

**SETTLEMENT AGREEMENT**

**FOR THE SACCARAPPA PROJECT**

**(FERC No. 2897)**

**LICENSE SURRENDER**

**NOVEMBER 15, 2016**

**By and Between:**

**S.D. Warren Company  
U.S. Department of the Interior and U.S. Fish and Wildlife Service  
Maine Department of Marine Resources  
Conservation Law Foundation  
Friends of the Presumpscot River  
City of Westbrook, Maine**

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FOR THE SACCARAPPA PROJECT (FERC No. 2897)  
LICENSE SURRENDER**

**1.0 INTRODUCTION AND GENERAL PROVISIONS**

This agreement, including exhibits A-E hereto (the “Settlement Agreement”), dated as of November 15, 2016, regarding the surrender (the “Surrender”) of the Federal Energy Regulatory Commission (“FERC” or “Commission”) license for the Saccarappa Project (FERC No. 2897) (the “Project”), is made and entered into by and among the following entities who shall, except as otherwise noted, each be referred to as a Party and collectively as “Parties.”

- S.D. Warren Company (“Warren” or “Licensee”);
- U.S. Department of the Interior (“USDOJ”) and U.S. Fish and Wildlife Service (“USFWS”);
- Maine Department of Marine Resources (“MDMR”);
- Conservation Law Foundation (“CLF”);
- Friends of the Presumpscot River (“FOPR”); and
- City of Westbrook, Maine (“City”).

**1.1 Purpose and Goals**

**1.1.1** The purpose of this Settlement Agreement is to specify the obligations of the Licensee under the Federal Power Act, the Clean Water Act, and the Maine Waterway Development and Conservation Act (“MWDCA”), and other laws, to meet the fish passage and other objectives and responsibilities of all Parties, and to bind the Parties to and implement the agreements set forth herein that have been reached as the result of comprehensive discussions among the Parties with regard to the Project for which Warren filed a license surrender application with FERC on December 2, 2015 (the “Pending Surrender Application”) and a WQC and MWDCA application with MDEP on December 2, 2015 and October 5, 2016 (the “Pending MDEP Application”).

**1.1.2** The goal of this Settlement Agreement is to provide safe, timely, and effective fish passage at the Saccarappa site after cessation of Project operations.

**1.1.3** The Parties, having given careful and equal consideration to power and non-power values, provide in this Settlement Agreement the terms and conditions for the resolution of fisheries, wetlands, wildlife, water quality, recreational, cultural and archaeological, aesthetic, access, land use, operation, and generation issues raised and analyzed by the Parties as they are applicable to the issuance of a FERC license surrender order for the Project and amendment of the FERC licenses for Mallison Falls (P-2932), Little Falls (P-2941), Gambo (P-2931), and Dundee (P-2942).

## **1.2 Definitions**

The Parties agree that the following definitions shall have the meanings so noted throughout this Settlement Agreement:

**1.2.1** Except as provided herein, “Consistent Surrender Order” means an order or orders accepting surrender of the Saccarappa Project license that is issued by either FERC staff on behalf of the Commission pursuant to its delegated authority or by the Commission itself: (1) that approves or includes all requests or provisions of Sections 2.1.1, 2.1.2, 2.1.4.3, 2.1.8.1, 2.2.3, and 3.2.1 of this Settlement Agreement, (2) that does not include provisions that are materially inconsistent with this Settlement Agreement, and (3) for which all administrative and judicial appeal periods have expired or any such appeals have been resolved in a manner consistent with this Settlement Agreement.

**1.2.2** “Consistent MDEP Order” means a water quality certification (“WQC”) issued by the Maine Department of Environmental Protection (“MDEP”) pursuant to Section 401 of the Clean Water Act with respect to the Surrender, and an accompanying order pursuant to the MWDCA, that (1) is consistent with this Settlement Agreement, (2) does not include provisions that are materially inconsistent with this

Settlement Agreement, and (3) for which all administrative and judicial appeals periods have expired or any such appeals have been resolved in a manner consistent with this Settlement Agreement.

### **1.3 Effective Date**

This Settlement Agreement shall become effective when it has been executed by the Parties, except that no obligations set forth in Sections 2.1.1, 2.1.2, 2.1.5, 2.1.6, 2.1.7, 2.1.8, or 2.1.9 shall become effective until: (1) the MDEP has issued a Consistent MDEP Order, as defined above, and (2) the Commission has issued a Consistent Surrender Order, as defined above.

### **1.4 Commission Record**

**1.4.1** The agreements in this Settlement Agreement are a comprehensive and integrated set of measures intended to address non-power and power values relating to the surrender of the FERC license for the Project, based on the substantial amount of evidence contained in the record before the Commission, drawn from a number of sources, and the subsequent negotiations and analyses conducted by the Parties.

**1.4.2** The Parties agree that the formal administrative record before the Commission, including this Settlement Agreement and filings made pursuant thereto, supports the finding that this Settlement Agreement is fair and reasonable and in the public interest.

### **1.5 Enforcement of Settlement**

The Parties acknowledge that all the terms of this Settlement Agreement may be enforced in a court of competent jurisdiction through remedies available under applicable state or federal law, which the Parties agree may include specific performance. However,

the United States and the State of Maine do not waive any claim of sovereign immunity or agree to any form of suit not provided for by otherwise applicable federal or state law.

