

IN THE MATTER OF

MERIMIL LIMITED PARTNERSHIP) MAINE WATERWAY DEVELOPMENT AND
Waterville and Winslow, Kennebec Co.) CONSERVATION ACT PERMITS AND
LOCKWOOD HYDRO PROJECT) WATER QUALITY CERTIFICATIONS
#L-20218-33-C-N)
)
HYDRO KENNEBEC LIMITED)
PARTNERSHIP)
Waterville and Winslow, Kennebec Co.)
HYDRO-KENNEBEC PROJECT)
#L-11244-35-A-N)
) PETITIONS FOR MODIFICATION,
) REVOCATION OR SUSPENSION
FPL ENERGY MAINE HYDRO LLC)
Fairfield, Somerset County)
SHAWMUT HYDRO PROJECT)
#L-19751-33-A-N)
)
FPL ENERGY MAINE HYDRO LLC)
Skowhegan, Somerset County)
WESTON HYDRO PROJECT) SECOND PROCEDURAL ORDER
#L-17472-33-C-M)

The Chair of the Board of Environmental Protection, Matthew Scott, conducted a pre-hearing conference on the matter of the public hearing scheduled by the Board to consider corrective action, modification, revocation or suspension of the water quality certifications issued to Merimil Limited Partnership for the Lockwood Hydro Project, Hydro Kennebec Limited Partnership for the Hydro-Kennebec Project, and FPL Energy Maine Hydro LLC for the Shawmut Hydro Project and Weston Hydro Project. The conference was held at the Cross Office Building in Augusta, Maine on July 19, 2006 pursuant to provisions of the Maine Administrative Procedure Act and 38 MRSA section 341-D(3). This Order records the issues discussed at the conference, motions made and responses thereto, and the rulings made by the Presiding Officer at and subsequent to the conference.

Persons present:

Matthew Scott,
Board Chair and Presiding Officer
Cynthia Bertocci,
Board Executive Analyst
Terry Hanson,
Board Administrative Assistant
Carol Blasi,
Assistant Attorney General
Dana Murch, DEP Project Manager
Matthew Manahan,
Attorney for Hydro Kennebec
Sarah Verville,
Attorney for FPL Energy and Merimil

Kevin Bernier, Brookfield Power
Frank Dunlap, FPL Energy
Kenneth Fletcher, Save Our Seabasticook
Jane Edwards, Save Our Seabasticook
Douglas Watts
Ed Friedman, Friends of Merrymeeting Bay
(FOMB)
Kathleen McGee, FOMB
Bruce Merrill, Attorney for FOMB
David Nicholas, Attorney for FOMB
Stephen Hinchman, Conservation Law
Foundation

MERIMIL LIMITED PARTNERSHIP	)	MAINE WATERWAY DEVELOPMENT AND
#L-20218-33-C-N	)	CONSERVATION ACT PERMITS AND
HYDRO KENNEBEC LIMITED	)	WATER QUALITY CERTIFICATIONS
#L-11244-35-A-N	)	PETITIONS FOR MODIFICATION,
FPL ENERGY MAINE HYDRO LLC	)	REVOCATION OR SUSPENSION
#L-19751-33-A-N)	
#L-17472-33-C-M	2	SECOND PROCEDURAL ORDER

1. Purpose of the Conference

The purpose of the conference was to review the relevant criteria, scope of the hearing, issues to be addressed at hearing, and the procedural rules that will be followed in preparation for, and at, the hearing.

2. Service List, Filing Requirements and Attendance

Parties were reminded that every time any party sends a document to the Board, the party must send a copy to each person on the service list. Department staff, Board staff and counsel to the Board will copy all parties on procedural orders, formal decisions of the Presiding Officer and other similar documents. If any party wishes to change the person designated on the service list, he/she must notify all other persons on the service list.

If there is a deadline for filing of a document, the document must be received by the Department’s Augusta office by **4:00 pm** on that date. Filings by telefax and electronic mail are acceptable, provided they are followed by receipt of an original to the Board within five working days. The sender bears the risk that a filing by telefax or electronic mail might not be received by the deadline. The documents may be sent to the other parties on the service list by regular US mail on the due date; certifications are not required. The parties agreed to copy one another by electronic mail on the due date.

Representatives of the licensees and the intervenors shall attend the pre-hearing conferences and the public hearing, and shall adhere to all schedules and deadlines. If unforeseen circumstances make attendance at a conference or a session of the hearing impossible, parties are asked to send a substitute who can speak on behalf of the absent member.

