

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Naugatuck Valley Council of Governments,	)	
Save the Sound, and	)	
Naugatuck River Revival Group	)	
Complainants	)	
	)	
v.	)	Docket No. _____
	)	
Kinneytown Hydro Company, Inc., and	)	
Hydroland Omega, LLC	)	
Respondents	)	
In re: Kinneytown Hydro Company, Inc.	)	Project Nos. 6985-005
Kinneytown Hydroelectric Project	)	6985-006

**NAUGATUCK VALLEY COUNCIL OF GOVERNMENTS,**  
**SAVE THE SOUND, AND**  
**NAUGATUCK RIVER REVIVAL GROUP’S**  
**MOTION OR, IN THE ALTERNATIVE, COMPLAINT TO REVOKE THE**  
**KINNEYTOWN EXEMPTION**

The Naugatuck Valley Council of Governments, Save the Sound, Inc., and the Naugatuck River Revival Group, Inc., pursuant to 18 C.F.R. §§ 385.212 and 385.207, make the following motion or, in the alternative and pursuant to 18 C.F.R. § 385.206, complaint to revoke the exemption held by Kinneytown Hydro Company, Inc. (KHC, “Respondent” or “Exemptee”), No. P-6985. KHC owns and operates the Kinneytown Hydroelectric Project (the “Kinneytown Project”). Hydroland Omega, LLC (“Hydroland”) owns KHC. The Kinneytown Project is in long-standing violation of fundamental and numerous conditions of its exemption. These fundamental, long-standing violations up to the present are part of improperly constructed facilities, changes to operations, and decades of neglect and deterioration that constitute material alterations to the Kinneytown Project’s design and operation established by the Commission in KHC’s exemption. See 18 C.F.R. § 4.35. Fish passage has never been safe, timely, and effective.

TARRANT, GILLIES  
& SHEMS  
44 EAST STATE STREET  
P.O. BOX 1440  
MONTPELIER, VERMONT  
05601-1440

Fish passage has been wholly inoperative since at least 2010. For the reasons detailed below, the exemption should be revoked.

The most recent evidence of these fundamental and long-standing violations occurred during the last several months when: (1) the Exemptee refused to implement the Commission's April 15, 2021 schedule requiring interim measures to improve fish passage, which (2) caused yet another year of completely failed diadromous fish migration on the Naugatuck River; (3) the Exemptee then further refused to update the Commission by August 1, 2021 on its (non)actions as required by the Commission, and (4) the Exemptee again refused to respond to the Commission's letter of August 26, 2021 directing KHC to provide such update by September 10, 2021. Further, the Exemptee has not responded to the Regional Engineer's August 31, 2021 letter stating his understanding of staffing changes and setting a 10-day deadline for updated contact, operator, and safety information. In short, the Kinneytown Project and its owners have consistently and continuously ignored most, and now all, of their obligations for over a decade.

## **I. The Complainants and Respondent**

1. The Naugatuck Valley Council of Governments (NVCOG) is a political subdivision of the State of Connecticut comprised of nineteen member municipalities in the west-central part of Connecticut. NVCOG's membership includes eight municipalities through which the Naugatuck River flows, along with many surrounding communities. Its governing board, consisting of the chief elected officials of those 19 municipalities, was dismayed to learn in 2020 that the fish ladder at the Kinneytown Project on the Naugatuck River in Seymour is not operating, and has not operated for at least a decade. The NVCOG Board was equally dismayed to learn that the Kinneytown Project was allowed to deteriorate for more than a decade and that many aspects of the Project no longer function. Upon fully understanding this complete failure of fish passage, the NVCOG Board determined that correcting this situation was a very high priority and directed

staff to immediately engage fully in finding a solution, charging staff with investigating the matter and developing recommendations to the board and regulators, while continually updating them on performance at the Kinneytown Project.

2. NVCOG works at the direction of its member municipalities and for the mayors and first selectmen of its nineteen-municipality region whose mandate is, in part, to ensure the health and safety of their residents.

3. NVCOG has a substantial interest in prompt resolution of the issues outlined in this Complaint, for the reasons described by NVCOG in the comments it filed in P-6985-005 on October 27, 2020 and December 16, 2020. NVCOG Comments (Oct. 27, 2020), Project No. 6985-005, accession no. 20201027-5232; NVCOG Comments (Dec. 16, 2020), Project No. 6985-005, accession no. 20201216-5185 at 1-2.

4. Many millions of dollars in public investment in the Naugatuck River -- by municipal, state, and federal governments -- has occurred over the previous decades to restore the ecological, recreational, and economic vitality of the river. These millions of dollars included funding the removal of barriers to fish passage along the Naugatuck River upstream from the Kinneytown Project, including the recently completed Tingué Bypass Channel in Seymour. This Tingué Bypass investment was made with the understanding that effective fish passage immediately downstream, at the Kinneytown Project, was occurring. However, the Kinneytown Project has never provided safe, timely, and effective fish passage, and any passage effectively ceased in 2010.

5. NVCOG's role includes assuring that investments made all along the River are being realized. This investment cannot be realized if the Kinneytown Project is preventing fish reaching the miles of restored habitat above the Project, and if the Project continues to deteriorate and remains as decrepit as detailed below.

6. Save the Sound, Inc. is a 501(c)(3) regional not-for-profit corporation, incorporated under the laws of the State of Connecticut, with its principal place of business at 900 Chapel Street, New Haven, CT 06510. Save the Sound seeks to protect, conserve, and improve the land, air, and water of Connecticut and the Long Island Sound region. Save the Sound uses legal and scientific expertise and brings people together to achieve results that benefit the environment for current and future generations.

7. Save the Sound has a long-standing interest in and ongoing programs for the purpose of restoring diadromous fish runs to the rivers of Connecticut discharging into Long Island Sound. Save the Sound's Ecological Restoration team, comprised of engineers and fish biologists, mobilizes partners and resources to bring back vibrancy to the region's shores, rivers, and wetlands, including on-the-ground work to reopen dammed rivers to migrating fish.

8. Naugatuck River Revival Group, Inc. (NRRG) is a Connecticut not-for-profit corporation whose focus is exclusively on the Naugatuck River. For over a decade, NRRG has undertaken a number of projects to reverse the degradation the river suffered prior to 1980. These projects have included: attempting to save migrating fish stranded at the base of the Project; removing trash and debris and improving habitat for aquatic flora and fauna in and around the river both at the Project and upstream; and educating the public about protecting the river and enjoying it safely. In these efforts, NRRG has worked closely with the municipalities abutting the river, NVCOG, and Save the Sound, and has directly observed and extensively documented failed fish passage at the Kinneytown Hydroelectric Project. NRRG has a significant interest in restoring the diadromous fish runs of the Naugatuck River, and possesses on-the-ground knowledge that can greatly contribute to the Commission's review of this matter and subsequent actions.

9. NRRG, with Save the Sound, has filed extensive comments in this matter. These comments are largely based on NRRG's meticulous documentation of conditions at the Kinneytown Hydroelectric Project.

10. Save the Sound and NRRG have a substantial interest in the swift resolution of the issues outlined in this Complaint, for the reasons described by Save the Sound and NRRG in the comments filed in P-6985-005 on October 20, 2020, November 30, 2020, and July 12, 2021. Save the Sound and NRRG Comments (Oct. 20,2020), Project No.6985-005, accession no. 20201020-5060; Save the Sound and NRRG Comments (Nov. 30, 2020,) Project No.6985-005, accession no. 20201201-5031; Save the Sound and NRRG Comments (Jul. 12, 2021), Project No.6985-005, accession no. 20210712-5068.