**1.6 Exhibits; Successors and Assigns; Amendments; Entire Agreement**

Exhibits A-E hereto are hereby incorporated into this Settlement Agreement as if fully stated herein. This Settlement Agreement shall be binding on the Parties and on their successors and assigns. If Warren decides to sell or otherwise transfer any property that is subject to this Settlement Agreement, then prior to such sale or transfer Warren shall inform any prospective buyer or transferee of the existence and obligations of this Settlement Agreement. This Settlement Agreement may be amended only by a writing duly executed by each of the Parties. This Settlement Agreement constitutes the Parties' entire understanding with respect to the subject matter hereof and supersedes any and all prior oral or written agreements, understandings, or expressions with respect thereto.

**1.7 Agency Appropriations and Costs**

**1.7.1** Nothing in this Settlement Agreement shall be construed as obligating any federal or state government agency to expend in any fiscal year any sum in excess of appropriations made by Congress or the Maine Legislature and administratively allocated for the purpose of this Settlement Agreement for the fiscal year, or to involve the State of Maine, USDOJ, or USFWS in any contract or other obligation for the future expenditure of money in excess of such appropriations or allocations, except for those expenditures of money required for actions specified in this Settlement Agreement utilizing funds provided by Warren pursuant to the terms of this Settlement Agreement.

**1.7.2** The Parties agree that no Party will request reimbursement, either through FERC or directly from another Party, for that Party's costs or for any other charges incurred in participating in the settlement negotiations leading to this Settlement Agreement.

## **1.8 Parties to Support Regulatory Approvals**

All Parties shall support this Settlement Agreement and refrain from making any public comments or governmental filings that undercut this Settlement Agreement or actions taken pursuant to it. The Parties agree to actively support this Settlement Agreement before the Commission and MDEP for the purpose of obtaining a Consistent MDEP Order and a Consistent Surrender Order, including supporting this Settlement Agreement through participation in any administrative or judicial appeal or rehearing request relating to the WQC / MWDCa order or the surrender order, as further set forth in Section 1.13 below, except that participation by MDMR in any future legal action will be at the discretion of the Maine Attorney General's Office. This support shall include reasonable efforts to assist in regulatory approvals that may be needed to implement provisions of this Settlement Agreement. With respect to the issuance by MDEP of a WQC / MWDCa order, the Parties agree to file written comments with MDEP supporting the issuance of a Consistent MDEP Order, if requested to do so by the Licensee.

## **1.9 Establishes No Precedents**

The Parties understand and agree that this Settlement Agreement establishes no admissions or precedents with regard to any issue addressed herein or with regard to any Party's participation in other licensing, surrender, or WQC / MWDCa proceedings, or the applicability of any laws or regulations to the subject facilities, except as specified in Section 2.3 of this Settlement Agreement.

## **1.10 Requirement for Consistent Surrender Order and Consistent MDEP Order**

**1.10.1** Except as provided herein, in the event Commission action does not result in a Consistent Surrender Order, then unless all Parties agree to amend this Settlement Agreement, this Settlement Agreement shall become null and void. In that

event, the Parties shall take the position that this Settlement Agreement cannot be used as support for any Commission action.

**1.10.2** Except as provided herein, in the event MDEP action does not result in a Consistent MDEP Order, then unless all Parties agree to amend this Settlement Agreement, this Settlement Agreement shall become null and void. In that event, the Parties shall take the position that this Settlement Agreement cannot be used as support for any MDEP or Commission action.

**1.10.3** In the event the Settlement Agreement becomes null and void, then this Settlement Agreement shall have no validity or effect and all Parties shall be relieved of any obligation to comply with this Settlement Agreement.

#### **1.11 Compliance with Applicable Laws**

Nothing in this Settlement Agreement is intended to or shall be construed to affect or limit the authority of any Party to fulfill its statutory or regulatory responsibilities under applicable law. By entering into this Settlement Agreement, however, the Parties with such responsibilities represent that they believe their responsibilities relative to the issues addressed herein have been, are, or can be met, for the purposes and goals stated in Section 1.1, consistent with the terms of this Settlement Agreement.

#### **1.12 Property Rights**

Other than as required to implement the terms of this Settlement Agreement, the Parties request that the Licensee not be required to acquire any additional property rights (including easements) to comply with the terms of the order accepting surrender or the WQC / MWDCA order.

### **1.13 Appeals**

**1.13.1** The Parties agree that none of them will file a challenge to a WQC / MWDCA order or a request for rehearing of a FERC order issued in response to any filing made pursuant to this Settlement Agreement unless the MDEP WQC / MWDCA order or FERC order contains provisions that are materially inconsistent with this Settlement Agreement. The Parties agree that if no rehearing request or other administrative or judicial challenge to the FERC surrender order or the MDEP WQC / MWDCA order is filed within the applicable filing deadlines, the WQC / MWDCA order shall be deemed to be a Consistent MDEP Order and the surrender order shall be deemed to be a Consistent Surrender Order. Furthermore, if at the conclusion of any appeals of the WQC / MWDCA order or the FERC surrender order any Party reasonably determines that the WQC / MWDCA order or surrender order is materially inconsistent with the terms of this Settlement Agreement, then such Party must so notify in writing all other Parties to this Settlement Agreement within 30 days after the surrender order becomes final and unappealable. If no such notice is provided, then the WQC / MWDCA order shall be deemed to be a Consistent MDEP Order and the surrender order shall be deemed to be a Consistent Surrender Order.

**1.13.2** In the event that the Commission does not issue a surrender order that is consistent with this Settlement Agreement, then all Parties agree that, to the extent they have the power to do so, they will, either jointly or separately, file a request for rehearing of the surrender order, or otherwise participate in a request to the Commission that it issue a surrender order in accordance with this Settlement Agreement. Thereafter, in the event that on rehearing the Commission still does not issue a surrender order consistent with this Settlement Agreement, then any Party may file a petition for judicial review of the Commission's underlying order and order on rehearing or take such other legal action as may then be available. In the event of a rehearing request or a petition for judicial review, the other Parties agree that they will, to the extent they have the power to do so, participate, or seek authorization to participate, for the purpose of advocating that the Commission issue a Consistent Surrender Order.



