

STATE OF MAINE  
CUMBERLAND, ss.

SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT  
LAW DOCKET NOS. SAG-07-711, SAG-07-712, KEN-08-36  
(consolidated)

*ED FRIEDMAN,*  
Appellant

v.

*MAINE BOARD OF ENVIRONMENTAL PROTECTION,*  
Appellee

*FRIENDS OF MERRYMEETING BAY,*  
Appellant

v.

*MAINE BOARD OF ENVIRONMENTAL PROTECTION,*  
Appellee

*DOUGLAS HAROLD WATTS,*  
Appellant

v.

*MAINE BOARD OF ENVIRONMENTAL PROTECTION,*  
Appellee

---

On appeal from Sagadahoc and Kennebec County Superior Courts

---

**APPENDIX**

G. STEVEN ROWE  
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Environmental Protection

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Date Filed June 15, 2007 Sagadahoc County Docket No. AP-07-6

Action 80C APPEAL

Ed Friedman

Maine Board of Environmental Protection

vs.

Plaintiff's Attorney Pro Se 42 Stevens Rd. Bowdoinham, ME 04008	Defendant's Attorney Jeffrey Thaler, Esq. Bernstein Shur P.O. Box 9729 Portland, ME 04104-5029
Date of Entry	

06-18-07	Received 06-15-07: Petitioner's Rule 80C Appeal filed. s/ Friedman, E.
06-27-07	Received 06-25-07: Entry of Appearance of Jeffrey Thaler, Esq. o/b/o Respondent.
07-05-07	Received 07-03-07: Written Appearance of Verso Paper Holdings, LLP. s/ K. Boden, Esq.  Received 06-29-07: Written appearance of David Swetnam-Burland, Esq. obo Miller Hydro Group.
07-06-07	Received: Written Appearance of FPL Energy Maine Hydro LLC, Rumford Falls Hydro, LLC, Hackett Mills Hydro Associates, and Ridgewood Maine Hydro Partners, L.P. by Matthew D. Manahan & Sarah A. Verville, Esqs.
07-17-07	Received 07-16-07: Respondent Maine Board of Environmental Protection's Motion to Dismiss Rule 80C Appeal with Incorporated Memorandum of Law, Exhibits A - D, Notice of Hearing and Proposed Order. s/ C. Blasi, AAG  Respondent Maine Board of Environmental Protection's Motion to Extend Time to File Agency Record and Incorporated Memorandum of Law with Notice of Hearing and Proposed Order. s/ C. Blasi, AAG
07-19-07	Received 07-19-07: Respondent's corrected pages 5 through 7 to substitute for the corresponding pages of Respondent's Motion to Dismiss dated 07-16-07, filed. s/ C. Blasi, AAG

(over)

1

Date of  
Entry

ED FRIEDMAN vs. MAINE BOARD OF ENVIRONMENTAL PROTECTION

Docket No. AP-07-6

08-13-07

Received 08-13-07:  
Memorandum of Parties-in-Interest FPL Energy Maine Hydro, LLC,  
Hackett Mills Hydro Associates, Ridgewood Maine Hydro Partners, L.P.,  
and Rumford Falls Hydro, LLC in Support of Motion to Dismiss.  
s/ M. Manahan, Esq.

Received 08-06-07:  
Limited Notice of Appearance of David A. Nichols, Esq. o/b/o  
Petitioner.  
Petitioner's Memorandum of Law in Opposition to Respondent's Motion  
to Dismiss. s/ E. Friedman & D. Nichols, Esq.

Received 08-09-07:  
Respondent Maine Board of Environmental Protection's Response  
Memorandum of Parties-in-Interest in Support of Maine Board of  
Environmental Protection's Motion to Dismiss. s/ C. Blasi, AAG

Received 08-10-07:  
Letter from Ed Friedman informing the Court that he will be out of the  
country from 08-12-07 through 08-31-07.

Received 08-13-07:  
Motion to Extend Time By Which to Respond to Motion to Dismiss  
by Real Parties in Interest. s/ E. Friedman

Received 08-13-07:  
Respondent Maine Board of Environmental Protection's Reply to  
Petitioner's Memorandum in Opposition to the Board's Motion to Dismiss.  
s/ C. Blasi, AAG

08-14-07

Received 08-14-07:

Motion to Dismiss of Parties-In-Interest FPL Energy Maine Hydro, LLC,  
Hackett Mills Hydro Associates, Ridgewood Maine Hydro Partners, L.P.  
and Rumford Falls Hydro, LLC and Incorporated Memorandum of Law.  
s/ M. Manahan, Esq.

08-28-07

On 08-28-07:  
Petitioner's Motion to Extend Time to Respond to Motion to Dismiss, GRANTED.  
COURT ORDER. s/ Field, J.  
Petitioner to file response no later than 09-14-07.  
Copies sent to parties on 08-28-07.

On 08-28-07:  
Respondent's Motion to Extend Time in Which to File Agency Record GRANTED  
COURT ORDER. s/ Field, J.  
It is ORDERED that the time within which to file the agency record in this  
matter be extended to 30 days from the date the Court decides the  
Board's motion to dismiss the within appeal, in the event that the  
Court denies the latter motion.  
Copies sent to parties on 08-28-07.

09-06-07

Received 09-06-07  
Entry of Appearance, filed. Janet M. McClintock, AAG obo Respondent, Maine  
Board of Environmental Protection.

Date of Entry	Docket No. <u>AP-07-6</u>
09-17-07	Received 09-14-07: Petitioner Ed Friedman's Memorandum of Law in Opposition to Motion to Dismiss Parties-In-Interest, filed. s/ E. Friedman & D. Nicholas, Esq.
9/21/2007	Reply of Parties in Interest FPL Energy Maine Hydro, LLC, Hackett Mills Hydro Assc, Ridgewood Maine Hydro Partner, LP and Rumford Falls Hydro LLC to Petitioner Ed Friedman's Opposition to the Parties in Interst's Motion to Dismiss (Monahan, Esq.)
9/28/07	Notice of hearing scheduling Motion to Dismiss for 10/18/07 @ 10:00 a.m. sent to parties.
10-18-07	On 10-18-07: Hearing held on Respondents' Motion to Dismiss with Justice Andrew M. Horton Parties in attendance. Proceedings electronically recorded. Tape Number: 38; Index: 12-2050 & 2435 - 5204. Matter taken under advisement by Justice Horton.
11-15-07	<del>On 11-08-07:</del> Respondent's Motion to Dismiss, GRANTED. COURT ORDER. s/ Horton, J. Mr. Friedman's 80C appeal is DISMISSED for lack of jurisdiction. Order incorporated into the docket by reference. Copies sent to parties on 11-15-07.



STATE OF MAINE  
BOARD OF ENVIRONMENTAL PROTECTION

VIRGINIA PLUMMER

CHAIR

CYNTHIA S. BERTOCCI

EXECUTIVE ANALYST

TERRY A. HANSON

ADMIN ASSISTANT

JOHN ELIAS BALDACCI

GOVERNOR

IN THE MATTER OF

FPL ENERGY MAINE HYDRO LLC ) MAINE WATERWAY DEVELOPMENT AND  
Brunswick and Topsham ) CONSERVATION ACT PERMITS AND  
Cumberland and Sagadahoc Counties ) WATER QUALITY CERTIFICATIONS  
BRUNSWICK HYDRO PROJECT )  
#03-4458-05030 )

TOPSHAM HYDRO PARTNERS )  
Topsham and Brunswick )  
Cumberland and Sagadahoc Counties )  
PEJEPSCOT HYDRO PROJECT )  
#L-007867-35-A-A )

MILLER HYDRO GROUP )  
Lisbon and Durham, Androscoggin County )  
WORUMBO HYDRO PROJECT )  
#L-10930-35-A-N )

PETITION FOR REVOCATION, MODIFICATION,  
OR SUSPENSION

FPL ENERGY MAINE HYDRO LLC )  
Lewiston and Auburn, Androscoggin County )  
LEWISTON FALLS HYDRO PROJECT )  
#L-009206-35-A-N )

FPL ENERGY MAINE HYDRO LLC )  
Lewiston, Auburn, Turner, Greene, Leeds, )  
and Livermore, Androscoggin County )  
GULF ISLAND-DEER RIPS PROJECT )  
#L-17100-33-O-N )

VERSO ANDROSCOGGIN LLC )  
Canton, Jay, Livermore & Livermore Falls )  
Androscoggin County )  
RILEY-JAY-LIVERMORE PROJECT )  
OTIS HYDRO PROJECT )  
#L-18829-33-A-N )



PRINTED ON RECYCLED PAPER



RUMFORD FALLS HYDRO LLC )  
Rumford, Oxford County )  
RUMFORD FALLS HYDRO PROJECT )  
#L-17643-33-A-N )  
) )  
RIDGEWOOD MAINE HYDRO )  
PARTNERS, L.P. )  
Auburn, Androscoggin County )  
LOWER BARKER MILL PROJECT )  
#L-08-4287-01010 )  
) )  
RIDGEWOOD MAINE HYDRO )  
PARTNERS, L.P. )  
Auburn, Androscoggin County )  
UPPER BARKER MILL PROJECT )  
#L-02/49-6848B-01010 )  
) )  
HACKETT MILLS HYDRO ASSOCIATES )  
Poland and Minot, Androscoggin County )  
HACKETT MILLS HYDRO PROJECT )  
#L-10052-35-A-N )  
) )  
RIDGEWOOD MAINE HYDRO )  
PARTNERS, L.P. )  
Mechanic Falls, Androscoggin County )  
MARCAL HYDRO PROJECT )  
#L-17778-33-C-N )

Pursuant to the provisions of 38 M.R.S.A. Sections 341-D(3), 464 et seq., and 06-096 CMR Chapter 2 (Rules Concerning the Processing of Applications and Other Administrative Matters), the Board of Environmental Protection has considered the May 17, 2006 petition of 64 individuals and Friends of Merrymeeting Bay with its supportive data, the responses of the permit/certification holders and other interested parties, and other related materials on file and, pursuant to the discretion vested in it, finds that the petition before it is substantially and materially the same as petitions to modify, revoke or suspend water quality certification for dams on the Androscoggin and Little Androscoggin Rivers by Friends of Merrymeeting Bay and Douglas Watts, also among the petitioners here, in 2005 ("2005 petitions"). The present petition raises the same issues and has substantially and materially the same factual basis as those petitions dismissed by the Board little more than a year ago. Petitioners here do not allege that conditions have changed since the last petitions were filed and dismissed, nor do they present any other considerations that materially affect the issues as initially presented to the Board.

BRUNSWICK HYDRO PROJECT	)	PETITIONS FOR REVOCATION, MODIFICATION
PEJEPSCOT PROJECT	)	OR SUSPENSION
WORUMBO HYDRO PROJECT	)	
LEWISTON FALLS HYDRO PROJECT	)	
GULF ISLAND-DEER RIPS PROJECT	)	
RILEY-JAY-LIVERMORE PROJECT	)	
OTIS HYDRO PROJECT	)	
RUMFORD FALLS HYDRO PROJECT	)	
LOWER BARKER MILL PROJECT	)	
UPPER BARKER MILL PROJECT	)	
HACKETT MILLS HYDRO PROJECT	)	
MARCAL HYDRO PROJECT	)	

Page 3 of 3

Therefore, the Board dismisses the petition dated May 17, 2006 to modify the water quality certifications for the Brunswick, Pejepsot, Worumbo, Lewiston Falls, Upper Androscoggin, Gulf Island-Deer Rips, Riley-Jay-Livermore, Otis, and Rumford Falls Projects located on the Androscoggin River and for the Lower Barker Mill, Upper Barker Mill, Hackett Mills, and Marcal Hydro Projects located on the Little Androscoggin River.

DONE AND DATED AT AUGUSTA, MAINE, THIS 17<sup>th</sup> DAY OF May, 2007.

BOARD OF ENVIRONMENTAL PROTECTION

BY: *Virginia Plummer*  
 VIRGINIA PLUMMER, Chair

**Petition for Judicial Review of Final Agency Action**  
**June 15, 2007**

The petitioner, Ed Friedman, residing at 42 Stevens Rd., Bowdoinham, ME 04008 is aggrieved by a recent decision [May 17, 2007] of the Maine Board of Environmental Protection [BEP] to dismiss, in the face of substantial evidence presented, without an adjudicatory hearing, a **Petition to the Maine Board of Environmental Protection Requesting a Public Hearing to Consider Modification of Maine Water Quality Certificates at Androscoggin River and Little Androscoggin River Hydroelectric Dams to Provide Immediate Safe Passage for the American Eel** [the petition known to all parties as Andro2] and seeks here review of the agency's final action.

**Grounds for Review & Remedy Sought**

Petitioner asserts that the BEP decision to dismiss Andro2 is "unsupported by substantial evidence on the whole record" [Title 5, Part 18, Chapter 375, subchapter 7, §11007 C. (5)], is "arbitrary and capricious and characterized by abuse of discretion" [§11007 C. (6)] and seeks judicial review of the merits. This petition was rejected in the face of an overwhelming body of evidence and after the BEP had granted a public hearing following the presentation of a similar petition dealing with the Kennebec River.

In ultimately and just recently [still not formally signed] rejecting the Kennebec petition, the BEP made much of the fact that some fish and eel passage does occur on the river now, there are newly issued DEP Condition Compliance Orders that dictate fish passage in the near future and that the Kennebec Hydro Developers Group [KHDG] agreement provides a framework and time-line for passage where lacking [we disagreed with many aspects of their conclusions]. **The Androscoggin River in contrast, has no agreements for eel passage, no upstream or downstream eel passage at any of its dams and no Condition Compliance Orders dictating passage.**

The petitioner requests the court to take such actions as it deems necessary to correct what can best be described as abuse by the BEP of the discretionary power vested in it. To this end, the petitioner suggests a court order for safe and effective eel passage at the named dams, pursuant to state water quality *standards* [currently violated by BEP/DEP issued water quality *certifications*]. If the court is hesitant to intercede directly in dam license modifications at this point despite continued inaction by resource agencies, then the petitioner requests the court to direct the BEP to hold an adjudicatory hearing on the matter at which proffered evidence may be thoroughly examined in the light of day.

**Standing**

The Andro2 petition was submitted to the BEP May 17, 2006 by the petitioner, approximately 60 other individuals and Friends of Merrymeeting Bay [FOMB]. The petitioner is volunteer Chairperson of Friends of Merrymeeting Bay but does not represent the organization in this proceeding. As a long-time Chair and member of Friends of Merrymeeting Bay concerned with fishery restoration issues, as a petitioner and as a Maine Guide and owner of a kayaking business on Merrymeeting Bay at the confluence of six rivers including Kennebec and Androscoggin, the petitioner has more than adequate standing to bring this action.

### **Final Agency Action & Agency Discretion**

The definition of final agency action is: "Final agency action" means a decision by an agency which affects the legal rights, duties or privileges of specific persons, which is dispositive of all issues, legal and factual, and for which no further recourse, appeal or review is provided within the agency.

[It is well known that agencies are accorded exceedingly large degrees of discretion as they perhaps should be (though citizen suit provisions should be in statute as well). Taken to its fundamental root, a citizen governing board optimally might be a relatively pure example of what our democracy should look and act like. The reality is that most often, citizen boards and agency leaders are political appointees and their objectivity may be thus encumbered. In my casual review of case law and in the experience of every environmental attorney with whom I have spoken (all of whom are extremely frustrated by this), the courts have yet recognize that the system appears broken-that important decisions are not being made on their merits. In my mind, this calls for a sea change in the form of a more active role of the judicial branch. The issue here is really not one of separation of powers but of checks and balances].

This petition under appeal is Andro2. There was an earlier set of petitions collectively known as Andro1 and somewhat similar in nature. Andro1 was also dismissed by the BEP [February 2, 2006] and that dismissal appealed by petitioner Douglas Watts [who submitted his petition to the BEP on November 10, 2005]. Justice Marden in Superior Court Civil Action Docket No. AP-06-19 upheld motions to dismiss the Watts appeal, primarily because he deemed the BEP 30 page finding of fact and order to dismiss, a non-final action since Watts could always re-petition the agency.

I believe this decision was in error. Upon dismissal, Andro1 was dead in the agency. There was "no further recourse, appeal or review ... provided within the agency." The only recourse was judicial review, which was denied. We did in fact go back to the agency with a new petition [Andro2] that differed from Andro1 [not that it statutorily needed to]. Andro2 differed from Andro1 in a number of ways besides the sixty or so individual additional [to FOMB] petitioners:

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

We came back to the BEP with this and were quickly dismissed with a cursory finding of fact stating that Andro2 was basically the same as Andro1. The BEP has and uses no standard of evidence in judging whether to move forward with a petition. The petitioner requests the court break what clearly seems to be an endless, fruitless and repetitive cycle that is a waste of time and money for all parties involved. As things stand now after the Marden decision, the BEP can just continue to dismiss petitions brought to it knowing that as supposedly non-final actions [at least for the court] they can never be independently reviewed by a judge on their merits.

Maine's narrative water quality standards, on which required certifications are supposed to be based, contain language including:

"suitable for the designated use of . . . habitat for fish and other aquatic life",

"the habitat shall be characterized as unimpaired."

"shall not cause adverse impact to aquatic life in that the receiving waters shall be of sufficient quality to support all aquatic species indigenous to the receiving water without detrimental changes in the resident biological community",

"provided that the receiving waters shall be of sufficient quality to support all species of fish indigenous to the receiving waters and maintain the structure and function of the resident biological community",

"Existing in-stream water uses and the level of water quality necessary to protect those existing uses must be maintained and protected",

"water quality certifications can be issued only if the standards of the water quality classification are met and the project does not cause or contribute to a failure of those standards."

For most of us it would seem reasonable for this to mean native migratory fish will have access to and from historical territories and turbine mortality and other anthropogenic forms of mortality will not be acceptable. Unfortunately this is not the interpretation of the executive branch or dam owners.

All of the scientific evidence supports the fact that dams without passage block upwards of 90% of eel habitat. **The DEP/BEP admit that on the Androscoggin River there is no upstream or downstream eel passage at any of the many dams, and that eels are in all likelihood being killed by turbines.**

How can a court determine abuse of discretion by an agency if it refuses to look at the merits? When the courts choose not to recognize final agency actions as such, and sentence us to re-petitioning, we are caught on an endless not-so-merry-go-round. More aptly a vicious cycle that in fact can lead to species extinction within a watershed.

STATE OF MAINE  
Sagadahoc, ss.

SUPERIOR COURT  
Civil Action  
Docket No. AP-07-06

ED FRIEDMAN

Petitioner

v.

MAINE BOARD OF ENVIRONMENTAL  
PROTECTION

Respondent

### ORDER OF DISMISSAL FOR LACK OF JURISDICTION

This matter comes before the court on Respondent Maine Board of Environmental Protection's (Board) motion to dismiss Petitioner Ed Friedman's appeal under M.R. Civ. P. 80C. For the reasons set forth below, the motion to dismiss is granted for lack of subject matter jurisdiction, namely the absence of reviewable final agency action for purposes of the Maine Administrative Procedure Act.<sup>1</sup>

#### PROCEDURAL HISTORY AND BACKGROUND

On May 17, 2007, Mr. Friedman and sixty-three other individuals filed a petition with the Board seeking a public hearing on the issue of whether certain water quality certifications held by the owners of hydroelectric dams on the Androscoggin and Little Androscoggin Rivers should be modified to require safe downstream and upstream passage for American eels.

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<sup>1</sup> Based on this outcome, it is not necessary to address the question of Petitioner Friedman's standing. See *Morse Bros. v. Webster*, 2001 ME 70, ¶ 32, 772 A.2d 842, 852; *Glynn v. City of South Portland*, 640 A.2d 1065, 1067 (Me. 1994). In fact, this decision assumes, without deciding, that Petitioner does have standing for purposes of this proceeding.

The petition was filed pursuant to the Board's governing statute, and a rule promulgated pursuant to the statute, authorizing any person to petition the Board to revoke, modify or suspend any license, permit, approval, order or certification issued by the Maine Department of Environmental Protection. *See* 38 M.R.S. § 341-D(3); 06-096 CMR, ch. 2, § 27.<sup>2</sup>

This was the second such petition in less than two years. As to the first petition, the Board did conduct a hearing; the petitioners were given the opportunity to present evidence in support of their petition, and the petition ultimately was dismissed for lack of substantial evidence. One of the petitioners before the Board appealed the dismissal to the Superior Court for Kennebec County. *See Watts v. Maine Bd. of Environmental Protection*, 2006 Me. Super. LEXIS 270 (Dec. 6, 2006). In that appeal, Justice Marden concluded that the court was without jurisdiction to hear

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<sup>2</sup> The full text of section 341-D(3) is:

3. MODIFICATION, REVOCATION OR SUSPENSION. After written notice and opportunity for a hearing pursuant to the Maine Administrative Procedure Act, Title 5, chapter 375, subchapter IV, the board may modify in whole or in part any license, or may issue an order prescribing necessary corrective action, or may act in accordance with the Maine Administrative Procedure Act to revoke or suspend a license, whenever the board finds that:

- A. The licensee has violated any condition of the license;
  - B. The licensee has obtained a license by misrepresenting or failing to disclose fully all relevant facts;
  - C. The licensed discharge or activity poses a threat to human health or the environment;
  - D. The license fails to include any standard or limitation legally required on the date of issuance;
  - E. There has been a change in any condition or circumstance that requires revocation, suspension or a temporary or permanent modification of the terms of the license;
  - F. The licensee has violated any law administered by the department;
- or
- G. The license fails to include any standard or limitation required pursuant to the federal Clean Air Act Amendments of 1990.

For the purposes of this subsection, the term "license" includes any license, permit, order, approval or certification issued by the department and the term "licensee" means the holder of the license.

the Rule 80C appeal because the Board's decision was discretionary and could not be considered final agency action. *Id.*

The present appeal stems from the Board's May 17, 2007 order dismissing the second petition on the ground that it presented "substantially and materially the same factual basis" as the first petition. Mr. Friedman filed an 80C appeal of the Board's decision on June 15, 2007, and the Board filed the present motion to dismiss on July 16, 2007.

### DISCUSSION

#### **Standard of Review**

Rule 80C of the Maine Rules of Civil Procedure allows for judicial review of "final agency action or the failure or refusal of an agency to act." Such review is to be in accordance with the Maine Administrative Procedure Act (APA). M.R. Civ. P. 80C(a). This court may review agency action only if there is statutory authority to do so. *Sears, Roebuck and Co. v. City of Portland*, 144 Me. 250, 255, 68 A.2d 12, 14 (1949).

"Final agency action" is defined in the APA as "a decision by an agency which affects the legal rights, duties or privileges of specific persons, which is dispositive of all issues, legal and factual, and for which no further recourse, appeal or review is provided within the agency." 5 M.R.S. § 8002(4) (2006). Under the APA, judicial review is limited to final agency action unless such review "would not provide an adequate remedy." *Id.* at §11001(1) (2006).

#### **The Board's Dismissal of the Petition Was Not Final Agency Action**



The Board asserts that its decision to dismiss Mr. Friedman's petition was not final agency action because it did not affect any of Mr. Friedman's legal rights, duties or privileges, and he is not precluded from seeking further recourse from the Board if and when he can present sufficient evidence that would justify a hearing.

Mr. Friedman argues that the statute allowing this court to review decisions of the Board expands the scope of review beyond final agency action. He points to the language of 38 M.R.S. § 346(1), which states that "any person aggrieved by any order or decision of the board or commissioner may appeal to the Superior Court. These appeals to the Superior Court shall be taken in accordance with Title 5, chapter 375, subchapter VII." Mr. Friedman focuses on the words "any order or decision" and reads the statute as an expansion of judicial review beyond what is authorized under the APA.

This interpretation of the Board's enabling act is incorrect. Section 346(1) merely provides the statutory basis for judicial review of Board decisions. According to the statute's plain language, the grant of judicial review of "any order or decision of the board" is subject to the requirements of the APA. To read it otherwise would undercut the procedural mechanism that is already in place for judicial review of agency action. Rule 80C also makes reference to the APA and explicitly uses the term "final agency action."

It is therefore clear that "final agency action" by the Board is required before Mr. Friedman, or anyone else, may seek judicial review, unless "review of final agency action would not provide an adequate remedy," 5 M.R.S. §11001(1) (2006). However, that exception to the general requirement of final agency action addresses

situations in which judicial review prior to final agency action is justified because delaying review until final agency action would deprive a party of “an adequate remedy.” Here, the Board has completed its consideration of the petition and has ordered it dismissed, so the exception does not apply.

In its May 17, 2007 decision to dismiss the second petition, the Board noted that it was “substantially and materially” based on the same facts as the first petition, and that the Petitioners had not shown any change in conditions that would alter the position of the Board. Thus, like the first petition, this petition was also dismissed for lack of substantial evidence. In the *Watts* decision, Justice Marden determined that the dismissal by the Board was not final agency action because Watts was not prevented “from petitioning the Board at a later date with more evidence.” *Watts v. Maine Bd. of Environmental Protection*, 2006 Me. Super. LEXIS 270 (Dec. 6, 2006).

It appears that in the second petition there again was not enough evidence submitted to the Board, but there is still nothing to prevent Mr. Friedman from gathering the necessary evidence, if it exists, and again petitioning the Board. The dismissal of the second petition on the same grounds as the first does not transform that second dismissal into “final agency action.”

**The Board’s Order is Not Subject to Judicial Review Because It Reflects a Decision Committed to the Agency’s Sole Discretion**

A separate reason why the Board’s dismissal of the second petition is not subject to review under the APA is that it involves a matter committed to the sole discretion of the agency. “[E]ven when an agency action is final, it does not follow that the action is subject to judicial review.” *New England Outdoor Ctr. v.*

*Commissioner of Inland Fisheries and Wildlife*, 2000 ME 66, ¶ 10, 748 A.2d 1009, 1013;

Me. Const. art. III, § 2. In *New England Outdoor Center*, the Law Court said:

[t]he Legislature may not constitutionally confer on the judiciary a commission to roam at large reviewing any and all final actions of the executive branch. Some executive action is by its very nature not subject to review by an exercise of judicial power. *Id.*, quoting *Brown v. State Dep't of Manpower Affairs*, 426 A.2d 880, 884 (Me.1981).