11. NVCOG, Save the Sound, and NRRG's interests in safe, timely, and effective fish passage are aligned in seeking the resolution of this long-standing problem for the restoration of Naugatuck River fish runs, revitalization of the Naugatuck River recreational economy and quality of life, and realization of decades-long investments. NVCOG, Save the Sound, and NRRG have worked together as part of the Naugatuck River Restoration Coalition.

12. The exemption for the Kinneytown Project is held by its owner and operator, KHC. According to a letter to the Commission dated March 19, 2021 from Clayton Orwig of Hydroland Omega, LLC, KHC was acquired by Hydroland Omega, LLC on December 15, 2020. Letter to Secretary Bose from Clayton Orwig, P.E., Regional Manager, Hydroland Omega, LLC (Mar. 19, 2010), Project No. 6985-005, accession no. 20210322-5171. KHC remains the Exemptee as a subsidiary of Hydroland Omega, LLC. The Commission has since been directing orders and correspondence to Hydroland, Inc.

## II. Project Description

13. The Order Granting Exemption from Licensing of a Small Hydroelectric Project of 5 Megawatts or Less for the Kinneytown Project was issued pursuant to 18 C.F.R. Part 4, Subpart K (1980) (18 C.F.R. §§ 4.101–4.108) on May 20, 1983, Project No. 6985-000, accession no. 19830524-0183. The Exemption was granted for the project as described in the Notice of Application Filed with the Commission (February 22, 1983) and attached to the Exemption (“Notice”). Id. The Kinneytown Project’s Application for Exemption of Small Hydroelectric Power Project from Licensing was filed on January 6, 1983, accession no. 19830111-0173.

14. The Notice describes the Project as having two turbine-generator units. One of these turbine generator units -- the Ansonia Unit, also known as Unit 2 -- is downstream of the spillway, at the end of a mile-long canal with a rated capacity of 850 kW. The Ansonia Unit is located in Ansonia, CT.

15. The other turbine-generator unit – the Seymour Unit, also known as Unit 1-- is co-located and adjacent to the Kinneytown Dam spillway, in Seymour, CT. Unit 1 is a newer unit and was installed after the exemption issued, with a rated capacity of 1,820 kW.

16. The exemption included Standard Article 2, requiring compliance with any terms and conditions that Federal or State Fish and Wildlife agencies have determined appropriate and filed as comments. See 18 C.F.R. § 4.106 (codifying Standard Article 2).

17. Standard Article 2 of the Kinneytown exemption provides:

Standard Article 2, included in this exemption, requires compliance with any terms and conditions that Federal or State fish and wildlife agencies have determined appropriate to prevent the loss of, or damage to, fish and wildlife resources. The terms and conditions referred to in Article 2 are contained in any letters of comment by these agencies which have been forwarded to the Applicant in conjunction with this exemption.

Order Granting Exemption (May 20, 1983), Project No. 6985-000, accession no. 8305240183 at

1.

18. Connecticut Department of Environmental Protection (CT DEP, now known as CT Department of Energy and Environmental Protection, CT DEEP) submitted comments on April 5, 1983 and United States Fish and Wildlife Service filed comments on April 11, 1983, both of which were incorporated into the Exemption pursuant to Standard Article 2. CT DEP Comments (Apr. 5, 1983), Project No. 6985-000 accession no. 19830412-0318; Dept. of Interior Letter to F.E.R.C. (Apr. 11, 1983), Project No. 6985, accession no. 19830421-0211.

**III. Actions and Inactions Amounting to Violations -- Rule 206(b)(1) & (2)**

19. The Kinneytown Project is violating numerous fundamental conditions of its exemption. These violations are longstanding, with many exceeding a decade.

20. Hydroland, the new owner of KHC, has allowed these violations to persist and worsen. Hydroland has also allowed new violations to develop. The Kinneytown Dam continues to deteriorate. These longstanding and new violations are detailed below.

***A. Facts Detailing Longstanding and Continuing Inaction and Recent Failures Violating Fish Passage Requirements of the KHC Exemption***

21. The April 5, 1983 Comments submitted by the Connecticut Department of Environmental Protection, and incorporated into Article 2, provide, in pertinent part, that:

Recognition and acceptance of a responsibility to provide adequate passage for anadromous fish species upon request from the Department when migratory fish plans are developed on the Naugatuck River that would require a fish ladder for passage though the project area.

\* \* \*

A request is made to the Commission to administratively include the above items in its granting of the exemption.

CT DEP Comments, Project No. 6985-000 (Apr. 5, 1983), accession no. 19830412-0318.

22. By letter dated April 11, 1983, and incorporated into Article 2, the U.S. Department of the Interior (DOI) prescribed, in part, the following measures to protect fish and wildlife resources: "The Exemptee shall provide fish-passage facilities at this project when prescribed by

the U.S. Fish and Wildlife Service in conjunction with the restoration of migratory fish in the Naugatuck River.” U.S. Dept. of Interior Letter to F.E.R.C. (Apr. 11, 1983), Project No. 6985, accession no. 19830421-0211.

23. The CT DEP Comments and DOI prescriptions are consistent with the agreements reached between the fish and wildlife agencies and the Applicant as part of the consultation process. Id; Application, supra, at Exhibit E, accession no. 19830111-0173.

24. In 1994, Connecticut drafted a migratory fish plan for the Naugatuck River, as was referenced in its 1983 comments, triggering the fish passage requirement. The Plan was later revised in 1996. Exhibit COM-01, CTDEP, Plan for the Restoration of Anadromous Fish to the Naugatuck River, Connecticut (1994, revised 1996). The Naugatuck River Restoration Plan projected restoration of the River would yield over 22,000 shad and over 220,000 river herring.

25. In 1995, CT DEP and the FWS initiated consultations leading to design and construction of fish passage facilities. See Commission’s Additional Information Request Oct. 9, 2020, Project No. 6985-005, accession no. 20201009-3009.

26. On June 26, 1998, Commission staff approved the passage design. Id.

27. Passage facilities were constructed in 1998 and started to operate in 1999. Id.

28. The Kinneytown Project fish passage facilities consist of, and depend on, operation of: (a) the mile-long canal and the Ansonia Unit at the end of the canal; (b) a Denil ladder that provides upstream passage which is required to operate from April 1 through July 15 and from October 1 through December 1; and (c) a bypass pipe that provides downstream passage that is required to operate July 1 through November 15. FERC Additional Information Request (Oct. 9, 2020) at 1-2, Project No. 6985-005, accession no. 20201009-3009.

29. A study of these passage facilities conducted by CT DEP from 2000 to 2002 and issued in March of 2003 (“2003 Study”) concluded that the facilities were capable of passing target



species, but identified important shortcomings including: false attraction, excess spillway discharges and inadequate attraction to the fishway, and stranding in the bypass reach. CT DEP, Kinneytown Dam Fish Passage Facility Evaluation Study (Mar. 31, 2003) (Letter to Secretary Bose from Katherine Fiedler, Save the Sound (Sept. 3, 2021), Project Nos. 6985-005, 6985-006, accession no. 20210903-5185, Attachment 2.

30. The CT DEP 2003 Study recommended that operational and engineering approaches be developed to address these important shortcomings. An example of an engineering approach to address stranding included “re-grading and re-arranging large streambed material within the bypass reach to reduce pooling of water and create zones of passage” as required by 1997 consultation letter (and raised again in FWS’s 1/12/21 letter). Letter to Secretary Bose from David Simmons, Acting Field Supervisor, New England Field Office, U.S. Fish and Wildlife Service (Jan. 12, 2021), Project No. 6985-005, accession no. 20210112-5213 (referencing Letter to Stephen D. Pike, CHI Energy, Inc. from Carol L. Sampson, Director, Office of Hydropower Licensing, FERC (June 26, 1998), Project No. 6985-003, accession no. 19980707-0259).