3. Scope of the Hearing : FOMB Motion, Discussion and Ruling

On July 17, 2006 Friends of Merrymeeting Bay filed a Motion to Limit the Scope of Hearing and to Preclude Evidence with regard to two issues. At the conference the dam owners argued that the motion should be denied, and requested an opportunity to file a written response to the motion. The Chairman set a deadline of Wednesday, July 26, 2006 for responses to the motion. The dam owners filed a joint response by letter dated July 26, 2006.

A. Role of Federal Energy Regulatory Commission (FERC): Discussion and Ruling.
 First, FOMB asks the Board to preclude discussion or consideration of the issue of “whether [FERC] has the ability to amend the dams’ FERC licenses in the event the Board modifies the water quality certifications.” FOMB asserts that “it is settled that FERC has the authority to amend its license to incorporate the terms of modified water quality certifications.” FOMB apparently relies in this assertion on the provision of the Lower Kennebec River

MERIMIL LIMITED PARTNERSHIP	)	MAINE WATERWAY DEVELOPMENT AND
#L-20218-33-C-N	)	CONSERVATION ACT PERMITS AND
HYDRO KENNEBEC LIMITED	)	WATER QUALITY CERTIFICATIONS
#L-11244-35-A-N	)	PETITIONS FOR MODIFICATION,
FPL ENERGY MAINE HYDRO LLC	)	REVOCATION OR SUSPENSION
#L-19751-33-A-N)	
#L-17472-33-C-M	3	SECOND PROCEDURAL ORDER

Comprehensive Hydropower Settlement Accord (the “KHDG Agreement”), incorporated into the projects’ water quality certifications and the FERC licenses, that permits the parties to the agreement to petition FERC to amend the licenses in issue in the event the dam owners and the resource agencies could not reach consensus on upstream or downstream eel passage by June 30, 2002. FOMB argues that this “reopener” permits the Board to “petition FERC to amend the FERC license for the dams,” and that such reopeners have been upheld by the courts.

Merimil Limited Partnership, Hydro Kennebec Limited Partnership, and FPL Energy Maine Hydro LLC (collectively the “dam owners”) argue that FERC’s authority to amend the licenses to incorporate any modification is relevant to the Board’s exercise of its discretion in deciding whether to modify the certifications in issue. The dam owners also reject the assertion that the KHDG agreement or water quality certifications contain reopeners that would require FERC to incorporate any modification.

Fundamentally, FOMB’s motion raises the issue of what the legal and practical effect of the Board’s modification of one or more of the certifications may have, where the certifications do not contain relevant reopener clauses.¹ The Attorney General’s Office has counseled the Board during consideration of the petitions to modify that this represents a substantial issue of law that has not yet been tested in court.² The Board will rightly want to know, and the dam owners have the right to argue, the possible legal and practical ramifications of any decision the Board may make as it considers whether to exercise its broad discretion in assessing the range of actions available to it under 38 M.R.S.A. § 341-D(3).

FOMB’s motion to limit the scope of the hearing with regard to the issue of the legal and practical effect of any modification of the certifications is denied. This includes the issue of FERC’s authority to incorporate any modification the Board may make. The parties may submit any further argument they may have on this issue in writing with their pre-filed testimony.

¹ The provision in the KHDG agreement referenced by FOMB simply permits the parties to the KHDG agreement, which does not include the DEP or the Board, to request that FERC take action to amend a license to insert appropriate terms and conditions. Even if the BEP or the DEP were such a party, this provision, which arguably reserves *FERC’s authority* to amend the license upon receiving such a petition, does not reserve a similar authority to the parties to the agreement. All FERC licenses also include a standard reopener that requires a licensee to take such action as is necessary for the conservation and development of fisheries resources “as may be ordered by [FERC] upon its own motion or upon the recommendation of [the USFWS] or the fish and wildlife agency or agencies of any State.” This reopener similarly does not reserve any authority to the Board or DEP.

² The Attorney General’s Office has also counseled that FERC is unlikely to find that it is required to incorporate any modification of a certification into a FERC license without a relevant reopener clause in the original certification. *See e.g. Public Utility District No. 1 of Pend Oreille County*, 112 F.E.R.C. P61,055 (July 11, 2005), at 61,412, n. 50 (“[b]ecause the original certification contains no reservation of authority for Washington Ecology to amend it in this manner, and the revisions were issued after the one-year deadline for state action, the Commission is not required to accept the revised certification”).