**1.13.3** In the event that the MDEP does not issue a WQC / MWDCA order that is consistent with this Settlement Agreement, then all Parties agree that, to the extent they have the power to do so, they will, either jointly or separately, appeal to the Board of Environmental Protection (“BEP”), or participate in, or seek authorization to participate in, such an appeal, requesting that the WQC / MWDCA order be amended to be consistent with this Settlement Agreement. In the event that such BEP appeal does not result in a WQC/ MWDCA order that is consistent with the provisions of this Settlement Agreement, any Party may file a petition for judicial review of the WQC / MWDCA order or take such other legal action as may then be available. In the event of a BEP appeal or a petition for judicial review, the other Parties agree that they will, to the extent they have the power to do so, participate, or seek authorization to participate, for the purpose of advocating that MDEP issue a WQC / MWDCA order that is a Consistent MDEP Order.

**1.14 Dispute Resolution**

The Parties shall work cooperatively to achieve the goals of this Settlement Agreement in a timely manner. The Parties agree to work in good faith to resolve any disputes that may arise over the implementation of this Settlement Agreement. Any Party recognizing such a dispute shall notify the other Parties in writing and convene a dispute resolution consultation meeting among all of the Parties.

**2.0 OBLIGATIONS OF THE PARTIES**

**2.1 Fish Passage at Saccarappa Site**

**2.1.1 Saccarappa Lower Falls**

At the lower falls of the Saccarappa site, Warren shall take the following actions, each element of which will be depicted in design plans that are 90% complete and agreed upon by Warren, MDMR, and USFWS pursuant to section 2.1.3 of this Settlement Agreement:

- Discontinue power generation at the Saccarappa site.

- Construct a double Denil fish passage facility (hereinafter “Denil”) as proposed in the Pending Surrender Application modified as necessary through the design process set forth in section 2.1.3 of this Settlement Agreement so as to take account of changes agreed to by the Parties since the filing of the Pending Surrender Application, including removal of the powerhouse and the possible need for relocation of the exit of the Denil due to the adoption in this Settlement Agreement of a two-channel upper falls fish passage design versus the one-channel upper falls fish passage design proposed in the Pending Surrender Application.
- Construct a fish counting facility at the exit of the Denil, with completion of the construction of said fish counting facility to occur at the same time as completion of construction of all other elements of the fish passage facilities addressed in this Settlement Agreement.
- Make changes and repairs to the tailrace guard wall, or portions of the tailrace guard wall, as required to support the structure and effective operation and maintenance of the Denil, and the related fish counting facility. Warren will repair or remove the guard wall as needed to facilitate construction of the Denil; the portions of the guard wall to remain in place will be determined as part of the Denil and power house removal design work.
- Remove the spillway adjacent to the powerhouse (“Western Spillway”), the power house currently situated at the lower falls, and other structures, including ancillary water control structures.

### **2.1.2 Saccarappa Upper Falls**

At the upper falls of the Saccarappa site Warren will remove the spillway located at the top of the upper falls (“Eastern Spillway”) and will construct the two-channel upper falls fish passage depicted in design plans that are 90% complete and agreed upon by Warren, MDMR, and USFWS pursuant to section 2.1.3 of this Settlement Agreement, with said design based upon the “Two Channel Alternative” conceptual drawings prepared by Princeton Hydro LLC and dated July 10, 2015, attached hereto as Exhibit E, but excluding the portions relating to the rock ramp design depicted therein to provide

passage over the lower falls, for which the Denil design pursuant to section 2.1.1 of this Settlement Agreement has been substituted (hereinafter, the “Two Channel Passage”).

### **2.1.3 Design Process**

All Parties, excepting the City, will participate in the design process in the manner set forth in this section. The City supports all terms of this design process.

#### **2.1.3.1 Selection of Engineering Consultants**

For those activities described in section 2.1.1 of this Settlement Agreement, Warren will engage an engineering consultant of its choice to prepare final design plans. For those activities described in section 2.1.2 of this Settlement Agreement, Warren will engage in a competitive bid process to select the engineering consultant to prepare final design plans, as follows.

- The Parties have agreed on the seven engineering consultants that will receive the design request for proposals (“RFP”) bid package.
- Warren has prepared the RFP bid package in consultation with the other Parties and it is attached hereto as Exhibit A.
- Warren will send the design RFP to the agreed upon list of bidders no later than November 8, 2016. Warren will conduct an on-site bidders’ conference on or about November 17, 2016, which conference may be attended in person by one technical (non-lawyer) representative from each of the other Parties, which representative will not comment or ask questions unless requested to do so by Warren; all questions will be answered orally at the bidders’ conference or in writing, after consultation with the Parties within 10 days after the bidders’ conference.
- Responses to the RFP will be due by December 21, 2016. Prior to that date, non-written communications by any Party will not be permitted without agreement of all the Parties; all communications with potential bidders will be in writing with Warren only, and Warren shall send copies of such communications to the other Parties.
- Warren shall consult with the other Parties to select the Two Channel Passage design engineering consultant. Warren will have final authority to select the Two Channel Passage design engineering consultant, but only from the pool of consultants

responding to the design RFP. If at least 65% of the bids received represent that additional data gathering (modeling, bathymetry, or gauging) is required (hereinafter “Additional Data Gathering”), only those bids that contain Additional Data Gathering for one or more issues may be selected absent a mutually agreed upon decision otherwise by the Parties. If more than 35% of the bids received represent that Additional Data Gathering is not required, Warren may select any bidder.