31. These shortcomings were never addressed. No engineering or operational approaches were developed or implemented.

32. The CT DEP 2003 Study concluded that “[a]ttraction to the fishway entrance during periods of spillway discharge is not very good and up-running fish may miss the entrance of the fishway and be delayed by false attraction by high flows in the bypass reach during large spill events.” CT DEP 2003 Study at 3. The 2003 Study found that spill over the face of the dam begins at flows of approximately 500 cfs, resulting in false attraction and poor fish passage rates. Id. at 6. When flows exceeded 1000 cfs, the fish passage was rendered completely ineffective due to spill and resulting false attraction. Id. The 2003 Study further found that spill occurred during 45% of the 2001 spring season and 24% of the 2002 spring season. Id.

33. The important shortcomings identified in the 2003 Study were worsened by KHC's subsequent actions and inactions.

34. By letter dated March 1, 2021, current Project owner Hydroland stated that the passage facilities were not properly constructed and have not properly operated since their construction. Letter to Secretary Bose from Donald E. Emel, Jr., Senior Engineer, Hydroland Green Energy (Mar. 1, 2021), Project No. 6985-005, accession no. 20210304-5056.

35. The March 1, 2021 letter from Hydroland also explained that when flows are less than 200 cfs, Unit 1, the Seymour Unit, is not serviceable, therefore flows are not diverted for power generation and instead spill over the face of the dam. The letter also stated that flows greater than 756 cfs exceed the capacity of Unit 1 and also result in spill. Id.

36. This March 1, 2021 letter further states that there was a significant error with the head pond elevation. A change in pond elevation is material. See 18 C.F.R. § 4.35(f)(1)(ii).

37. The concerns identified by CT DEP in its 2003 Study were confirmed by Intervenor-Complainant Save the Sound's review of that Study and two decades of fish counts and flow data from the Kinneytown Project. Save the Sound concluded that there are limited natural flow and operational conditions that do not result in spill events and false attraction.

Fish passage essentially ceases under 200 cfs when flows are too low to run the Kinneytown turbine; fish passage begins to decrease around 473 cfs and ceases when flows are over 1000 cfs. Both high and low flow conditions cause water to overtop the spillway, creating false attraction to the base of the dam away from the fish passage entrance. However, random spillway activation can occur at any flow depending on hydropower management. Favorable passage flows occurred on average only 39% of the time during the peak fish passage period for the years 2000-2020. The percentage of optimal passage flow days during the peak fish passage period in April and May varied widely from year to year ranging from 0% to 83%. . . . The average annual fish passage from 2000 to 2020 for American Shad (*Alosa sapidissima*), Blueback Herring (*Alosa aestivalis*), and Alewife (*Alosa pseudoharengus*) combined is 12.5 individual fish per year from April 1 to July 1.

Bill Lucey, et al., *Review of the Connecticut Department of Energy and Environmental Protection, Fisheries Division, 2003 Kinneytown Dam Fish Passage Facility Evaluation Study and cumulative*

*daily fish passage counts from 2000-2020* (Sept. 3, 2020), Letter to Secretary Bose from Katherine Fiedler, Save the Sound (Sept. 3, 2021), Project Nos. 6985-005, 6985-006, accession no. 20210903-5185, Attachment 1.

38. The fish passage design and operation depended, in part, on operation of the Project's Unit 2, the Ansonia Unit. Letter to Secretary Bose from Thomas Chapman, Supervisor, New England Field Office, US FWS 2 (Sept. 29, 2020), Project No. 6985-005, accession no. 20200929-5074 (“[T]he fishway was designed with the assumption that the Ansonia unit would be operated.”).

39. KHC knows that fish passage depends on operation of the Ansonia Unit. Letter to Secretary Bose from Donald E. Emel, Jr., Senior Engineer, Hydroland Green Energy (Mar. 1, 2021), Project No. 6985-005, accession no. 20210304-5056.

40. The Ansonia unit caught fire and ceased operating in 2010. Id.

41. When the Ansonia Unit stopped functioning, passage efficacy went from inadequate to zero. See Exhibit COM-02, DEEP Annual Fish Counts, Personal Correspondence to Jon Vander Werff, Fish Biologist, Save the Sound, from Tim Wildman, CT DEEP (Feb. 23, 2021). See also Letter to Secretary Bose from Thomas Chapman, Supervisor, New England Field Office, US FWS (Sept. 29, 2020), Project No. 6985-005, accession no. 20200929-5074.

42. Unit 1 has also been out of operation since October of 2020. Hydroland's March 1, 2021 letter states that Unit 1 “was not able to run and had not run in some period of time.” Letter to Secretary Bose from Donald E. Emel, Jr., Senior Engineer, Hydroland Green Energy 2 (Mar. 1, 2021), Project No. 6985-005, accession no. 20210304-5056.

43. With both hydroelectric units out of operation, all streamflow is directed over the face of the dam resulting in constant spill events for the duration of the 2021 spring fish run. See Letter to Secretary Bose from Katherine Fiedler, Save the Sound at 2 (July 12, 2021), Project No.

6985-006, accession no. 20210712-5068, Attachment A, Log 125, p. 13-30 (photos documenting daily spill events).

44. CT DEEP fish passage data consistently show low fish passage counts since the fish passage structure went into operation in 2000, notwithstanding on-site field data submitted by Intervenor-Complainants Save the Sound and NRRG in November 2020 and July 2021 demonstrating many anadromous and catadromous fish just below the dam or at the spillway attempting to pass upstream, as described in ¶¶ 48 and 64 below. Between 2000 and 2019, in only three years did more than even the miniscule number of *ten* American shad pass the Project (2002 – 17; 2012 – 59; 2013 – 14). *No* American eels passed between 2010 and 2020. In 2010 and 2021, only three eels passed the Project. Since 2010, only seven blueback herring have been recorded passing the Project. No American shad or river herring passed the Project in 2020. In 2021, DEEP recorded three alewife and one gizzard shad passing the Project, but no blueback herring or American shad. See Exhibit COM-03, DEEP Annual Fish Counts, Personal Correspondence to Soundkeeper Bill Lucey, Save the Sound, et al. from Tim Wildman, CT DEEP (Aug. 17, 2021).

45. On September 29, 2020, the FWS filed comments expressing concern with the Project's passage facilities and requesting that the Commission require KHC to address the lack of effective passage. Letter to Secretary Bose from Thomas Chapman, Supervisor, New England Field Office, US FWS (Sept. 29, 2020), Project No. 6985-005, accession no. 20200929-5074.

46. On October 9, 2020, Commission staff issued a Request for Additional Information requiring the Exemptee to provide the following within 30 days of October 9, 2020:

- An updated evaluation of all possible scenarios for Unit 2, as proposed in your June 30, 2016 filing, including schedule and cost analysis for each possible scenario, and your plans for Unit 2;
- A plan and schedule for interim and/or permanent measures that can be enacted starting in the 2021 fish passage season to reduce false attraction to the spillway and improve efficiency of the ladder, including physical or operational changes that may be enacted;

- A description of conditions for flashboard failure and current protocol for replacing flashboards (e.g., flow conditions, safety concerns); and
- Any documentation of consultation you have (i.e. emails, letters, phone memos) with the FWS and Connecticut DEEP during the past year.

Commission's Additional Information Request (Oct. 9, 2020), Project No. 6985-005, accession no. 20201009-3009.

