

June 7, 2006

Matthew Scott, Chair & Members of the Board
c/o Terry Hanson
MBEP
17 State House Station
Augusta, ME 04333-0017

Re: Androscoggin Eel Petition of May 17, 2006 Request for Dismissal Letter of May 24, 2006

Dear Chairman Scott and members of the Board,

This letter is not a supplement to our Androscoggin petition of 5/17. It is a timely response to those concerns brought to your attention by Mr. Manahan of Pierce Atwood on behalf of many of the dam owners.

The petition of 5/17 of is a new and unique petition. While it does seek some of the same results as the earlier petition filed with the Board, it clearly stands on its own. Out of the approximately sixty petitioners there are only two in common with the first petition, Friends of Merrymeeting Bay [FOMB], a corporation and Douglas Watts. In these two cases Mr. Watts names an additional dam as a party to this petition and FOMB adds quite a few more. That as the Chair of FOMB I signed the first petition on behalf of the corporation is wholly irrelevant to the fact that as an individual I have signed and filed the second one. The petitions and petitioners are substantially and substantively different in both cases and as such, any reconsideration limitations are not relevant. *The Board is thus bound by law to consider this petition on its agenda within 30 days of its receipt on May 24, 2006*

In addition to the sixty or so petitioners instead of two it is further noted that the second petition differs from the first in the following ways:

1. It includes additional dams.
2. It includes previously excluded evidence.
3. It includes additional evidence.
4. It includes and details historical precedents.
5. It includes responses to earlier motions to dismiss that Board members were not permitted to see or hear.
6. It includes BEP/DEP Findings of Fact supporting our arguments.
7. It includes citations disputing the AAG efforts to dismiss based on jurisdictional issues.

8. It includes US Supreme Court arguments from *SD Warren v. BEP* that point to inconsistencies in the AAG's arguments for dismissal and support the Board's authority to dictate water quality standards.
9. Petitioners include virtually the entire Lewiston/Auburn legislative delegation, the Senate Chair of the Marine Resources Committee and an assortment of other legislators who are very concerned with both the eel/dam mortality issue and the manner in which the issue has been considered by the Board, the AAG and the DEP.

The dam operators argue that the petition should be dismissed because it is really a petition for reconsideration. This is a straw man argument that should be rejected. Petitioners here are not asking the Board to make any rulings on any previously filed petition. They are asking for a hearing on a new petition.

The fact is, there is nothing in either the Maine statutes or Board rules that prohibits, as a matter of law, re-filing a petition to modify water quality certifications.

There is a common law doctrine aimed at preventing the re-litigation of claims that were tried or could have been tried in an earlier suit: the doctrine of *res judicata*. However, *res judicata* does not apply here. As the court stated in *Town of Ogonquit v. Cliff House & Hotels, Inc.*, 2000 ME 169; 759 A.2d 731, 735 (2000):

The doctrine of *res judicata* applies to prior administrative proceedings, provided that such proceedings contain the "essential elements of adjudication." See *Town of Freeport v. Greenlaw*, 602 A.2d 1156, 1160 (Me. 1992). The "essential elements of adjudication" include:

- 1) adequate notice; 2) the right to present evidence and legal argument and to rebut opposing evidence and argument; 3) a formulation of issues of law and fact to apply rules to specified parties concerning a specified transaction; 4) the rendition of a final decision; and 5) any "other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question." *Town of North Berwick v. Jones*, 534 A.2d 667, 670 (Me. 1987) (quoting *Restatement (Second) of Judgments* § 83(2) (1982)).

The essential elements of adjudication are not present here. First, there was no right to present evidence. While the petition to modify had to specifically describe the factual basis for the petition, including what evidence *will be offered* to support the petition, Board Rules, Ch. 2, Rule 27, evidence was not permitted to be presented at the public meeting at which the Board denied the earlier Androscoggin petition. Evidence can only be presented in an adjudicatory hearing, which was not granted.

Second, there was no right to rebut legal argument. Dam owners filed what was essentially a motion to dismiss the petition to modify the water quality certifications, and the Board would not consider a response to that legal argument by FOMB's attorney, Bruce Merrill.

Third, there was no formulation of issues of law and fact because a hearing on the petition to modify was not granted and litigation of the petition never got to that stage.

The dam operators also argue that the Board has no jurisdiction over this petition because of the pendency of an appeal of the earlier petition. However, as the Gagne v. City of Lewiston, 281 A.2d 579, 583 (Me. 1971) case cited by the dam operators makes clear, jurisdiction of an agency is terminated only when there is an appeal of the very decision that the agency seeks to modify. Again, in this case there is an entirely new petition before the Board and petitioners are not asking the Board to take action on any earlier petitions.

In sum, if the Maine Legislature or Board of Environmental Protection wanted to prevent more than one petition to modify it could have done so by passing a statute or rule which enacts such a prohibition - but they did not. There is a check on multiple litigations, but it is the doctrine of *res judicata*, and that doctrine applies only when claims are truly and thoroughly litigated, which is not the case here.

Sincerely,

Ed Friedman

C.C. Androscoggin Service List