On its face, Section 341-D(3), in using the word "may," vests the Board with discretion to modify, revoke or suspend a license when it finds that one of the factors enumerated in section 341-D(3)(A)-(G) exists.<sup>3</sup> By virtue of the phrase, "whenever the Board finds," the statute suggests that a finding that one or more of those factors exists is a prerequisite to Board action under that section, but the statute does not compel the Board to act even if it makes a such a finding.

The absence of any meaningful standards in section 341-D(3), upon which a court could review the Board's dismissal of the petition, confirms that the Board's dismissal of the petition was a non-reviewable exercise of the Board's discretionary authority. See *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) ("if no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'").

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<sup>3</sup> "In general, the word 'may,' used in statutes, will be given ordinary meaning, unless it would manifestly defeat the object of the statute, and when used in a statute is permissive, discretionary, and not mandatory." *Collins v. State*, 161 Me. 445, 449, 213 A.2d 835, 837 (1965), quoting *Roy v. Bladen School District No. R-31 of Webster County*, 84 N.W. 2d. 119, 124 (Neb. 1957). In *Collins*, the Law Court rejected the argument that the statutory word "may" should be construed to mean "must," based on the purposes of the statute. *Id.* A similar analysis here compels the conclusion that the Legislature, in enacting section 341-D(3), did not intend to compel the Board to take action whenever it finds a violation of a license occurs, but only to authorize it to do so, in its discretion.

In that sense, as Justice Marden recognized in the *Watts* case, section 341-D(3) in substance codifies the Board's discretionary authority to take enforcement action, by means of modification, revocation or suspension, if the Board determines to do so, based on a finding that one of the seven factors in section 341-D(3)(A)-(G) exists. See *Watts v. Maine Bd. of Environmental Protection*, 2006 Me. Super. LEXIS 270 (Dec. 6, 2006).<sup>4</sup>

In general, Maine courts are not free to review discretionary enforcement decisions. In *Bar Harbor Banking & Trust Co. v. Alexander*, the Law Court observed, "[t]he constitutionally mandated separation of powers forbids precipitous injunctive interference with the legitimate, ongoing executive function." (citations omitted). Moreover, judicial interference with apparently legitimate executive department activity not only disrupts the administrative process but also encourages the circumvention of statutorily authorized investigation and enforcement mechanisms." 411 A.2d 74, 77 (Me. 1980). Cf. *Herrle v. Town of Waterboro*, 2001 ME 1, ¶¶ 9-10, 763 A.2d 1159, 1161-1162.

The *Bar Harbor* case involved what the Law Court determined to be an inappropriate judicial infringement on the executive's enforcement authority, by means of an injunction prohibiting a bank regulator's attempt to conduct an investigatory hearing. The present case involves a regulatory agency's discretionary determination *not* to take action, but the same principle applies. See

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<sup>4</sup> Section 341-D(3) and the rules implementing it do require the Board to accept petitions filed under section 341-D(3), and the Board does not have discretion to refuse even to consider a petition. However, Petitioner Friedman does not allege that the Board refused to consider his petition; rather he objects to its dismissal without hearing after consideration. Thus, as the Board points out, this case does not involve a failure or refusal to act on the part of the agency; the agency did act, and did exercise its discretion, to the extent required by the statute and rule.

*Dumont v. Speers*, 245 A.2d 151, 155 (Me. 1968) (petitioners lacked right to appeal fisheries commissioner's discretionary decision not to require construction of fishway at dam).

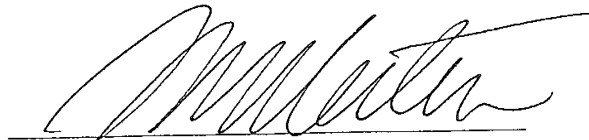
While the Law Court in *Brown* declined to "define the precise limits of the judicial power granted in the constitution," 426 A.2d at 884, it seems clear that a review by this court of the Board's decision to dismiss the petition without hearing would constitute an impermissible intrusion on the Board's discretionary authority.

### CONCLUSION

For the foregoing reasons, the Board's motion to dismiss is GRANTED. Mr. Friedman's 80C appeal is DISMISSED for lack of jurisdiction.

The clerk shall incorporate this Order into the docket by reference pursuant to M.R. Civ. P. 79(a).

DATED: November 8, 2007



A. M. Horton  
Justice

Date Filed 08-06-07 Sagadahoc County Docket No. AP-07-10

Action 80C APPEAL

FRIENDS OF MERRYMEETING BAY

MAINE BOARD OF ENVIRONMENTAL PROTECTION  
Hydro Kennebec Limited Partnership (PII)  
FPL Energy- Maine Hydro, LLC (PII)  
Merimil Limited Partnership (PII)

vs.

Plaintiff's Attorney	Defendant's Attorney
Bruce Merrill, Esq. 225 Commercial St., STE 501 Portland, ME 04101 775-3333	Janet M. McClintock, AAG 6 SHS Augusta, ME 04333
David Nicholas, Esq. 20 Whitney Road Newton, MA 02460	

Date of Entry	
08-06-07	Received 08-06-07: Petition for Review of Final Agency Action by the Maine Board of Environmental Protection, filed. s/ B. Merrill, Esq.
08-14-07	Received 08-14-07: Written Appearance of Hydro Kennebec Limited Partnership, filed. s/ M. Manahan, Esq.
08-15-07	Received 08-15-07: Written Appearance of FPL Energy Maine Hydro, LLC and Merimil Limited Partnership, filed. s/ J. Thaler, Esq. & S. Tracy, Esq.
09-04-07	Received 09-04-07: Respondent Maine Board of Environmental Protection's Motion to Extend Time to File Agency Record and Incorporated Memorandum of Law, with Notice of Hearing and Proposed Order.  Respondent Maine Board of Environmental Protection's Motion to Dismiss Rule 80C Appeal with Incorporated Memorandum of Law, Request for Hearing, and Proposed Order. s/ J. McClintock, AAG
09-06-07	Received 09-06-07: Joint Motion to Dismiss of Parties-In-Interest Hydro Kennebec Limited Partnership, FPL Energy Maine Hydro, LLC and Merimil Limited Partnership with Incorporated Memorandum of Law, Request for Hearing and Proposed Order, filed. s/ M. Manahan, Esq.
09-19-07	Received 09-17-07: Petitioner's Consented -To Motion fo rEnlargement of Time by Which to Answer Respondent's Motion to Dismiss, filed. (MOOT)  Petitioner's Consented-To Motion to File Consolidated Opposition to Motions to Dismiss in Excess of 20 Pages, filed. (MOOT)  Petitioner's Consented-To Motion for Enlargement of Time by Which to Answer Respondent's Motion to Extend Time to File Agency Record, filed. (MOOT)

FRIENDS OF MERRYMEETING BAY V. MAINE BOARD OF ENVIRONMENTAL PROTECTION

Docket No. AP-07-10

pg. 2

Date of Entry

09-19-07

~~Received 09-18-07:~~

Petitioner's Corrected Consented-To Motion for Enlargement of Time by Which to Answer Respondent Board of Environmental Protection's Motion to Dismiss, filed. s/ D. Nicholas, Esq.

Petitioner's Corrected Consented-To Motion for Enlargement of Time By Which to Answer Responent's Motion to Extend Time Within Which to File the Agency Record, filed.

Petitioner's Consented-To Motion to File Consolidated Opposition to Motions to Dismiss in Excess of 20 Pages, filed.

09-20-07

On 09-20-07:

Petitioner's Corrected Consented-To Motion for Enlargement of Time to Answer Respondent's Motion to Dismiss, **GRANTED**.

**COURT ORDER.** s/ Field, J.

Petitioner may file its opposition to Respondent's Motion to Dismiss by **09-27-07**.

Petitioner's Corrected Consented-To Motion for Enlargement of Time to Answer Respondent's Motion to Extend Time Within Which to File the Agency Record, **GRANTED**.

**COURT ORDER.** s/ Field, J.

Time to file Opposition to Respondent's Motion for Enlargement of Time Within Which to File the Agency Record extended to **09-27-07**.

Petitioner's Corrected Consented-To Motion to File Consolidated Opposition to Motions to Dismiss in Excess of 20 pages, **GRANTED**.

**COURT ORDER.** s/ Field, J.

Petitioner may file one opposition to both motions in one document not to exceed 35 pages.

9/26/2007

Copies sent to parties on 09-20-07.

Petitioner's Consolidated Opposition to Motions to Dismiss filed by Respondent Board of Environmental Protection and the Parties in Interest; Affidavit of David Nicholas, Esq. is Support of Opposition; and Opposition to Respondent's Motion to Extend Time to File Agency Record (filed by Atty Nicholas for Petitioner

10-03-07

Received 10-03-07:

Reply of Parties-In-Interest to Petitioner Friends of Merrymeeting Bay's Opposition to the Motions to Dismiss. s/ M. Manahan, Esq.

Respondent Maine Board of Environmental Protections Reply to Petitioner's Consolidated Opposition to Motions to Dismiss Filed by Respondent Board and the Parties-In-Interest, filed. s/ J. McClintock, AAG

FRIENDS OF MERRYMEETING BAY V. MAINE BOARD OF ENVIRONMENTAL PROTECTION

Date of  
Entry

Docket No. AP-07-10

10-18-07

On: 10-18-07:  
Hearing held on Respondents' Motion to Dismiss with Justice Andrew M. Horton, presiding. Parties in attendance. Proceedings electronically recorded. Tape Number: 38; Index: 12 - 2050 & 2435 - 5204. Matter taken under advisement by Justice Horton.

11-15-07

On 11-08-07: Respondent's Motion to Dismiss, GRANTED.

11-15-07

On 11-08-07:

COURT ORDER. s/ Horton, J.

The Rule 80C appeal of Friends of Merrymeeting Bay is DISMISSED for lack of jurisdiction. Order incorporated into the docket by reference. Copies sent to parties on 11-15-07.





STATE OF MAINE  
BOARD OF ENVIRONMENTAL PROTECTION

VIRGINIA PLUMMER

CHAIR

CYNTHIA S. BERTOCCI

EXECUTIVE ANALYST

TERRY A. HANSON

ADMIN ASSISTANT

JOHN ELIAS BALDACCIO

GOVERNOR

IN THE MATTER OF

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

Pursuant to the provisions of 38 M.R.S.A. Sections 341-D(3), 464 et seq., and 06-096 CMR Chapter 2 (Rules Concerning the Processing of Applications and Other Administrative Matters), the Board of Environmental Protection, and as a result of September 28, 2005 and September 29, 2005 petitions<sup>1</sup> of Douglas H. Watts and Friends of Merrymeeting Bay ("FOMB") (collectively, "Intervenors,"), determined to hold a public hearing to consider whether the permits and water quality certifications previously issued for the Lockwood, Hydro-Kennebec, Shawmut, or Weston Hydro Projects should be modified, suspended or revoked. Following that hearing, and consideration of the testimony and written briefs of all parties, the Board has determined, in its discretion, to take no further action to modify, revoke, or suspend the certifications in issue. The Board's reasons follow.

<sup>1</sup> A summary of the petitions, petition proceedings, public hearing testimony, and post-hearing briefs is appended hereto and incorporated herein.



PRINTED ON RECYCLED PAPER

1. FISH PASSAGE REQUIREMENTS IN EXISTING WATER QUALITY CERTIFICATIONS

On May 26, 1998, various parties<sup>2</sup> signed the Lower Kennebec River Comprehensive Hydropower Settlement Accord which, among other things, led to the removal of the Edwards Dam in Augusta. Included as part of the settlement accord was the *Agreement Between Members of the Kennebec Hydro Developers Group, the Kennebec Coalition, the National Marine Fisheries Service, the State of Maine, and the U.S. Fish and Wildlife Service (1998 KHDG Agreement)*. The *1998 KHDG Agreement* was intended to achieve a comprehensive settlement governing fisheries restoration on the Kennebec River and Sebasticook River for catadromous<sup>3</sup> American eel and anadromous<sup>4</sup> American shad, Atlantic salmon, alewife and blueback herring at the seven dams covered by the agreement. The then existing water quality certifications and FERC licenses for each of the dams<sup>5</sup> were subsequently amended to be consistent with the *1998 KHDG Agreement*.

With regard to upstream passage for anadromous fish, the *1998 KHDG Agreement*, and therefore the water quality certifications, require interim upstream passage at the Lockwood Project, the first of the subject dams on the Kennebec River, by May 1, 2006, with permanent passage to be provided based on a biological trigger (2 years after 8,000 shad are passed or some appropriate alternative determined by the state and federal fisheries agencies), but in any event, no earlier than 2010. Biological triggers are also provided for permanent upstream passage at the Hydro-Kennebec, Shawmut and Weston Projects, and dates are established before which upstream passage will not be required at these dams ranging from 2010 to 2014.

Regarding downstream passage for anadromous fish, the water quality certifications require that the dam owners continue, and where needed improve, existing interim operational

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<sup>2</sup> The signing parties to the *1998 KHDG Agreement* included: the City of Augusta; Edwards Manufacturing Company; the Kennebec Coalition (American Rivers, Inc., the Atlantic Salmon Federation, Kennebec Valley Chapter of Trout Unlimited, the Natural Resources Council of Maine, and Trout Unlimited); the Kennebec Hydro Developers Group (Central Maine Power Company, Merimil Limited Partnership, UAH-Hydro Kennebec Limited Partnership, Ridgewood Maine Hydro Partners, L.P., and Benton Falls Associates); the State of Maine (acting by and through the Governor of the State of Maine, the Maine Department of Inland Fisheries and Wildlife, the Maine Department of Marine Resources, and the Maine State Planning Office); the US Department of Commerce (through the National Marine Fisheries Service); and the US Department of the Interior (through the US Fish and Wildlife Service).

<sup>3</sup> Catadromous fish migrate as adults from freshwater to the ocean to spawn, and their offspring then migrate back to freshwater as juveniles to grow to maturity.

<sup>4</sup> Anadromous fish migrate as adults from the ocean to freshwater to spawn, and their offspring then migrate back to the ocean as juveniles to grow to maturity.

<sup>5</sup> The certification for the Lockwood Hydro project was issued in August 26, 2004 and its FERC license will expire June, 2035. The certification for the Hydro-Kennebec project was issued June 6, 1986 and its FERC license will expire October, 2036. The certification for the Shawmut project was issued May 21, 1981 and its FERC license will expire January 25, 2021. The certification for the Weston project was issued November 17, 1992 and its FERC license will expire November 25, 2036.

measures to diminish entrainment, allow for downstream passage, and eliminate significant injury or mortality to out-migrating anadromous fish. Permanent downstream anadromous fish passage facilities are required to be operational no later than the date permanent upstream passage facilities are operational.

With regard to the American eel, KHDG dam owners and DMR, in consultation with federal fisheries agencies, were required to undertake three years of study, beginning no later than 1999, to determine the appropriate placement of upstream eel passage facilities at each project and appropriate permanent downstream eel passage measures at each project. According to the terms of the certifications, if no agreement was reached by June 30, 2002, parties were free to petition FERC to amend any license to insert appropriate terms and conditions. If studies revealed that interim downstream measures were needed to avoid significant turbine injury or mortality to downstream migrating eels at a particular site, KHDG dam owners were required to consult with the fisheries agencies and agree to undertake cost-effective measures to minimize mortality at that project.

2. STATUS OF FISH AND EEL PASSAGE UNDER EXISTING WATER QUALITY CERTIFICATIONS

An interim trap, lift, and transfer facility providing upstream passage for anadromous fish has been built at the Lockwood Project and became operational prior to May 1, 2006, as required by the Lockwood Project's water quality certification and FERC license. The lift is capable of passing up to 228,471 American shad; 164,640 river herring; and 4,750 Atlantic salmon annually.<sup>6</sup> The biological trigger has not yet been reached to require upstream passage at the next dam, (Hydro-Kennebec Project). Various interim operational measures (e.g. gate openings and spillage) have been instituted at the Lockwood, Shawmut and Weston Projects to diminish entrainment and facilitate downstream passage for anadromous fish and eel. At the Hydro-Kennebec Project, an interim downstream fish passage facility (consisting of an angled guidance structure and a new gate) has been constructed and is now in operation.

All dams currently have installed upstream passage for eels. The issue of upstream eel passage, therefore, is not an issue before the Board. Prior to the initiation of these proceedings, however, efforts at providing downstream eel passage had reached an impasse. As correctly pointed out by Intervenor, the studies necessary to determine appropriate downstream passage measures that were to have been completed by 2001 had not been done, and consequently there was no agreement regarding these measures. Nor had any parties sought amendments of the licenses or certifications requiring such measures, as permitted by the terms of the water quality certification and FERC license.

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<sup>6</sup> After sorting at the new Lockwood lift facility, anadromous American shad, river herring and Atlantic salmon will be trucked to suitable upriver locations for release.

Subsequent to the filing of the petitions, however, the Department issued Condition Compliance Orders approving proposals for further studies of downstream eel passage at the Lockwood, Shawmut and Weston Projects and design and operational plans for interim downstream anadromous fish and eel passage facilities at the Hydro-Kennebec Project. These Orders indicated that, subject to certain conditions, the dam owners were now taking appropriate steps to provide downstream eel passage in compliance with the conditions of their water quality certifications.

Pursuant to the Orders, the owners of the Lockwood, Shawmut and Weston Projects are required to conduct radio-telemetry and/or PIT studies in 2007, or in the case of Weston, 2008, prepared in consultation with the Maine Department of Marine Resources (“DMR”) and the United States Fish and Wildlife Service (“USFWS”). These studies will determine whether and how the eels are migrating downstream. The results of the studies must then be reported to the Department by December 31, 2007 for the Lockwood and Shawmut Projects, and December 31, 2008 for the Weston Project, together with a proposal for permanent downstream eel passage measures or additional studies, as appropriate, prepared in consultation with DMR, National Marine Fisheries Service (“NMFS”) and USFWS. Significantly, this submission must also include an implementation schedule for the installation and operation of permanent downstream eel passage for Department review and approval. For the Hydro-Kennebec Project, where certain interim anadromous fish and eel passage facilities have already been installed, the Compliance Order requires effectiveness studies of those measures. Visual monitoring is required at all dams together with interim measures needed to avoid significant downstream turbine injury or mortality. Neither the intervenors nor the dam owners appealed these orders.

### 3. ISSUE BEFORE THE BOARD

The issue before the Board is whether it will exercise its discretion to modify the certifications for the subject dams, not to require fish passage – the existing certifications as enforced by the Compliance Orders, provide a process by which fish passage will be required over a period of time – but rather, to require *immediate* passage.<sup>7</sup> Intervenors argue that Maine’s water quality standards require such immediate passage and that the lack of it poses a threat to the environment and human health. Intervenors also argue that circumstances have changed since the water quality certifications were issued that require immediate passage. The dam owners answer that the phased approach provided by the water quality certifications is biologically and legally justifiable and that in any event, the legal effect of such modification is questionable given that the terms of the existing water quality certifications have now been incorporated into the FERC licenses and the State does not have

<sup>7</sup> Upstream eel passage has been installed at all dams, as has upstream anadromous fish passage at Lockwood and downstream anadromous fish passage at Hydro-Kennebec. In the Third Procedural Order, the Board Chair ruled that the Board would not take any further evidence or hear argument with regard to upstream eel passage at any of the dams, upstream fish passage at the Lockwood Project, or downstream fish passage at the Hydro-Kennebec Project, as these issues were now moot. The full Board upheld the Chair’s Order at a subsequent meeting.

the authority, absent a specific reopener in the water quality certifications, to require FERC to modify those licenses.

4. THREAT TO HUMAN HEALTH OR THE ENVIRONMENT

The Board first addresses the argument put forward by Intervenors that the lack of downstream fish passage facilities in the interim period prior to the installation of passage results in fish and eels being killed and injured, and that this poses a threat to the environment justifying modification under 38 M.R.S.A. § 341-D(C). In support of this argument, studies were presented and discussed at the hearing showing that multiple hydropower dams on a river can generally be expected to result in significant mortality rates of those migrating adult fish and eels that pass through the turbines (between 40 and 60 percent). *See e.g.* Intervenors' Exhibit 5. *See also* Exhibit GLH-13 at 4992. Also presented was a limited DMR study involving the radio-tagging of eels above Lockwood that found that two out of the five eels tagged were entrained in the turbines. Intervenors' Exhibit 7 at 73.

The Board, however, is not convinced that there is a sufficient basis on which to conclude that the operation of the dams during the interim period pending the ultimate implementation of downstream passage, as required by the water quality certifications and Compliance Orders, poses a threat to the environment. The Board credits the studies that show that impacts from turbines may reasonably be expected to cause significant mortality in eels passing through the turbines (of course, this does not account for some proportion of the eels that survive passage in spillover). The Board has not been presented evidence, however, that this will result in a threat to the population of Kennebec River eels, especially in the time it will take to do the necessary studies and implement passage measures, pursuant to the existing water quality certifications and Compliance Orders.

In fact, the evidence in the record demonstrates that requiring immediate downstream eel passage at this time would be neither warranted nor effective. DMR testified that it has not seen evidence of substantial eel mortality on the Kennebec River, that the radio-tagging study that was done was too limited to rely on, and that without additional studies it is not possible to determine suitable downstream passage strategies at each project.<sup>8</sup> However, the limited study conducted to date suggests that there may be substantial eel mortality through turbine passage at these projects, as has been found in studies at other hydropower dams. In any event, this concern is addressed through the Compliance Orders, which require that the dam owners take measures during this interim period in consultation with DMR and USFWS to prevent significant eel mortality at the dam. *See* Compliance Orders, DEP Staff Exhibit 5.

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<sup>8</sup> With respect to the American eel, the Board notes that, at the time the petitions were filed, a petition was pending before the United States Fish and Wildlife Service to list eels as an endangered species. The Board also notes that, on February 2, 2007, the U.S. Fish and Wildlife Service issued a decision finding that the American eel is not an endangered or threatened species.

Given the limited amount of time required for the necessary studies to be performed (2 years), and the measures in place to prevent significant eel mortality during that time, there is an insufficient basis on which to conclude that the operation of the dams under the existing water quality certifications pose a threat to the Kennebec American eel population. However, the Board understand the compliance orders to provide a limited time within which the additional studies must be completed, and expects no further delays from the dam owners in completing these studies and implementing downstream eel passage measures.

While downstream passage of eels was a particular focus of the hearings, Intervenor also raised the issue of whether anadromous fish were being killed by dam turbines during the phase-in of fish passage required by the existing water quality certifications. The Atlantic Salmon Commission (“ASC”) testified, however, that the terms of the existing water quality certifications for the projects provide a means for consultation to determine appropriate additional measures, if necessary, to minimize injury or mortality to migratory fish, including Atlantic salmon. ASC also testified that it was participating in resource agency consultations with the dam owners to discuss resource requirements for interim downstream passage. Given this, and the lack of reliable information demonstrating mortality of anadromous fish species on the Kennebec, there is an insufficient basis on which to determine that the operation of the dams under the existing water quality certifications pose a threat to anadromous fish populations on the Kennebec.

Finally, Intervenor Friends of Merrymeeting Bay provided information that the killing of downstream migrating adult eels in the Sebasticook River released long-sequestered toxins into the water and food chain, and thus posed a threat to human health. The concentrations of toxins found on the Sebasticook, however, are not necessarily relevant to the larger Kennebec River, where there is more dilution. Moreover, toxins in fish is a widespread problem in Maine and elsewhere, as evidenced by the State’s fish advisories, and will not be resolved by the change in operations of these dams, especially in the period prior to the implementation of downstream eel passage required by the existing water quality certifications and Compliance Orders. There is, therefore, an insufficient basis upon which to conclude that there is a threat to human health from the operation of the dams in accordance with the existing water quality certifications.

5. FAILURE TO INCLUDE STANDARD OR LIMITATION LEGALLY REQUIRED ON THE DATE OF ISSUANCE

The Board next takes up the question of whether the water quality certifications failed to include a standard or limitation legally required at the time they were issued, namely immediate, safe passage for migratory fish at all dams.

After considering arguments of the parties, the Board concludes that the fact that the certifications at issue here did not include requirements for the immediate passage of all migratory fish does not mean that these certifications did not meet legal standards required

on the date of issuance, including water quality standards. Intervenor have not identified any state or federal law that requires immediate fish passage to be part of a certification in every case. *S.D. Warren v. BEP*, cited by Intervenor, upheld the Department’s authority to condition new FERC licenses with, among other things, fish passage requirements; however, this decision did not *require* the Department to include such passage in every certification, nor did it require that any such passage be provided immediately.

Decisions regarding whether and when fish passage facilities should be required as part of a water quality certification for a given dam are made in the context of fishery management goals and objectives, habitat suitability and availability, and current status of fish passage. These decisions run the full spectrum from not requiring fish passage, to leaving open the opportunity to require fish passage at a later date, to establishing a schedule for the future installation of fish passage, to requiring the immediate installation of fish passage. The water quality certification upheld in *S.D. Warren*, cited by Intervenor, contained phased-in anadromous fish passage with biological triggers on upstream dams.

Taken to its logical extreme, Intervenor’s argument that the water quality standards require immediate fish passage at all dams, would mean that fish passage is required at any dam within the historic range of anadromous or catadromous fish, whether or not fish are likely to be present to use the passage facilities. There is no legal or practical justification for requiring that fish passage be constructed at a dam when that passage facility is not now, and may never be, actually used by migrating fish.