47. On October 27, 2020, Intervenor-Complainant NVCOG filed comments detailing the significant public investment made to remove barriers to fish passage along the Naugatuck River, and further detailed that the Kinneytown Projects violations preclude realization of this significant public investment.

In recent months I have personally visited the location and have been greatly disturbed by the condition of the entire KHP facility which gives the appearance of total abandonment. The fish ladder has been regularly blocked with debris on the impoundment side and does not appear to function effectively as any kind of passage for migratory fish. I am also deeply concerned by the complete abandonment of the diversion channel and the Ansonia plant, which is open to the elements, has been vandalized, and is a clear hazard to the public who apparently enter the site from the adjacent neighborhood. Earlier this year, there was news coverage of a dog stranded on a floating pile of trash within the KHP canal to Ansonia that needed to be rescued by local Emergency Services: [https://valley.newhavenindependent.org/archives/entry/officials\\_eye\\_trash-clogged\\_canal\\_in\\_seymour/](https://valley.newhavenindependent.org/archives/entry/officials_eye_trash-clogged_canal_in_seymour/). As recently as September the canal was once again filled with trash. I raise this issue with the FERC because it demonstrates the total lack of attention or investment in this facility by KHC that is not only dangerous to aquatic resources, but to the neighboring and downstream public as well.

The Naugatuck River is a very important resource to our communities . . . a fully restored river, including the recreational and sport fishing that will result, constitute a key goal in supporting environmental quality and recreational development in this region. The NVCOG and municipalities have worked tirelessly to create opportunities for people to interact with and enjoy the River, including through a coordinated effort to improve access with the continued development of the Naugatuck River Greenway. Those efforts have been made possible by the dramatic improvement in water quality and wildlife habitat that past restoration work has won. The ultimate success of those and future efforts will rely on continued improvement, including the return of migratory fish.

NVCOG Comments (Oct. 27, 2020), Project No, 6985-005, accession no. 20201027-5232.

48. On November 9, 2020, the Exemptee responded to the Information Request. Letter from Enel to Secretary Bose (Nov. 9, 2020), Project No. 6985-005, accession no. 20201109-5164. The Exemptee proposed to provide for fish passage by recreating the effect of flow through Unit 2 on which passage design was, in part, based. Id. The Exemptee did not provide any further specific action, and instead asked for additional time. As detailed in the comments cited below, this response was inadequate and inaccurate.

49. On November 30, 2020, Intervenor-Complainants Save the Sound and NRRG filed detailed comments documenting the failure of the Kinneytown Project's fish passage. Save the Sound and NRRG Comments (Dec. 01, 2020), Project No. 6985-005, accession no. 20201201-5031. These comments included video footage and photos of fish blocked, stranded, and subject to predation because of the Kinneytown Project's failed passage facilities. In summary, these Comments document that:

Notwithstanding the very significant public and private efforts that have been expended during the last decades to restore the water quality, fisheries, recreational, and aesthetic attributes of the once hugely degraded Naugatuck River – efforts that have included the expenditures of many millions of dollars of public and private monies – and the considerable resulting progress that has been achieved upstream of Kinneytown due to these multi-community efforts, the Project as currently operated has singularly halted – stopped in its tracks – the recovery of native diadromous and resident species in the Naugatuck River. Each year, thousands of fish, representing the array of species targeted for restoration by the State of Connecticut (including American shad, alewife, blueback herring and sea-run brown trout) remain stranded at the foot of Kinneytown. These species are subject to predation and unable to migrate upstream to more than thirty miles of restored spawning and rearing habitat that waits just upstream. Through direct on-site observations of the constantly failing fish passage at the Project, a sampling of which are provided in these comments, it is obvious that upstream fish passage at the Project does not work and cannot be described as safe, timely and effective. For downstream migration, no safe passage exists, although an absence of monitoring means that accurate records of downstream morbidity and mortality is unavailable.

This depressing, ongoing situation is the result of another failure – the failure of the Project's owner, the Kinneytown Hydro Co., Inc. (the “Exemptee”), to comply with its license exemption conditions and its utter indifference to the ecological harm that its compliance failure has caused. The Exemptee has been out of compliance for nearly a decade and has ignored efforts by FERC to evaluate its compliance. This noncompliance, combined with a patient attitude toward the Exemptee's conduct exhibited by state and

federal agencies prior to the September 29, 2020 filing by the U.S. Fish and Wildlife Service with the Commission has resulted in the fisheries situation that Save the Sound and NRRG ask the Commission to confront and correct.

Even in the early years immediately after construction of the fish passage facilities in 2000 and prior to the shutdown of the Unit 2 (or Ansonia) powerhouse, when the ladder and dam operations were functioning as intended, the available data shows that the number of fish successfully navigating the denil fishway and passing upstream was quite small, strongly suggesting that safe, timely and effective passage was never occurring at the Project. Therefore, the Exemptee's stated goal in response to the FWS's Request for Information and the Commission's Additional Information Request – that the operations of the Project be altered to re-create the fish passage intended in 2000 – is unlikely to result in the fish passage needed on this river. There is no evidence that either restoring Unit 2 or eliminating false attraction through some other fix is sufficient, in and of itself, to achieve safe, timely, and effective fish passage.

Instead, in order to implement the fisheries outcomes intended in the license exemption, the Commission, working with the natural resources agencies, must use their individual and collective authority to impose on the Exemptee species-specific fish passage performance standards to ensure that safe, timely and effective passage is the actual outcome of future Project operations. Achievement of these performance standards must be assured by multi-year post-installation effectiveness testing to measure and monitor whether any Commission-required changes to Project operations are actually successful.

Id. at 1-2.

50. Hydroland, Inc. took ownership of the Project, through acquisition of Kinneytown Hydro Company, on December 15, 2020.

51. On December 16, 2020, NVCOG filed further comments detailing the inadequacy of the Exemptee's response:

Enel's comments amount to a request that its heightened state of non-compliance be allowed to indefinitely persist.

\* \* \*

Enel has been in a state of increasing non-compliance for about ten years now. Enel's comments fail to demonstrate that an end is in sight.

NVCOG Comments (Dec. 16, 2020), Project No. 6985-005, accession no. 20201216-5185 at 1-2.

52. On January 12, 2021, the FWS filed comments detailing why the Exemptee's comments and proposed solutions are unworkable and unfounded. Letter to Secretary Bose from

David Simmons, Acting Field Supervisor, New England Field Office, US FWS (Jan. 12, 2021), Project No. 6985-005, accession no. 20210112-5213.

53. Specifically, the FWS documented that, in March of 2020, the Exemptee knew that it would be difficult and cost prohibitive to do exactly what the Exemptee's November 9, 2020 letter proposed – recreate the flow simulating the Ansonia Unit's operation. Id.

54. The January 12, 2021 FWS Comments state, in part:

FERC also requested KHC provide a plan and schedule for interim or permanent measures that can be enacted for the 2021 fish passage season to reduce false attraction to the spillway and improve efficiency of the ladder. In response, KHC proposes to release water through the Ansonia unit's canal spillways, located on either side of the powerhouse.

FWS Response: Using canal outlet structures was discussed among KHC, the Service, and the Connecticut Department of Energy and Environmental Protection (CTDEEP) during a teleconference on March 13, 2020. Meeting minutes sent by the Service to KHC and the CTDEEP via email reflect concerns KHC had with passing water at the Ansonia powerhouse. KHC stated it needed to investigate if the headgates were operable, ascertain whether the waste gate could pass sufficient flow, and determine how to perform needed investigations under current Covid-19 restrictions.

