 12, 2023).

Appalachian Mountain Club, Crab Apple Whitewater, Inc., New England FLOW, Zoar Outdoor, Access Fund, Franklin Regional Council of Governments, and Western Massachusetts Climbers Coalition (“Settling Parties”). The Recreation Settlement Agreement is a package that, by its terms, addresses all outstanding issues among the Settling Parties for relicensing of the Projects pertaining to recreation.³

FirstLight’s commitments in the Recreation Settlement Agreement are in the form of a proposed Recreation Management Plan (“RMP”)⁴ submitted for the Commission’s approval as part of its orders issuing the new Project licenses.⁵ None of the elements of the Recreation Settlement Agreement can be viewed in isolation, including the timing of when recreation improvements will be implemented. Understanding that the Commission will independently review the provisions of the RMP, the Settling Parties nevertheless have reserved the right to withdraw from the Recreation Settlement Agreement if the Commission makes material modifications to the RMP.⁶

In the RMP, FirstLight has agreed to implement a number of recreation improvements in addition to those it proposed in the AFLAs. These additions to the RMP reflect the preferences and priorities of federal and state agencies, local communities, and recreation users as articulated during the extensive negotiations over the RMP. In addition, the Settling Parties anticipate a higher level of recreation use at the Project as a

³ Recreation Settlement Agreement, Section 2.1. Recreational boating flows were previously resolved in the Flows and Fish Passage Settlement Agreement (March 2023) filed on March 31, 2023.

⁴ FirstLight also has made certain other commitments to be implemented outside of the new Project licenses. These are contained in Appendix C of the Recreation Settlement Agreement, which was included for the Commission’s information.

⁵ The RMP is Appendix E to the Recreation Settlement Agreement. The RMP, if approved by the Commission, would supersede the recreation management plans FirstLight filed with its Amended Final License Applications (“AFLAs”) on December 4, 2020.

⁶ See Recreation Settlement Agreement, Sections 1.3.6, 6.1.

result of the increased flows in the bypass reach of the Connecticut River provided in the Flows and Fish Passage Settlement Agreement. The RMP includes recreation facilities and amenities to account for such increased use as well as to attract additional recreation users to the Project area for the benefit of the local economy. The total cost of the recreation improvements in the RMP is almost \$6 million, representing a substantial investment by FirstLight in the local communities.

II. RESPONSE TO COMMENTS

Relicensing participants filed three sets of comments⁷ on the Recreation Settlement Agreement.⁸ FirstLight is responding to the principal points raised in those comments. FirstLight's silence as to any particular argument or factual assertion should not be read as an admission to such argument or assertion.

A. Relationship to Flows and Fish Passage Settlement Agreement

CRC objects to the provision in the Recreation Settlement Agreement that states that the Settling Parties who are not Parties to the Flows and Fish Passage Settlement Agreement will not oppose the Flows and Fish Passage Settlement Agreement.⁹ CRC

⁷ Comments of Connecticut River Conservancy re the Offer of Partial Recreation Settlement, Project Nos. 2485-071 and 1889-085 (filed July 10, 2023) ("CRC Comments"); Comments of The Nolumbeka Project, Nipmuck, Abenaki, Tribal Coalition re the Recreation Settlement Agreement, Project Nos. 2485-071 and 1889-085 (filed July 10, 2023) ("Tribal Comments"); Comments of Meg Moynahan Bandarra o/b/o Unpaved Trails for All re the Proposed Recreation Settlement Agreement and Explanatory Statement, Project Nos. 2485-000 and 1889-000 (filed July 7, 2023) ("Unpaved Trails Comments").

⁸ FirstLight notes that the opposing commenters did not object to every aspect of the Recreation Settlement Agreement. Under Rule 602, "failure to file a comment constitutes a waiver of all objections to the offer of settlement." 18 C.F.R § 385.602(f)(3). Any aspect of the Recreation Settlement Agreement to which no one objects is uncontested. *Id.* § 385.602(h)(1)(i) (Commission will decide the merits of the contested settlement issues in a case where an offer of settlement is contested in part). No commenter may be heard to object later to any aspect of the Recreation Settlement Agreement to which it failed to object within the time set by the Commission for comments. *Exxon Corp. v. FERC*, 114 F.3d 1252, 1259-60 (D.C. Cir. 1997). Thus, any elements of the Recreation Settlement Agreement to which no one timely objected must be considered uncontested in this relicensing proceeding.