In the case of the projects at issue here, the Department has issued permits and water quality certifications requiring the phased installation of upstream and downstream passage facilities for eels and various species of anadromous fish based on the record before it and in accordance with the provisions of the *1998 KHDG Agreement*. This Agreement, which is the latest step in a long history of efforts to restore migratory fish to the Kennebec River, is supported by all appropriate state and federal fisheries agencies, as well as a number of non-profit environmental groups, and has been approved by FERC.<sup>9</sup> While different technical and policy decisions might have been drawn from the record before the Department, the time has long passed for an aggrieved party to challenge these decisions. Intervenor point to no law that was contravened. In sum, the Board cannot agree that immediate fish passage was legally required on the date of the issuance of the water quality certifications in lieu of the phased-in approach adopted by the Department.

<sup>9</sup> In approving the 1998 KHDG Agreement, FERC wrote: “We congratulate the parties on their successful efforts to resolve the long-running, contentious debate over the future of the Edwards Project. The settlement will allow removal of the Edwards Dam, in a manner that is acceptable to the Edwards Project licensees, federal and state agencies, and the members of the Kennebec Coalition, and will substantially enhance fish restoration efforts in the Kennebec River Basin. In addition, the settlement resolved disputes regarding the provision of fish passage at the upstream projects, with concomitant environmental benefits.” Order Approving Settlement, issued September 16, 1998 (84 F.E.R.C. ¶ 61,227).

6. CHANGE IN CONDITION OR CIRCUMSTANCE

Intervenor Watts argues that a petition is now pending to declare the Kennebec River Atlantic salmon to be an endangered species, and that these circumstances did not exist at the time the Department issued water quality certifications for the projects.<sup>10</sup> Intervenor FOMB argues that there is new evidence regarding the harm dams cause to eels, and also argues that it was not anticipated that there would be significant delay in the completion of eel studies.

The fact that the Kennebec River Atlantic salmon is still being considered for listing as an endangered species does not constitute changed circumstances. Any claim that the species is endangered is at this point speculative, and will be determined by the USFWS in due course.

Furthermore, while there may be an increased awareness of the harm dams cause to eels, this awareness alone cannot constitute changed circumstances justifying modification. In any event, the certifications already contain a requirement for downstream passage, and although there was a delay in completing the studies, the Compliance Orders set forth a reasonable path forward to ensure that such passage will be studied and necessary measures implemented in an expeditious and effective manner. Moreover, downstream passage facilities, once constructed, will be subject to modification based on the results of the effectiveness studies required by the *1998 KHDG Agreement* and the Department's certifications. The existing water quality certifications, together with the Compliance Orders, therefore, address the concerns regarding the harm to eels caused by dams raised by Intervenor such that no modification is necessary.

7. VIOLATION OF LAW

The Intervenor argue that the lack of fish passage at the projects causes the Kennebec River to violate its water quality standards.<sup>11</sup> The Board, however, does not agree that the projects are currently in violation of existing law. Section 341-D(3)(F) on its face permits the Board to take action to address actual violations of law. Other criteria contained in section 341-D(3) permit the Board to act where, regardless of whether there is a violation of law, other circumstances, such as a change in conditions or a threat to the environment, support that action. The water quality certifications at issue here provide that, subject to certain conditions, there was reasonable assurance that the projects would meet Maine's water quality standards. Petitioners have not alleged that the licensees are out of compliance with

<sup>10</sup> Mr. Watts initially argued that a similar petition regarding the listing of American eel constituted changed circumstances justifying modification of the water quality certifications. As noted above, subsequent to the filing of the petitions in this matter, the U.S. Fish and Wildlife Service issued a decision finding that the American eel is not an endangered or threatened species.

<sup>11</sup> Mr. Watts also argues that the entrainment of fish in a hydro-electric dam turbine is not a legal fishing method, is illegal fishing and is thus a Class E crime under Maine law, specifically 12 M.R.S.A. §§ 12453 and 12454. The Board does not agree that entrainment of fish in a dam that is operating in accordance with its State water quality certification and FERC license falls within the definition of "fishing" in 12 M.R.S.A. § 10001.



the conditions of their water quality certifications or FERC licenses. By operating in compliance with their water quality certifications and FERC licenses, the dams are currently operating in compliance with the law.

This does not mean, however, that the Department is powerless in the event of a demonstrated fish kill. The Department has in the past taken appropriate enforcement action in response to fish kills, and will continue to do so in the future.<sup>12</sup>

The Board notes in this regard that the Department has issued Condition Compliance Orders approving proposals for further studies of downstream eel passage at the Lockwood, Shawmut and Weston Projects and design and operational plans for interim downstream anadromous fish and eel passage facilities at the Hydro-Kennebec Project. These Orders indicated that, subject to certain conditions, the dam owners were taking appropriate steps to provide downstream eel passage in compliance with the conditions of their water quality certifications. No appeals of these Condition Compliance Orders were filed. Consequently, the issue of whether the dam owners are in compliance with the terms and conditions of the water quality certifications for the projects is not before the Board in this proceeding.

Notwithstanding this, the Board considers that the task of determining and implementing appropriate measures for downstream eel passage at the projects can be described as a “work in progress” for which a process and schedule are now in place. The Board expects substantive and timely progress by the dam owners in fulfillment of this task, especially in light of past delays. The Board reserves the right to assume jurisdiction over future condition compliance applications to ensure timely and effective downstream eel passage at the projects, and will exercise its responsibility to consider timely appeals of any future condition compliance orders regarding downstream eel passage issued by the Department. The Board requests that the Department provide the Board with at least annual progress reports on the status of the implementation of downstream eel passage measures at the Lockwood, Hydro-Kennebec, Shawmut and Weston Hydro Projects.

8. LEGAL EFFECT OF MODIFYING A WATER QUALITY CERTIFICATION THAT DOES NOT CONTAIN A SPECIFIC REOPENER

The Intervenors ask the Board to modify permits and water quality certifications that were issued for four projects on the Kennebec River to require immediate and safe fish passage. All of the permits/certifications have requirements for phased upstream and downstream passage for anadromous fish and eels. However, none of the permits/certifications contain conditions that reserve the Department’s right to “reopen” the certification to change the

<sup>12</sup> For example, in 2000, the Department negotiated and the Board approved an Administrative Consent Agreement, including a monetary penalty and corrective actions, following the death of and injury to numerous downstream migrating alewives at the Benton Falls Project due to the failure of the project operator to keep the approved downstream fish passage facilities clear of debris and fully operational, as required by the terms of the permit and water quality certification for the project.

LOCKWOOD HYDRO PROJECT )  
HYDRO-KENNEBEC PROJECT )  
SHAWMUT HYDRO PROJECT )  
WESTON HYDRO PROJECT )

PETITIONS FOR REVOCATION, MODIFICATION  
OR SUSPENSION

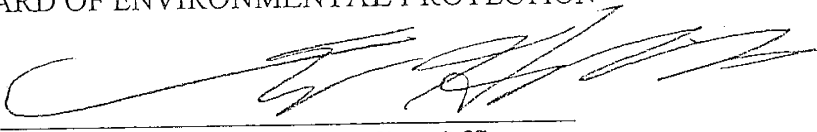
provisions of the anadromous fish or eel passage provisions, and in particular the timing contained in those provisions.

The issue of the legal effect of any action by the Board to modify a water quality certification in the absence of a reopener was addressed by the parties in their post-hearing briefs. However, the Board does not need to decide this untested issue of law because, as set forth above, the Board finds that there is an insufficient basis upon which to modify the certifications.

Therefore, the Board in its discretion declines to take any action to revoke, modify or suspend the permits and water quality certifications for the Lockwood, Hydro- Kennebec, Shawmut, and Weston Hydro Projects located on the Kennebec River.

DONE AND DATED AT AUGUSTA, MAINE, THIS 5<sup>th</sup> DAY OF July, 2007.

BOARD OF ENVIRONMENTAL PROTECTION

BY:   
ERNEST W. HILTON, Presiding Officer

**BOARD OF ENVIRONMENTAL PROTECTION**

MERIMIL LIMITED PARTNERSHIP )	PETITIONS FOR REVOCATION, MODIFICATION,
Waterville and Winslow, Kennebec County )	OR SUSPENSION
LOCKWOOD HYDRO PROJECT )	
#L-20218-33-C-N )	
)	
HYDRO KENNEBEC LIMITED )	
PARTNERSHIP )	
Winslow and Waterville, Kennebec County )	
HYDRO-KENNEBEC PROJECT )	
#L-11244-35-A-N )	Maine Waterway Development and Conservation
)	Permits and Water Quality Certifications
FPL ENERGY MAINE HYDRO LLC )	
Fairfield, Somerset County )	
SHAWMUT HYDRO PROJECT )	
#L-19751-33-A-M )	
)	Summary of Petitions, Petition Proceedings,
FPL ENERGY MAINE HYDRO LLC )	Public Hearing Testimony, and Post-Hearing
Skowhegan, Somerset County )	Briefs
WESTON HYDRO PROJECT )	
#L-17472-33-C-M )	

1. PETITIONS

On October 3, 2005, pursuant to Section 27 of the Department's Chapter 2 Rules, Douglas H. Watts ("Watts") submitted a petition (dated September 28, 2005) requesting that the Board modify the water quality certifications issued for the Lockwood, Hydro-Kennebec, Shawmut, and Weston Hydro Projects on the Kennebec River to provide immediate safe downstream passage for Atlantic salmon, alewife, American shad, blueback herring, and American eel.

On October 3, 2005, pursuant to Section 27 of the Department's Chapter 2 Rules, Friends of Merrymeeting Bay ("FOMB") submitted a petition (dated September 29, 2005) requesting that the Board (1) revoke, modify or suspend the Maine hydropower permits and water quality certifications for the same projects to provide for immediate safe upstream and downstream passage for the same fish species, and (2) modify the project permits to comply with 38 M.R.S.A. Section 464(10),<sup>1</sup> which requires existing hydropower facilities to implement reasonable changes that do not significantly affect existing energy generation capability and which would result in improvements in habitat and aquatic life.

<sup>1</sup> In its petition, Friends of Merrymeeting Bay incorrectly cited this provision as 38 M.R.S.A. Section 464(1).

## 2. SUMMARY OF PETITIONS

Petitioners contend that the licensed activities pose a threat to human health or the environment, in that the lack of safe downstream passage at these dams results in native migratory fish being killed and severely injured through entrainment in the turbines at the dams.

Petitioners further contend that the licenses fail to include standards or limitations legally required on the date of issuance, in that the failure of the water quality certifications issued for the dams to require immediate upstream and downstream passage for native migratory fish causes the Kennebec River to fail to meet its water quality standards.

Petitioners also contend that there have been changes in conditions or circumstances that require revocation, suspension or a temporary or permanent modification of the terms of the licenses, in that the federal government is now considering protection of the American eel and the Atlantic salmon of the Kennebec River under the United States Endangered Species Act, and in that there is now a greater awareness and definitive documentation of the consequences of no safe downstream passage.

Finally, Petitioners contend that the licensees have violated laws administered by the Department, in that the lack of safe downstream passage for native migratory fish causes the Kennebec River to violate the Clean Water Act and Maine water quality standards, and in that it is illegal under Maine law to kill an Atlantic salmon in the waters of the State.

## 3. SUMMARY OF PROCEEDINGS

On January 19, 2006, after providing an opportunity to be heard to the petitioners, dam owners, the Department staff, and other interested parties, the Board voted to schedule a public hearing on the petitions.

On February 16, 2006, the Department issued a Condition Compliance Order approving operational and effectiveness study plans for upstream fish passage facilities at the Lockwood Hydro Project indicating that, subject to certain conditions, the dam owner was taking appropriate steps to provide upstream fish passage in compliance with the conditions of its water quality certification.<sup>2</sup> No appeals of this Condition Compliance Order were filed.

Notice of the public hearing and opportunity for intervention on the petitions was published in the Kennebec Journal and Morning Sentinel on May 26, 2006. The deadline for petitions to intervene in the proceeding was established as June 9, 2006.

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<sup>2</sup> In a Condition Compliance Order dated March 3, 2005, the Department had previously approved final design drawings and construction plans for an interim trap, lift and transfer facility to provide upstream fish passage at the Lockwood Project. No appeals of this Order were filed.

In a First Procedural Order dated July 6, 2006, the Board granted intervenor status to the petitioners and to Save Our Sebasticook.<sup>3</sup> The Board also established a schedule for a pre-hearing conference.

A pre-hearing conference was held in Augusta on July 19, 2006. In a Second Procedural Order dated August 23, 2006, the Board Chair, acting as the Presiding Officer, addressed filing and attendance requirements, the scope of and schedule for the hearing, and other procedural matters discussed at the conference. In this Order, the Chair denied FOMB's motion to preclude evidence of the economics of implementing eel and fish protection measures. The Chair also ruled that the Board would hold the public hearing in abeyance until the Department had issued condition compliance orders pertaining to eel and fish passage at the dams and all appeal periods had run,<sup>4</sup> and that at that time, the Board would 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. Finally, the Order established a deadline for any appeal to the full Board from the Order. No appeals of the Second Procedural Order were filed.

On August 8, 2006, the Department issued Condition Compliance Orders approving design, operational, and effectiveness study plans for upstream eel passage facilities at the Lockwood, Hydro-Kennebec, Shawmut, and Weston Projects, indicating that, subject to certain conditions, the dam owners were taking appropriate steps to provide upstream eel passage in compliance with the conditions of their water quality certifications. No appeals of these Condition Compliance Orders were filed.

On September 14, 2006, the Department issued Condition Compliance Orders approving proposals for further studies downstream eel passage at the Lockwood, Shawmut and Weston Projects and design and operational plans for interim downstream anadromous fish and eel passage facilities at the Hydro-Kennebec Project. These Orders indicated that, subject to certain conditions, the dam owners were taking appropriate steps to provide downstream eel passage in compliance with the conditions of their water quality certifications. No appeals of these Condition Compliance Orders were filed.

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<sup>3</sup> Section 7 of the First Procedural Order also establishes that, by virtue of owning the dams that are subject of the pending hearings to revoke, modify or suspend, Merimil Limited Partnership, Hydro Kennebec Limited Partnership, and FPL Energy Maine Hydro LLC are the entities whose legal rights, duties or privileges are at issue here, and that these entities therefore have standing as parties in the proceedings.

<sup>4</sup> Section 4 of the Second Procedural Order reads in part as follows: "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."

The Board Chair subsequently established a schedule for a second pre-hearing conference.

A second pre-hearing conference was held in Augusta on November 15, 2006. In a Third Procedural Order dated November 30, 2006, the Board Chair addressed the scope and organization of the hearing, the procedural rules to be followed in preparation for, and at, the hearing, and other procedural matters discussed at the conference. In this Order, the Chair ruled that the proceedings would not be held in abeyance and that the Board would proceed to public hearing on the issue of eel and fish passage at the subject dams, subject to certain limitations on the scope of the hearing. The Chair further ruled that the Board would not take any further evidence or hear argument with regard to upstream eel passage at any of the dams, upstream fish passage at the Lockwood Project, or downstream fish passage at the Hydro-Kennebec Project, as these issues were now moot.<sup>5</sup> The Chair also ruled that consolidation of appearance of the parties at the hearing was not ordered,<sup>6</sup> and that the Board would first receive the pre-filed direct testimony of all parties and then the pre-filed rebuttal testimony of all parties. The Chair further ruled on a schedule for the filing of direct testimony of the parties, Department staff materials, rebuttal testimony of the parties, and state agency comments, and established a tentative schedule for the public hearing. Finally, the Order established a deadline for any appeal to the full Board from the Order.

On December 5, 2006, FOMB appealed the Third Procedural Order to the Board, requesting that the Board reverse the Chair's ruling limiting the scope of the hearing.

On December 5, 2006, the dam owners jointly appealed the Third Procedural Order to the Board, requesting that the Board reverse the Chair's ruling not to hold these proceedings in abeyance and reverse the Board's January 19, 2006 decision to hold a public hearing on the petitions.

On December 7, 2006, after providing an opportunity to be heard to the petitioners, dam owners, and the Department staff, the Board voted to deny the appeals of the Chair's Third Procedural Order.

By letter dated January 4, 2007, the Board notified the Department of Marine Resources, the Department of Inland Fisheries and Wildlife, and the Atlantic Salmon Commission that the

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<sup>5</sup> Section 4 of the Third Procedural Order reads in part as follows: "The condition compliance orders now issued by the Department contain findings that upstream eel passage facilities have now been installed and are operational at all dams, that upstream fish passage now exists and is operational at the Lockwood dam, and that downstream fish passage now exists and is operational at the Hydro-Kennebec dam. These orders were not appealed and are now final. Given these undisputed facts, the issues of whether the water quality certifications should be modified to require immediate upstream eel passage facilities at each of the dams, immediate upstream fish passage facilities at Lockwood, and immediate downstream fish passage facilities at Hydro-Kennebec are moot." [footnote omitted.]

<sup>6</sup> However, the Chair urged the parties to coordinate their presentation of evidence and cross-examination of witnesses wherever possible to and appropriate.

Board was interested in receiving comments from the agencies on the matters at issue in the proceeding.

#### 4. PUBLIC HEARING

An adjudicatory hearing to receive testimony from the parties and the general public on whether the Board will modify, prescribe necessary corrective action, or act, in accordance with the Maine Administrative Procedure Act, to revoke or suspend the Maine hydropower permits and water quality certifications for the Lockwood Hydro Project, Hydro-Kennebec Project, Shawmut Hydro Project, and Weston Hydro Project was held on March 15 and 16, 2007 in Augusta (daytime sessions were devoted to testimony and cross-examination of the parties and the fisheries agencies, and an evening session on March 15 was devoted to testimony from members of the general public).

Notice of the hearing was provided in accordance with the Maine Administrative Procedure Act (5 MRSA Section 9051-A) and the DEP's Chapter 20 hearing regulations. Pursuant to this notice, the record was left open until 5:00 pm on March 16, 2007, for the receipt of written comments from the general public.

#### 5. SUMMARY OF DIRECT TESTIMONY

Written pre-filed direct testimony was due by January 17, 2007 from the parties. This testimony is summarized below.

- a. Intervenor Watts. Intervenor Watts requests that the water quality certifications issued for the Lockwood, Hydro-Kennebec, Shawmut and Weston Projects be modified to require immediate, safe and effective downstream passage for American eel, Atlantic salmon, American shad, alewife, and blueback herring.<sup>7</sup>

Mr. Watts contends that Maine's water quality laws require that immediate, safe and effective downstream passage be provided at the subject dams at all times for American eel, Atlantic salmon, American shad, alewife and blueback herring, each of which is a species of migratory fish that is indigenous to the Kennebec River.

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<sup>7</sup> In his pre-filed direct testimony, Watts requests "immediate, safe and effective upstream and downstream passage at the subject dams for all native, migratory fish species of the Kennebec River, including but not limited to American Eel, Atlantic salmon, American shad, Alewife, Blueback Herring, and Sea Lamprey." (emphasis added). However, Watts' September 28, 2005 petition only requested immediate safe downstream passage for Atlantic salmon, alewife, American shad, blueback herring, and American eel. The scope of the petition cannot now be expanded beyond what was originally requested. Therefore, Watts' testimony, as summarized here, is limited to the issue of downstream passage for the species listed in his September 28, 2005 petition.

Mr. Watts further contends that the four dams at issue all kill downstream migrating eels and sea-run fish, and that this directly causes the Kennebec River to fail to provide suitable habitat for these species as required by law.

Mr. Watts also contends that hydro-electric dams which prevent the passage of native fish from their spawning grounds constitute a form of pollution under state and federal law and that such pollution is an inherent threat to the environment.

Mr. Watts further contends that Maine water quality statutes prohibit the killing of fish, that the existing water quality certifications for the dams at issue allow them to kill native migratory fish, that the sole statutory purpose of these water quality certifications is to ensure that the existence and operation of the dams do not cause the Kennebec River to be in violation of its water quality standards, and that the certifications are “legal nullities” because they fail to accomplish the purpose for which they were issued.

Mr. Watts also contends that expert testimony from the Maine Department of Marine Resources and the U.S. Fish and Wildlife Service establishes that the dams at issue do not provide safe downstream passage for adult eels.

Mr. Watts further contends that the existing water quality certifications for the dams at issue are unlawful because these certifications make legal and thus prevent the State of Maine from stopping severe and prolonged kills of American eel.

Mr. Watts also contends that the existing water quality certifications are unlawful because they contain no deadline for compliance and are unenforceable.

Finally, Mr. Watts contends that he has standing as an expert, citing his research on native fisheries of the Kennebec River and other rivers in Maine and his involvement in various hydro-electric licensing and relicensing proceedings and Endangered Species Act petitions.

In support of his September 28, 2005 petition,<sup>8</sup> Mr. Watts submitted the following exhibits: (1) a number of photographs showing the effect of turbine passage on migratory fish of the Kennebec River drainage and typical hydroelectric turbines; (2) various documents and scientific reports regarding the population status and threats to the American eel in Maine and the United States, including a November 2004 petition to list the American eel as an endangered species; (3) a May 2005 petition to list the Atlantic salmon of the Kennebec River as an endangered species; (4) documents purporting to show the continued failure of the State of Maine to stop the documented killing of American eel and other migratory species at hydroelectric dams in the Kennebec River

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<sup>8</sup> Mr. Watts’ pre-filed direct testimony incorporated by reference all material provided in his September 28, 2005 petition and appendices.



drainage; and (5) a June 17, 2005 letter from the DEP purporting to describe the lack of safe and effective fish passage facilities for native migratory fish species at the Lockwood, Hydro Kennebec, Shawmut and Weston dams.

- b. Intervenor FOMB. In testimony presented by its Chairman, Ed Friedman, Intervenor FOMB requests that all relevant provisions relating to fish and eel passage in the water quality certifications for the dams at issue here be replaced with the following language:

“The dam owner shall provide immediate, safe and effective upstream and downstream passage for all indigenous fish. For the purposes of this paragraph:

- a. ‘Immediate’ means the date this certification is approved by the Board of Environmental Protection.
- b. ‘Safe’ means that all fish migrating upstream can pass the dam and no fish migrating downstream are killed or injured by the dam.
- c. ‘Effective’ means efficiently.
- d. ‘Fish’ includes, but is not limited to, American eel.”

FOMB contends that the current water quality certifications do not require safe passage for fish and eels, and that its petition satisfies four of the criteria for modification of the existing certifications. Specifically, FOMB contends that: (a) the operations of the dams clearly threaten the environment because they kill and injure fish and eels and reduce their habitat; (b) the certifications fail to assure that the Kennebec River is suitable as habitat for fish and other aquatic life; (c) there is now a greater awareness of the consequences of no safe passage, as evidenced by the fact that the population of American eel is in such decline that it is now under consideration for inclusion on the Endangered Species List; and (d) the licensees are causing a violation of water quality standards because they kill and injure fish and eels and reduce their habitat.

FOMB further contends that there is extensive evidence that the four dams at issue kill and injure fish and reduce their habitat, and that immediate, safe and effective upstream and downstream passage is required by the state’s water quality standards. Specifically, FOMB discusses evidence that hydro-electric dams in general, and the Lockwood and Shawmut dams in particular, kill or injure adult eels.

FOMB also contends that Maine law expressly provides that the Board may modify a water quality certification, and that there is nothing to prevent the Board or the DEP from requesting that FERC amend its licenses for the dams to include the modified certifications. FOMB further contends that neither the Board nor the DEP is a signatory

to the KHDG Agreement, and thus did not bargain away their statutory power to modify water quality certifications.

FOMB also contends that turbines kill mostly female eels and thus threaten the eel population as a whole because eel reproduction is reduced. FOMB also contends that eels are prone to accumulating large doses of persistent organic pollutants and that turbine-killed eels become an available source of these contaminants to fish-eating predators such as bald eagle, otter, Atlantic salmon and snapping turtle.

With respect to upstream passage of migratory fish other than eels, FOMB contends that fish ladders, even if available, are not used by certain species, and that possible injury may result from trapping, pumping, handling, sorting, and trucking.

With respect to downstream passage of migratory fish other than eels, FOMB contends that dams kill out-migrating alewives, shad, Atlantic salmon and blueback herring.

FOMB contends that the fundamental requirements of safe and effective passage are blocking access to turbines and guiding eels/fish towards an alternative pathway through or around dams. FOMB discusses various measures that are used to facilitate downstream passage for eels and other fish.

FOMB further contends that the Department of Marine Resources “signed off” on the proposed plans for downstream eel passage at the subject dams despite its earlier comments that the proposed plans would be ineffective at preventing turbine entrainment.

FOMB also contends that, in view of the specific language in the KHDG Agreement, there appears to be no basis in fact for the belief that the KHDG Agreement will fall apart if the State petitions FERC to amend the licenses for the dams.

Finally, FOMB contends that it has standing as a non-profit organization dedicated to protecting the ecological, aesthetic, historic, recreational and commercial values of Merrymeeting Bay.

In support of its testimony, FOMB has submitted a number of exhibits,<sup>9</sup> including various DEP orders and DMR Kennebec River diadromous fish restoration annual reports, various reports regarding eels, photographs of eels and fish killed at various dams, information regarding contaminant analysis of eels killed at the Benton Falls Dam, a copy of the KHDG Agreement, and miscellaneous correspondence.

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<sup>9</sup> These exhibits are presented as joint exhibits of Intervenors.

Merimil Limited Partnership	)	
Hydro Kennebec Limited Partnership	)	Summary of Petitions, Petition Proceedings,
FPL Energy Maine Hydro LLC	)	Public Hearing Testimony, and Post-Hearing
	)	Briefs

- c. FPL Energy Maine Hydro LLC and Merimil Limited Partnership. FPL Energy Maine Hydro LLC (“FPLE”) and Merimil Limited Partnership<sup>10</sup> (“Merimil”) presented joint testimony and exhibits from two employees of FPLE<sup>11</sup> and two consulting fisheries biologists.<sup>12</sup>

FPLE and Merimil contend that the Department of Marine Resources, the Atlantic Salmon Commission, and the Department of Inland Fisheries and Wildlife have primary responsibility for fisheries management policies, goals and objectives in Maine, and that DMR and DIFW have primary responsibility for determining fish passage requirements in Maine.