In a subsequent email dated March 20, 2020, KHC informed the Service and the CTDEEP it had inspected the head gate structure, but a more in-depth inspection with divers was needed to observe if silt and debris had built up on the gates before KHC operates them. On April 21, 2020, KHC informed the agencies that the head gates are inoperable and likely require removal of debris and sediment. By email dated April 27, 2020, KHC notified the agencies that removing the debris was cost prohibitive and solicited potential funding opportunities to defray the costs. In subsequent emails, focus shifted from using the canal as a means to reduce spillage at the dam to other options, including flashboard management and construction of a barrier to prevent fish from moving up to the dam under spill conditions.

Even if KHC is able to use the canal spillways to manage spill at the dam as an interim measure, information provided in the consultation history suggests it will not eliminate spill entirely, as flows naturally exceed the Project's maximum generating capacity a portion of the passage season in a typical year. In addition, as noted in our September 25, 2020, letter to FERC, the Project loses flashboards each year during the passage season. The resultant spill creates false attraction to the base of the dam. Once the boards are replaced, spill quickly ceases, resulting in stranding.



In 1997, to address potential stranding after spill events, KHC and the agencies discussed construction of a barrier dam. Ultimately, the agencies determined that stranding could be minimized by re-grading and re-arranging large streambed material within the bypass reach to reduce pooling of water and create zones of passage (Attachment A).

Based on documentation in our files, we cannot ascertain if the bypass modifications were undertaken. Regardless, a December 1, 2020, filing by Save the Sound, Inc. and the Naugatuck River Revival Group provided comments, affidavits, and video clips documenting multiple stranding and false attraction events at the Project over the past 5 years. If bypass reach modifications were made, at some point in the past they have since lost effectiveness in preventing fish stranding.

Id. (footnotes omitted).

55. Consistent with the relief sought in this filing, the FWS also stated that:

Unit 2 has not operated since 2013, and KHC's letter affirms there are no present plans to make the unit operational. Decommissioning Unit 2 through an amendment proceeding would allow for the exemption to accurately reflect project structures, facilities, and operational capacity and would not preclude future reactivation, should project finances become favorable for repairing the turbine.

Id.

56. Hydroland, in its March 1, 2021 correspondence, proposed the following: 1) Spring 2021: Correct dam elevation error and restore the turbine to operation; 2) Summer 2021: Repair the canal gates and automate them to work with the turbine to control pond level; and 3) 2022, 2023: Rehabilitation at Ansonia powerhouse to work in conjunction with the dam. Letter to Secretary Bose from Donald E. Emel Jr., Senior Engineer, Hydroland Green Energy (Mar. 1, 2021), Project No. 6985-005, accession no. 20210304- 5056.

57. On April 5, 2021, FWS filed comments on Hydroland's proposed plan, noting the "urgent need for comprehensive solutions." Letter to Secretary Bose from David Simmons, Acting Field Supervisor, New England Field Office, US FWS (Apr. 2, 2021), Project No. 6985-005, accession no. 20210405-5427. The Comments set forth a schedule of both short-term and long-term solutions, which included the following deadlines: 1) Return Seymour unit (Unit 1) to service

by April 15, 2021; 2) Install flashboards to elevation 54.8 feet by April 15, 2021; 3) Implement interim stranding prevention measures in the bypass reach during the 2021 passage season starting April 15, 2021; 4) Insert/remove upper baffles in ladder based on flashboard status between April 15 and June 30 annually; 5) FWS conducts a comprehensive field investigation of the project fish passage facilities and features, including the bypass reach by May 15, 2021; 6) Develop a plan to implement interim and long-term solutions to improve fish passage effectiveness based on the FWS technical memorandum between July 1 and December 31, 2021; and 7) Implement long-term solutions pursuant to an agreed upon schedule, but by no later than December 2022. Id.

58. In its April 5, 2021 Comments, FWS invited Hydroland to discuss these fish passage issues in detail and requested that CT DEEP be included in all consultation. Id.

59. On April 15, 2021, the Commission adopted FWS's proposed short-term and long-term implementation schedule. The Commission also required an update describing all actions taken at the Project and fish passage facility by August 1, 2021. Letter to Tim Carlsen from Andrea Claros, Acting Chief, Aquatic Resources Branch, Division of Hydropower Administration and Compliance, FERC (Apr. 15, 2021), Project No. 6985-005, accession no. 20210415-3050.

60. This April 15, 2021 Letter also required immediate installation of flashboards or crestboards to correct reservoir elevation discrepancies. Id.

61. Flashboards or crestboards have not been installed.

62. The reservoir elevation remains altered.

63. On April 28, 2021, CT DEEP filed comments requesting prompt action, including the achievement of “unfettered upstream and downstream passage of diadromous fish at efficiencies equal to or greater than standards set by the [FWS] . . . no later than February 28, 2022,” by way of the implementation of both short-term and long-term measures as described in

the FWS Comments. Letter to Secretary Bose from Katherine S. Dykes, CT DEEP Commissioner (Apr. 28, 2021), Project No. 6985-005, accession no. 20210428-5137.

64. On May 25, 2021, CT DEEP filed comments indicating that as of May 7, 2021 none of the short-term measures detailed in FWS's April 5, 2021 schedule to be completed by April 15 had been implemented. Letter to Secretary Bose from Pete Aarrestad, Director, CT DEEP Fisheries Division (May 25, 2021), Project No. 6985-005, accession no. 20210525-5097.

65. Intervenor-Complainants Save the Sound and NRRG filed comments on July 12, 2021 that included photo and video documentation demonstrating the following: "1) Fish passage remains effectively nonexistent, despite the presence of significant numbers and varieties of anadromous fish seeking upstream migration; 2) Significant spillage across the face of the dam was observed almost daily throughout the fish run season, creating significant and ongoing false attraction; 3) No or minimal Project-owner activities were observed on-site responsive to or in compliance with the Commission's April 15, 2021 directive, as well as the USFWS's and Connecticut DEEP's April 2, 2021 and April 26, 2021 filings, respectively; and 4) The facilities of the Kinneytown Hydroelectric Project remain in a state of disrepair notwithstanding representations made by the new and former owners." Letter to Secretary Bose from Katherine Fiedler, Save the Sound 2 (July 12, 2021), Project No. 6985-006, accession no. 20210712-5068.

66. Hydroland did not file an update to the Commission describing its activities by the August 1, 2021 deadline, as was requested by FWS and the Commission.

67. On August 26, 2021, the Commission filed a delegated order requiring Hydroland to file the required status update within 15 days from the date of the letter. Delegated Order issued to Tim Carlsen, Hydroland, Inc. by Holly Frank, Aquatic Resources Branch, Division of Hydropower Administration and Compliance, FERC (Aug. 26, 2021), Project Nos. 6985-005, 6985-006, accession no. 20210826-3008.

68. The delegated order emphasized the importance of the deadlines established by the resource agencies and the Commission, acknowledging the urgency of remedying the fish passage issues: “The schedule for improvements was aggressive by necessity.” Id. at 5.

69. Hydroland has not acted upon, let alone completed, any of the plans it presented in its March 1, 2021 correspondence, specifically: correcting the dam elevation error and restoring the Seymour Unit (Unit 1) to operation (to be completed in Spring 2021) or repairing and automating the canal gates (to be completed in Summer 2021).

70. Hydroland has not responded to the FWS comments or the Commission’s correspondence, nor has it filed any status update as required by the original August 1, 2021 deadline or the Commission ordered September 10, 2021 deadline.