⁹ Recreation Settlement Agreement, Section 2.2.

comments that this is an attempt to “stifle” any input or opposition to the Flows and Fish Passage Settlement Agreement.¹⁰

All of the Settling Parties to the Recreation Settlement Agreement entered into the agreement freely and of their own accord. Any of them could have refused to sign the agreement if they, like CRC, could not live with the non-opposition language. CRC’s suggestion that FirstLight somehow manipulated the other Settling Parties into signing the Recreation Settlement Agreement is both incorrect and implausible.

Moreover, the Flows and Fish Passage Settlement Agreement is directly relevant to the Recreation Settlement Agreement in that it includes enhanced flows for recreational boating. Several Settling Parties to the Recreation Settlement Agreement represent recreational boating interests and are also Parties to the Flows and Fish Passage Settlement Agreement. All the Parties to the Flows and Fish Passage Settlement Agreement, not just FirstLight, have a strong interest in the Commission adopting that agreement’s proposed flow regime. The agreement not to oppose the Flows and Fish Passage Settlement Agreement on the part of the Settling Parties here, while not an affirmative endorsement of that agreement, at a minimum reflects that they will not contest it and therefore benefits all the Parties to the Flows and Fish Passage Settlement.

In any case, the contractual arrangements among the Settling Parties are not relicensing issues for the Commission to decide or change.¹¹ CRC’s objection to the non-opposition language is irrelevant to the Commission’s licensing decision.

¹⁰ CRC Comments at 1.

¹¹ *See, e.g., Wis. Elec. Power Co.*, 173 FERC ¶ 61,162 at P 15 (2020), *reh’g denied*, 174 FERC ¶ 61,044 (2021).

B. Seasonal Minimum Flow in the Upper Bypass Reach

CRC reiterates its objection to the Flows and Fish Passage Settlement Agreement's provision for a minimum flow of 500 cubic feet per second ("cfs") in the bypass reach of the Connecticut River from July 1 to November 15.¹² FirstLight provided a detailed response to CRC on this issue in its June 12, 2023 response to comments on the Flows and Fish Passage Settlement Agreement.¹³ CRC continues to push a narrative that FirstLight is obligated to maximize opportunities for recreational boating at the Turners Falls Project no matter the cost, and no matter the natural resource tradeoffs. That is not consistent with the Commission's responsibility to balance competing resource needs within a waterway in the public interest.

C. License Term

As it did with the Flows and Fish Passage Settlement Agreement, CRC continues to oppose 50-year new license terms for the Projects. CRC adds nothing of substance to its prior arguments. FirstLight answered this objection in its previous response.¹⁴

D. Recreation Advisory Group and Recreation Management Plan

CRC objects to what it claims is the approach taken by the Recreation Settlement Agreement in forming two groups to advise FirstLight on recreation issues throughout the term of the new Project licenses.¹⁵

¹² CRC Comments at 2-4.

¹³ Response of FirstLight MA Hydro LLC and Northfield Mountain LLC to Comments on Flows and Fish Passage Settlement Agreement at 6-8 and Attachment A, Project Nos. 2485-071 and 1889-085 (filed June 12, 2023) ("FirstLight Flows and Fish Passage Response"). CRC's comments on this same issue here are essentially an answer to FirstLight's response. The Commission's Rules prohibit an answer to an answer unless ordered by the Commission. 18 C.F.R. § 385.213(a)(2).

¹⁴ FirstLight Flows and Fish Passage Response at 23-27. Again, CRC's comments here are essentially an unauthorized answer to FirstLight's response to CRC's initial comments.

¹⁵ CRC Comments at 5.

