

Eel appeals renew dam debate

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BATH — A Sagadahoc Superior Court judge on Friday tossed out a petition requesting the review of certifications for hydro-power dams, sending petitioners who want to open the Kennebec and Androscoggin rivers to migrating fish to the Maine Supreme Judicial Court.

Bowdoinham-based conservation group Friends of Merrymeeting Bay and Augusta resident Douglas Watts had each petitioned the Board of Environmental Protection to revisit water quality certifications of hydro- power projects along the Androscoggin and Kennebec rivers, claiming that project turbines violate the Clean Water Act — federal legislation passed in 1972 by Maine Sen. Edmund Muskie in response to pollution of rivers — because they destroy eels and other aquatic species attempting to navigate riverways.

When the Board of Environmental Protection, composed of Maine residents, dismissed separate petitions regarding both Kennebec and Androscoggin rivers over the last two years, Friends of Merrymeeting Bay and Watts, acting separately to simplify legal fees, filed suit against the board in Sagadahoc County Superior Court.

That court dismissed FOMB's suit in November and on Friday dismissed Watts', sending both to appeal the court's decisions through the Maine Supreme Judicial Court, Maine's highest law court.

At issue for Watts and Friends of Merrymeeting Bay is the disruption of eel migration by turbines at hydro power projects along both the Kennebec and Androscoggin rivers, the latter of which affords no passage for eels.

The plaintiffs say the Board of Environmental Protection should modify water quality certificates, a requirement for obtaining licensure for the projects from the Federal Energy Regulatory Commission, to require provision for migration of eels and other fish.

Such an amendment would allow the state to request that FERC make provisions for the passage of eels a condition for dam licenses, which in most cases permit a project's operation for 30 to 50 years. The next license for an affected dam — for a project on the Little Androscoggin River — comes up for review in 2019, according to state officials.

But a review every half century isn't sufficient for the petitioners, who claim turbines adversely affected eels and other species.

"You could actually have a population of eels go extinct because no one is going to open up those licenses for 49 years," said Ed Friedman, Friends of Merrymeeting Bay board chairman. "That's not what the Clean Water Act had in mind."

Watts started his fight to open eel passages eight years ago after seeing dead eels near a hydro plant while fishing on Cobbossee Stream in Gardiner.

"I said this is obviously a fish kill and this is illegal," Watts said. "That's what I've been doing since then: trying to get the (Department of Environmental Protection) to enforce the law. To me this is no different than somebody dumping a chemical into the water and all the fish going belly up."

Solutions

Friedman and Watts maintain changes to dams would cost relatively little and could be as simple as placing screens in front of turbines to prevent eels from swimming through them. Solutions could also include nocturnal shutdown of turnbines during eels' fall migration season, as is done on the Presumpscot River, Watts said.

Both Friedman and Watts have spoken to dam owners about making allowances at the dams for eels, but the

response of dam owners has failed to satisfy them.

"The position that all the hydro owners have taken in response to the appeals is that adequate provision is being made," said F. Allen Wiley, director of business and regulatory affairs for FPL Energy, which operates 24 hydro electric plants throughout the state.

Wiley maintains that FPL Energy, just one of the hydroelectric power project operators on the Kennebec and Androscoggin, has met all the state requirements for operating its plants.

"We take our direction from the resource agencies that are managing the species," he said.

And thus far, river management plans, which have guided FPL Energy's \$20 million investment in fish passages and environmental improvements, don't require provision for eels or other catadromous species, he said.

State agencies don't require eel passageways because no one on the east coast has ever requested them, according to Gail Wipplehauser, a scientist for Maine's Department of Marine Resources.

"Eels were not a species of concern before 1995 or 1996," she said, after a research documenting a decrease in yellow eels was published and after existing Maine hydro plants had been licensed.

While that research drew attention to eels, Maine hydro plants had already received licenses, many of which do not include a provisions to add new conditions for operation.

"The best time to request passages is when the project is up for relicensing. It makes it easier for the agency to request passages," she said.

To draw more attention to the plight of eels on Maine Rivers, Watts lobbied the U.S. Fish and Wildlife Service to reclassify the eels as an endangered species. That request was denied on Feb. 1, 2007.

Not even a change in classification would trigger reconsideration of a hydro plant's license, Wipplehauser said.

The Department of Marine Resources, which counts eels along the Kennebec, said eel populations have fluctuated from year to year, but the Kennebec, which has one eel passage, to allow fish downriver passage, attracts more eels to the mouth of the river compared to the Androscoggin, which does not have a downriver passage.

Wipplehauser can only speculate about reasons for the difference, but said the absence of eel passageways on both rivers does not necessarily impact the eel population that, as a whole, stretches from Canada to South America.

"Even though something that happens at one dam may be upsetting, it might not affect the whole population," she said. "That said, we request passage whenever we can.

At the prospect of waiting decades for another relicensing opportunity, Friends of Merrymeeting Bay and Watts began petitioning the Department of Environmental Protection to revisit its certification of the dams and initiate change sooner.

"We just want safe passage for the fish," Watts said.

Defining boundaries

But Assistant Attorney General Jan McClintock, who is representing the Department of Environmental Protection, said the appeals have less to do with securing a hearing for eels than with the separation of judiciary and enforcement powers.

"Is a court prevented by a separation of powers clause from reviewing that decision," she said, in framing the issue and suggesting a court ruling could infringe on the responsibilities of state agencies to enforce license restrictions.

"This is a very narrow legal question," she said.

On the appeal also hinges the first step towards

systemic change to the federal licensing process, according to Friedman, who argues states do and should hold authority to request licensing alterations within the licensed period. "Really, where this needs to go is a wholesale revision of the Federal Power Act," he said, noting that rivers and their ecosystems as natural resources should be protected by a public trust.

Reaching that aim requires a long journey, one rife not only with turbines also by court actions and ongoing appeals.

"We've learned now that you've got to be patient," Watts said.