MERIMIL LIMITED PARTNERSHIP	)	MAINE WATERWAY DEVELOPMENT AND
#L-20218-33-C-N	)	CONSERVATION ACT PERMITS AND
HYDRO KENNEBEC LIMITED	)	WATER QUALITY CERTIFICATIONS
#L-11244-35-A-N	)	PETITIONS FOR MODIFICATION,
FPL ENERGY MAINE HYDRO LLC	)	REVOCATION OR SUSPENSION
#L-19751-33-A-N)	
#L-17472-33-C-M	4	SECOND PROCEDURAL ORDER

B. Economic Evidence: Discussion and Ruling. FOMB also moves to preclude evidence regarding the economics of implementing eel and fish protection measures, as being irrelevant to the issues before the Board. Specifically, FOMB argues that economics is irrelevant to the issue of whether water quality standards are being violated. The dam owners have argued that the economics of eel and fish passage measures is relevant to the issue of how any action the Board may take would affect the designated and existing use of hydropower, and thus the antidegradation requirements of State law.

As stated above, the Board has broad discretion under section 341-D(3) whether to take action in this matter, and as to the type of action to take. In light of this, and without knowing what evidence may be introduced, FOMB's motion to preclude evidence of the economics of implementing eel and fish protection measures at this time is denied. This ruling should not be taken, however, as a decision as to the relevance of any such evidence which may be introduced. The Board will make that decision after it has an opportunity to hear all the evidence.

4. Impact of Condition Compliance Orders on the Proceeding

At the conference, Department staff stated that it has requested that the dam owners submit documentation pertaining to eel and fish passage in accordance with the conditions of their water quality certifications as issued by the Department. Staff noted that the dam owners are in the process of responding to the Department request and that the Department anticipates issuing Condition Compliance Orders by early September 2006. Staff noted that the Condition Compliance Orders may address some of the issues raised in the petitions filed by the intervenors in this proceeding. In any event, the information to be submitted in response to the Department's request and the Orders themselves should be considered in this proceeding.

Following a general discussion, all parties agreed that it would be appropriate to hold the public hearing in abeyance until the Condition Compliance Orders have been issued and all appeal periods have run.

Ruling: The Board will hold the public hearing on the water quality certifications in question in abeyance until the Department has issued the Condition Compliance Orders and all appeal periods have run. At that time the Board will revisit the need for a public hearing, the scope of any hearing, and whether and how any appeals of the Condition Compliance Orders should be coordinated with this proceeding.

MERIMIL LIMITED PARTNERSHIP	)	MAINE WATERWAY DEVELOPMENT AND
#L-20218-33-C-N	)	CONSERVATION ACT PERMITS AND
HYDRO KENNEBEC LIMITED	)	WATER QUALITY CERTIFICATIONS
#L-11244-35-A-N	)	PETITIONS FOR MODIFICATION,
FPL ENERGY MAINE HYDRO LLC	)	REVOCATION OR SUSPENSION
#L-19751-33-A-N)	
#L-17472-33-C-M	5	SECOND PROCEDURAL ORDER

5. Other Matters

The following additional matters were discussed at the conference: criteria set forth in 38 MRSA section 341-D(3) governing modification, revocation or suspension of a license; consolidation of parties; the roles and responsibilities of the parties and Department staff at a public hearing; Board requirements for pre-filed testimony; the Department's Chapter 20 rules governing hearings; and a site visit by Board members. A decision on these matters was deferred pending the issuance of the Condition Compliance Orders for the facilities at issue in this proceeding and all appeal periods for those orders have run.

6. Ex-parte Communications

As set forth in the Administrative Procedure Act, 5 M.R.S.A. section 9055, the parties shall not communicate directly or indirectly with the decision-maker, meaning any member of the Board, in connection with any issue of fact, law or procedure pertaining to this licensing proceeding while the matter is pending. The parties may communicate with Department staff, counsel to the Board, the Board's Executive Analyst, and the Board's Administrative Assistant.

7. Appeal

Any appeal to the full Board from this Order must be filed by Friday, September 1, 2006 at 4:00 p.m. and will be considered by the Board at its regular meeting on Thursday, October 5, 2006.

DONE AND DATED IN AUGUSTA, MAINE THIS 23rd DAY OF AUGUST, 2006.

Matthew Scott |

Matthew Scott, Chair
Board of Environmental Protection