- Warren will conduct interviews before making a final selection after consulting with the Parties to determine those bidders that the Parties would like to interview and with no fewer than the top two qualifying bidders being interviewed, unless it is determined by all Parties that interviews are not needed for making a selection, or in the event that there is only one bidder, in which case an interview shall occur with that bidder. The interviews may be attended in person by two technical (non-lawyer) representatives from each of USFWS, MDMR, and, jointly, CLF / FOPR. These representatives will not comment or ask questions unless requested to do so by Warren, but Warren will provide a mechanism for USFWS, MDMR, CLF, and FOPR to obtain answers to their questions. MDMR, USFWS, CLF, and FOPR will be afforded the opportunity to review and comment to Warren on the bids and Warren’s initial ranking thereof, and discuss their comments with Warren as a group prior to Warren making a final selection.
- The total cost of the Two Channel Passage design work, including any modeling and on-site construction observation, shall be capped at \$500,000. If there are no acceptable bids within this cost cap, the Settlement Agreement will become null and void, unless the Parties otherwise agree. The Parties will work together in good faith to seek ways to avoid this Settlement Agreement from becoming null and void.
- A Two Channel Passage design bid selected by Warren that does not require Additional Data Gathering shall be referred to in this Settlement Agreement as “Two Channel Passage Design A.” A Two Channel Passage design bid selected by Warren that does require Additional Data Gathering shall be referred to in this Settlement Agreement as “Two Channel Passage Design B.”
- If by March 1, 2017 Warren has not entered into a contract for the final design of either Two Channel Passage Design A or Two Channel Passage Design B, then this

Settlement Agreement will become null and void, unless the Parties otherwise agree, and Warren will file a New Surrender Application within 60 days.

### **2.1.3.2 Review and Approval of Design Plans**

MDMR and USFWS engineering staff will each be provided 14 days for design review and comments for design plans developed pursuant to section 2.1.3.1 of this Settlement Agreement. Said provision for review and comment shall be afforded by Warren to MDMR and USFWS when the design plans for each are 60% complete and, by no later than the deadline set forth in the RFP attached hereto at Exhibit A, 90% complete. CLF and FOPR shall simultaneously be provided with copies of said design plans. If Warren, MDMR, and USFWS cannot agree on the 90% design plans for either the lower falls or the upper falls, this Settlement Agreement will become null and void, unless the Parties, excepting the City, otherwise agree.

## **2.1.4 Construction Process**

### **2.1.4.1 Selection of Construction Contractor**

So long as the Settlement Agreement has not previously become null and void pursuant to the terms of this Settlement Agreement, Warren will engage in a competitive bid process to select the construction contractor to undertake all activities described in sections 2.1.1 and 2.1.2 of this Settlement Agreement, as set forth in this section, paragraphs (1) – (7) below. All parties to this Settlement Agreement, excepting the City, will participate in the construction process in the manner set forth in this section. The City supports all terms of this construction process.

- (1) Warren will prepare the RFP bid package in consultation with the other Parties.
- (2) The Parties have agreed on the six construction contractors that will receive the construction RFP bid package.
- (3) If the Two Channel Passage Design A has been selected by Warren, said RFP bid package shall be sent to the six selected construction contractors no later than on or about September 15, 2017. If the Two Channel Passage Design B has been selected

by Warren, said RFP bid package shall be sent to the six selected construction contractors no later than on or about October 15, 2017.

(4) Warren shall consult with the other Parties to select the construction contractor. Warren will have final authority to select the construction contractor, but only from the pool of contractors responding to the construction RFP.

(5) The total cost of the construction work, including (without limitation) bonding costs and contingency, shall be capped at \$4.6 million, unless the total cost of the design work is less than \$400,000, in which case the total cost of the construction work shall be capped at \$4.7 million. If there are one or more commercially and technologically acceptable bids within this cost cap, Warren shall enter into a contract with the selected bidder that, in Warren's discretion, is commercially reasonable, to undertake all activities described in sections 2.1.1 and 2.1.2 of this Settlement Agreement. If there are no commercially and technologically acceptable bids within this cost cap, this Settlement Agreement shall become null and void, unless the Parties otherwise agree. The Parties shall work together in good faith to seek ways to avoid this Settlement Agreement becoming null and void.

(6) If the Two Channel Passage Design A has been selected and by December 1, 2017 Warren has not entered into a construction contract pursuant to this Settlement Agreement, then this Settlement Agreement shall become null and void, unless the Parties otherwise agree. If by December 1, 2017, however, Warren has entered into a construction contract pursuant to this Settlement Agreement (contingent on FERC approval of the New Surrender Application filed pursuant to Section 3.2 below):

(a) Warren will file a New Surrender Application by December 1, 2017 that will request that FERC issue a Consistent Surrender Order.

(b) USFWS will submit a revised fishway prescription for the Saccarappa Project to extend until May 2020 the deadline for operational upstream passage for anadromous fish at the Saccarappa Project, and USFWS shall revise its Section 18 fishway prescriptions for the Presumpscot River projects as follows.

- o Amending the third sentence of the second paragraph of Section 10.1(E) to provide as follows:

“In order to allow for proper consultation with resource agencies and approval by the Commission of all design plans, permanent fish passage must be operational at the Saccarappa Dam within 7 years of the completion of fishway installation at Cumberland Mills Dam.”

- Amending the anadromous fish upstream passage section of Table 3 that applies to the Saccarappa Project as follows:

“Upstream passage completed 7 years after passage is available at Cumberland Mills Dam, or at such later time as may be designated by the Service by written notice to the Commission.”