FPLE and Merimil further contend that the Federal Energy Regulatory Commission is authorized by Congress to regulate hydropower projects in the United States, including the Lockwood, Shawmut and Weston Projects, and that FERC is obligated to incorporate appropriate terms of a state water quality certification into a new FERC license when issued.

FPLE and Merimil further contend that, once a state has issued its water quality certification and FERC has incorporated those conditions into a license, those conditions are enforceable only by FERC, and that a state may modify its certification after the FERC license is issued only if the FERC license includes a “re-opener” conditions authorizing the state to modify said conditions, or if the licensee proposes to amend its license in a way that requires a new certification.

FPLE and Merimil also contend that the FERC licenses for the Lockwood, Shawmut and Weston Projects do not include re-opener provisions for the State to modify the water quality certifications for the projects, and that, once a FERC license is issued, the license may be modified only upon the mutual consent of FERC and the licensee.

FPLE and Merimil further contend that there is no regulatory mechanism available to the Board to revoke, modify or suspend the water quality certifications for the Lockwood, Shawmut and Weston Project, and that the petitions should be dismissed.

FPLE and Merimil further contend that the settlement that resulted in the signing of the Lower Kennebec River Comprehensive Hydropower Settlement Accord and its attendant 1998 KHDG Agreement was instrumental in resolving long-running, contentious debate over the future of the Edwards Dam, and that the Settlement Accord allowed the removal

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<sup>10</sup> FPLE owns Kennebec Hydro Resources, Inc. that in turn is the General Partner and owns a 50% interest in Merimil, which owns the Lockwood Project. The project is operated by FPLE.

<sup>11</sup> F. Allen Wiley, Director of Business and Regulatory Affairs – Northeast Region, FPL Energy; and Robert C. Richter III, Senior Environmental Specialist, FPL Energy Maine Hydro LLC.

<sup>12</sup> Brandon H. Kulik, Senior Fisheries Scientist, Kleinschmidt Associates; and Scott R. Ault, Biologist and Project Manager, Kleinschmidt Associates.

of the Edwards Dam to proceed in an expeditious and cooperative manner and for fish passage measures to be implemented at upstream dams in a rational, sequential and scientific manner.

FPLE and Merimil also contend that KHDG dam owners have invested considerable time, effort and monies to support the State's fisheries restoration efforts on the lower Kennebec River, and that these efforts have been substantially enhanced by the cooperative efforts among the dam owners, State and federal resource agencies, the Kennebec Coalition, and other parties to the Settlement Accord.

FPLE and Merimil further contend that the 1998 KHDG Agreement may be subject to termination if FERC or the DEP alter or prohibit execution of terms considered essential to any party in the Agreement, and that, under such circumstances, the State may be required to refund virtually all of the \$4 million contributed to date by KHDG members and may not be entitled to \$720,000 of contributions planned between 2007 and 2010.

FPLE and Merimil also contend that the petitions to revoke, modify or suspend the water quality certifications for the Lockwood, Shawmut and Weston Projects should be dismissed since the petitioners have failed to demonstrate: (1) that the certified activities pose a threat to human health or the environment; (2) that the certifications failed to include any standard or limitation legally required on the date of issuance; (3) that there has been a change in any condition or circumstance that requires revocation, suspension or a temporary or permanent modification of the terms of the certifications; or (4) that the licensees have violated any law administered by the DEP.

FPLE and Merimil have submitted testimony from a staff environmental specialist detailing the implementation of upstream and downstream anadromous fish passage measures and downstream eel passage measures at the Lockwood, Shawmut and Weston Projects.

FPLE and Merimil have also submitted testimony from two consulting fisheries biologists, who contend that: (1) operation of the Lockwood, Shawmut and Weston Projects and related fish passage measures do not pose a threat to the restoration of catadromous eels or anadromous fish species and do not pose a threat to human health or the environment; (2) there has been no change in status or circumstances regarding anadromous fish or eels on the Kennebec River that would warrant modification of existing fish passage conditions; (3) significant eel mortality is not occurring at the Lockwood, Shawmut or Weston Projects; and (4) the studies proposed by FPLE and Merimil present a sound scientific approach to determining the passage routes used by downstream migrating eels and are in line with other state-of-the-art studies.

In support of their testimony, FPLE and Merimil have submitted the following exhibits: a map of the Kennebec River and major tributaries; an excerpt from a March 1986

Legislative Committee report on water reclassification; various documents relating to the 1998 Lower Kennebec River Comprehensive Hydropower Settlement Accord and 1998 KHDG Agreement; aerial photographs and site plans of the Lockwood, Shawmut and Weston Projects; and a map showing the location of targeted anadromous fish spawning habitat in the Kennebec River drainage area.

- d. Hydro Kennebec Limited Partnership. In testimony presented by Brian Stetson and Kevin Bernier, both employees of Brookfield Power New England,<sup>13</sup> Hydro Kennebec Limited Partnership (“HKLP”) requests that the Board dismiss the petitions.

HKLP contends that there is no site-specific information documenting significant eel injury or mortality from downstream turbine passage at the Hydro-Kennebec Project, and that the operation of the project does not pose a threat to American eels.

HKLP also contends that, during studies of downstream passage conducted at the Hydro-Kennebec Project in 2001, 2002 and 2003, there was no evidence of mortality to downstream migrating anadromous fish (primarily juvenile shad and alewife) or American eel.

HKLP further contends that an interim downstream fish passage facility has been installed and became operational at the Hydro-Kennebec Project in August 2006, that studies of the effectiveness of this facility in providing downstream passage for anadromous fish and eels are underway, and that improvements will be made to the facility as determined to be necessary to meet fishery restoration goals on the Kennebec River.

HKLP also contends that interim upstream passage of anadromous fish at the Hydro-Kennebec Project is presently addressed by the Lockwood fish lift, in that fish from the Lockwood lift are transported upstream and released above Hydro-Kennebec, and that the schedule described in the KHDG Agreement for installing a permanent upstream anadromous fish passage facility at the Hydro-Kennebec Project is based primarily upon the anticipated growth in population of American shad in the river.

HKLP further contends that upstream and downstream passage facility plans, as specified in the KHDG Agreement, are achieving the goals of fish restoration on the Kennebec River, and that the Hydro-Kennebec Project has operated, and continues to operate, in compliance with its FERC license, water quality certification, and laws administered by DEP.

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<sup>13</sup> On January 20, 2005, subsidiaries of Branscan Power (now Brookfield Power) acquired the partnership interests in Hydro Kennebec Limited Partnership, owner of the Hydro-Kennebec Project. Brookfield Power New England, a subsidiary of Brookfield Power, now operates and oversees the project.

Finally, HKLP contends that granting Intervenors' requests to modify the Kennebec River Settlement and water quality certifications will establish a significant precedent which will be detrimental to future efforts to resolve issues through a collaborative process.

In support of its testimony, HKLP has submitted the following exhibits: a graph showing Maine adult American eel landings from 1964 through 2005; a graph showing Maine elver landings from 1994 through 2005; and photographs of the interim downstream fish passage facility installed at the Hydro-Kennebec Project.

## 6. SUMMARY OF STATE AGENCY COMMENTS

Written comments on the pre-filed testimony of the parties were due from the Department of Marine Resources ("DMR"), the Department of Inland Fisheries and Wildlife ("DIFW"), and the Atlantic Salmon Commission ("ASC") (collectively, "the fisheries agencies") by February 7, 2007. The joint comments of the fisheries agencies<sup>14</sup> are summarized below.

The fisheries agencies comment that the modifications requested by the Intervenors are neither warranted nor appropriate, and urge the Board to dismiss the petitions.

The fisheries agencies also comment that the licensed activities do not pose a threat to human health or the environment and that the licenses have not failed to include a standard of legally required limitation. Specifically, the fisheries agencies comment that: (1) they have not understood the water quality standards for the Kennebec River as necessitating a complete lack of mortality or harm to migratory fish, as advocated by the Intervenors; (2) passage at hydro projects is not without risk to migrating fish, and site-specific studies are needed to avoid, minimize and mitigate any potential adverse effects; (3) DMR has only documented a total of 11 eel mortalities in the mainstem Kennebec River, and the Intervenors' assertions inappropriately rely on mortality information from the Sebasticook River; (4) additional studies are necessary to determine suitable downstream passage strategies at each project, and the licensees have been consulting with the agencies to develop approved operational plans and effectiveness studies for interim downstream passage; (5) ASC is confident that the interim upstream passage facility at the Lockwood Project is sufficient for capture and subsequent transport of Atlantic salmon over the next few years, and more work needs to be done to ensure that Atlantic salmon smolts can pass downstream with minimal injury or mortality; and (6) current fish consumption advisories because of mercury, PCBs, dioxins and DDT mean that all fish, not just eels, are a potential source of contaminants to other wildlife.

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<sup>14</sup> The fisheries agencies' comments were submitted by George Lapointe, Commissioner, Department of Marine Resources; Steven Timpano, Environmental Coordinator, Department of Inland Fisheries and Wildlife; and Patrick Keliher, Executive Director, Atlantic Salmon Commission.

The fisheries agencies further comment that there is no evidence of changes in the conditions or circumstances of American eel utilizing the Kennebec River that warrants modifying the water quality certifications for the projects. Specifically, the fisheries agencies comment that, while the potential for listing of the American eel as a threatened or endangered species was pending at the time the petitions were filed, the U.S. Fish and Wildlife Service has subsequently found that listing the American eel as either threatened or endangered is not warranted at this time.

The fisheries agencies further comment that there is no evidence of changes in the conditions or circumstances of Atlantic salmon utilizing the Kennebec River that warrant modifying the water quality certifications for the projects. Specifically, the fisheries agencies comment that: (1) the terms of the existing water quality certifications for the projects provide a suitable means for consultation to determine appropriate additional measures, if any, to minimize injury or mortality to migratory fish, including Atlantic salmon, and to improve fish passage; (2) the 1998 KHDG Agreement has provided ASC an opportunity to begin Atlantic salmon restoration work in the Kennebec River drainage that would likely not have occurred if the Agreement was never formulated; (3) the timing of initial operation of the Lockwood fish lift coincided with the initial returns of Atlantic salmon from streamside incubation of eggs in the Sandy River sub-drainage; and (4) ASC has considerable experience in transporting adult Atlantic salmon, and the Lockwood fish lift adequately addresses the interim upstream passage requirement for Atlantic salmon at this time.

Finally, the fisheries agencies comment that they strongly support continuation of the 1998 KHDG Agreement, without alteration, because it has provided a vehicle for substantial progress on the restoration and enhancement of migratory fish in the Kennebec watershed and it provides a framework for continued progress. The fisheries agencies state their concern that a decision by the Board to alter the water quality certifications for the projects may undermine the KHDG Agreement and jeopardize further progress and will discourage hydropower project owners from entering into settlement agreements with the State in the future.

In support of its comments, the fisheries agencies have submitted the following exhibits: (1) a summary of the agencies' roles and missions; (2) a copy of Title 38, §465, "Standards for classification of fresh surface waters;" (3) DMR counts of eels using upstream passage at some KHDG projects; (4) Maine Bureau of Health fish consumption advisory; and (5) the U.S. Fish and Wildlife Service 12-month finding on a petition to list the American eel as threatened or endangered (from Federal Register for February 2, 2007).

7. SUMMARY OF REBUTTAL TESTIMONY

Written pre-filed rebuttal testimony was due from the parties by February 7, 2007. This testimony is summarized below.

- a. Intervenor Watts. Intervenor Watts presented rebuttal testimony in the form of a critique of specific statements made in the direct testimony filed by FPLE and Merimil.

In rebuttal of the direct testimony of FPLE/Merimil witness Robert Richter, Mr. Watts contends that: (1) the admitted killing of American eels at FPLE’s dams is a Class E crime under Maine’s fish and game laws; (2) FPLE conducted no eel observations at its dams from 1998 until late 2004 and only began observations after a reported eel kill at the Benton Falls Dam; (3) the only scientific studies of American eel survival at Kennebec River drainage dams shows per dam downstream survival rates of 40-50 percent at best, and Mr. Richter provides no evidence to support his contention that eel mortalities at the projects are not significant; and (4) the evidence and studies referenced by Mr. Richter prove that dams do kill American eels and that FPLE’s dams kill American eels.

In rebuttal of the direct testimony of FPLE/Merimil witness Brandon Kulik, Mr. Watts responds to many specific statements made by the witness. In general, he contends that: (1) anadromous fish, including Atlantic salmon smolts, suffer significant injury and mortality in migrating downstream through the projects’ turbines; (2) the trapping and trucking of fish from the Lockwood Dam constitutes a deliberate “bypass” of the river between the Lockwood Dam and Weston Dam that prevents this river reach from being in attainment of water quality standards; (3) the project dams lack any passage mechanisms or devices specifically designed, manufactured and installed for the purpose of safely passing migrating fish; (4) migrating fish could suffer 40 percent or greater cumulative mortality when attempting to pass downstream through the four project dams, and that such a mortality rate would jeopardize the existence of the Kennebec River Atlantic salmon population; (5) all Atlantic salmon in the Kennebec River are part of the Gulf of Maine Distinct Population Segment (DPS) of Atlantic salmon; (6) dams and related hydraulic structures are not fishways; and (7) FPLE bears the burden of proof to demonstrate that its dams are capable of safely passing migrating fish and thus are not causing violations of water quality standards.

In rebuttal of the direct testimony of FPLE/Merimil witness Scott Ault, Mr. Watts contends that (1) the “observation program” of FPLE cannot determine the actual, total number of eels killed at FPLE’s dams and therefore cannot allow Mr. Ault to conclude that eels are not being killed at the dams in the magnitude asserted by the Intervenor; and (2) Mr. Ault fails to reference or discuss any of the agency consultation letters regarding downstream eel passage at the project dams or the eel tracking studies conducted to date at the Lockwood Project.

Finally, in rebuttal of the direct testimony of FPLE/Merimil witness F. Allen Wiley, Mr. Watts contends that the State has the authority to enforce water quality certification conditions at hydro-electric dams; that a regulatory mechanism exists in State law to revoke, modify or suspend the water quality certifications for the dams at issue; and that



Maine law requires Maine water bodies to be suitable habitat for all native, indigenous fish, including sea lamprey.

- b. Intervenor FOMB. Intervenor FOMB<sup>15</sup> contends that, despite the dam owners' arguments to the contrary, various legal avenues exist for the State to assure that fish and eel passage are provided at the dams at issue and that water quality standards are met.

FOMB also contends that the trapping and trucking of migrating fish removes these fish from the river between the Lockwood Dam and the Weston Dam and thus violates water quality standards.

FOMB further contends that killing up to 15% of downstream migrating fish that go through turbines, as admitted by FPLE/Merimil witness Brandon Kulik, is unacceptable.

FOMB also contends that the recent Status Review for Anadromous Atlantic Salmon in the United States details the immediate and delayed effects of hydroelectric dams on migrating Atlantic salmon, including injury, immediate and delayed mortality, and delays in migration.

FOMB further contends that, in order to comply with the terms of the KHDG Agreement, the dam owners must prevent fish access to their turbines until site-specific studies are conducted to demonstrate that downstream passage of adult Atlantic salmon through turbines will not result in significant injury or mortality.

FOMB also contends that FPLE admits that its dams kill eels, that turbines adversely affect eel abundance on a regional or local scale, and that state agencies and boards such as the BEP should take immediate action to stem the species decline.

Finally FOMB contends that FPLE can afford to provide safe downstream passage and that expense should not be a considered factor in modifying certifications or in satisfying water quality standards.

In support of its rebuttal testimony, FOMB has submitted the following exhibits:<sup>16</sup> (1) excerpts from "Status review for Anadromous Atlantic Salmon [*Salmo salar*] in the U.S. 2006;" and (2) the U.S. Fish and Wildlife Service 12-month finding on a petition to list the American eel as threatened or endangered (from Federal Register for February 2, 2007).

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<sup>15</sup> FOMB rebuttal testimony was submitted by its Chairman, Ed Friedman.

<sup>16</sup> These exhibits are presented as joint exhibits of Intervenor.

- c. FPLE and Merimil. FPLE and Merimil presented joint rebuttal testimony and exhibits from each of its direct testimony witnesses.<sup>17</sup>

FPLE/Merimil witness F. Allen Wiley contends that: (1) Intervenors' claim that, in order to meet water quality standards, certifications must be modified to require immediate permanent upstream and downstream fish passage has no basis in law and is contrary to the longstanding positions of Maine's fisheries agencies and the DEP; (2) Intervenors' claim that, in order to meet water quality standards, certifications be modified to require passage of all migrating fish without injury or mortality has no basis in law and is contrary to the longstanding positions of Maine's fisheries agencies and the DEP; (3) reinterpreting Maine's water quality standards as proposed by the Intervenors would turn Maine's water quality laws and fisheries management policies on their heads and could have grave implications on fish restoration efforts throughout the State; and (4) the petitions to modify the water quality certifications for the Lockwood, Shawmut and Weston Projects should be dismissed.

FPLE/Merimil witness Robert Richter contends that: (1) Intervenors have not demonstrated that the Lockwood, Shawmut or Weston Projects pose a threat to human health or the environment, that the project owners have violated any laws administered by the DEP, or that there has been a change in a condition or circumstance that requires revocation, suspension or modification of the certifications for the projects; (2) Intervenors' claims that upstream and downstream passage measures for anadromous species are not adequate at the projects are not supported by any site specific facts; and (3) Intervenors' claims that significant eel mortality is occurring at the projects is not supported by any specific evidence.

FPLE/Merimil witness Brandon Kulik contends that neither of the Intervenors has presented any credible evidence that the upstream or downstream fish passage provisions at the Lockwood, Shawmut or Weston Projects are precluding restoration of anadromous fish in the Kennebec River.

FPLE/Merimil witness Scott Ault contends that: (1) neither of the Intervenors has presented any credible evidence that downstream eel passage measures are not adequate, or that the planned studies will not provide adequate information to determine if additional passage measures are appropriate at the Lockwood, Shawmut and Weston Projects; and (2) the decision by the USFWS not to list the American eel is further evidence that there has not been a change in circumstances that would warrant modification of the water quality certifications.

In support of their rebuttal testimony, FPLE and Merimil have submitted the following exhibits: a 1985 DEP summary of the scientific basis for proposed changes to Maine's

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<sup>17</sup> See footnotes 10 and 11 above for witness identifications.

water quality standards; an excerpt from EPA’s Water Quality Standards Handbook; an excerpt from a 1986 Legislative report on water reclassification; various photographs of downstream fish passage routes available at the Lockwood, Shawmut and Weston Projects; a photograph of the Lockwood fish lift, trap and truck facility; and excerpts from various DMR annual progress reports on Kennebec River anadromous fish restoration.

- d. HKLP. HKLP presented rebuttal testimony from one of its direct testimony witnesses, Brian Stetson, as well as from Lewis Flagg, a retired State fisheries biologist and former Deputy Commissioner and Acting Commissioner of DMR, and Matthew Manahan, an attorney representing HKLP.

HKLP witness Brian Stetson contends that the Hydro-Kennebec Project does not pose a threat to human health or the environment, in that (1) an interim downstream fish passage system has been installed and is operational at the project, (2) are no anadromous fish seeking upstream passage at the project, (3) there is no evidence of eel or fish mortality or injury at the Hydro-Kennebec Project, and (4) the hydropower generated by the project is a clean and renewable energy source, which provides substantial benefits to the environment.

HKLP witness Lewis Flagg contends that the water above and below the Hydro-Kennebec Project are suitable for the designated use of fish habitat, and that there has not been a change in any condition or circumstance that requires revocation, suspension or modification of the Hydro-Kennebec Project’s certification. Specifically, HKLP witness Flagg (1) explains the rationale for the 1986 and 1998 KHDG Agreements, (2) summarizes the benefits and accomplishments of the Agreements to the anadromous and catadromous fish resources of the Kennebec River, (3) supports the phased construction of fish passages on the Kennebec and Sebasticook drainages, (4) notes that the USFWS has determined that the American eel is not threatened or endangered, and (5) reviews the steps being taken by state and federal agencies to conserve and protect the American eel.

In support of its rebuttal testimony, HKLP has submitted the following exhibits: various plans and reports regarding the interim downstream fish passage facility at the Hydro-Kennebec Project; the U.S. Fish and Wildlife Service 12-month finding on a petition to list the American eel as threatened or endangered (from Federal Register for February 2, 2007); USFWS press release and question and answer document concerning the eel non-listing decision; the Maine Supreme Judicial Court’s July 30, 1991 decision in *Bangor Hydro-Electric v. Board of Environmental Protection*; the Maine Supreme Judicial Court’s February 15, 2005 decision in *S.D. Warren Co. v. Board of Environmental Protection*; several letters from the DEP regarding downstream fish passage at the American Tissue Dam; and FERC’s 1998 order amending the license for the Hydro-Kennebec Project.

8. SUMMARY OF POST-HEARING BRIEFS

At the close of the public hearing on March 16, 2007, the record was left open until April 9, 2007, for the parties to submit post-hearing briefs.<sup>18</sup> These briefs are summarized below.

- a. Intervenor Watts. Mr. Watts contends that, according to the Maine Attorney General and the Maine DEP, the downstream fish passage language in the water quality certifications for the dams at issue makes it legal for the dams to kill every American eel swimming down the Kennebec River and prohibits the State of Maine from taking any enforcement action to stop this killing.

Mr. Watts further contends that the two scientific studies conducted to date show downstream passage survival rates for adult eels of 40-50 percent, and that simply arithmetic modeling shows that survival rates of 40-50 percent at each of the four dams at issue will result in 90-95 percent cumulative mortality for adult American eels, Atlantic salmon or American shad migrating to the ocean.

Mr. Watts also contends that the existing water quality certifications do not include any specific, measurable performance benchmarks for fish passage effectiveness, and do not require any specified and enforceable measures for safe and effective downstream passage at the dams at issue.

Mr. Watts further contends that (1) the killing of fish in the turbines of a hydro-electric dam is illegal, (2) Maine law requires 100 percent safe passage at hydro-electric dams, and (3) assertions that dam owners have a legal right to kill an indefinite number of fish in their turbines have no basis in law.

Mr. Watts also contends that there are many proven and effective ways for dam owners to not kill fish.

Finally, Mr. Watts contends that the task of defining “safe and effective” fish passage cannot be left to Maine fisheries agencies or DEP, and that it is up to the Board to precisely define the level of fish passage required by Maine law and to establish clear performance benchmarks so as to make the Board’s standards enforceable under law.

- b. Intervenor FOMB. FOMB contends that the Board is responsible for issuing water quality certifications that safeguard the biological integrity of the Kennebec River, and that the evidence is clear that a requirement to provide safe and effective eel passage is

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<sup>18</sup> The record was also left open for the receipt of U.S. Fish and Wildlife Service guidance policy regarding fish passage efficiency. However, no such guidance policy apparently exists, and no additional information on this issue was admitted into the record.

required for the Kennebec River to attain water quality standards, and that the current certifications must be modified accordingly.

FOMB also contends that four of the statutory criteria for modifying water quality certifications are met. Specifically:

- FOMB contends that dam operations are causing a violation of water quality standards and pose a threat to the environment, in that (1) the dams at issue kill and injure a significant number of eels, (2) the dams at issue kill a significant number of fish, (3) the dams at issue block passage in the river between the Lockwood Dam and the Weston Dam, (4) there is no evidence any of the types of “passage” provided at the dams actually works, and (5) the certifications do not require the dam owners to do anything except study downstream eel passage, and even these studies have not been done properly or on time;
- FOMB contends that the certifications fail to include a legally required standard, in that the certifications do not require the dam owners to do anything to actually provide safe eel and fish passage; and
- Finally, FOMB contends that there has been a change in condition that warrants modification of the certifications, in that (1) there has been a significant amount of new evidence regarding the harm dams cause to eels, (2) the recent Status Review on Kennebec Atlantic salmon documents the significant harm the dams cause to salmon, and (3) it was unanticipated that there would be a wholesale failure to complete the eel studies required under the KHDG Agreement.

FOMB further contends that, by its questioning at the public hearing, the DEP staff was asserting that the Board should adopt a technology based standard, in which dam owners should be required to do only what has been demonstrated thus far they can so with respect to eel and fish passage. However, FOMB contends that water quality certifications require that an activity not violate water quality standards, regardless of what technology is available. FOMB also contends that the Board should view the DEP staff’s opposition to modification of the certifications with skepticism, because the DEP staff has been an integral part of the failure to date to achieve safe passage.

FOMB also contends that the state’s fisheries agencies and the DEP have failed to adequately address eel and fish passage problems at the dams, and that the Board must therefore take control of the situation.

FOMB further contends that the dam owners’ legal defenses are without merit. Specifically, FOMB contends that: (1) the 1998 KHDG Agreement does not prevent modification of the water quality certifications, because the Agreement cannot trump applicable state water quality standards and the dam owners bear responsibility for

breaches of the Agreement; (2) both federal regulations and state law allow for modifications of certifications, and the existence of a FERC license does not mean that the certifications cannot be modified; and (3) the Board has the power to enforce state water quality certifications, even if it cannot enforce the terms of FERC licenses.

Finally, FOMB urges the Board to adopt Intervenor's proposed language requiring 100% safe passage, arguing that the dam owners, as private users of an important public resource, should be required to meet the highest possible environmental standards using the best available technologies.

- c. FPLE and Merimil. FPLE/Merimil contend that the Board's scope of review and jurisdiction is limited by Intervenor's tactical choices, prior Board Orders, and Federal law. Specifically, FPLE/Merimil contend that: (1) the Intervenor is time-barred from arguing that the certifications failed to include any standard or limitation legally required on the date of issuance; (2) the Intervenor has waived any claim that FPLE has violated or is violating its certifications; (3) the certifications do not contain relevant reopener clauses, and the legal effect of any attempt to modify the certification in the absence of such reopeners "is highly questionable."