The first group, the Recreation Advisory Group (“RAG”), will meet at least annually to discuss recreation use and maintenance needs at Project recreational facilities. The formation of the RAG is not a component of the RMP, but rather an off-license provision of the Recreation Settlement Agreement which the Settling Parties have not submitted for FERC’s approval.¹⁶ Membership of the RAG is a contractual matter among the Settling Parties and thus not a relicensing issue for the Commission to decide.¹⁷

Unpaved Trails for All recommends that the RAG be expanded to include the disabled community.¹⁸ FirstLight, and no doubt the other Settling Parties, would have welcomed the participation of Unpaved Trails for All in the meetings and negotiations leading to the Recreation Settlement Agreement, had Unpaved Trails for All expressed an interest in participating. As noted, membership of the RAG is a contractual matter among the Settling Parties. Nevertheless, FirstLight will propose to the RAG that the RAG consult with the disabled recreation community to obtain input regarding those matters within the scope of the RAG’s responsibilities.¹⁹

The second group will assist FirstLight in its periodic 10-year comprehensive reviews of Project recreation needs.²⁰ Any changes to the RMP proposed to FERC will be based on a consensus of the group. FirstLight will consult with a broad range of recreation interests in conducting these reviews, including the Massachusetts Department of Conservation and Recreation, local communities, and local and regional recreation

¹⁶ Recreation Settlement Agreement, Appendix C, Section C103.

¹⁷ *See supra* note 11.

¹⁸ Unpaved Trails Comments at 2.

¹⁹ In addition, the RMP includes provisions for enhancing recreational access for the disabled community. *See* RMP, Section 4.1.2.

²⁰ Recreation Settlement Agreement, Section 4.1.1.

organizations. CRC does not make a persuasive case why its participation in this effort is essential and not adequately represented by the participants. Further, there is nothing in the RMP that precludes FirstLight and the consulted entities from considering information from other sources such as CRC. However, FirstLight does not believe that forcing CRC, a non-Settling Party to the Recreation Settlement Agreement, into a process that is intended to be collaborative and consensus-based, would be constructive.

E. Recreation Implementation Schedule

CRC advocates for requiring the portage trail around Rock Dam to be constructed in Year 3 of the new Project licenses, rather than Year 5. CRC says this would be logical given that the increased flows for recreational boating will be made available in Year 3.²¹

FirstLight agrees as this is already in the RMP. CRC misunderstands the intent of the RMP with respect to timing of the trail. Recognizing that the new bypass flow regime will be implemented in Year 1 of the license, the RMP provides that FirstLight will consult with the National Marine Fisheries Service, Massachusetts Natural Heritage Endangered Species Program, Massachusetts Department of Conservation and Recreation, American Whitewater, Appalachian Mountain Club, The Nolumbeka Project Inc., the Elnu Abenaki Native American Tribe, and the Town of Montague in Year 1 to stake out and/or flag a desired trail, with directional signage to avoid critical features. FirstLight also will clear low-lying vegetation and tree saplings as needed. If improvements are needed to the trail based on user experience, the RMP states that FirstLight will make those improvements by Year 5.²²

²¹ CRC Comments at 6.

²² RMP, Section 6.1.9.

F. Flow and Water Notification Website

Under RMP Section 4.2.2, FirstLight will provide certain real-time and forecasted data on a website accessible to the public to facilitate recreational use of the Project area. CRC states that the website should be made available in the languages spoken throughout the region. CRC also asserts that the website should comply with Americans with Disabilities Act guidance,²³ and that a review of FirstLight's recreation-related websites and materials should be included in the accessibility assessment under RMP Section 4.1.2.²⁴

FirstLight believes this is a matter that does not need to be codified in the RMP, but can be handled by the RAG. FirstLight will consult with the RAG on how to design the website so that it is publicly available in multiple languages, and will evaluate adding an accessibility menu option relative to the visual appearance of the website (font size, spacing, contrast, line, height, etc.). The approach can be adapted as technology changes.

G. Cabot Woods Fishing Access

CRC states that while the RMP proposes improvements to the Cabot Woods area, public use of that area is dependent on vehicular access to Migratory Way which is hampered by gate closures and confusing signage at the U.S. Geological Survey's Conte Lab facility.²⁵

FirstLight closes the security gate at Migratory Way on weekends due to excessive trash dumping, property damage, and other activities not conducive to public

²³ ADA, U.S. Department of Justice Civil Rights Division, Guidance on Web Accessibility and the ADA (Mar. 18, 2022), <https://www.ada.gov/resources/web-guidance/>.