(7) If the Two Channel Passage Design B has been selected by Warren and by January 1, 2018, Warren has not entered into a construction contract pursuant to this Settlement Agreement, then this Settlement Agreement shall become null and void, unless the Parties otherwise agree. If by January 1, 2018, however, Warren has entered into a construction contract pursuant to this Settlement Agreement (contingent on FERC approval of the New Surrender Application filed pursuant to Section 3.2 below):

(a) Warren will file a New Surrender Application by January 1, 2018 that will request that FERC issue a Consistent Surrender Order.

(b) USFWS will submit a revised fishway prescription for the Saccarappa Project to extend until May 2021 the deadline for operational upstream passage for anadromous fish at the Saccarappa Project, and USFWS shall revise its Section 18 fishway prescriptions for the Presumpscot River projects as follows.

- Amending the third sentence of the second paragraph of Section 10.1(E) to provide as follows:

“In order to allow for proper consultation with resource agencies and approval by the Commission of all design plans, permanent fish passage must be operational at the Saccarappa Dam within 8 years of the completion of fishway installation at Cumberland Mills Dam.”

- Amending the anadromous fish upstream passage section of Table 3 that applies to the Saccarappa Project as follows:

“Upstream passage completed 8 years after passage is available at Cumberland Mills Dam, or at such later time as may be designated by the Service by written notice to the Commission.”

#### **2.1.4.2 Review of Construction Activities**

The engineering consultant retained by Warren pursuant to Section 2.1.3 of this Settlement Agreement, MDMR, and USFWS may conduct on-site observation of construction, which may include observing a range of flows if feasible and reasonably cost-neutral. Communications regarding construction activities and on-site visits between MDMR, USFWS, Warren, the engineering consultant, and the construction firm are expressly permitted. MDMR and USFWS shall provide to Warren timely written site visit reports noting any requested construction modifications.

#### **2.1.4.3 Consistency Determination by USFWS**

License surrender shall be considered effective only after a USFWS fishway engineer reviews all completed construction activities, and provides to FERC, MDEP, and the Parties a statement that construction occurred according to the approved design drawings or, alternatively, according to construction changes approved by a USFWS fishway engineer.

#### **2.1.5 Remediation Attributable to Impoundment Drawdown**

Warren shall be responsible for the cost of any remediation attributable to impoundment drawdown (*e.g.*, repairing riprap and exposed culverts) that is required of Warren by FERC or MDEP, the cost of which is not subject to the construction cost cap stated in section 2.1.4 of this Settlement Agreement.

#### **2.1.6 Effectiveness Testing**

Warren shall contribute up to \$200,000 to an effectiveness study to be done by MDMR of the effectiveness of the Saccarappa site, both the areas under FERC jurisdiction and State jurisdiction, at passing target species. The effectiveness study will



be conducted in accordance with the Effective Testing and Adjustment Plan attached hereto as Exhibit B.

MDMR shall send to Warren for payment to MDMR annual invoices for the estimated cost of the effectiveness testing-related work for the following year, plus up to a 5% contingency. Warren shall submit payment to MDMR no later than 30 days after receipt of the invoices. The \$200,000 contribution to the study constitutes the limit of Warren's responsibilities under this Settlement Agreement for effectiveness testing at the Saccarappa site.

### **2.1.7 Post-Construction Adjustments**

#### **2.1.7.1 Denil**

Upon issuance of the consistency determination contemplated by Section 2.1.4.3, Warren will have no responsibility for post-construction adjustments related to the Denil, with the exception of any such requirements as may be required pursuant to federal or state law, as applicable.

#### **2.1.7.2 Two Channel Passage**

After FERC has issued a final decommissioning order, and Warren has finally surrendered the Saccarappa Project FERC license, Warren will oversee and make those post-construction adjustments MDMR believes are necessary to achieve effective fish passage in the upper channels, in consultation with USFWS and Warren, up to a cap of \$300,000. This capped amount shall constitute final fulfillment of Warren's responsibilities for post-construction adjustments, except as may be required pursuant to 12 M.R.S. § 12760, as amended (the "Fishway Statute"). All decisions regarding post-construction adjustments shall rest with MDMR, which decisions shall be made pursuant to the Effective Testing and Adjustment Plan attached hereto as Exhibit B.

#### **2.1.7.3 Deed Restriction**

With respect to land or interests in land owned by Warren below the high water mark of the Presumpscot River, Warren agrees to a deed restriction prohibiting future

alterations of the upper channels without prior written approval from USFWS and MDMR, which deed restriction language shall be pursuant to the Maine Conservation Easement Law, 33 M.R.S. §§ 476-479-C, in a form not materially inconsistent with the form attached hereto as Exhibit C.

By execution of this Settlement Agreement, USFWS and MDMR agree to accept their responsibilities as set forth in Exhibit C hereto, subject only to formal approval by legal counsel for those agencies as to specific final language regarding procedures for enforcement. The internal review by USFWS and MDMR shall begin immediately upon execution of this Settlement Agreement, shall proceed and progress in good faith, and shall require approval by Warren, CLF, and FOPR to confirm that any proposed changes are not materially inconsistent with Exhibit C. Time being of the essence, both USFWS and MDMR must agree to the final language of the deed restriction by January 31, 2017 or this Settlement Agreement will become null and void, unless the Parties mutually agree to extend said deadline.

The final deed restriction, as approved by the Parties, excepting the City, shall be signed by Warren and delivered to USFWS and MDMR within 60 days after the Saccarappa license surrender becomes effective. USFWS shall coordinate with MDMR and Warren to ensure that the original, fully executed deed restriction is recorded in the Cumberland County Registry of Deeds within 30 days after receipt of original duly authorized and executed acceptance pages from both USFWS and MDMR. If Warren proposes to transfer title to the protected property prior to the date the Saccarappa license surrender becomes effective, Warren shall provide a copy of the FERC license transfer application to the Parties concurrently with its filing at FERC.