Alternatively, FPLE/Merimil contend that FERC is the only legally proper forum for any challenges to the license conditions for the projects. Specifically, FPLE/Merimil contend that: (1) once a water quality certification has been incorporated into a FERC license, the conditions of the certification are enforceable only by FERC, not by the State; (2) absence specific reopener provisions in the certification that are incorporated into the FERC license, FERC licenses may be amended only upon the consent of FERC and the licensee; and (3) none of the certifications at issue in this proceeding contain a reopener clause with respect to eel passage that gives the Board of DEP any authority to change the certification in any way.

FPLE/Merimil further contend that the water quality certifications for the Lockwood, Shawmut and Weston Projects contained all standards or limitations legally required on the date of issuance, and that the Intervenor has not presented any evidence calling into question the record upon which the DEP based its past certifications decisions requiring fish passage in accordance with the 1998 KHDG Agreement.

FPLE/Merimil also contend that the Intervenor has not satisfied their burden of proving that there has been any change in condition or circumstance that requires revocation, suspension or modification of the terms of the water quality certifications. Specifically, FPLE/Merimil contend that: (1) during the pendency of this proceeding, the U.S. Fish and Wildlife Service found that the American eel is not an endangered or threatened species; (2) mere consideration by U.S. fish and Wildlife Service of a petition to list the Kennebec River Atlantic salmon as an endangered species is not legally sufficient to constitute a change requiring revocation, suspension or modification; and (3) there have

been no changes in the construction or operation of the projects, the characteristics of the water, the applicable water quality criteria, or applicable effluent limitations or other requirements.

FPLE/Merimil further contend that they have not violated any law administered by the DEP. Specifically, FPLE/Merimil contend that: (1) there is no support for Mr. Watts’s argument that it is illegal for any dam in Maine to kill an Atlantic salmon; (2) hydropower is a designated use under Maine’s water quality laws and the certifications for the Lockwood, Shawmut and Weston Projects contemplate some impact to aquatic life; (3) there is no legal requirement that immediate installation of fish passage facilities must be implemented to achieve compliance with Maine’s water quality standards; and (4) the DEP made a case-by-case determination regarding the need for fish passage at the projects and determined that incorporating the terms of the 1998 KHDG Agreement would provide adequate passage to satisfy the requirements of the MWDCA and Maine’s applicable water quality standards.

FPLE/Merimil also contend that the Intervenors have not satisfied their burden to establish that the Lockwood, Shawmut and Weston Projects pose a threat to human health or the environment. Specifically, FPLE/Merimil contend that: (1) the Intervenors have not proven by substantial site-specific evidence that existing interim downstream fish passage measures at the projects are significantly unsafe or that the projects are causing a significant loss or impact on anadromous fish or eels populations; and (2) Mr. Watts speculatively inflated the level of cumulative impact to migrating fish and eels through the projects, and erred in assuming that eel only pass through the projects’ turbines.

Finally, FPLE/Merimil contend that the Board should not alter the 1998 KHDG Agreement, because (1) the Agreement has greatly enhanced the Kennebec River fishery resources, (2) altering the terms of the Agreement would have a “chilling effect” on any future settlement negotiations and would delay fish passage on the Kennebec River; and (3) if altered, the Agreement may be declared null and void and the State would have to reimburse dam owners for financial contributions made to date.

- d. HKLP.<sup>19</sup> HKLP contends that the certification for the Hydro-Kennebec Project includes all legally required standards on the date of issuance and HKLP has not violated any law

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<sup>19</sup> Matthew Manahan submitted pre-filed testimony on behalf of HKLP. Because Mr. Manahan’s testimony was addressed to legal argument, it was more appropriately considered as part of HKLP’s post hearing briefing of the issues. Matthew Manahan argues that the Intervenor’s failed to demonstrate that the Hydro-Kennebec Project certification does not include any standard or limitation legally required on the date it was issued, or that HKLP has violated any law administered by DEP. Specifically he asserts that the Maine Supreme Judicial Court’s 2005 decision in *S.D. Warren v. Board of Environmental Protection* (1) did not hold that immediate installation of fish passage facilities is required to achieve compliance with Maine’s water quality standards, (2) did not hold that fish passage at hydropower projects must result in zero fish mortality or injury in order for a project to be in compliance with water quality standards; and (3) rejected the notion that what is required for fish passage at one hydropower project is required at all projects. Mr. Manahan further contends that the conditions contained in the water quality

administered by the DEP. Specifically, HKLP contends that: (1) Maine’s water quality standards do not require installation at the Hydro-Kennebec Project of an upstream fish passage facility for anadromous fish; (2) Maine’s water quality standards do not require that hydropower project must pass all native migratory species with no mortality or injury. HKLP further contends that (1) A “no mortality” standard is unachievable and would make the designated use of hydropower generation impossible to achieve, (2) an assumption of cumulative mortality at hydropower projects does not constitute substantial evidence that a violation of Maine’s water quality laws has occurred, and (3) there is no site-specific evidence of significant eel mortality at the Hydro-Kennebec Project.

HKLP further contends that the operation of the Hydro-Kennebec Project does not pose a threat to human health or the environment, and that the Intervenor base their argument that the project poses a threat to human health and the environment on documentation of fish mortality at two projects on other rivers and on the assumption that all hydropower projects cause some fish mortality or injury.

HKLP also contends that there has been no change in any condition or circumstances that requires modification of the certification for the Hydro-Kennebec Project. Specifically, HKLP contends that: (1) on February 2, 2007, the U.S. Fish and Wildlife Service has issued its decision finding that the American eel is not an endangered or threatened species; (2) “the greater awareness of the consequences of no safe passage” for eels is not a basis upon which to modify the certification; and (3) the pending petition to list Atlantic salmon on the Kennebec River as an endangered species is not a change circumstance or condition that requires modification of the certification.

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certification for the Hydro-Kennebec Project are sufficient to ensure compliance with water quality standards. Finally, Mr. Manahan contends that any decision by the BEP to modify the certification for the Hydro-Kennebec Project would have no effect, because the certification does not contain a reopener condition that has been incorporated into the FERC license for the project.



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Finally, HKLP contends that modification of the certification for the Hydro-Kennebec Project would have no legal effect because (1) the certification does not include a reopener, (2) once FERC issues a license, the certification has no further effect independent of the license, and (3) FERC did not incorporate any of the certification conditions into the 1998 license amendment.

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This summary prepared by Dana Murch, Department of Environmental Protection.

Date: June 21, 2007

STATE OF MAINE  
Sagadahoc, ss.

SUPERIOR COURT  
Civil Action  
Docket No. CV-07-

FRIENDS OF MERRYMEETING BAY )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 MAINE BOARD OF ENVIRONMENTAL )  
 PROTECTION, )  
 )  
 Respondent, )

**PETITION FOR REVIEW OF FINAL AGENCY ACTION  
BY THE MAINE BOARD OF ENVIRONMENTAL PROTECTION**

For its Petition for review of final agency action by the Maine Board of Environmental Protection, Petitioner states as follows:

**INTRODUCTION**

1. Dams owned by large energy conglomerates are causing a significant problem on the Kennebec River: they are killing migratory eels and fish, and blocking and ruining their habitat. This petition seeks review of a Board of Environmental Protection final action that furthers this problem.

**THE PARTIES**

2. Petitioner Friends of Merrymeeting Bay ("FOMB") is a Maine non-profit corporation dedicated to protecting the ecological, aesthetic, historical, recreational and commercial values of Merrymeeting Bay (the "Bay"). FOMB works to preserve and protect ecosystems of the Bay through education, land conservation, and research, advocacy, and membership events. The geographic area of concern for FOMB is the mid-coast Maine riverine delta and watershed consisting of the Kennebec and five other

rivers. FOMB has over 400 members who use and enjoy these rivers. FOMB members are concerned about the declining American eel population and threats to eels and fish in the Kennebec, and FOMB has been active in eel and fish issues from both educational and advocacy standpoints. FOMB's principal place of business is located in Richmond, Maine, located in Sagadahoc County.

3. Respondent Board of Environmental Protection (the "Board") is a citizen board created by the Legislature to provide, among other things, independent and timely decisions on the interpretation and administration of the laws relating to environmental protection. 38 MRSA § 341-B.

#### **NATURE OF ACTION TO BE REVIEWED**

4. Section 401 of the federal Clean Water Act, 33 U.S.C. § 1341, provides that in order to obtain a federal license to operate, dischargers to navigable waters such as hydroelectric dams must be issued a water quality certification certifying that the dam will not cause violations of state water quality standards. In Maine, a water quality certification is issued by the Department of Environmental Protection ("DEP") or the Board.

5. The Clean Water Act also provides that water quality certifications must impose limits on dam operations necessary to assure that the dams will comply with state water quality standards. 33 U.S.C. § 1341(d).

6. Water quality certifications can be modified. In Maine, 38 MRSA § 341-D(3) provides that the Board may modify, in whole or in part, any "license." The definition of "license" includes any "certification" issued by DEP, DEP Rules Ch. 2, § 1(J).

7. DEP issued water quality certifications to four dams on the Kennebec River which are at issue here: the Lockwood Hydro Project, the Hydro-Kennebec Project, the Shawmut Hydro Project, and the Weston Hydro Project. All are owned by FPL Energy Maine Hydro LLC ("FPL") or an affiliate of FPL, except Hydro-Kennebec, which is owned by an affiliate of Brookfield Power.

8. The water quality certifications are not assuring that Kennebec water quality standard are being achieved because the certifications allow significant numbers of eels and fish to be killed and injured, and allow eel and fish habitat to be blocked and reduced to the point of grave concern. Accordingly, FOMB petitioned the Board to modify the certifications for the four dams so that they would require the dams to provide immediate, safe and effective passage for fish and eels (the "Board Petition"). After a hearing, the Board denied FOMB's Petition.

#### **FINAL AGENCY ACTION TO BE REVIEWED**

9. The Board voted to deny FOMB's Petition to modify the water quality certifications on July 5, 2007. The reasons for the Board's decision to deny the Board Petition were set forth in a ten page document titled "Petitions for Revocation, Modification, or Suspension," also dated July 5, 2007 (the "Denial Order"). It is the July 5 vote and the Denial Order (collectively, the "Board's decision") that FOMB asks this Court to review.

#### **GROUND'S UPON WHICH RELIEF IS SOUGHT**

10. The Board may modify a water quality certification for any of seven reasons, set forth in 38 MRSA § 341-D(3) and DEP Rules, Ch. 2, § 27. In its Board Petition,

FOMB asserted four reasons the Board should modify the water quality certifications of the dams:

- a. The licensed activity poses a threat to human health or the environment (38 MRSA § 341-D(3)(C));
- b. The license fails to include any standard or limitation legally required on the date of issuance (38 MRSA § 341-D(3)(D));
- c. There has been a change in circumstance that requires modification (38 MRSA § 341-D(3)(E));
- d. The license violates a law administered by DEP (38 MRSA § 341-D(3)(F)).

11. The hearing evidence established that the operations of the dams kill and injure a significant number of eels and fish, block their passage, and significantly reduce their habitat. The evidence also established that the types of “passage” the dams claim they are providing (sluices, gates, spillage over the top of the dam, and passage through turbines) in fact do not provide adequate safe passage.

12. Further, the hearing evidence established that dam operations cause a violation of water quality standards because:

- the dams render the Kennebec unsuitable as habitat for eels and fish, in violation of 38 MRSA § 465(3)(A) and 4(A);
- the Weston dam causes a Class B stretch of the Kennebec to be impaired, violating 38 MRSA § 465(3)(A), and detrimentally changes the resident biological community, in violation of 38 MRSA 465(3)(C);
- Lockwood, Hydro-Kennebec and Shawmut prevent the Kennebec from supporting all species of indigenous fish and maintaining the structure and function of the resident biological community, in violation of 38 MRSA 465(3)(C);
- existing in-stream uses (habitat for eels and fish) are not being maintained and protected, in violation of 38 M.R.S.A. § 464(4)(F).

13. The hearing evidence also established that the water quality certifications do not require the dams to assure compliance with state water quality standards.

14. Further, the hearing evidence established that after the original water quality certifications were issued, new evidence regarding eels was generated and a federal review of Kennebec Atlantic Salmon was issued documenting the significant harm the dams cause to salmon. In addition, it was unanticipated at the time the water quality certifications were issued that the dam owners would not fail to complete various studies regarding eel passage that they were obligated to conduct.

15. In short, while only one reason for modification must be met, the evidence clearly established that all four asserted bases for modification were met. However, the Board Petition was denied in a manner that meets a number of the criteria warranting a reversal or modification of final agency action under 5 MRSA § 11007(4).

The Board's Decision Was Unsupported On The  
Whole Record And Was Arbitrary, Capricious  
And Characterized By Abuse Of Discretion

16. The Board's June 5, 2007 decision and the Denial Order was unsupported on the whole record and arbitrary, capricious and characterized by an abuse of discretion for the following reasons, among others:

17. The Board found it had not been presented with evidence that the significant mortality in eels passing through dam turbines will result in a threat to the population of Kennebec River eels. However, this finding is contradicted by evidence from the Department of Marine Resources ("DMR"), the United States Fish and Wildlife Service ("USFWS"), the dam owners' own experts, and peer reviewed scientific literature, among other sources. There is no evidence to support the Board's finding.

18. The Board found it is not possible to determine suitable downstream passage strategies at each dam without additional studies. This finding is contradicted by the evidence of proven strategies that could be implemented now, including some being used at the Hydro-Kennebec dam that the FPL-owned dams could employ. In addition, the evidence showed that other water quality certifications issued by DEP do require adequate eel and fish passage. There is no evidence to support the Board's finding.

19. The Board found compliance orders that DEP issued to the dams require owners to take measures to prevent significant eel mortality while eel passage studies are being conducted. This finding is contradicted by the evidence as to the true content of the Compliance Orders, which in fact do not require that the dam owners provide adequate safe passage for eels. There is no evidence to support the Board's finding.

20. The Board makes reference in its Denial Order to "measures in place to prevent significant eel mortality" while eel passage studies are being conducted. The evidence shows there are no such measures in place. There is no evidence to support the Board's finding.

21. With respect to the eel passage studies being conducted, the evidence shows that there is no definite end point to the studies. The studies were required to be completed five years ago, and there is no end in sight as to when they will be completed.

22. The Board found there was no reliable information demonstrating mortality of anadromous fish species on the Kennebec. The evidence from the Atlantic Salmon Biological Review Team and the dam owners' experts contradict this finding.

23. The Board found the water quality certifications provide a means for the dam owners to consult with state agencies about fish passage. The evidence established that the ability to consult is not translating into safe fish passage.

24. The Board found the evidence demonstrated that requiring immediate downstream eel passage at this time would be neither warranted nor effective. For the reasons set forth in paragraphs 11-23, above, among other reasons, the evidence contradicts this finding. Nor is there evidence to support the Board's finding.

25. The Board made no findings with respect to the need to modify the water quality certifications to provide upstream passage for migrating fish. The uncontradicted evidence established that there are no fish migrating upstream between the lowermost dam, Lockwood and the farthest upstream dam, Weston. Instead, some fish are trapped below the Lockwood dam and trucked to locations above the Weston dam. Significant reaches of the river are biologically bereft, contrary to the requirements of water quality standards.

26. The Board found that the water quality certifications do not contain a specific "reopener" allowing the certifications to be modified. This finding is erroneous. FOMB recognizes that this finding was not the basis for the Board's decision. Nonetheless, FOMB anticipates this finding may come into play in the event the dam owners intervene in this proceeding.

27. In addition, FOMB refers to paragraphs 28-38, below, as additional reasons, among others, why the Board's decision was arbitrary, capricious, and characterized by an abuse of discretion.

The Board's Decision Was Affected By Errors Of Law



28. The Board's decision was affected by the following errors of law, among others.

29. As a matter of law, a water quality certification cannot allow the licensee to violate water quality standards. The water quality certifications for the four dams at issue allow the dams to cause violations of the water quality standards for the Kennebec.

30. Similarly, as a matter of law, no long "phase-in period" to assure compliance with water quality standards is allowed, but the Board believes that such a phase-in is allowed.

31. As a matter of law, a compliance order issued with respect to a defective water quality certification, which is the case here, is not the functional equivalent of having a valid water quality certification.

32. As a matter of law, water quality standards cannot be deemed satisfied when the designated uses of the waterbody are not actually present. The designated uses of the Kennebec are not present as a result of the dam's operations, and have not been for some time.

32. The Board stated: "Decisions regarding whether and when fish passage facilities should be required as part of a water quality certification for a given dam are made in the context of fishery management goals and objectives, habitat suitability and availability, and current status of fish passage." This standard does not exist in the State's water quality laws, or any applicable federal law, and is unlawful.

33. The Board found "[t]here is no legal or practical justification for requiring that fish passage be constructed at a dam when that passage facility is not now, and may never be, actually used by migrating fish." This standard is unlawful because it allows

the grandfathering of water quality standard violations, and in any event is inapplicable to the four dams on the Kennebec.

34. The agreement between dam owners, the State, the federal government and other stakeholders in 1998 as to eel and fish passage, known as the "KHDG Agreement," cannot and does not, as a matter of law, supplant the requirement that water quality certifications assure compliance with water quality standards.

35. The Board's decision did not take into account that the Clean Water Act requires that water quality certifications impose limits on dam operations necessary to assure that the dams will comply with state water quality standards.

36. The Board's decision violated its mandate to independently make decisions on the interpretation and administration of the laws relating to environmental protection because it abdicated the decision as to whether to modify the water quality certifications and allowed DMR and the Atlantic Salmon Commission to make the decision. 38 MRSA § 341-B.

#### The Board's Decision Violated Statutory Provisions

37. The Board's decision violates the requirements for water quality certifications set forth in the Clean Water Act, 33 U.S.C. § 1341.

38. The Board's decision violates its mandate to independently make decisions on the interpretation and administration of the laws relating to environmental protection. 38 MRSA § 341-B.

#### THE MANNER IN WHICH FOMB IS AGGRIEVED

39. A description of FOMB and its concern for the protection of eels and fish on the Kennebec is set forth in Paragraph 1.

40. The evidence established that a healthy Kennebec is of economic and personal importance to FOMB members. From both an aesthetic and economic standpoint, the use and enjoyment of the Kennebec River and Merrymeeting Bay by FOMB members are adversely affected by the dams' operations because the dams kill and injure eels and fish, block their passage, and ruin their habitat.

41. Among other evidence, the testimony of FOMB member and Chairman Ed Friedman established that he is a long-time Maine guide with a kayaking business along Merrymeeting Bay. He has conducted kayaking tours and instruction in Merrymeeting Bay and on the Kennebec River since the mid 1980s. He has also conducted tours by skiff and provided interpretive guiding services for various groups such as Maine Audubon and Mid-Coast Senior College on charter boats coming up the river. Services Mr. Friedman conducts on the Bay and rivers are a significant part of his business. The slaughter of eels and other migratory fish by dams adversely affects his livelihood, which is based in large part on a healthy population of native fish present in the unique system of the Bay.

42. Other FOMB members made presentations to the Board as well, and discussed their personal interest and stake in the issues raised by the Board Petition.

43. FOMB and its members have a right to water quality certifications that comply with applicable law. Further, the public trust placed in the Board to administer water quality laws has been violated with the Board decision.

#### DEMAND FOR RELIEF

44. FOMB requests that this Court grant one or more of the following:

- a. reverse the Board decision;

b. reverse the Board decision, order the Board Petition to be granted, and direct the Board to modify the water quality certifications so as to provide immediate, safe and effective upstream and downstream passage for eels and fish;

c. reverse the Board decision, order the Board Petition to be granted, and direct the Board to modify the water quality certifications so as to provide immediate, safe and effective downstream passage for eels;

d. reverse the Board decision, order the Board Petition to be granted, and direct the Board to modify the water quality certifications so as to provide immediate, safe and effective upstream and downstream passage for fish;

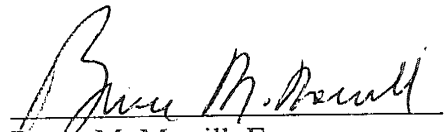
e. reverse the Board decision, order the Board Petition to be granted, and direct the Board to modify the water quality certifications as this Court may determine is necessary to assure compliance with water quality standards and/or remove threat to eels and fish;

f. reverse the Board decision, order the Board Petition to be granted, and direct the Board to determine how best to modify the water quality certifications so as to assure compliance with water quality standards;

g. vacate the Board decision and remand the Board Petition to the Board for a decision on the Board Petition that will correct the errors of law made by the Board;

h. Such other relief as the Court may determine to be appropriate.

Dated at Portland, Maine, this 3<sup>rd</sup> day of August, 2007.



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Attorneys for Friends of  
Merrymeeting Bay

STATE OF MAINE  
Sagadahoc, ss.

SUPERIOR COURT  
Civil Action  
Docket No. AP-07-010

FRIENDS OF MERRYMEETING BAY

Petitioner

v.

MAINE BOARD OF ENVIRONMENTAL  
PROTECTION

Respondent

**ORDER OF DISMISSAL FOR LACK OF JURISDICTION**

This matter comes before the court on Respondent Maine Board of Environmental Protection's (Board) motion to dismiss the appeal of Friends of Merrymeeting Bay (Friends) under M.R. Civ. P. 80C. For the reasons set forth below, the motion to dismiss is granted for lack of subject matter jurisdiction, namely the absence of reviewable final agency action for purposes of the Maine Administrative Procedure Act.<sup>1</sup>

In a decision issued today, this court dismisses an appeal by Ed Friedman from the decision of the Board to dismiss his petition to modify the water quality certifications for designated hydro projects located on the Androscoggin and Little Androscoggin Rivers. *See Friedman v. Maine Board of Environmental*

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<sup>1</sup> Based on this outcome, it is not necessary to address the question of standing raised by the Respondent Board. *See Morse Bros. v. Webster*, 2001 ME 70, ¶ 32, 772 A.2d 842, 852; *Glynn v. City of South Portland*, 640 A.2d 1065, 1067 (Me. 1994). As does the decision today in the companion case, *Friedman v. Maine Board of Environmental Protection*, Super. Ct., Sag. Cty., Docket No. AP-07-06, this decision assumes, without deciding, that the Friends do have standing for purposes of this proceeding.

*Protection*, Super. Ct., Sag. Cty., Docket No. SAG-AP-07-06. The Friends have filed a different petition seeking different relief with regard to different projects on the Kennebec River. In this instance, the Board held a public hearing in response to the petition and eventually determined not to take action to modify, suspend or revoke the permits or water quality certifications in question. The Board's analysis and rationale for its conclusion are reflected in a July 5, 2007 order dismissing the Friends' petition.

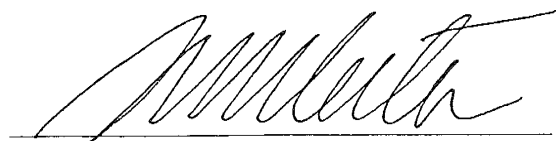
Thus, after a different procedural route and a more detailed consideration of the Friends' petition, the Board came to the same conclusion with respect to the Friends' petition as it did with respect to Mr. Friedman's petition: that no action was warranted and that the petition should be dismissed. Given this identity in outcome, and given that both petitions and both appeals arise under the same set of statutes and rules, this court discerns no difference in substance between the jurisdictional issues presented in this appeal and those presented in the *Friedman* case.

Perceiving no need to reiterate in detail its reasoning in the *Friedman* order, this court hereby adopts that reasoning and concludes that it lacks jurisdiction because there is no final agency action subject to judicial review for purposes of Rule 80C and the Maine Administrative Procedure Act.

For the foregoing reasons, the Board's motion to dismiss is GRANTED. The Rule 80C appeal of Friends of Merrymeeting Bay is DISMISSED for lack of jurisdiction.

The clerk shall incorporate this Order into the docket by reference pursuant to M.R. Civ. P. 79(a).

DATED: November 8, 2007

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

A. M. Horton  
Justice



Date Filed November 5, 2007 Kennebec County Docket No. AP-07-73

Action Appeal 80C

**J. JABAR**

Janet M. McClintock, AAG

Douglas Harold Watts  
131 Cony Street  
Augusta ME 04330

Maine Board of Environmental Protection  
17 State House Station  
Augusta ME 04333-0017

- Messalonskee Stream Hydro, LLC (PII)

State of Maine vs.