71. On September 2, 2021, FWS filed a letter in which it updated the Commission on its ongoing engineering assessment of the problems with the fishway and informed the Commission that it intended to file with the Commission by October 31, 2021 a complete engineering assessment of existing fish passage problems and the solutions required to achieve safe, timely, and effective fish passage at the dam. Letter to Secretary Bose, FERC, from Audry Mayer, Supervisor, New England Field Office, USFWS (Sept. 2, 2021), Project No. 6985-005, accession no. 20210902-5159.

72. FWS’s update sets forth initial concerns identified after its May 7, 2021 site visit. The initial concerns identified aspects of the fish ladder facilities that were not constructed or operated according to the approved design: 1) Turnpools A and B, which are critical features for shad and blueback passage; and 2) the grizzly (trash) rack, potentially impacting movement of fish out of the ladder. Id. at 2. FWS’s letter also identified structures that were poorly maintained or in a state of disrepair: 1) stoplogs are ineffective, rendering necessary maintenance and some fishway operations infeasible; 2) eroded and deteriorated baffles; and 3) the weir structure is in disrepair,

a necessary structure for attraction flows. Id. FWS also observed that “water in the sloped ladder sections was impacting the timber baffle cross supports, likely creating impassible water velocities and potentially causing fish injury.” Id. The cause of this excessive flow requires further investigation.

73. The concerns identified in the September 2, 2021 update were made from only initial inspections. FWS wrote that because Hydroland had been unable to fully dewater the fish ladder during the May 7<sup>th</sup> visit (due to ineffective stoplogs) and because the ladder was therefore not dewatered, FWS was unable to take all necessary measurements and therefore needs to return to the site in order to collect final survey measurements to complete its analysis and report to the Commission by the end of October 2021. Id. at 3.

74. The FWS set a September 16, 2021 date to complete its inspection of the fish ladder and asked Hydroland to dewater the ladder to facilitate this inspection. Hydroland failed to dewater the ladder for the September 16 FWS inspection and FWS was not able to complete its inspection.

75. Nonetheless, the record before the Commission amply demonstrates that:

a) Fish passage at the Kinneytown Project is wholly ineffective;  
b) This ineffectiveness occurs for at least the following reasons (individually and in combination):

i) Shutdown of the Ansonia Powerhouse (Unit 2) resulting in excess spillage and false attraction;

ii) Shutdown of Seymour Powerhouse (Unit 1) resulting in excess spillage and false attraction;

iii) Operational limitations of Unit 1 resulting in excess spillage and false attraction when flows are insufficient for operation;

iv) Operational limitations of Unit 1 resulting in excess spillage and false attraction during high flow conditions that exceed Unit 1 capacity;

- v) Components of the fish ladder were not constructed as designed, including Turnpools A and B and the grizzly (trash) rack;
  - vi) Long-term maintenance failures, including failure to maintain stoplogs and baffles;
  - vii) Design of fish passage structure based on incorrect head-pond operating level, resulting in spill and false attraction; and
  - viii) Failure to develop or implement engineering and operational approaches to address important shortcomings;
- c) Two decades of neglect and deterioration preclude the Kinneytown Project from operating as designed. The Kinneytown Project, and particularly its fish passage facilities are decrepit and inoperable;
- d) The effective shut down of upstream diadromous fish passage continues to date; and
- e) The current status of the Kinneytown Project is not in the public interest.

76. These complete, long-term, and continuing failures to provide diadromous fish passage, and the reasons behind this failure, are, individually or collectively, material violations of Standard Article 2 of the exemption. See 18 C.F.R. § 4.35(f)(1)(ii)(B).

77. Various factors contributing to this fish passage failure are also material violations of the exemption including: failure of the Ansonia Unit, failure of the Seymour Unit, and the failure to maintain the required reservoir elevation.

78. The Exemptee's actions and inactions caused these material alterations to the Project design or operation.

***B. Generator Unit Violations***

79. The exemption was issued on the representation that the project consists of two generation units. Order Granting Exemption from Licensing, Project No. 6985-000 (May 20,

1983), accession no. 19830524-0183, appending and referencing Notice of Application Filed with Commission.

80. Exemptions are granted on the notion that exempt facilities produce power with minimal environmental harm. 16 U.S.C. § 2705(d).

81. The fish passage structure was constructed based on the operation of both generation units as described in the Notice.

82. As detailed in this complaint, the Kinneytown Project causes significant harm to fishery resources.

83. The Kinneytown Project is failing to produce power as required by the exemption.

84. The Ansonia Unit (Unit 2) has not operated since 2010. Enel's November 9, 2020 Response to the Commission's Information Request provides no timeline for restoration of the Ansonia Unit. To the contrary, Enel sought further, indefinite delay for developing a plan to return this unit to service. Hydroland has not provided a specific plan for restoration of the Ansonia Unit. Letter to Secretary Bose from Hydroland (Mar. 1, 2021), Project No. 6985-005, accession no. 20210304-5066 at 2.

85. As detailed above, this March 1, 2021 letter states that Unit 1, the Seymour Unit, "was not able to run and had not run in some period of time." *Id.* at 2. See also USFWS Update (Sept. 2, 2021) at 2 (noting that the Seymour unit was not generating during the May 7, 2021 FWS visit and that it has been off-line at least since February of 2021).

86. Neither of the Kinneytown Project's generation units are operational, nor have they been for some period of time.

87. The Exemptee did not formally or timely inform the Commission of the Ansonia Unit's failure and that this unit would be inoperable for over a decade. The Ansonia Unit's long-term failure is a material change.

88. Other than the above referenced March 1, 2021 letter, the Exemptee does not appear to have informed the Commission of the Seymour Unit's failure. The Seymour Unit's failure is a material change.

89. Changes in the number or capacity of generating units are material violations of the exemption. See 18 C.F.R. § 4.35(f)(1)(i).

90. Changes in reservoir elevation are material violations of the exemption.

91. The Exemptee's actions and inactions caused these material alterations.

### ***C. Maintenance and Potential Safety Violations***

92. Following an inspection of the Kinneytown Project on June 10, 2019, Commission Regional Engineer John Spain, P.E. wrote a letter to the Exemptee stating, in part:

The flows passing the project and two or three partially failed flashboards did not allow walking the downstream spillway for the inspection. However, much of the downstream spillway face was inspected from the left and right abutments. The concrete on the downstream face of the spillway is in poor condition in several areas with cracking, concrete loss, and exposed steel. Reviewing pictures from the 2010 inspection, the concrete has continued to deteriorate and expose more steel. Continued exposure of steel and loss of concrete may develop into a dam safety issue. Please provide a long term plan and schedule to address the concrete issues and the rehabilitation of the downstream dam face.

Letter from John Spain to Salim Ayas (July 5, 2019), Project No. P-6985, accession no. 20190705-3026. The letter also detailed other maintenance failures.

93. The Exemptee failed to respond to this letter or to address the maintenance and potential safety issues.

94. On February 25, 2021, Regional Engineer Spain sent another letter to the Exemptee stating:

By letter dated November 2, 2020 (Attachment 1), you were asked to provide additional information to complete our internal review of the Kinneytown Project hazard potential classification within 60 days. We have not received the requested operation procedures and dimensions of the downstream flood closure structures as of the date of this letter. Additionally, the long-term plan and schedule to address the concrete deterioration and rehabilitation of the downstream dam face, requested



in our July 5, 2019 inspection follow-up letter (Attachment 2), is still outstanding. While the current level of deterioration does not pose stability concerns, the ongoing long-term degradation must be addressed.

Within 30 days of this letter, please provide the outstanding items.

Letter from Regional Engineer John Spain, P.E. to Exemptee (Feb. 25, 2021), Project No. 6985, accession no. 20210225-3014.