## **2.1.8 Operations and Maintenance**

### **2.1.8.1 Denil**

Warren shall be responsible for operating and maintaining the Denil and supporting structures (including the fish counting facility and any remaining portions of the lower falls tailrace guard wall), in accordance with the O&M Plan attached hereto as Exhibit D, as approved by FERC. The O&M Plan will not require fish counting to

commence until 2024, although MDMR shall be provided access to the fish counting facility for the purposes of effectiveness testing in accordance with the Effectiveness Testing and Adjustment Plan (Exhibit B). The parties recognize that the fish counting provisions of the O&M Plan may need to be amended prior to the start of fish counting in 2024.

In the New Surrender Application filed with FERC pursuant to section 2.1.4.1 (6) or (7) of this Settlement Agreement Warren will request that the Denil and its associated structures be included within the Mallison Falls FERC project boundary to provide regulatory oversight of operations and maintenance.

#### **2.1.8.2 Two Channel Passage**

Warren shall have no responsibility for operating or maintaining the Two Channel Passage, with the exception of any such requirements that may be imposed pursuant to a fishway proceeding under the Fishway Statute (a “Fishway Proceeding”) or other applicable state law.

#### **2.1.9 Fish Stocking**

MDMR shall delay its Presumpscot River fish stocking program until 2025, with the exception of annual tagging and release of no more than 250 fish from outside the Presumpscot River conducted as part of the effectiveness study referred to in Section 2.1.5 above, and no other Party will engage in or allow fish stocking until 2025. MDMR may conduct limited stocking of alewives in Highland Lake before 2025, consistent with MDMR’s recent levels of Highland Lake stocking.

### **2.2 Fish Passage at Upstream Projects**

#### **2.2.1 Mallison Falls (P-2932)**

Upon the occurrence of 2,960 American shad or 18,020 blueback herring passing in any single season at the Saccarappa fish counting facility, Warren shall either (1) two years thereafter construct the fish passage as required by the Mallison Falls Project FERC

license, or (2) three years thereafter surrender its FERC license, having proposed in its surrender application to remove, at a minimum, all dam spillways at the project.

### **2.2.2 Little Falls (P-2941)**

Warren will either (1) construct the fish passage as required by the Little Falls Project FERC license, or (2) three years after removal of the spillway at the Mallison Falls Project, surrender its FERC license, having proposed in its surrender application to remove, at a minimum, all dam spillways at the project.

### **2.2.3 Gambo (P-2931) and Dundee (P-2942)**

Warren's New Surrender Application and New MDEP Application will request that the fish passage requirements in the Gambo and Dundee licenses not apply for the term of the license and any extensions thereof, and that fish passage at those projects will not be required by the license amendment orders issued pursuant to this Settlement Agreement. Given the surrender of the Saccarappa Project license and the work at the Saccarappa site contemplated by this Settlement Agreement, the Parties agree that the record before FERC, MDEP, USFWS, and MDMR supports a finding that, under present circumstances, fish passage at Gambo and Dundee is not required or appropriate, and that the removal of the Mallison Falls and Little Falls dams would not change that finding. MDMR shall make a recommendation to MDEP to issue a Consistent MDEP Order concluding that the New Surrender Application contemplated in Section 3.2 below does not violate water quality standards.

## **2.3 Further Fishway Proceedings**

Unless Warren has failed to comply with its obligations contained in this Settlement Agreement:

- The Parties acknowledge that it is USFWS's general policy not to participate as a party in state administrative proceedings, and, therefore, USFWS agrees not to participate as a party in any future Fishway Proceeding.

- No Party will take a position in any Fishway Proceeding that is contrary to this Settlement Agreement.
- For as long as FERC has jurisdiction over the Denil, CLF and FOPR agree not to initiate or support a Fishway Proceeding relating to the Saccarappa site or to argue that the structures or man-made alterations at the site are a “dam or other artificial obstruction.”
- In any future fishway proceeding relating to the Saccarappa site, Warren agrees not to argue that location of the fishway within a FERC project boundary preempts the jurisdiction of the commissioners of MDMR or the Maine Department of Inland Fisheries and Wildlife (“DIFW”).

Except as provided herein, nothing in this Settlement Agreement constitutes, or may be used by any of the Parties, as an admission, determination, or finding by any of the Parties that any of the conditions set forth in the Fishway Statute exists or may exist.

#### **2.4 USFWS Prescriptions**

Concurrent with the New Surrender Application to be submitted pursuant to Section 3.2, USFWS agrees to submit to FERC preliminary modifications of its fishway prescriptions incorporating (1) the extensions of time to extend the deadline for operational upstream fish passage at the Saccarappa Project until May 1, 2020 or May 1, 2021, as provided in Section 2.1.4.1, (2) the 2024 counting initiation date at Saccarappa, discussed above in Section 2.1.7.1, (3) the extensions of time for fishway construction at the Mallison and Little Falls Projects contemplated in Sections 2.2.1 and 2.2.2, and (4) the inapplicability of the fishway obligations at the Gambo and Dundee Projects contemplated by Section 2.2.3. All Parties agree to support USFWS in any challenge to the preliminary modified fishway prescriptions, except that participation by MDMR in any legal action will be at the discretion of the Maine Attorney General’s Office.