Offense	Attorney
	Matthew D. Manahan, Esq. (Messalonskee) Pierce Atwood - One Monument Square Portland, ME 04101
Date of Entry	
11/06/2007	Filed 11/05/2007: Petition for Review of Final Agency Action by the Maine Board of Environmental Protection filed by plaintiff, pro se. along with Motion Requesting Temporary Restraining Order.
12/6/07	Written Appearance Of Messalonskee Stream Hydro LLC, filed 11/26/07. s/Manahan, Esq.
12/7/07	Memorandum In Opposition Of Party-In-Interest Messalonskee Stream Hydro, LLC To Petitioner's Motion Requesting Temporary Restraining Order, filed 11/26/07. s/Manahan, Esq.
12/17/07	ORDER ON MOTION FOR TEMPORARY RESTRAINING ORDER, Marden, J. Without hearing, motion DENIED. Issue briefing schedule. Copies mailed to atty and Pltf.
-----	Notice and Briefing Schedule mailed to atty. of record and party.
12/17/07	Motion yo Dismiss of Party-in-Interest Messalonskee Stream Hydro, LLC and incorporated Memorandum of Law, filed. s/Manahan, Esq. (12/11/07) Proposed Order, filed.
12/17/07	Request for Hearing, filed. s/Manahan, Esq.
12/17/07	Notice and Briefing Schedule mailed to atty. of record/party
12/19/07	Respondent Maine Board of Environmental Protection's Motion to Dismiss Rule 80C Appeal and incorporated Memorandum of Law, filed. s/McClintock, AAG Notice of Hearing, filed. s/McClintock, AAG (12/6/07) Proposed Order, filed.
12/19/07	Respondent Maine Board of Environmental Protection's Motion to Extend Time to File Agency Record and incorporated Memorandum of Law, filed. Notice of Hearing on Maine Board of Environmental Protection's Motion to Extend Time to File Agency Record, filed. s/McClintock, AAG Proposed Order, filed. (12/6/07)
12/20/07	Letter regarding briefing schedule and pending motions, filed. s/McClintock, AAG
12/26/07	Response of Petitioner to Respondents Motions to Dismiss, filed. s/Watts,

Date of Entry	Docket No. _____
1/2/08	<p>Reply of Party-In-Interest Messalonskee Stream Hydro LLC to Petitioner's Opposition to Motions to Dismiss, filed. s/Manahan, Esq.</p> <p>Respondent Maine Board of Environmental Protections' Reply to Petitioner's Opposition to Motion to Dismiss, filed. s/McClintock, AAG</p>
1/10/08	<p>ORDER DISMISS APPEAL, Jabar, J.</p> <p>The Court finds that it lacks subject matter jurisdiction to hear the appeal. See Watts v. ME. <u>BED</u> /Kenn. AP06-19</p> <p>It is therefore ORDERED that the appeal filed in this matter be dismissed</p> <p>Copies to attys. of record.</p>
1/18/08	<p>Notice of Appeal, filed. s/Douglas Watts, Pro Se</p> <p>Copy of notice of appeal, docket sheet and receipt of filing fee mailed to James Chute Clerk of the Law Court.</p> <p>Copies to atty. of record and party.</p>
1/24/08	<p>Notice from Law Court, filed. s/Matthew Pollack, Clerk. Case to be transmitted by February 8, 2008, docket number assigned is KEN-08-36</p>
2/8/08	<p>Entire file mailed to Law Court. Copies of docket sheet and transmittal sheet mailed to Matthew Pollack, Clerk and attys. of record.</p>



STATE OF MAINE  
BOARD OF ENVIRONMENTAL PROTECTION

VIRGINIA PLUMMER  
CHAIR  
CYNTHIA S. BERTOCCI  
EXECUTIVE ANALYST  
TERRY A. HANSON  
ADMIN. ASSISTANT

JOHN ELIAS BALDACCI  
GOVERNOR

IN THE MATTER OF

MESSALONSKEE STREAM HYDRO LLC) WATER QUALITY CERTIFICATION  
Waterville, Kennebec County )  
UNION GAS HYDRO PROJECT ) PETITION FOR REVOCATION, MODIFICATION,  
#L-17585-33-D-N ) OR SUSPENSION

Pursuant to the provisions of 38 M.R.S.A. § 341-D(3) and *Rules Concerning the Processing of Applications and Other Administrative Matters*, 06-096 CMR 2(27) (effective April 1, 2003), the Board of Environmental Protection (Board) has considered the petition of Douglas H. Watts (Petitioner) with its supportive data, the response of the certification holder, and other related materials on file and, pursuant to the discretion vested in it, has determined that the Petitioner's arguments and offer of evidence do not describe a sufficient factual basis that, if proven at hearing, would support modifying the 1995 water quality certification previously issued for the Union Gas Hydro Project and that other additional factors weigh against reopening and modifying the certification at this time, and therefore dismisses the petition. The Board's reasons follow.

1. PROCEDURAL HISTORY

1995 Water Quality Certification for the Union Gas Hydro Project

On August 28, 1995, the Department issued a water quality certification, with conditions, in conjunction with the proposed Federal Energy Regulatory Commission (FERC) relicensing of the existing Messalonskee Hydro Project (FERC No. 2556) (Department Order #L-17585-33-D-N). The water quality certification was necessary for the issuance of a FERC license under Section 401 of the federal Clean Water Act. The project, which was owned at the time by Central Maine Power (CMP), consisted of five dams and four generating stations, including the Union Gas Hydro Project. No fish passage facilities were required at the project under the terms of this certification.

As constructed, the Union Gas Hydro Project consisted of an earthen and stone masonry dam equipped with 1.5-foot-high spillway flashboards, an adjacent powerhouse containing a single turbine-generator unit rated at 1,500 kilowatts, and a 25-acre impoundment at a normal full pond elevation of 69.1 feet. The project is located on Messalonskee Stream in the City of Waterville, about one mile upstream from the confluence of Messalonskee Stream and the Kennebec River.

The 1995 water quality certification for the Messalonskee Hydro Project, including the Union Gas Hydro Project, was not appealed.



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On December 23, 1998, the Department transferred the 1995 water quality certification for the FERC relicensing of Messalonskee Hydro Project from CMP to FPL Energy Maine Hydro LLC (FPL Energy).

On July 28, 1999, FERC issued a new 37-year license for the continued operation of the Messalonskee Hydro Project that incorporated all of the terms and conditions of the Department's 1995 water quality certification for the project. No fish passage facilities were required at the project under the terms of this license.

#### 2001 MWDCA Permit and Water Quality Certification for Emergency Dam Stabilization

On June 23, 2001, a roughly 30-foot-square portion of the downstream face of the Union Gas Dam in the deep gate section failed. The failed section consisted of cut granite blocks, which partially filled the outlet channels from the deep gates. FPL Energy immediately initiated a controlled draw down of the impoundment to minimize any pressure on the remaining dam structure and removed the fallen granite blocks from the stream bed. On June 29, 2001, a tarp was hung over the failed section of the dam, with water running down the inside of the tarp, to both prevent the core material in the dam from drying and protect the core material from damage during a driving rain event.

By Department Order #L-20694-34-A-N dated September 4, 2001, the Department approved FPL Energy's application for a Maine Waterway Development and Conservation Act (MWDCA) permit and water quality certification for emergency dam stabilization activities to ensure the safety of the Union Gas Dam following the June 2001 failure of the downstream face of the dam. The water quality certification was necessary for the issuance of a dredge and fill permit from the Army Corps of Engineers (ACOE) under Section 404 of the federal Clean Water Act. These activities, which involved removing the failed section of the dam and creating a breach in the dam sufficient to handle expected fall and spring flows, were intended as temporary measures designed to stabilize the dam until a final determination could be made regarding the future of the dam. The MWDCA permit and water quality certification were not appealed.

On December 9, 2003, the Department transferred the 1995 water quality certification (issued in conjunction with the FERC relicensing) for the Messalonskee Hydro Project from FPL Energy to Messalonskee Stream Hydro LLC (MSH).

#### 2005 MWDCA Permit and Water Quality Certification for Dam Repair

On February 2, 2005, MSH filed an application for a MWDCA permit and water quality certification (necessary for issuance of an ACOE permit) to repair the Union Gas Dam so that power generation can resume at the site. The repaired dam would be of similar dimensions to the original dam and would have the same impoundment size and elevation.

By Department Order #L-22230-34-A-N dated May 10, 2005, the Department approved MSH's application for a MWDCa permit and water quality certification to repair the Union Gas Dam, subject to a number of standard and special conditions.

On June 8, 2005, Friends of the Kennebec Salmon, Inc. filed a timely appeal to the Board of the Department's May 10, 2005 Order. This appeal was filed and signed by Douglas H. Watts, President of Friends of Kennebec Salmon, Inc. In its appeal, Friends of Kennebec Salmon, Inc. contended that the dam repair project will destroy one mile of free-flowing Atlantic salmon spawning and rearing habitat on Messalonskee Stream, will impair and harm existing Atlantic salmon spawning and nursery habitat directly below the dam, and will eliminate the existing safe and convenient access to and from Messalonskee Stream by indigenous fish species including Atlantic salmon, American eel and sea lamprey. Friends of Kennebec Salmon, Inc. further contended that the Department's May 10, 2005 Order approving the repair of the Union Gas dam is in violation of the MWDCa and Maine's water quality standards. Friends of Kennebec Salmon, Inc. asked the Board to overturn or modify the Order.

On November 3, 2005, the Board affirmed the Department's May 10, 2005 Order and denied the appeal of Friends of Kennebec Salmon, Inc. In making its decision, the Board adopted the findings, conclusions and conditions of the Department's May 10, 2005 Order.

On November 29, 2005, Friends of Kennebec Salmon, Inc. filed a timely appeal to Kennebec County Superior Court of the Department's and Board's actions approving the repair of the Union Gas Dam. This appeal was filed by Douglas H. Watts, President of Friends of Kennebec Salmon, Inc.

On July 19, 2006, the appeal of Friends of Kennebec Salmon, Inc. was dismissed by Kennebec County Superior Court because the appeal was filed by a non-lawyer who was not authorized to represent a corporation.

By letter dated July 20, 2007, FERC authorized MSH to commence construction activities to repair the Union Gas Dam.<sup>1</sup>

## 2. PETITION FOR REVOCATION, MODIFICATION OR SUSPENSION

On May 1, 2007, Douglas H. Watts filed a petition (dated April 30, 2007) requesting that the Board hold a public hearing to modify the 1995 water quality certification for the Union Gas Hydro Project "so as to allow for hydro electric power generation to resume at the Union Gas Project site in a manner which conforms with Maine water quality laws and allows Messalonskee Stream to be in attainment of its Class C water quality standards and designated uses." Specifically, Petitioner requests that the height of the proposed dam and spillway be lowered to the elevation of the natural bedrock ledge at the site in order to "allow for hydro electric generation, safe and effective upstream and downstream fish passage, and

<sup>1</sup> The repair of the dam is currently underway and is expected to be completed on or about November 15, 2007.

preservation of nearly all of the natural, free-flowing stream habitat in the 1.2 mile reach of Messalonskee Stream formerly impounded by the pre-2001 dam structure.”

### 3. APPLICABLE STANDARDS

38 M.R.S.A. Section 341-D(3) provides that, after written notice and opportunity for a hearing, the Board may modify in whole or in part any license, or may issue an order prescribing necessary corrective action, or may act in accordance with the Maine Administrative Procedure Act to revoke or suspend a license, whenever the Board finds that any one of seven specified statutory criteria exist:

- A. The licensee has violated any condition of the license;
- B. The licensee has obtained a license by misrepresenting or failing to disclose fully all relevant facts;
- C. The licensed activity poses a threat to human health or the environment;
- D. The license fails to include any standard or limitation legally required on the date of issuance;
- E. There has been a change in any condition or circumstance that requires revocation, suspension or a temporary or permanent modification of the terms of the license;
- F. The licensee has violated any law administered by the Department; or
- G. The license fails to include any standard or limitation required pursuant to the federal Clean Air Act Amendments of 1990.

Section 27 of the DEP's *Rules for the Processing of Applications and Other Administrative Matters*, 06-096 CMR 2, provides that any person, including the Commissioner, may petition the Board to modify, suspend or revoke a license. This section of the rules further provides that, after notice and opportunity for the petitioner and the licensee to be heard, the Board shall, within 30 days of the filing of the petition,<sup>2</sup> dismiss the petition or schedule a hearing on the petition. Finally, this section of the rules provides that, after a hearing, the Board may modify in whole or in part any license, issue an order prescribing necessary corrective action, or refer a license to District Court for revocation or suspension when the Board finds that any one of the seven grounds specified in statute exist.

<sup>2</sup> The Board has acted on the petition as expeditiously as possible, given its meeting schedule, other meeting agenda commitments, and the need to give the licensee sufficient time to respond to the petition. Petitioner has agreed to the Board's schedule for consideration of the petition.

## 4. STANDARD TO BE APPLIED BY THE BOARD IN DECIDING WHETHER TO DISMISS THE PETITIONS OR PROCEED TO HEARING

The Board may modify a license, or take action to suspend or revoke a license, only after a hearing and only if the Board finds that at least one of the specified statutory grounds for such action exist. Whether to dismiss a petition to modify, suspend or revoke or proceed to hearing is discretionary with the Board.<sup>3</sup> Factors to consider in exercising that discretion include whether the petition describes a sufficient factual basis that, if proven at a hearing, would support the requested action by the Board, with reference to the specified grounds listed in statute. The Board may also consider whether there are any other reasons to decline to exercise its discretion to reopen a license, including the existence of any legal impediments to the Board taking the requested action. While the Board has the authority to modify a license upon making certain required findings, nothing in the statute compels the Board to do so. The Board's decision to modify or not modify an existing license is wholly within the discretion of the Board.

## 5. SUMMARY OF PETITION

Petitioner contends that three of the statutory grounds for modification of a license<sup>4</sup> are met. Specifically, Petitioner contends that:

- The Union Gas Hydro Project poses a threat to human health or the environment, in that the reconstructed dam (1) will be an impassable barrier to all fish, including indigenous migratory American eel, Atlantic salmon, sea lamprey and blueback herring, and (2) will preclude indigenous Atlantic salmon from living in the 1.2-mile-long river reach impounded by the dam;
- The license fails to include standards or limitations legally required on the date of issuance, in that the 1995 water quality certification issued for the dam fails to "allow all of the migratory fish of Messalonskee stream to safely migrate back and forth past the Union Gas Dam and live in their native habitat in Messalonskee Stream," thus violating Class C water quality standards; and
- There have been changes in conditions or circumstances that require revocation, suspension or a temporary or permanent modification of the terms of the certification, in that (1) the removal of the Edwards Dam in 1999 has restored access to Messalonskee Stream to various native migratory fish species; (2) the water quality of Messalonskee

<sup>3</sup> The discretionary nature of the Board's decision in response to a petition to modify, suspend or revoke a license has been affirmed in a December 8, 2006 decision by Kennebec County Superior Court in *Watts v. Maine Board of Environmental Protection*, Docket No. AP-06-19. That case involved Mr. Watts' appeal of a decision by the Board to dismiss a petition filed by Mr. Watts requesting that the Board modify the water quality certifications for various projects on the Androscoggin and Little Androscoggin Rivers to require immediate safe and effective upstream and downstream fish passage for American eel.

<sup>4</sup> The term "license" includes any license, permit, order, approval or certification issued by the Department. 38 M.R.S.A. Section 341-D(3).

Stream has improved due to the closure of the Cascade Woolen Mill in Oakland in the late 1990s; and (3) the removal of the Union Gas Dam in 2001 has restored the stream to its natural, free-flowing condition and has improved passage for migrating American eel.

Petitioner describes the evidence to be presented at a hearing as including the following: various photographs of Messalonskee Stream taken between 2001 and 2006; various statements by agency staff and a consultant for MSH regarding eels and eel passage on Messalonskee Stream; and the entire record of Mr. Watts' appeal to the Board of the Department's May 10, 2005 Order approving the repair of the Union Gas Dam.

## 6. STANDING

Section 27 of the DEP's Chapter 2 *Rules for the Processing of Applications and Other Administrative Matters*, 06-096 CMR 2, provides that any person, including the Commissioner, may petition the Board to modify, suspend or revoke a license. For the purposes of the Chapter 2 Rules, "person" means any individual; partnership; corporation; federal, state or local government entity; association; or public or private organization of any character; except the agency conducting the proceeding. As an individual, Douglas H. Watts may petition the Board to modify, revoke or suspend a license.

## 7. RESPONSE TO PETITION

In a June 21, 2007 response to the petition, MSH argues that the material offered by Mr. Watts does not justify the scheduling of a public hearing to modify the 1995 water quality certification for the Union Gas Hydro Project and that the Board should dismiss the petition.

Specifically, MSH argues that, to proceed to public hearing, there must be no legal impediments to the Board taking the requested action, and the Petitioner must describe a sufficient factual basis which, if proven at a hearing, would support the requested action pursuant to the standards described in statute and rule. MSH further argues that the Board should dismiss the petition because there are legal impediments to the Board taking the requested action, in that there is no reopener for fish passage in the 1995 water quality certification; therefore, the legal effect of action by the Board to modify the certification would be highly questionable. MSH also argues that the Board should dismiss the petition because the Petitioner has not described sufficient evidence that, if proven at a hearing, would result in a finding that: (1) the licensed activity poses a threat to human health or the environment; (2) there has been a change in circumstances or conditions that required modification of the certification; or (3) the certification failed to include requirements or standards legally required on the date of its issuance. Finally, MSH argues that the Board should dismiss the Petition because it is untimely, since MSH has already entered into a contract to repair the Union Gas Dam.



## 8. DISCUSSION

a. The Legal Effect of Modifying a Water Quality Certification That Does Not Contain a Specific Reopener

The Petitioner asks the Board to modify the water quality certification that was issued for the Union Gas Project. The certification does not contain any requirements for fish passage, nor does the certification contain a condition that reserves the Department's right to require such passage in the future (a so-called "reopener" provision). Thus, the FERC license issued for the project does not contain any condition reserving the right of the Department to "reopen" the certification to include fish passage requirements.

Whether the Board has the authority to modify the terms of a water quality certification in areas not covered by a specific reopener in the certification itself involves complicated issues of law involving two federal statutes, the Clean Water Act and the Federal Power Act, as well as 38 M.R.S.A. § 341-D(3). The Board, however, does not need to decide this untested issue of law because, as set forth below, the Board finds that there is an insufficient basis upon which to proceed to hearing on the petition before it.

b. Threat to the Environment

Petitioner argues that the lack of passage for migratory fish and eel at the Union Gas Dam, as repaired, poses a threat to the environment within the meaning of 38 M.R.S.A. § 341-D(3)(C). He states that there are eels in the 1.2 mile stretch of the river which was impounded by the dam prior to its failure and that if the dam is repaired and the project is permitted to operate under its 1995 water quality certification, the 35 foot high concrete dam will impede and potentially eliminate the upstream migration of fish and eels, and will subject downstream migrating fish and eels to mortality as they pass through the facility's turbines.

While Petitioner has offered compelling photographic evidence of the riverine habitat above the site of the Union Gas Dam and below the Automatic Dam, including evidence that juvenile eels are migrating upstream through the current breach in the dam, the significance of eel passage through the Union Gas site is difficult to assess. The extent and quality of the available habitat in the previously impounded area are unknown and the environmental consequences of not requiring fish and eel passage at the Union Gas site is uncertain given the presence of other dams further upstream on Messalonskee Stream which do not have fish or eel passage.

While the Board is concerned about the potential for mortality of migrating fish and eels, the Board finds that Petitioner did not identify evidence that he would present at hearing that would likely be sufficient to warrant modifying a settled certification. To support a finding that the lack of fish passage poses a threat to the environment, the Board would need to gather evidence, including expert testimony, regarding the current and future

effect of the project on the viability of fish and eel populations and the overall integrity of the aquatic ecosystem.<sup>5</sup> Petitioner has not offered such evidence.

The Board finds that the petition does not describe a sufficient factual basis that, if proven at hearing, would support modifying the 1995 water quality certification on the ground that the lack of fish passage poses a threat to the environment.

c. Failure to Include Legally Required Standard or Limitation

Petitioner argues that, because the 1995 water quality certification issued for the Union Gas Hydro Project does not include passage for migratory fish and does not allow these fish to live in their native habitat, it fails to include standards and limitations legally required on the date of its issuance within the meaning of 38 M.R.S.A. § 341-D(3)(D). Specifically, Petitioner argues that Maine's water quality standards require that all Class C water bodies<sup>6</sup> be suitable habitat for all of their indigenous fish species, and that if a dam prevents indigenous fish species from gaining access to a water body, that dam is causing or contributing to the failure of that water body to meet standards.

The Board finds that the fact that the certification at issue here did not include fish passage requirements and allowed the Union Gas Dam to continue to impound a section of Messalonskee Stream does not mean that it did not meet legal standards required on the date of issuance, including water quality standards. Hydroelectric power generation is a designated use for all fresh surface waters of the State except for Class AA waters. Neither state nor federal law requires fish passage to be part of a certification in every case.<sup>7</sup> Decisions regarding whether and when fish passage facilities should be required as part of a water quality certification for a given dam are made in the context of information on fisheries management goals, migratory fish restoration plans, habitat suitability and availability, and current status of fish passage. These decisions, which are made in consultation with state and federal fisheries management agencies, run the full spectrum from not requiring fish passage, to leaving open the opportunity to require fish passage at a later date, to establishing a schedule for the future installation of fish passage, to requiring the immediate installation of fish passage.

<sup>5</sup> See Board decision dismissing petitions to modify, suspend or revoke the hydropower permits and water quality certifications for various dams on the Androscoggin and Little Androscoggin Rivers, dated February 2, 2006, at page 25.

<sup>6</sup> The waters of Messalonskee Stream have been classified as Class C from the outlet of Messalonskee Lake to its confluence with the Kennebec River, including all impoundments except Rice Rips Lake. 38 M.R.S.A. § 467(4)(E)(1)(a).

<sup>7</sup> As previously noted by the Board, in *S.D. Warren Co. v. BEP*, 2005 ME 27, ¶¶ 23-26, the Maine Supreme Judicial Court upheld the Department's authority to condition FERC licenses with, among other things, fish passage requirements; however, this decision did not require the Department to include such passage in every certification. See Board decision dismissing petitions to modify, suspend or revoke the hydropower permits and water quality certifications for various dams on the Androscoggin and Little Androscoggin Rivers, dated February 2, 2006, at page 26.

When the Department issued the 1995 water quality certification for the project at issue here, it determined that, subject to enumerated conditions, there was reasonable assurance that water quality standards would be met. At that time, the same designated uses and narrative standards applied as do now. Based on the information available to the Department, the licensee is in full compliance with this certification.

The Board finds that the petition does not describe a sufficient factual basis that, if proven at hearing, would support modifying the 1995 water quality certification on the ground that, when it was issued, fish passage was required.

d. Change in Condition or Circumstance

Petitioner argues that several circumstances did not exist at the time the Department issued the 1995 water quality certification which now warrant modification of the certification within the meaning of 38 M.R.S.A. § 341-D(3)(E). These changed circumstances include the removal of the Edwards Dam thus giving native migratory fish species access to the lower reaches of Messalonskee Stream, the increased ability of the stream to support native fish species due to the closure of the Cascade Woolen Mill and the resulting improvement in water quality, and the restoration of the 1.2 mile stretch of upstream riverine habitat and improved passage conditions in the six years since the Union Gas dam was breached.

With respect to the significance of improved access to Messalonskee Stream due to the removal of Edwards Dam and improved water quality and habitat in Messalonskee Stream, the Board necessarily relies on the expertise and data of the fisheries agencies that set fish restoration goals for each watershed based on the current state of fish populations and habitat suitability. The Board notes that legal mechanisms exist for state and federal fisheries agencies to petition FERC at any time for the installation or improvement of fish passage facilities at any licensed project in order to protect and provide passage for migrating fish,<sup>8</sup> and that no petitions have been made for the project at issue here.

With respect to the effects of the 2001 breaching of the dam, the Board finds that the Union Gas Dam was voluntarily breached by its owner at the time (FPL Energy Maine Hydro LLC) as a temporary safety measure following the failure of a portion of the downstream face of the dam. The current dam owner holds all required state and federal regulatory permits to continue to operate the project once the dam is repaired. Neither the breaching of the dam nor the passage of time since the breach occurred affects the

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<sup>8</sup> All FERC licenses contain the following standard condition: "The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain and operate, or arrange for the construction, maintenance, and operation of such reasonable facilities, and comply with such reasonable modification of the project structures and operation, as may be ordered by [FERC] upon its own motion or upon the recommendation of the Secretary of the Interior or the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after notice and opportunity for hearing." FERC Forms L-3, L-4, L-9, L-10, L-11, L-12, L-14, and L-15 (October 1975).

dam owner's legal right to continue to operate the project in accordance with its State certification and FERC license. The fact that the dam failed, and was subsequently breached for safety reasons, does not necessarily subject the project to re-evaluation and re-design on the occasion of its repair. Licensees are entitled to a reasonable assurance that projects, once permitted, can be constructed, maintained and repaired in accordance with the terms and conditions of the project's license and water quality certification unless sufficient evidence exists to justify actions to the contrary.

The Board finds that the petition does not describe a sufficient factual basis that, if proven at hearing, would support modifying the 1995 water quality certification due to a change in any condition or circumstance.

e. Other Factors

The Board has found that the petition does not describe a sufficient factual basis that, if proven at a hearing, would support the requested modifications to the 1995 water quality certification at issue here. In addition, there are other reasons that the Board declines to exercise its discretion to reopen this license at this time. These reasons and other observations follow.

The ability of the Board to reopen and modify an existing license is a powerful tool that should not be used lightly. The Board recognizes that licensees rely on the finality of licenses. Hence, there must be a good reason to disturb and modify an existing license, whether it has been in existence for one year or several decades.

Further, efforts to revisit fish and eel passage issues after-the-fact by petition on a dam-by-dam basis is generally an inappropriate vehicle to advance fish restoration. The impact of dams on migratory species and the need for fish and eel passage in a particular watershed are best evaluated whenever dams are licensed or re-licensed.

Finally, the Department of Inland Fisheries and Wildlife and the Department of Marine Resources have primary responsibility for fisheries management in Maine. It is appropriate for the Board to rely on the expertise, experience and data of these agencies. The Board urges these agencies to use the legal authority which they have to petition FERC to re-open a federal license to provide fish and eel passage whenever they find that the evidence warrants such passage and the passage is consistent with State fisheries management goals.

STATE OF MAINE  
Kennebec, ss.

SUPERIOR COURT  
Civil Action  
Docket No.

DOUGLAS HAROLD WATTS )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 MAINE BOARD OF ENVIRONMENTAL )  
 PROTECTION, )  
 )  
 Respondent, )

**PETITION FOR REVIEW OF FINAL AGENCY ACTION**  
**BY THE MAINE BOARD OF ENVIRONMENTAL PROTECTION**

For his Petition for review of final agency action by the Maine Board of Environmental Protection, Petitioner states:

1. Messalonskee Stream is a navigable waterway which enters the Kennebec River in Waterville, Maine. On the stream are several hydro-electric dams built by Central Maine Power from 1900-1920. The lowermost hydro-electric dam, called the Union Gas Dam, is approx. 1 mile above the Kennebec River. This dam was relicensed by Federal Energy Regulatory Commission in 1997 after receiving its Maine water quality certification from the Maine Board of Environmental Protection on August 28, 1995. In 2000, Florida Power & Light (FPL) purchased the dam from Central Maine Power.