95. By letter dated March 11, 2021, the Exemptee responded to Regional Engineer Spain's February 25 letter by stating that:

The long-term plan for rehabilitation of downstream dam face and spalling concrete is to conduct a closer inspection. This inspection would include mapping the location, dimensions and volume of the deterioration in order to develop an informed plan for any needed repairs. Once an informed repair plan is developed, the actual repairs will be coordinated to occur during a time of low river flow.

Letter from Hydroland to Secretary Bose (Mar. 11, 2021), Project No. 6985, accession no. 20210312-5088. The plan required by the July 5, 2019 letter was not provided. The Exemptee seemed to blame third parties for some of the failures outlined by the Regional Engineer. Id.

96. Other information relating to maintenance and safety of the Kinneytown Project is classified as CEII.

97. As detailed above and in NVCOG comments filed on October 10, 2020, the Kinneytown Project has long been neglected and in a decrepit condition.

98. Kevin Zak, Naugatuck River Revival Group, documented the ongoing state of disrepair at the Kinneytown project:

“During [a June 25, 2021] visit, the Unit 2 door and accessible skylight were open. The door and skylight have been open during every visit I have made for [the] past few years. I believe this to be a significant public safety issue given that there is easy access from nearby homes on 4<sup>th</sup> Street and any child could walk directly onto the roof to the open skylight (see Observation Logs 203 and 204 in Attachment A). The Unit 1 eel pass is not running and is in total disrepair and overwhelmed with vegetation. . . . The Unit 1 grounds appear unkept and unmowed. There are ripped garbage bags outside the Unit 1 powerhouse door (see Observation Log 201, Photo

201a, in Attachment A). . . . The state of Unit 1 and Unit 2 gives the appearance of being abandoned.”

Comments by Save the Sound and NRRG (July 12, 2021), Project No. 6985-005, accession no. 20210712-5068, Kevin Zak Affidavit, att. B.

99. A boat barrier boom consisting of a rope and buoys above the dam is broken and dangling over the spillway. See Delegated Order issued to Tim Carlsen, Hydroland, Inc. by Holly Frank, Aquatic Resources Branch, Division of Hydropower Administration and Compliance, FERC (Aug. 26, 2021), at 4, Project Nos. 6985-005, 6985-006, accession no. 20210826-3008. This boat barrier has been in this condition for well over one year. This presents a safety hazard.

100. There are no signs above the dam warning boaters of the dam’s presence. There have been no signs for at least two years. The absence of signs presents a safety hazard.

101. There is a boat launch less than two miles upstream of the dam.

102. On August 31, 2021, Regional Engineer John Spain issued a letter to Exemptee Hydroland reflecting that there have been recent staffing changes and asking that the Exemptee submit: (a) updated primary and secondary contacts for the projects, (b) the names and contact information of local operators; and (c) an updated Owners Dam Safety Program. Letter from Regional Engineer John Spain, P.E. to Don Emel, Hydroland Omega, LLC re: Dam Safety Contact (Aug. 31, 2021), Project No. 6985-005, accession no. 20210909-3051.

103. The Exemptee was to have submitted the information required by Regional Engineer Spain’s August 31, 2021 letter “within 10 days from the date of this letter.” Id. To date, the Exemptee has not responded to this letter.

**IV. Business, commercial, and economic burdens and impacts; Rule 206(b)(3) and (4)**

104. The Kinneytown Project has negative business, commercial and economic impacts.

105. As detailed above, the Kinneytown Project is not producing electricity and one of its two units (Unit 2, the Ansonia Unit) was destroyed in 2010 and there are no plans to restore it.

106. Unit 1, the Seymour Unit, has not operated since October of 2020.

107. Also, as detailed above, the Kinneytown Project presents severe environmental impacts with concomitant economic and commercial impacts.

108. More than \$10.8 million has been spent removing barriers to fish passage and restoring habitat upstream of Kinneytown Dam, with the understanding that the Kinneytown Dam fish passage was functioning. Approximately \$277 million of Clean Water Fund investments have been made to wastewater treatment plants discharging to the Naugatuck River since 2000. Kinneytown Dam is preventing migratory fish from accessing miles of restored habitat with greatly improved water quality, preventing the full benefit of these investments from being realized.

109. According to the American Sportfishing Association, anglers spend \$381 Million while fishing in Connecticut annually. Economic Impacts of Recreational Fish-Connecticut, American Sportfishing Association <https://asafishing.org/state-reports/economic-impacts-of-recreational-fishing-connecticut> (last visited Sept. 22, 2021). Improvements in water quality over the last several decades have made recreational fishing possible along the Naugatuck River, but the longstanding issues at Kinneytown Dam are preventing the full potential of sport fishing from being realized along the River and tributaries. Popular sport fish are currently being prevented from accessing substantial habitat upstream from Kinneytown Dam, preventing the region from fully participating in the outdoor recreation economy. The dam impacts sportfishing downstream as well, trapping sediment in the reservoir behind the dam, and preventing the natural transport of sediment that is critical to riverine and marine habitat. Commercial fishing is also impacted downstream, with the dam blocking commercial fish species (and those they rely on for food) from suitable spawning habitat and preventing the natural sediment deposition critical to the Long Island Sound Estuary.

**V. Practical, operational or other non-financial impacts; Rule 206(b)(5)**

110. Industry had a devastating impact on the Naugatuck River and species that once flourished in it. Dams were constructed all along the watercourse, blocking fish passage and destroying habitat. For decades, the river was a dumping ground for sewage and industrial waste, degrading water quality and habitat. For years, the river did not support aquatic life and was toxic to humans. Following the passage of the Clean Water Act in 1972, sewage treatment plants were upgraded, and industrial wastewater discharges were regulated. These actions, in addition to a general decline of certain industries in the region, greatly reduced pollution impacts to the river and water quality improved.

111. Dams were removed along the river's course, and numerous habitat restorations have been completed. Over the past several decades, the Naugatuck River has made a remarkable, but still partial, comeback. Many species of fish, birds and other wildlife have returned to the river. The Kinneytown Project prevents further ecological restoration. Migratory fish play a crucial role in riverine habitats by transporting nutrients upstream and providing food and fertilizer for animals and riverbank vegetation, supporting healthy ecosystems. Kinneytown Dam is currently blocking this transport of nutrients upstream.

112. Kinneytown Dam captures heavier sediments like sand and gravel which are crucial to stream bed function as spawning and rearing habitat. Sediments from watersheds make their way to the estuaries and are sources for wetland accretion to meet rising seas. Sand from rivers can replenish beaches creating dune habitat and adding resiliency to shorelines.

113. The Kinneytown dam creates a false attraction when water spills over the dam face trapping fish in the bypass channel making them vulnerable to predation and removing them from the spawning population further hindering restoration of sustaining populations. Heat from the impoundment raises the temperature of the pond and river downstream from the dam which

impacts the physiology of fish. If fish were able to pass, the impounded water above the dam can slow the upriver migration as guiding currents are spread out.

114. With impacts to ecosystems all along the river's course Kinneytown Dam is causing the entire system to be degraded, with drastically reduced productivity and water quality, and causing those ecosystems to be less resilient to climate change.

115. The project area and Dam's blighted condition pose public safety issues. The Ansonia Unit (Unit 2) has been unsecured for at least three years now. The Ansonia Unit, and other parts of the project works, are open and accessible to anyone including children from the adjacent residential neighborhood. The Ansonia Unit is open to the elements and is deteriorating. The lack of security welcomes vandalism.