## **2.5 City-Related Obligations**

### **2.5.1 Obermeyer Recreational Feature at Bridge Street**

The City has full responsibility for obtaining permits and funding for any planned recreational features at Bridge Street (the “Obermeyer”). Warren will provide any easements (or, if easements are not sufficient, other property interests), as needed, for permitting and construction of the Obermeyer, which property interests will be subject to the deed restriction required by Section 2.1.7.3. The City will be afforded an opportunity to collaborate with Warren’s construction contractor in an effort to reduce construction costs associated with coffer dams and other aspects of the construction of the Obermeyer. Such assistance may be offered by Warren in the exercise of its sole discretion, but Warren shall use commercially reasonable efforts to assist the City. All Parties agree to support timely permitting of the Obermeyer once (1) agreement is reached on the Obermeyer operating regime during spring fish migration, and (2) DEP has issued a Consistent MDEP Order and FERC has issued a Consistent Surrender Order. The City shall assume sole responsibility for compliance with any regulatory requirements associated with permitting of the Obermeyer, including for any required fish passage.

### **2.5.2 Land Transfer**

With the exception of Saccarappa Project lands associated with or necessary or convenient for operation and maintenance of the Denil and other portions of Warren’s hydropower and electric transmission system, Warren shall transfer to the City all project lands associated with the Saccarappa Project that are necessary for extension of the City’s river walk, subject to and conditioned on negotiation of terms and conditions for such transfer mutually agreed to by Warren and the City. The closing on such transfers shall occur within ninety (90) days after the surrender of the Saccarappa Project FERC license becomes effective.

## **3.0 NEW MDEP AND SURRENDER APPLICATIONS**

If FERC and MDEP take the actions requested below in Section 4, and if this Settlement Agreement has not previously become null and void pursuant to this

Settlement Agreement, by either December 1, 2017 or January 1, 2018, as determined by Section 2.1.4.1(6) and (7) of this Settlement Agreement, Warren will file, and the other Parties will support, the following applications with MDEP and FERC.

### **3.1 New MDEP Application**

Warren will request (the “New MDEP Application”) that MDEP issue a Consistent MDEP Order, which will include extension of the deadline for operational upstream passage for anadromous fish at the Saccharappa Project to either May 2020 or May 2021, as determined by Section 2.1.4.1(6) and (7) of this Settlement Agreement. The New MDEP Application will request that MDEP conclude that the provisions of the New Surrender Application do not violate state water quality standards.

### **3.2 New Surrender Application**

#### **3.2.1 Requests by Warren**

Warren will request (the “New Surrender Application”) that FERC issue a Consistent Surrender Order. The New Surrender Application will include, without limitation, the following proposals, plans, and requests for approval:

- Warren will propose to discontinue power generation at the Saccharappa Project and remove the Eastern Spillway and the Western Spillway, the powerhouse, and the ancillary structures in the forebay channels currently existing at the Saccharappa Project, and construct fish passage at the Saccharappa lower falls and upper falls pursuant to sections 2.1.1 and 2.1.2 of this Settlement Agreement.
- Warren will propose to take such actions and have such fish passage facilities fully operational by May 1, 2020 or May 1, 2021, as determined by Section 2.1.4.1(6) and (7) of this Settlement Agreement.

- Warren will request that FERC extend the deadline for operational upstream fish passage at the Saccharappa Project until May 1, 2020 or May 1, 2021, as determined by Section 2.1.4.1(6) and (7) of this Settlement Agreement.
- Warren will request that FERC include the Denil as part of the Mallison Falls project works, as set forth in section 2.1.8.1 of this Settlement Agreement.
- Warren will propose to operate and maintain the Denil and supporting structures, including the fish counting facility, as set forth in section 2.1.8.1 of this Settlement Agreement.
- Warren will request that FERC change the requirements for fish passage at the Dundee and Gambo projects as specified in section 2.2.3 of this Settlement Agreement.
- Warren will request that FERC condition issuance of a final surrender acceptance order upon receipt of a written statement authored by a USFWS fishway engineer, pursuant to section 2.1.4.3 of this Settlement Agreement, stating that Warren has constructed all fish passage facilities according to the approved design drawings or, alternatively, according to construction changes approved by a USFWS fishway engineer.

### **3.2.2 Action by FERC**

The New Surrender Application will request that FERC issue a Consistent Surrender Order, which will approve, without limitation, the proposals, plans, and requests contained in Section 3.2.1. The New Surrender Application also will request that FERC extend for ten years, until 2053, the license expiration dates for the Mallison, Little Falls, Gambo, and Dundee projects.



#### **4.0 SUBMISSIONS TO MDEP AND FERC**

On or before November 15, 2016, Warren will request, and all other Parties will support the request, that by no later than December 31, 2016 MDEP amend the WQC issued for the Saccharappa Project to extend until May 2019 the deadline for operational upstream passage for anadromous fish at the Saccharappa Project, to allow the Parties time to undertake the obligations set forth above in Section 2.

On or before November 15, 2016, Warren will request, and all other Parties will support the request, that by no later than January 31, 2017, FERC, upon receipt of the revised WQC referred to in the preceding paragraph and the revised fishway prescription referred to in this Section 4 below, extend until May 2019 the deadline for operational upstream passage for anadromous fish at the Saccharappa Project, to allow the Parties time to undertake the obligations set forth above in Section 2.

On or before November 15, 2016, USFWS shall notify FERC that USFWS is extending until May 2019 the deadline for operational upstream passage for anadromous fish at the Saccharappa Project.

Within 14 days after FERC takes the actions requested in this section, Warren shall withdraw the Pending Surrender Application and Pending MDEP Application.

#### **5.0 NOTICES, CONTACTS, PROVISION OF DOCUMENTS**

Notices, contacts, consultations, and provision of documents required under this Settlement Agreement shall be made to the designated representative(s) of each party listed below. If a party chooses to change its designated representative(s), it shall notify all other parties in writing by email.