²⁴ CRC Comments at 6-7.

²⁵ *Id.* at 7.

safety. While gate closure prevents vehicular access, public parking is available at the head of the gate at 15th and G Streets. Members of the public can walk or bike down Migratory Way, which is paved, to Cabot Woods a distance of 0.6 miles. FirstLight does not believe this is an undue burden on the public.

H. Recreation Fees

RMP Section 9 states that FirstLight may charge reasonable fees to help defray the cost of constructing, operating, and maintaining its developed recreational facilities,²⁶ although it will not charge for access to Project waters and undeveloped lands. The RMP additionally commits FirstLight to charging reduced or no fees for residents of the host towns and Franklin County. Before charging even reduced fees for such residents, it will consult with the host communities.

CRC states that FirstLight should implement the reduced or no fee policy immediately.²⁷ As noted in the RMP, FirstLight does not currently charge fees for many of its Project recreation features. FirstLight also provides free passes at host community libraries enabling residents to rent canoes, kayaks, or paddleboards at Barton Cove in the summer, and to access cross country ski trails in the winter. FirstLight will implement the policy described in the RMP upon issuance of the new Project licenses approving the RMP.

I. Invasive Aquatic Plants

CRC critiques the Recreation Settlement Agreement, as it did the Flows and Fish Passage Settlement Agreement, for failure to address invasive aquatic plant species in the

²⁶ The Commission permits licensees to charge for such costs. 18 C.F.R. § 2.7.

²⁷ CRC Comments at 7.

Turners Falls Impoundment.²⁸ For example, CRC discusses hydrilla, which it says has been found in the lower Connecticut River watershed but which is not present in the Turners Falls Impoundment. Regardless of whether this is an issue that needs to be addressed or not, it is not within the scope of the Recreation Settlement Agreement. CRC's assertions regarding FirstLight's obligations to monitor and control invasive aquatic plants are not pertinent here.

J. Continuation of Programming

CRC states that FirstLight should be required to make a formal commitment to continue its current practice of year-round programming at its facilities to engage community members in experiential learning and recreation.²⁹ FirstLight presently intends on continuing its year-round programming and will work with the RAG on future programming needs.

K. Outdoor Accessibility

Unpaved Trails for All makes several recommendations for improving accessibility at FirstLight's outdoor recreation facilities. Section 4.1.2 of the RMP commits FirstLight, for any new construction or rehabilitation of existing public recreation buildings and facilities, to comply with applicable accessibility requirements. In addition, FirstLight agreed in the RMP to conduct a programmatic assessment of existing public recreation buildings and facilities for consistency with applicable requirements, and to implement improvements within a reasonable period of time.

²⁸ *Id.* at 7-8.

²⁹ *Id.* at 8.

FirstLight will consult with the local towns, agencies, and recreation organizations as specified in the RMP.

To address the comments of Unpaved Trails for All, in conducting its programmatic assessment FirstLight will seek input on accessibility issues from individuals with disabling conditions who engage in outdoor recreation. FirstLight also will consult with such individuals in planning and designing its proposed upgrades to existing facilities and construction of new facilities. Making outdoor accessibility improvements must take into account a range of considerations including site suitability, feasibility, and cost. Input from the outdoor recreation disabled community will help inform FirstLight in making these decisions.

L. Tribal Issues

The Nolumbeka Project, in coalition with the Chaubunagungammaug Band of Nipmuck Indians and the Elnu Abenaki Tribe (“Tribes”), raise several concerns about the Recreation Settlement Agreement.

First, the Tribes state that no Tribal entities are signatories to the Recreation Settlement Agreement, and none will be part of the RAG.³⁰ The reason there are no Tribal signatories is because no Tribe chose to sign the settlement. A representative of The Nolumbeka Project, who also is identified as the author of the comment letter, participated in the discussions and negotiations on the Recreation Settlement Agreement but did not sign, presumably for the reasons stated in the letter. If a Tribe or Tribes had signed the settlement, they would have been entitled to be a member of the RAG.