116. Trash has continually been allowed to accumulate across the Project Area, and particularly in the canal leading to the Ansonia Unit. Such blight undermines the massive efforts that have been undertaken to improve the health and appearance of the River and could negatively affect nearby property values and quality of life.

117. The Exemptee still has not replaced a boat barrier boom above the dam, presenting a safety hazard.

118. These practical and non-financial impacts are also relevant to commercial and economic burdens and impacts detailed in Section IV, above.

#### **VI. Whether issues may be resolved through another matter; Rule 206(b)(6)**

119. NVCOG, Save the Sound, and NRRG are filing this pleading as a motion or petition in Nos. P-6895-005 and -006, or in the alternative, as a complaint. NVCOG, Save the Sound, and NRRG have filed motions to intervene in Nos. 6895-005 and -006.

120. The Motion and Complaint are identical and seek the same relief.

121. The nature of Nos. P-6895-005 and -006 is not clear. The relief requested in this Complaint may be in response to the Motion, assuming that the Motions to Intervene are granted, and the nature of those proceedings. 18 C.F.R. § 385.212(a)(2).

**VII. Remedy Requested and Basis for Relief; Rule 206(b)(7)**

122. See request for relief, below.

123. Requested relief includes issuance by the Commission of an order revoking the exemption and requiring Hydroland to apply for a license with a term of forty years; establishing an aggressive licensing schedule to ensure timely permanent fish passage that is safe, timely and effective; and issuance by the Commission of an order to Hydroland aimed at achieving maximally possible improved fish passage immediately and until the licensing process is finalized.

**VIII. Supporting Documents; Rule 206(b)(8)**

124. Most of the documents supporting the facts in this complaint and motion are already filed with the Commission and are referenced through their accession numbers.

125. Other documents supporting the facts in the complaint are appended to this complaint and referenced as exhibits. Exhibits submitted by the co-movants/complainants are referenced as COM (short for “Complainants”) followed by the exhibit number. An exhibit list is also appended.

**IX. ADR, Rule 206(b)(9)**

126. The Enforcement Hotline and Dispute Resolution Service were not used for three reasons. First, the issues here are pending in P-6985-005,-006 (fish passage) and P-6985 (maintenance). Second, the violations are widespread, longstanding, and ongoing without any apparent effort to correct them through several owners. Complete review of the Kinneytown Project’s exemption is required. Third, the basic relief sought is revocation of the Kinneytown Project’s exemption. Revocation requires Commission action.

127. Intervenor-Complainants NVCOG, Save the Sound, and NRRG do not believe that ADR would be appropriate here.

128. NVCOG reached out to Hydroland by telephone and email to request a meeting to discuss the issues raised in this complaint. Hydroland did not respond to NVCOG's efforts.

129. As detailed above, Hydroland has repeatedly ignored and failed to comply with Commission and resource agency delegated orders and requests. Nevertheless, a Hydroland principal was recently quoted -- in a September 25, 2021 article in the Naugatuck Valley's local newspaper, the *Republican-American*,-- as stating that Hydroland has already submitted plans with FERC for a major restoration and is "feel[ing] good about what we and FERC have moved through and gotten approval on and are moving forward with." Michael Puffer, *Power struggle: 'What you have here is a fish-killing machine with no positive benefit'* Republican-American (Sept. 25, 2021), appended as COM-04. This false statement is directly contradicted by the Commission record and further demonstrates that ADR would not be appropriate.

130. An order from the Commission is required to correct the violations and assure compliance.

**X. Form of Notice of the Complaint; Rule 206(b)(10)**

131. A form of notice of this Complaint is appended as Exhibit COM-05.

**XI. Fast Track Processing; Rule 206(b)(11)**

132. NVCOG, Save the Sound, and NRRG do not request that this matter be set for Fast Track processing.

**XII. CONCLUSION**

133. Individually or together, the above violations amount to numerous material violations of the Kinneytown Project's exemption.

134. These long-standing and numerous violations have materially altered several aspects of the Kinneytown Project's design and operation, including Standard Article 2, effective changes to the Project's installed capacity and number of units, and changes to the reservoir elevation causing adverse environmental impacts. See 18 C.F.R. § 4.35(f)(1).

135. The Kinneytown Project has been grossly neglected for well over a decade and is in a state of increasing deterioration.

136. The Exemptee's actions and inactions caused these material alterations. The Exemptee's actions and inactions causing the material alterations are long-term, known, and deliberate.

137. The Exemptee is violating, and continues to violate compliance letters, safety directives, and delegated orders in the several respects detailed in the above allegations.

138. The exemption should be revoked because the Kinneytown Project has fundamentally failed to be developed and operated as required by its exemption.



## **REQUEST FOR RELIEF**

WHEREFORE, the Naugatuck Valley Council of Governments, Save the Sound, and Naugatuck River Revival Group respectfully request the following relief:

- A. A Commission declaration that the Exemptee: 1) materially altered the required design and operation of the Kinneytown Project; and 2) has not been in compliance with the terms and conditions of its exemption for close to two decades; and,
- B. That the Commission revoke the exemption issued in P-6985 and require that the Project owner apply for a new exemption or license within a specified time period, and that any new application contain a detailed set of designs, based on best available engineering and science, for construction of safe, timely, and effective upstream and downstream diadromous fish passage at the Project site, a comprehensive post-construction multi-year effectiveness testing plan to ensure that safe, timely, and effective passage is occurring, and a detailed operations and maintenance plan for maintaining both all fish passage and all safety-related components of the Project;
- C. That on an interim basis, while a new application is being processed by the Commission, the Exemptee be required to immediately take specified actions aimed at achieving maximally possible improved fish passage at the existing fish passage and related structures, until the licensing process is finalized and comprehensive new safe, timely and effective passage has been ordered by the Commission.
- D. Assess penalties; and
- E. Order all other appropriate relief, including but not limited to costs and fees as and if available pursuant to this proceeding.

September 30, 2021

NAUGATUCK VALLEY COUNCIL OF GOVERNMENTS



By: \_\_\_\_\_

Ronald A. Shems  
Nicholas E.F. Low  
[ron@TarrantGillies.com](mailto:ron@TarrantGillies.com)  
[nick@TarrantGillies.com](mailto:nick@TarrantGillies.com)  
TARRANT, GILLIES & SHEMS, LLP  
44 East State Street  
Montpelier, Vermont 05601-1440  
(802) 223-1112 ext. 109

Attorneys for Naugatuck Valley Council of Governments

SAVE THE SOUND, INC.

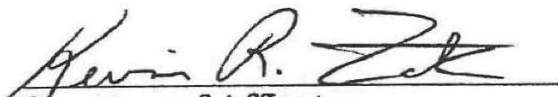
By: \_\_\_\_\_



Katherine M. Fiedler  
[kfiedler@savethesound.org](mailto:kfiedler@savethesound.org)  
900 Chapel Street, Suite 2202  
New Haven, CT 06510  
(203) 787-0646 ext. 108

Attorney for Save the Sound

NAUGATUCK RIVER REVIVAL GROUP, INC.



By: \_\_\_\_\_

Kevin Zak  
[kznrrg@sbcglobal.net](mailto:kznrrg@sbcglobal.net)  
Naugatuck River Revival Group  
132 Radnor Avenue  
Naugatuck, CT 06770  
(203) 530-7850

President, Naugatuck River Revival Group

TARRANT, GILLIES  
& SHEMS  
44 EAST STATE STREET  
P.O. BOX 1440  
MONTPELIER, VERMONT  
05601-1440

TARRANT, GILLIES  
& SHEMS  
44 EAST STATE STREET  
P.O. BOX 1440  
MONTPELIER, VERMONT  
05601-1440