- For City of Westbrook

Westbrook City Council  
c/o Council President  
Westbrook City Hall  
2 York Street  
Westbrook, ME 04092  
Telephone: 207-854-9105  
[jbryant@westbrook.me.us](mailto:jbryant@westbrook.me.us)

Scott D. Anderson, Partner  
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Portland, ME 04112-0586  
Telephone: 207-253-4540  
[sanderson@verrilldana.com](mailto:sanderson@verrilldana.com)

- For Conservation Law Foundation:

Sean Mahoney, Esq.  
Executive Vice President  
Conservation Law Foundation  
53 Exchange Street  
Portland, ME 04103  
Telephone: 207-210-6439  
Email: [smahoney@clf.org](mailto:smahoney@clf.org)

- For Friends of the Presumpscot River:

Ronald Kreisman, Esq.  
77 Mackworth Street  
Portland, ME 04103  
Telephone: 207-699-4558 or 207-557-3571  
Email: [ron@kreisman.net](mailto:ron@kreisman.net)

and

President  
Friends of the Presumpscot River  
PO Box 1474  
Westbrook, Maine 04098

- For Maine Department of Marine Resources

Mark Randlett, Esq.  
Office of the Maine Attorney General  
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Oliver Cox  
Maine Department of Marine Resources  
Division of Sea Run Fisheries and Habitat  
650 State Street  
Bangor, ME 04401  
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[oliver.n.cox@maine.gov](mailto:oliver.n.cox@maine.gov)

- For S.D. Warren Company

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[mmanahan@pierceatwood.com](mailto:mmanahan@pierceatwood.com)

- For U.S. Fish and Wildlife Service

Andrew Tittler  
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Northeast Regional Solicitor's Office  
One Gateway Center, Suite 612  
Newton, MA 02458  
Telephone: 617-527-3400  
[Andrew.tittler@sol.doi.gov](mailto:Andrew.tittler@sol.doi.gov)

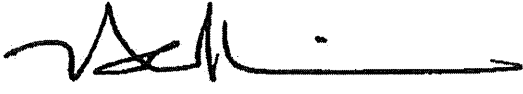
Steven Shepard, C.F.P.  
U.S. Fish and Wildlife Service  
P.O. Box A  
306 Hatchery Road  
East Orland, ME 04431  
Telephone: 207-902-1572  
[steven\\_shepard@fws.gov](mailto:steven_shepard@fws.gov)

## **6.0 MULTIPLE COUNTERPARTS**

This Settlement Agreement may be executed in two or more counterparts, each of which is deemed an original but all constitute one and the same instrument.

Settlement Agreement dated as of November 15, 2016 relating to the Saccarappa  
Project license surrender (Federal Energy Regulatory Commission License No. 2897).

S.D. WARREN COMPANY



By: Thomas A. Collins  
Title: Vice President - specialties

Date: 11-11-2016

This signature must be ratified by the Sappi North America Board of Directors at its  
December 6, 2016 meeting.

Settlement Agreement dated as of November 15, 2016 relating to the Saccarappa  
Project license surrender (Federal Energy Regulatory Commission License No. 2897).

U.S. Fish and Wildlife Service

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

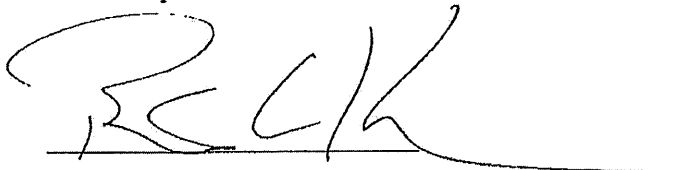
By: /s/ Wendi Weber

Title: Regional Director

Date: NOV 10 2016

Settlement Agreement dated as of November 15, 2016 relating to the Saccarappa  
Project license surrender (Federal Energy Regulatory Commission License No. 2897).

Maine Department of Marine Resources

A handwritten signature in black ink, appearing to read 'PK', is written over a horizontal line. The signature is stylized and cursive.

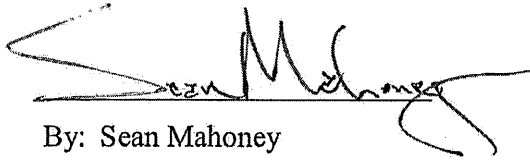
By: Patrick C. Keliher

Title: Commissioner

Date: November 14, 2016

Settlement Agreement dated as of November 15, 2016 relating to the Saccarappa  
Project license surrender (Federal Energy Regulatory Commission License No. 2897).

Conservation Law Foundation

A handwritten signature in black ink, appearing to read "Sean Mahoney", written over a horizontal line.

By: Sean Mahoney


Title: Executive Vice-President

Date: November 11, 2016



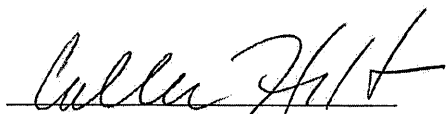
Settlement Agreement dated as of November 15, 2016 relating to the Saccarappa  
Project license surrender (Federal Energy Regulatory Commission License No. 2897).

Friends of the Presumpscot River

  
By: MICHAEL SHAUGHNESSY  
Title: PRESIDENT F.O.P.R.  
Date: 11.11.2016

Settlement Agreement dated as of November 15, 2016 relating to the Saccarappa  
Project license surrender (Federal Energy Regulatory Commission License No. 2897).

City of Westbrook

A handwritten signature in cursive script, appearing to read "Colleen Hilton", written over a horizontal line.

By: COLLEEN HILTON

Title: MAYOR

Date: 11.11.2016

This signature must be ratified by the Westbrook City Council at its November 21, 2016  
meeting.