2. In June 2001, a substantial portion of the huge granite blocks that form the Union Gas Dam suddenly collapsed and fell into the stream bed. In August 2001 FPL applied for and received a permit from Maine DEP to remove the remaining portion of the dam in the stream and stabilize its abutments with concrete. This removal work was completed in Sept. 2001. Since Sept. 2001 the dam has been not been operational and Messalonskee Stream has flowed freely over its natural bed at the dam site.

3. In 2004, Synergics Inc. of Annapolis, MD d/b/a Messalonskee Stream Hydro purchased the Union Gas Dam site. In Feb. 2005, Synergics filed an application with the Maine DEP for a permit to rebuild the Union Gas Dam and resume generating hydro-electric power.

4. In April 2005 the Petitioner submitted approx. 20 pages of formal comments to the Maine DEP opposing the dam reconstruction permit. On May 8, 2005 the Maine DEP approved the permit. In June 2005, Mr. Watts appealed the Maine DEP permit to the Maine Board of Environmental Protection. In November 2005, the Maine BEP dismissed Mr. Watts' appeal.

5. In November 2005, Mr. Watts appealed the Maine BEP decision to Kennebec County Superior Court. In July 2006, Justice Donald Marden dismissed this appeal on the sole basis that it named Friends of the Kennebec Salmon, Inc. as plaintiff and was submitted by Douglas Watts, who is not licensed to practice law in Maine. Justice Marden did not rule on or examine of the merits or substance of Mr. Watts' claim.

6. On May 1, 2007 Mr. Watts filed with the Maine BEP a petition under 38 MRSA §341-D to modify the Maine Water Quality Certification for the Union Gas Dam in 1995 to require (a) full fish passage for native fish species (b) to reduce the height of the proposed new dam and size of the dam impoundment. This petition asserted that both modifications are necessary to ensure the proposed new dam will not violate Maine water quality statutes and the legal water quality classification of Messalonskee Stream.

7. In July 2007, Synergics Inc. began rebuilding the Union Gas Dam. The dam reconstruction is scheduled to be completed in November 2007.

8. On October 4, 2007 the Maine BEP voted to dismiss the §341-D Petition filed by Mr. Watts on May 1, 2007.

#### THE PARTIES

9. Petitioner Douglas Harold Watts lives along the Kennebec River at its head of tide at

Cushnoc in the City of Augusta, Maine. Mr. Watts has lived along the Kennebec River in Augusta and Hallowell, Maine from July 1, 1991 to the present. For the past 16 years Mr. Watts has worked on his own behalf and as a paid professional consultant and journalist to protect and restore the native migratory fish of the Kennebec River to their historic health and number. Mr. Watts has been observing and photographically documenting the massive killing of migratory fish at hydro-electric dams in the Kennebec River drainage for more than a decade. Mr. Watts' personal, volunteer research and advocacy efforts have stopped the annual slaughter of migratory fish at the American Tissue Dam on Cobbosseecontee Stream in Gardiner, Maine, the Benton Falls Dam on the Sebasticook River in Benton, Maine and the Burnham Dam on the Sebasticook River in Burnham, Maine.

10. Respondent Board of Environmental Protection (the "Board") is a citizen board created by the Legislature to provide, among other things, independent and timely decisions on the interpretation and administration of the laws relating to environmental protection. 38 MRSA § 341-B.

11. Party-in-interest Synergics, Inc. is the owner of the Union Gas dam and hydro-electric project along Messalonskee Stream in the City of Waterville, Maine.

#### NATURE OF ACTION TO BE REVIEWED

12. Section 401 of the federal Clean Water Act, 33 U.S.C. § 1341, provides that in order to obtain a federal license to operate, dischargers to navigable waters such as hydroelectric dams must be issued a water quality certification certifying that the dam will not cause violations of state water quality standards. In Maine, a water quality certification is issued by the Department of Environmental Protection ("DEP") or the Board.

13. The Clean Water Act also provides that water quality certifications must impose limits on dam operations necessary to assure that the dams will comply with state water quality standards. 33 U.S.C. § 1341(d).

14. Water quality certifications can be modified. In Maine, 38 MRSA § 341-D(3)

provides that the Board may modify, in whole or in part, any "license." The definition of "license" includes any "certification" issued by DEP, DEP Rules Ch. 2, § 1(J).

15. On August 28, 1995 the Maine BEP issued a water quality certification to the Union Gas Dam and hydro-electric project on Messalonskee Stream in Waterville, Maine.

16. This water quality certification fails to ensure that legal water quality standards for Messalonskee Stream will be met because the certification contains no requirements for safe passage of native fish past the Union Gas Dam. The certification allows significant numbers of American eels and other fish to be killed in the dam turbines and allows eel and fish habitat to be blocked and rendered unusable. Accordingly, on May 1, 2007 Mr. Watts petitioned the Board to modify the certification for the Union Gas Dam to correct these defects (the "Board Petition"). On October 4, 2007 the Board voted to dismiss Mr. Watts' Petition.<sup>1</sup>

#### **FINAL AGENCY ACTION TO BE REVIEWED**

17. The Board voted to deny Mr. Watts' Petition to modify the water quality certifications on October 4, 2007. It is this October 4, 2007 vote that Mr. Watts asks this Court to review.

#### **GROUND UPON WHICH RELIEF IS SOUGHT**

18. Petitioner asserts that the BEP vote to dismiss his Petition is "unsupported by substantial evidence on the whole record" [Title 5, Part 18, Chapter 375, subchapter 7, §11007 C. (5)], is "arbitrary and capricious and characterized by abuse of discretion" [§11007 C. (6)] and seeks judicial review of the merits.

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<sup>1</sup> The urgency of this instant Petition has been greatly magnified by the failure of the Maine BEP to rule on Mr. Watts' May 1, 2007 petition in a lawful and timely manner. 38 MRSA §341-D and Ch. 2 §27 of Maine DEP rules state that upon receipt of a petition to modify a license the Maine BEP must act within 30 days to dismiss the petition or schedule a public hearing on it. In this case, the Board did not take any action on Mr. Watts' petition until October 4, 2007 -- *five months* after Mr. Watts submitted it. During this five month period, the Union Gas dam owner began reconstruction work at the dam has now substantially completed it.



19. The Board may modify a water quality certification for any of seven reasons, set forth in 38 MRSA § 341-D(3) and DEP Rules, Ch. 2, § 27. In his Board Petition, Mr. Watts asserted three reasons the Board should modify the water quality certification of the Union Gas Dam:

- a. The licensed activity poses a threat to human health or the environment (38 MRSA § 341-D(3)(C));
- b. The license fails to include any standard or limitation legally required on the date of issuance (38 MRSA § 341-D(3)(D));
- c. There has been a change in circumstance that requires modification (38 MRSA § 341-D(3)(E));

20. The evidence in Mr. Watts' Petition demonstrates that (a) native fish now have free access at the Union Gas Dam site and have since Sept. 2001; (b) many hundreds of American eels have been documented by Mr. Watts migrating up Messalonskee Stream past the dam site since the dam was removed in 2001; (c) without the modifications requested in Mr. Watts' Petition, the existing Maine water quality certification will allow the reconstructed Union Gas Dam to eliminate all safe and convenient access up and down Messalonskee Stream ; (d) the elimination of this safe access at the dam site will cause the death and injury of pregnant, female American eels in the turbines of the reconstructed Union Gas Dam as they attempt to migrate downstream this fall in order to reach the Atlantic Ocean to give birth.

21. Evidence in Mr. Watts' Petition establishes that operations at the reconstructed Union Gas Dam will cause a violation of Maine water quality standards because:

- the reconstructed Union Gas Dam will render Messalonskee unsuitable as habitat for eels and fish, in violation of 38 MRSA § 465(3)(A) and 4(A);
- the reconstructed Union Gas Dam will detrimentally change the resident biological community of the Class C Messalonskee Stream, in violation of 38 MRSA § 465(3)(C);
- the reconstructed Union Gas Dam will prevent Messalonskee Stream from supporting all species of indigenous fish and maintaining the structure and function of the resident

biological community, in violation of 38 MRSA § 465(3)(C);

· the reconstructed Union Gas Dam will prevent the existing in-stream uses (free-flowing habitat for indigenous fish and aquatic life ) being maintained and protected, in violation of 38 M.R.S.A. § 464(4)(F).

22. While only one reason for modification must be met, evidence in the Mr. Watts' Petition clearly established that all three asserted bases for modification were met.

23. Mr. Watts' Petition was dismissed in a manner that meets a number of the criteria warranting a reversal or modification of final agency action under 5 MRSA §11007(4).

**The Board's Decision is a Final Agency Action**

24. The Board's vote on Oct. 4, 2007 to dismiss Mr. Watts' Petition is a final agency action. Reconstruction of the Union Gas Dam will be completed in November 2007 and the severe violations of Maine water quality statutes caused by the reconstructed dam will begin immediately upon completion of the dam. Several of these violations, such as the flooding and killing of all animal and plant life in the former impoundment and the killing of migrating American eels in the dam turbines this fall, are immediate and irrevocable. They cannot be undone. Preventing this killing and destruction is the sole reason Mr. Watts filed his Petition with the Board on May 1, 2007.

25. With the Board's dismissal of his May 1, 2007 Petition, Mr. Watts has exhausted all of his regulatory remedies to prevent the immediate and irrevocable destruction of fish, plant and animal life by the reconstruction and completion of the Union Gas Dam on Messalonskee Stream.

**The Board's Decision Was Unsupported On The  
Whole Record And Was Arbitrary, Capricious And  
Characterized By Abuse Of Discretion**

26. The Board's October 4, 2007 decision and the Denial Order was not accompanied by any written order or Findings of Facts. While the Board has stated that it may eventually approve a written Findings of Fact, Mr. Watts has no assurance this will actually occur.<sup>2</sup>

**The Board's Vote Was Affected By Errors Of Law**

28. The Board's vote was affected by the following errors of law.

29. As a matter of law, a water quality certification cannot allow the licensee to violate Maine water quality standards. The water quality certification for Union Gas Dam allows the dam to cause violations of the water quality standards for Messalonskee Stream by allowing the dam to block all migration of native fish in the stream and to kill in its turbines those native fish trying to migrate downstream past the dam.

30. As a matter of law, water quality standards cannot be deemed satisfied when the designated uses of the waterbody are not actually present. The designated uses of the Kennebec will not be present upon completion of the dam reconstruction permitted by the 1995 water quality certification.

31. The Maine BEP's October 4, 2007 vote has the effect of grandfathering severe violations of Maine quality standards on Messalonskee Stream in perpetuity, including annual fish kills of pregnant American eels. Severe, annual violations of Maine water quality standards cannot be "grandfathered."

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<sup>2</sup> The Board's failure to craft a Findings of Facts on Oct. 4, 2007 forces Mr. Watts to request judicial review of the Board's decision in order to preserve his legal rights and to stop the irrevocable destruction of fish, animal and plant life in and along Messalonskee Stream which will occur this fall with the completion of the Union Gas Dam.

**THE MANNER IN WHICH MR. WATTS IS AGGRIEVED**

32. Mr. Watts' use and enjoyment of Messalonskee Stream is adversely affected by the dam's operations because the reconstructed Union Gas Dam will kill and injure eels and fish, block their passage, and ruin their habitat.

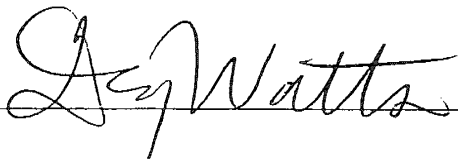
33. Mr. Watts has a right to water quality certifications that comply with applicable law. Further, the public trust placed in the Board to administer water quality laws has been violated by the Board's decision.

**DEMAND FOR RELIEF**

34. Mr. Watts requests this Court grant one or more of the following:

- a. reverse the Board Oct. 4, 2007 decision to dismiss his May 1, 2007 Petition;
- b. reverse the Board decision, order the Board Petition to be granted, and direct the Board to conduct a public hearing on it;
- c. vacate the Board decision and remand the Board Petition to the Board for a decision on the Board Petition that will correct the errors of law made by the Board;
- d. Such other relief as the Court may determine to be appropriate.

Dated at Augusta, Maine, this 5th day of November, 2007.



Douglas Harold Watts  
131 Cony Street  
Augusta, Maine 04330  
(207) 622-1003

STATE OF MAINE  
KENNEBEC, ss.

SUPERIOR COURT  
CIVIL ACTION  
DOCKET NO. AP-07-73

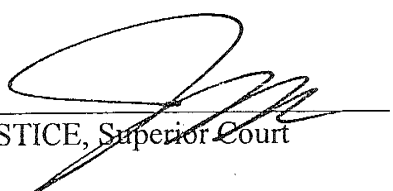
DOUGLAS HAROLD WATTS, )  
)  
Petitioner )  
)  
v. )  
)  
MAINE BOARD OF )  
ENVIRONMENTAL PROTECTION, )  
)  
Respondent )

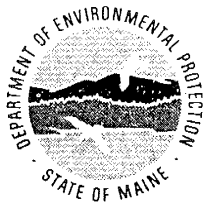
**ORDER DISMISSING APPEAL**

This cause came to be heard on Respondent Maine Board of Environmental Protection's ("Board") motion to dismiss the appeal in the within matter, pursuant to M. R. Civ. P. 80C(a) and 12(b)(1). After full consideration of the Board's motion, and all responses thereto, and after hearing on the motion, and for Good Cause:

The Court finds that it lacks subject matter jurisdiction to hear the appeal. *See Watts v. M.B.E.P. Ken. # AP-0619*  
It is therefore ORDERED that the appeal filed in this matter be dismissed.

Dated: 1-10-08

  
JUSTICE, Superior Court



STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
STATE HOUSE STATION 17  
AUGUSTA, MAINE 04333

BOARD ORDER

IN THE MATTER OF

FPL ENERGY MAINE HYDRO LLC	)	MAINE WATERWAY DEVELOPMENT AND
Brunswick and Topsham	)	CONSERVATION ACT PERMITS AND
Cumberland and Sagadahoc Counties	)	WATER QUALITY CERTIFICATIONS
BRUNSWICK HYDRO PROJECT	)	
#03-4458-05030	)	
	)	
TOPSHAM HYDRO PARTNERS	)	
Topsham and Brunswick	)	
Cumberland and Sagadahoc Counties	)	
PEJEPSCOT HYDRO PROJECT	)	
#L-007867-35-A-A	)	
	)	
MILLER HYDRO GROUP	)	
Lisbon and Durham, Androscoggin County	)	
WORUMBO HYDRO PROJECT	)	PETITIONS FOR REVOCATION, MODIFICATION,
#L-10930-35-A-N	)	OR SUSPENSION
	)	FILED BY
FPL ENERGY MAINE HYDRO LLC	)	FRIENDS OF MERRYMEETING BAY
Lewiston and Auburn, Androscoggin County)	)	AND
LEWISTON FALLS HYDRO PROJECT	)	DOUGLAS H. WATTS
#L-009206-35-A-N	)	
	)	
FPL ENERGY MAINE HYDRO LLC	)	
Lewiston, Auburn, Turner, Greene, Leeds,	)	
and Livermore, Androscoggin County	)	
GULF ISLAND-DEER RIPS PROJECT	)	
#L-17100-33-O-N	)	
	)	
INTERNATIONAL PAPER COMPANY	)	
Canton, Jay, Livermore & Livermore Falls	)	
Androscoggin County	)	
RILEY-JAY-LIVERMORE PROJECT	)	
#L-18829-33-A-N	)	
	)	FINDINGS OF FACT AND ORDER
RIDGEWOOD MAINE HYDRO	)	
PARTNERS, L.P.	)	
Auburn, Androscoggin County	)	
LOWER BARKER MILL PROJECT	)	
#L-08-4287-01010	)	

RIDGEWOOD MAINE HYDRO )  
 PARTNERS, L.P. )  
 Auburn, Androscoggin County )  
 UPPER BARKER MILL PROJECT )  
 #L-02/49-6848B-01010 )  
 )  
 HACKETT MILLS HYDRO ASSOCIATES) )  
 Poland and Minot, Androscoggin County )  
 HACKETT MILLS HYDRO PROJECT )  
 #L-10052-35-A-N )  
 )  
 RIDGEWOOD MAINE HYDRO )  
 PARTNERS, L.P. )  
 Mechanic Falls, Androscoggin County )  
 MARCAL HYDRO PROJECT )  
 #L-17778-33-C-N )

Pursuant to the provisions of 38 M.R.S.A. Sections 341-D(3), 464 et seq., 630 et seq., and 06-096 CMR Chapter 2 (Rules Concerning the Processing of Applications and Other Administrative Matters), the Board of Environmental Protection has considered the petitions of FRIENDS OF MERRYMEETING BAY and DOUGLAS H. WATTS with their supportive data, the responses of the permit/certification holders and other interested parties, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. INTRODUCTION

Friends of Merrymeeting Bay has filed a petition requesting that the Board revoke, modify or suspend the Maine hydropower permits and water quality certifications for the Brunswick, Pejepscot, Worumbo, Lewiston Falls, Upper Androscoggin, and Gulf Island-Deer Rips Hydro Projects on the Androscoggin River to provide for immediate safe upstream and downstream passage for American eel and, within the scope of their historic range, for American shad, blueback herring, alewife, and Atlantic salmon.

Douglas H. Watts has filed a petition requesting that the Board modify the water quality certifications for the same projects as well as for the Livermore, Riley and Jay Hydro Projects on the Androscoggin River and the Lower Barker Mill, Upper Barker Mill, Hackett Mills, and Marcal Hydro Projects on the Little Androscoggin River to provide immediate safe and effective upstream and downstream passage for American eel. Douglas H. Watts also requests that the Board modify the water quality certifications issued for the Brunswick, Pejepscot, and Worumbo dams to require safe passage for sea lamprey.

BRUNSWICK HYDRO PROJECT	)	PETITIONS FOR REVOCATION, MODIFICATION
PEJEPSCOT PROJECT	)	OR SUSPENSION
WORUMBO HYDRO PROJECT	)	
LEWISTON FALLS HYDRO PROJECT	)	
GULF ISLAND-DEER RIPS PROJECT	)	
RILEY-JAY-LIVERMORE PROJECT	)	
LOWER BARKER MILL PROJECT	)	
UPPER BARKER MILL PROJECT	)	
HACKETT MILLS HYDRO PROJECT	)	
MARCAL HYDRO PROJECT	)	

2. REGULATORY HISTORY

Brunswick Hydro Project

On August 8, 1962, the Federal Power Commission (predecessor to the Federal Energy Regulatory Commission) issued an initial license to Central Maine Power Company for the constructed Brunswick-Topsham Hydro Project (No. 2284), located on the Androscoggin River in the Towns of Brunswick and Topsham. No fish passage facilities were required at the project under the terms of this license.

By Orders #03-4458-05030 dated August 23, 1978 and April 11, 1979, the Board and Department approved a Coastal Wetlands Alteration Act permit and water quality certification for the redevelopment of the existing Brunswick Hydro Project. The approved project consisted of a new 40-foot-high concrete dam, a new powerhouse with an installed generating capacity of 12 MW, a 300-acre impoundment, and appurtenant facilities. Upstream and downstream fish passage facilities were approved as part of the redevelopment. No substantive conditions were attached to the permit or certification.

On February 9, 1979, FERC issued a new 50-year license to Central Maine Power Company for the redeveloped Brunswick Hydro Project. The license approved the construction of upstream and downstream fish passage facilities at the project.

On September 21, 1981, FERC amended the license for the Brunswick Hydro Project to increase the approved installed generating capacity from 12 MW to 19 MW.

Finally, on December 28, 1998, FERC transferred the license for the Brunswick Hydro Project from Central Maine Power Company to FPL Energy Maine Hydro LLC.

Pejepscot Hydro Project

By Orders #02/49-7867-23080 dated May 26, 1982 and May 27, 1982, the Department approved a Great Ponds Alteration Act permit and water quality certification for the redevelopment and licensing of the existing Pejepscot Hydro Project, located on the Androscoggin River in the Towns of Topsham and Brunswick. At the time, the project was owned by the Androscoggin Water Power Company. The approved project consisted of an existing concrete-filled timber crib dam with a maximum height of 41.5 feet, a new powerhouse with an installed generating capacity of 10 MW, a 203-acre impoundment, and appurtenant facilities.



BRUNSWICK HYDRO PROJECT	)	PETITIONS FOR REVOCATION, MODIFICATION
PEJEPSCOT PROJECT	)	OR SUSPENSION
WORUMBO HYDRO PROJECT	)	
LEWISTON FALLS HYDRO PROJECT	)	
GULF ISLAND-DEER RIPS PROJECT	)	
RILEY-JAY-LIVERMORE PROJECT	)	
LOWER BARKER MILL PROJECT	)	
UPPER BARKER MILL PROJECT	)	
HACKETT MILLS HYDRO PROJECT	)	
MARCAL HYDRO PROJECT	)	

The 1982 Department orders included conditions requiring that downstream fish passage facilities be constructed concurrent with project redevelopment and that upstream fish passage facilities be constructed at such time as deemed appropriate by the Department of Marine Resources and the Department of Inland Fisheries and Wildlife.

On September 16, 1982, FERC issued an initial 40-year license to Androscoggin Water Power Company for the proposed Pejepscot Project (No. 4784). The license included a condition requiring the construction of downstream fish passage facilities. The license did not include any project-specific condition relating to the construction of upstream fish passage facilities at the project. However, the license did include a standard condition providing authority for FERC to require the installation of such upstream fish passage facilities when needed.

By Order #L-007867-35-A-A dated June 12, 1985, the Board approved a Maine Waterway Development and Conservation Act permit and water quality certification for the amendment of license for the Pejepscot Hydro Project. As amended, the project consisted of a concrete dam with a maximum height of 44.5 feet, a powerhouse with an installed generating capacity of 13.88 MW, a 225-acre impoundment, and appurtenant facilities.

The 1985 Board order included conditions requiring that downstream fish passage facilities be constructed and operational concurrent with the commencement of operation of the approved project and that upstream fish passage facilities be constructed and operational no later than May 1, 1988.

On November 17, 1985 and December 26, 1985, FERC approved the amendment of license for the redeveloped Pejepscot Hydro Project. The amendment of license states that the licensee has agreed to install both upstream and downstream fish passage facilities as part of project construction.

On January 31, 1986, FERC transferred the license for the Pejepscot Hydro Project from Androscoggin Water Power Company to Topsham Hydro Partners.<sup>1</sup>

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<sup>1</sup> After several subsequent partial transfers, the current co-licensees for the Pejepscot Hydro Project are Topsham Hydro Partners Limited partnership, Teton Power Funding LLC, and DaimlerChrysler Services North America LLC.

BRUNSWICK HYDRO PROJECT	)	PETITIONS FOR REVOCATION, MODIFICATION
PEJEPSCOT PROJECT	)	OR SUSPENSION
WORUMBO HYDRO PROJECT	)	
LEWISTON FALLS HYDRO PROJECT	)	
GULF ISLAND-DEER RIPS PROJECT	)	
RILEY-JAY-LIVERMORE PROJECT	)	
LOWER BARKER MILL PROJECT	)	
UPPER BARKER MILL PROJECT	)	
HACKETT MILLS HYDRO PROJECT	)	
MARCAL HYDRO PROJECT	)	

Finally, by Order #L-007867-35-E-M dated February 10, 1986, the Department transferred the permit and certification for the Pejepscot Hydro Project from Androscoggin Water Power Company to Topsham Hydro Partners.

Worumbo Hydro Project

By Order #L-10930-35-A-N dated June 12, 1985, the Department approved a Maine Waterway Development and Conservation Act permit and water quality certification for the redevelopment and licensing of the existing Worumbo Hydro Project, located on the Androscoggin River in the Towns of Lisbon and Durham. The project was then and is currently owned by Miller Hydro Group. The approved project consisted of an existing concrete and timber-crib dam with a maximum height of 17 feet, a new forebay, a new powerhouse with an installed generating capacity of 14 MW, a 180-acre impoundment, and appurtenant facilities.

The 1985 Department order included conditions requiring that downstream fish passage facilities be constructed and operational concurrent with the commencement of operation of the approved project and that upstream fish passage facilities be constructed and operational no later than May 1, 1988.

On December 24, 1985, FERC issued an initial 40-year license to Miller Hydro Group for the proposed Worumbo Hydro Project (No. 3428). The license stated that upstream and downstream fish passage facilities should be constructed concurrent with the redevelopment of the project.

By Order #L-10930-35-G-M dated January 1, 1988, the Department modified the permit and certification for the Worumbo Hydro Project to change the operational deadline for upstream fish passage facilities from May 1, 1988 to May 1, 1989.

By Order #L-10930-35-K-M dated August 22, 1989, the Department modified the permit and certification to reflect the as-built generating capacity of the new powerhouse of 19.1 MW.

On October 3, 1990, FERC amended the license for the Worumbo Hydro Project to reflect the as-built generating capacity of the new powerhouse of 19.1 MW.

By Order #L-10930-35-N-M dated July 13, 1998, in conjunction with a pending application for a FERC license amendment, the Department modified the permit and certification for the

BRUNSWICK HYDRO PROJECT	)	PETITIONS FOR REVOCATION, MODIFICATION
PEJEPSCOT PROJECT	)	OR SUSPENSION
WORUMBO HYDRO PROJECT	)	
LEWISTON FALLS HYDRO PROJECT	)	
GULF ISLAND-DEER RIPS PROJECT	)	
RILEY-JAY-LIVERMORE PROJECT	)	
LOWER BARKER MILL PROJECT	)	
UPPER BARKER MILL PROJECT	)	
HACKETT MILLS HYDRO PROJECT	)	
MARCAL HYDRO PROJECT	)	

Worumbo Project to increase the approved impoundment elevation by 1.5 feet and to increase the installed generating capacity by 0.2 MW.