³⁰ Tribal Comments at 1.

Second, the Tribes express concern about ground disturbing activities in connection with recreational upgrades and improvements and the potential impact to cultural resources, asserting “there is not a process by which Tribal oversight for the protection of cultural resources is guaranteed.”³¹ This is inaccurate. FirstLight submitted its proposed Historic Property Management Plans (“HPMPs”) to FERC as part of its AFLAs in December 2020.³² Section 5.4 of each HPMP describes management measures for archaeological resources potentially affected by ground-disturbing Project activities. These measures include appropriate consultations with the applicable State Historic Preservation Officers and Tribal Historic Preservation Officers. Thus, there will be a process by which Tribal oversight for the protection of cultural resources is guaranteed.

Third, the Tribes state that they signed the Memorandum of Understanding in Principle on cultural resources with FirstLight (“MOUIP”)³³ in “good faith” but what they thought was a common agreement “proved to be false.”³⁴ FirstLight and the Tribes continue to negotiate on Tribal and cultural resource issues and FirstLight is hopeful that those negotiations will eventually culminate in a settlement. FirstLight will not cast blame or negotiate in public with the Tribes, honoring the ground rules we reached with stakeholders to the settlement process.

Fourth, the Tribes reiterate their critiques of the Traditional Cultural Properties (“TCP”) study FirstLight conducted as part of the FERC-approved study plan and say that there are TCPs that could be adversely affected by Project recreational

³¹ *Id.* at 2.

³² AFLAs, Vol. 4 – Historic Properties Management Plan (filed as non-public).

³³ Memorandum of Understanding in Principle (MOUIP) to Develop a Relicensing Settlement Agreement, Project No. 1889-092 (filed Mar. 24, 2023).

³⁴ Tribal Comments at 3.

improvements.³⁵ FirstLight answered this in its response to the Tribes' comments on the Flows and Fish Passage Settlement Agreement.³⁶

Fifth, the Tribes claim that FirstLight included elements of the MOUIP with FirstLight in the Recreation Settlement Agreement “without our knowledge or consent.”³⁷ This is simply false. The representative who participated in the Recreation Settlement Agreement discussions on behalf of The Nolumbeka Project was certainly aware that the RMP included provisions for installing interpretive cultural signage and consulting with area Tribes on such signage. Like all recreation settlement participants, he received drafts of the Recreation Settlement Agreement which included the RMP. Aside from any question of protocol, FirstLight fails to see how its commitment to install interpretive cultural signage in consultation with area Tribes, even in the absence of a settlement agreement with the Tribes, can in any way be characterized as a negative.³⁸

Sixth, the Tribes state that 500 cfs in the bypass reach would expose “ancient shale beds,” “ancient fishing stations,” and artifacts and other cultural items that boaters will be tempted to remove.³⁹ FirstLight has previously addressed this comment, which is unsupported by any evidence in the record.⁴⁰

³⁵ *Id.* at 3-4.

³⁶ FirstLight Flows and Fish Passage Response at 8-9 & n.21.

³⁷ Tribal Comments at 4.

³⁸ Curiously, the Tribes also take umbrage at the supposed “inclusion of a Historical Property Management Plan” in the Recreation Settlement Agreement. *Id.* However, the only reference in the RMP to an HPMP is with respect to disposition of the Cabot Camp historic structures, which are not Tribal cultural resources. RMP, Section 4.2.3.

³⁹ Tribal Comments at 5.

⁴⁰ FirstLight Flows and Fish Passage Response at 8.

III. CONCLUSION

WHEREFORE, for the foregoing reasons, the Commission should: (1) reject all proposed license requirements from the commenters beyond those included in the RMP; and (2) approve the RMP as filed.

Respectfully submitted,

/s/ Michael A. Swiger

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Dated: July 25, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Federal Energy Regulatory Commission in these proceedings.

Dated at Washington, DC this 25th day of July, 2023.

/s/ Mealear Tauch
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