Finally, on August 13, 1998, FERC amended the license for the Worumbo Hydro Project to increase the approved impoundment elevation by 1.5 feet.

Lewiston Falls Hydro Project

On December 2, 1963, the Federal Power Commission (predecessor to the Federal Energy Regulatory Commission) issued an initial license to Central Maine Power Company and Union Water Power Company for the constructed Lewiston Falls Hydro Project (No. 2302), located on the Androscoggin River in the Cities of Lewiston and Auburn. No fish passage facilities were required at the project under the terms of this license.

By Order #L-009206-35-A-N dated June 6, 1986, the Board approved a Maine Waterway Development and Conservation Act permit and water quality certification for the redevelopment and relicensing of the existing Lewiston Falls Hydro Project. The approved project consisted of an existing dam with a maximum height of 23 feet, a new powerhouse with an installed generating capacity of 25 MW, a 200-acre impoundment, the Lewiston Canal System, six existing generating stations within the Canal System with a total installed capacity of 7.3 MW, and appurtenant facilities.

In its 1986 order, the Board found that the applicants proposed to subsequently convey the existing Upper Androscoggin Station, located within the Lewiston Canal System, to the City of Lewiston, such that the City will own and operate this facility after the new powerhouse began commercial operation.<sup>2</sup>

The 1986 Board order included a condition requiring that, based on recommendations from the Department of Marine Resources or the Atlantic Sea Run Salmon Commission, the applicants provide such fish passage facilities as may be required by the Board, after notice to the applicants and opportunity for public hearing, to allow the migration of anadromous fish into and out of the watershed upstream from the project.

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<sup>2</sup> The Upper Androscoggin generating facility was to be a replacement for the City of Lewiston's former municipal power facility, which was decommissioned and razed to make way for the new Lewiston Falls powerhouse (known as Monty Station).

BRUNSWICK HYDRO PROJECT	)	PETITIONS FOR REVOCATION, MODIFICATION
PEJEPSCOT PROJECT	)	OR SUSPENSION
WORUMBO HYDRO PROJECT	)	
LEWISTON FALLS HYDRO PROJECT	)	
GULF ISLAND-DEER RIPS PROJECT	)	
RILEY-JAY-LIVERMORE PROJECT	)	
LOWER BARKER MILL PROJECT	)	
UPPER BARKER MILL PROJECT	)	
HACKETT MILLS HYDRO PROJECT	)	
MARCAL HYDRO PROJECT	)	

On September 29, 1986, FERC issued a new 40-year license to Central Maine Power Company and Union Water Power Company for the redeveloped Lewiston Falls Hydro Project. The license did not include any project-specific condition relating to the construction of fish passage facilities at the project. However, the license did include a standard condition providing authority for FERC to require the installation of fish passage facilities when needed.

By letter dated August 27, 1990, the Department waived water quality certification for the proposed transfer of ownership and separate licensing of the Upper Androscoggin Station.<sup>3,4</sup>

On February 26, 1991, FERC amended the license for the Lewiston Falls Hydro Project to approve the transfer of the 1.695 MW Upper Androscoggin Station from Central Maine Power Company and Union Water Power Company to the City of Lewiston and to re-designate the Upper Androscoggin Station as Project No. 11006.

On May 13, 1992, FERC amended the license for the Lewiston Falls Hydro Project to reflect the as-built generating capacity of the new powerhouse of 28.44 MW.

On December 23, 1998, the Department transferred the permit and certification for the Lewiston Falls Hydro Project from Central Maine Power Company and Union Water Power Company to FPL Energy Maine Hydro LLC.

Finally, on December 28, 1998, FERC transferred the license for the Lewiston Falls Hydro Project from Central Maine Power Company to FPL Energy Maine Hydro LLC.

Gulf Island-Deer Rips Project

On July 5, 1962, the Federal Power Commission (predecessor to the Federal Energy Regulatory Commission) issued an initial license to Central Maine Power Company for the constructed Gulf Island-Deer Rips Hydro Project (No. 2283), located on the Androscoggin River in the Cities of Lewiston and Auburn and the Towns of Turner, Greene, Leeds and

<sup>3</sup> Because there is no permit or water quality certification in effect for the Upper Androscoggin Project, there is no reference to this project in the caption of this order.

<sup>4</sup> In its letter waiving water quality certification, the DEP stated that “there are no specific permit or certification conditions that pertain to the operation of the Upper Androscoggin Station, and thus no conditions that need to be attached to a separate license for the Upper Androscoggin Station. Furthermore, CMP’s regulatory obligations for the operation of the Lewiston Falls Hydro Project will not change with the transfer of ownership of the Upper Androscoggin Station.”

BRUNSWICK HYDRO PROJECT	)	PETITIONS FOR REVOCATION, MODIFICATION
PEJEPSCOT PROJECT	)	OR SUSPENSION
WORUMBO HYDRO PROJECT	)	
LEWISTON FALLS HYDRO PROJECT	)	
GULF ISLAND-DEER RIPS PROJECT	)	
RILEY-JAY-LIVERMORE PROJECT	)	
LOWER BARKER MILL PROJECT	)	
UPPER BARKER MILL PROJECT	)	
HACKETT MILLS HYDRO PROJECT	)	
MARCAL HYDRO PROJECT	)	

On November 13, 1985, FERC amended the license for the Riley-Jay-Livermore Project to reflect the modified redevelopment proposal for the Livermore Dam.

By Order #L-18829-33-A-N dated May 5, 1998, the Department approved a Maine Waterway Development and Conservation Act permit and water quality certification for the redevelopment and relicensing of the Riley-Jay-Livermore Hydro Project and approved water quality certification for the relicensing of the Otis Hydro Project. The approved projects consisted of the existing Riley, Jay, Otis, and Livermore dams, powerhouses, and impoundments, and 4.46 MW of new generating capacity at the Livermore Dam.<sup>7</sup>

The 1998 Department order included a condition requiring that, based on a written request from the Atlantic Salmon Commission that fish passage facilities be installed on the main stem Androscoggin River above Lewiston Falls to facilitate the restoration of Atlantic salmon, the applicants shall install such fish passage facilities as may be required by the Department, after notice to the applicant and the opportunity for a public hearing, to allow the migration of salmon into and out of the river in and above the project area.<sup>8</sup>

On September 16, 1998, FERC issued a new 50-year license to International Paper Company for the redeveloped Riley-Jay-Livermore Hydro Project and a new 50-year license to Otis Hydroelectric Company for the constructed Otis Hydro Project. The licenses included a condition reserving FERC's authority to require the licensee to construct, maintain and operate such fishways as may be prescribed by the Secretary of the Interior under Section 18 of the Federal Power Act.

By Order #I-18830-35-B-M dated July 26, 2002, in connection with a pending application for a FERC license amendment, the Department modified the permit and certification for the

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<sup>7</sup> Neither Petitioner has requested that the Board revoke, modify or suspend the May 5, 1988 water quality certification for the Otis Hydro Project. However, the regulatory history of this project is discussed herein so as to provide a complete description of the regulatory history and fish passage requirements at all of the dams on the Androscoggin River below Rumford. The Board notes that the Otis Dam is located between the Jay and Livermore dams.

<sup>8</sup> The following findings are included in the Department's May 5, 1998 Order: "To enhance and expedite the relicensing process for the Riley-Jay-Livermore Project and the Otis Project, the licensees formed a Collaborative Team consisting of interested federal, state and local agencies, various non-governmental organizations and the public. Beginning in 1994, the Collaborative Team met regularly to address resource concerns, to assist and guide the licensees in the completion of studies and the timely filing of relicensing applications, and to develop an enhancement package that protects and improves the natural and human environment by balancing the needs of the public, regulatory agencies, and the licensees. DEP staff participated as members of the Collaborative Team."

BRUNSWICK HYDRO PROJECT	)	PETITIONS FOR REVOCATION, MODIFICATION
PEJEPSCOT PROJECT	)	OR SUSPENSION
WORUMBO HYDRO PROJECT	)	
LEWISTON FALLS HYDRO PROJECT	)	
GULF ISLAND-DEER RIPS PROJECT	)	
RILEY-JAY-LIVERMORE PROJECT	)	
LOWER BARKER MILL PROJECT	)	
UPPER BARKER MILL PROJECT	)	
HACKETT MILLS HYDRO PROJECT	)	
MARCAL HYDRO PROJECT	)	

Riley-Jay-Livermore Hydro Project to reduce the approved increase in generating capacity at the Livermore Dam from 4.46 MW to 1.0 MW.

Finally, on September 30, 2002, FERC amended the license for the Riley-Jay-Livermore Hydro Project to reflect the modified generating capacity of the Livermore Dam. As a result of this amendment, the total approved installed generating capacity of the project was reduced to 19.725 MW.

Lower Barker Mill Hydro Project

By Order #L-08-4287-01010 dated April 24, 1978, the Department approved water quality certification for the redevelopment and licensing of the proposed Lower Barker Mill Hydro Project, located on the Little Androscoggin River in the City of Auburn. At the time, the project was owned by Maine Hydro-Electric Development Corporation. The approved project consisted of an existing 30-foot-high concrete Ambursen dam, a new 780-foot-long penstock, a new powerhouse with an installed generating capacity of 1.5 MW, a 12-acre impoundment, and appurtenant facilities. No substantive conditions were attached to the certification.

On February 23, 1979, FERC issued an initial 40-year license to Maine Hydro-Electric Development Corporation for the proposed Lower Barker Mill Hydro Project (No. 2808). The license did not include any project-specific condition relating to the construction of fish passage facilities at the project. However, the license did include a standard condition providing authority for FERC to require the installation of fish passage facilities when needed.

On February 28, 1986, FERC transferred the license for the Lower Barker Mill Hydro Project from Maine Hydro-Electric Development Corporation to Lower Barker Hydro Company, Inc.

On June 18, 1987, FERC transferred the license for the Lower Barker Mill Hydro Project from Lower Barker Hydro Company, Inc. to Consolidated Hydro Maine, Inc.

Finally, on December 19, 1996, FERC transferred the license for the Lower Barker Mill Hydro Project from Consolidated Hydro Maine, Inc. to Ridgewood Maine Hydro Partners, L.P.

BRUNSWICK HYDRO PROJECT	)	PETITIONS FOR REVOCATION, MODIFICATION
PEJEPSCOT PROJECT	)	OR SUSPENSION
WORUMBO HYDRO PROJECT	)	
LEWISTON FALLS HYDRO PROJECT	)	
GULF ISLAND-DEER RIPS PROJECT	)	
RILEY-JAY-LIVERMORE PROJECT	)	
LOWER BARKER MILL PROJECT	)	
UPPER BARKER MILL PROJECT	)	
HACKETT MILLS HYDRO PROJECT	)	
MARCAL HYDRO PROJECT	)	

Upper Barker Mill Hydro Project

By Order #L-02/49-6848B-01010 dated April 13, 1983, the Department approved a Small Hydroelectric Generating Facilities Act permit and water quality certification for the redevelopment and licensing of the proposed Upper Barker Mill Hydro Project, located on the Little Androscoggin River in the City of Auburn. At the time, the project was owned by Maine Hydro-Electric Development Corporation. The approved project consisted of an existing 21-foot-high masonry dam, a new powerhouse with an installed generating capacity of 0.95 MW, a 41-acre impoundment, and appurtenant facilities.

The 1983 Department order included conditions requiring that downstream fish passage facilities be constructed concurrently with project redevelopment and that upstream fish passage facilities be constructed at such time as deemed appropriate by the Department of Marine Resources to allow the migration of anadromous fish into the watershed above the project dam.

On August 22, 1983, FERC issued an initial 40-year license to Maine Hydro-Electric Development Corporation for the proposed Upper Barker Mill Hydro Project (No. 3562). The license included a condition requiring the construction of downstream fish passage facilities. The license did not include any project-specific condition relating to the construction of upstream fish passage facilities at the project. However, the license did include a standard condition providing authority for FERC to require the installation of such fish passage facilities when needed.

By Order #L-006848-35-C-M dated May 23, 1984, the Department transferred the permit and certification for the Upper Barker Mill Hydro Project from Maine Hydro-Electric Development Corporation to Barker Hydro Company.

On December 28, 1984, FERC transferred the license for the Upper Barker Mill Hydro Project from Maine Hydro-Electric Development Corporation to Barker Hydro Company.

On June 15, 1987, FERC transferred the license for the Upper Barker Mill Hydro Project from Barker Hydro Company to Consolidated Hydro Maine, Inc.

By Order #L-006848-35-G-M dated September 16, 1987, the Department transferred the permit and certification for the Upper Barker Mill Hydro Project from Barker Hydro Company to Consolidated Hydro Maine, Inc.

BRUNSWICK HYDRO PROJECT	)	PETITIONS FOR REVOCATION, MODIFICATION
PEJEPSCOT PROJECT	)	OR SUSPENSION
WORUMBO HYDRO PROJECT	)	
LEWISTON FALLS HYDRO PROJECT	)	
GULF ISLAND-DEER RIPS PROJECT	)	
RILEY-JAY-LIVERMORE PROJECT	)	
LOWER BARKER MILL PROJECT	)	
UPPER BARKER MILL PROJECT	)	
HACKETT MILLS HYDRO PROJECT	)	
MARCAL HYDRO PROJECT	)	

On December 19, 1996, FERC transferred the license for the Upper Barker Hydro Project from Consolidated Hydro Maine, Inc. to Ridgewood Maine Hydro Partners, L.P.

Finally, by Order #L-006848-35-I-T dated June 29, 1997, the Department transferred the permit and certification for the Upper Barker Mill Hydro Project from Consolidated Hydro Maine, Inc. to Ridgewood Maine Hydro Partners, L.P.

Hackett Mills Hydro Project

By Order #L-10052-35-A-N dated April 25, 1984, the Department approved a Maine Waterway Development and Conservation Act permit and water quality certification for the redevelopment and licensing of the proposed Hackett Mills Hydro Project, located on the Little Androscoggin River in the Towns of Minot and Poland. The project was then and is currently owned by Hackett Mills Hydro Associates. The approved project consisted of an existing 8-foot-high rock-filled timber crib dam, a new powerhouse with an installed capacity of 0.47 MW, a 60-acre impoundment, and appurtenant facilities.

The 1984 Department order included conditions requiring that downstream fish passage facilities be constructed concurrent with project redevelopment and that upstream fish passage facilities be constructed at such time as deemed appropriate by the Department of Marine Resources to allow the migration of anadromous fish into the watershed above the project dam.

On September 12, 1984, FERC issued an initial 40-year license to Hackett Mills Hydro Associates for the proposed Hackett Mills Hydro Project (No. 6398). The license included a condition requiring immediate installation of downstream fish passage facilities and construction of upstream fish passage facilities at the project following the construction of such facilities at the downstream Upper Barker Mill Project.

Marcal Hydro Project

By Order #L-17778-33-C-N dated May 23, 1997, the Department approved water quality certification for the licensing of the existing Marcal Hydro Project, located on the Little Androscoggin River in the Town of Mechanic Falls. The project was then and is currently owned by Ridgewood Maine Hydro Partners, L.P. The approved project consisted of a granite and concrete gravity dam with a maximum height of 15 feet, a powerhouse with an installed generating capacity of 1.3 MW, a 27-acre impoundment, and appurtenant facilities.



BRUNSWICK HYDRO PROJECT	)	PETITIONS FOR REVOCATION, MODIFICATION
PEJEPSCOT PROJECT	)	OR SUSPENSION
WORUMBO HYDRO PROJECT	)	
LEWISTON FALLS HYDRO PROJECT	)	
GULF ISLAND-DEER RIPS PROJECT	)	
RILEY-JAY-LIVERMORE PROJECT	)	
LOWER BARKER MILL PROJECT	)	
UPPER BARKER MILL PROJECT	)	
HACKETT MILLS HYDRO PROJECT	)	
MARCAL HYDRO PROJECT	)	

The 1997 Department order included conditions requiring that downstream fish passage facilities be constructed and operational within 2 years of issuance of a FERC license and that upstream fish passage facilities be installed, or an alternative fish passage plan provided, at such time as is deemed appropriate by the Department of Marine Resources and/or the Atlantic Salmon Commission to allow the migration of anadromous fish into the watershed above the project dam, except that upstream passage is not required until the agencies produce an anadromous fish restoration and management plan for the Little Androscoggin River Basin.

On July 17, 1997, FERC issued an initial 40-year license to Ridgewood Maine Hydro Partners, L.P. for the existing Marcal Hydro Project (No. 11482). The license included conditions requiring immediate installation of downstream fish passage facilities and reserving FERC's authority to require the licensee to construct, maintain and operate such fishways as may be prescribed by the Secretary of the Interior under Section 18 of the Federal Power Act.

4. PETITIONS FOR REVOCATION, MODIFICATION OR SUSPENSION

On October 3, 2005, Friends of Merrymeeting Bay filed a petition (dated September 29, 2005) requesting that the Board revoke, modify or suspend the Maine hydropower permits and water quality certifications for the Brunswick, Pejepscot, Worumbo, Lewiston Falls, Upper Androscoggin, and Gulf Island-Deer Rips Hydro Projects on the Androscoggin River to provide for immediate safe downstream and upstream passage of American eel and safe ingress and egress, within the scope of their historic range, for American shad, blueback herring, alewife, and Atlantic salmon.<sup>9</sup> Friends of Merrymeeting Bay also requests that the Board modify the project permits to comply with 38 M.R.S.A. Section 464(10),<sup>10</sup> which requires existing hydropower facilities to implement reasonable changes that do not significantly affect existing energy generation capability and which would result in improvements in habitat and aquatic life.

On November 10, 2005, Douglas H. Watts filed a petition (dated October 3, 2005) requesting that the Board modify the water quality certifications issued for the Brunswick, Pejepscot, Worumbo, Lewiston Falls, Upper Androscoggin, Deer Rips, Gulf Island, Livermore, Jay, and Riley dams on the Androscoggin River and the Lower Barker Mill, Upper Barker Mill,

<sup>9</sup> The portion of the petition filed by Friends of Merrymeeting Bay dealing with fish passage at various dams on the Kennebec River is being dealt with in a separate proceeding.

<sup>10</sup> In its petition, Friends of Merrymeeting Bay incorrectly cited this provision as 38 M.R.S.A. Section 464(1).

BRUNSWICK HYDRO PROJECT	)	PETITIONS FOR REVOCATION, MODIFICATION
PEJEPSCOT PROJECT	)	OR SUSPENSION
WORUMBO HYDRO PROJECT	)	
LEWISTON FALLS HYDRO PROJECT	)	
GULF ISLAND-DEER RIPS PROJECT	)	
RILEY-JAY-LIVERMORE PROJECT	)	
LOWER BARKER MILL PROJECT	)	
UPPER BARKER MILL PROJECT	)	
HACKETT MILLS HYDRO PROJECT	)	
MARCAL HYDRO PROJECT	)	

Hackett Mills, and Marcal dams on the Little Androscoggin River to provide immediate safe and effective upstream and downstream passage for American eel. Douglas H. Watts also requests that the Board modify the water quality certifications issued for the Brunswick, Pejepscot, and Worumbo dams to require safe passage for Sea Lamprey.

5. APPLICABLE STANDARDS

Title 38 M.R.S.A. Section 341-D(3) provides that, after written notice and opportunity for a hearing, the Board may modify in whole or in part any license, or may issue an order prescribing necessary corrective action, or may act in accordance with the Maine Administrative Procedure Act to revoke or suspend a license, whenever the Board finds that any one of seven specified criteria are met.

Section 27 of the DEP's Chapter 2 Rules for the Processing of Applications and Other Administrative Matters provides that any person, including the Commissioner, may petition the Board to revoke, modify or suspend a license. The DEP's Rules further provide that, after notice and opportunity for the petitioner and the licensee to be heard, the Board shall, within 30 days of the filing of the petition,<sup>11</sup> dismiss the petition or schedule a hearing on the petition. Finally, the DEP's Rules provide that, after a hearing, the Board may modify in whole or in part any license, issue an order prescribing necessary corrective action, or refer a license to District Court for revocation or suspension when the Board finds that:

- A. The licensee has violated any condition of the license;
- B. The licensee has obtained a license by misrepresenting or failing to disclose fully all relevant facts;
- C. The licensed activity poses a threat to human health or the environment;
- D. The license fails to include any standard or limitation legally required on the date of issuance;
- E. There has been a change in any condition or circumstance that requires revocation, suspension or a temporary or permanent modification of the terms of the license;

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<sup>11</sup> The Board has acted on the petitions as expeditiously as possible, given its meeting schedule, other meeting agenda commitments, and the need to give the owners of the dams sufficient time to respond to the petitions. Petitioners have agreed to the Board's schedule for consideration of the petitions.

BRUNSWICK HYDRO PROJECT	)	PETITIONS FOR REVOCATION, MODIFICATION
PEJEPSCOT PROJECT	)	OR SUSPENSION
WORUMBO HYDRO PROJECT	)	
LEWISTON FALLS HYDRO PROJECT	)	
GULF ISLAND-DEER RIPS PROJECT	)	
RILEY-JAY-LIVERMORE PROJECT	)	
LOWER BARKER MILL PROJECT	)	
UPPER BARKER MILL PROJECT	)	
HACKETT MILLS HYDRO PROJECT	)	
MARCAL HYDRO PROJECT	)	

F. The licensee has violated any law administered by the Department; or

G. The license fails to include any standard or limitation required pursuant to the federal Clean Air Act Amendments of 1990.

6. STANDARD TO BE APPLIED BY THE BOARD IN DECIDING WHETHER TO DISMISS THE PETITIONS OR PROCEED TO HEARING

The Board may only modify, or take such other actions as are listed in Chapter 2, section 27, after providing licensees with an opportunity for hearing. Whether to dismiss a petition to modify, suspend or revoke or proceed to hearing is discretionary with the Board. Factors to consider in exercising that discretion include whether the petition describes a sufficient factual basis that, if proven at a hearing, would support the requested action by the Board, with reference to the standards listed in section 27, A through H. The Board must also consider whether there are any legal impediments to the Board taking the requested action.

7. STANDING

Section 27 of the DEP's Chapter 2 Rules for the Processing of Applications and Other Administrative Matters provides that any person, including the Commissioner, may petition the Board to revoke, modify or suspend a license. For the purposes of the Chapter 2 Rules, "person" means any individual; partnership; corporation; Federal, state or local government entity; association; or public or private organization of any character; except the agency conducting the proceeding.

Petitioner Friends of Merrymeeting Bay is a 501(c)(3) non-profit organization whose mission is to preserve, protect, and improve the unique ecosystems of Merrymeeting Bay.

Petitioner Watts is a resident of Augusta, Maine, with a demonstrated interest in the native migratory fish species of the Androscoggin River.

In its response to the petition filed by Friends of Merrymeeting Bay, Miller Hydro Group argues that the petitioner has not presented any evidence that it has been harmed by the alleged impact of the Worumbo Project on the American eel or other identified species of fish and thus has not established standing to petition the Board. In its response to the petitions, Topsham Hydro Partners argues that neither petitioner has established that they would suffer particularized injury as a result of the current operation of the Pejepscot Hydro

BRUNSWICK HYDRO PROJECT	)	PETITIONS FOR REVOCATION, MODIFICATION
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WORUMBO HYDRO PROJECT	)	
LEWISTON FALLS HYDRO PROJECT	)	
GULF ISLAND-DEER RIPS PROJECT	)	
RILEY-JAY-LIVERMORE PROJECT	)	
LOWER BARKER MILL PROJECT	)	
UPPER BARKER MILL PROJECT	)	
HACKETT MILLS HYDRO PROJECT	)	
MARCAL HYDRO PROJECT	)	

Project or that they would have aggrieved status and standing if the Board dismissed the petitions or denied the request to modify the permit and water quality certification for the Pejepscot Hydro Project.<sup>12</sup>

The Chapter 2 Rules provide that “any person”<sup>13</sup> may petition the Board to revoke, modify or suspend a license. The demonstration of harm or of standing as an aggrieved party that is necessary to bring an appeal is not required for a person to have standing to file a petition to revoke, modify or suspend a license. Therefore, the Board will consider the petitions of Friends of Merrymeeting Bay and Douglas H. Watts.

## 8. BASIS OF PETITIONS

Petitioners contend that four of the criteria set forth for the revocation, modification, or suspension of a license<sup>14</sup> are met. Specifically, the petitioners contend that:

- The licensed activities pose a threat to human health or the environment, in that thousands of eels and other fish are being killed through passage in the turbines at the dams;<sup>15</sup>
- The licenses fail to include standards or limitations legally required on the date of issuance, in that the failure of the water quality certifications issued for the dams to require passage facilities for eels violates state water quality standards;
- There have been changes in conditions or circumstances that require revocation, suspension or a temporary or permanent modification of the terms of the licenses, in that the federal government is now considering protection of the American eel under the United States Endangered Species Act, and in that there is now a greater awareness and definitive documentation of the consequences of no safe downstream passage; and

<sup>12</sup> For the purposes of the DEP’ Chapter 2 Rules, “aggrieved person” means any person whom the Board determines may suffer particularized injury as a result of a licensing or other decision. See 06-096 CMR Chapter 2, Section 1(B).

<sup>13</sup> For the purposes of the DEP’s Chapter 2 Rules, “person” means any individual; partnership; corporation; Federal, state or local government entity; association; or public or private organization of any character, except the agency conducting the proceeding. See 06-096 CMR Chapter 2, Section 1(O).

<sup>14</sup> For the purposes of the DEP’s Chapter 2 Rules, “license” means any license, license amendment, license renewal, transfer, permit, variance, approval or certification issued by the Department. See 06-096 CMR Chapter 2, Section 1(J).

<sup>15</sup> Only Petitioner Friends of Merrymeeting Bay contends that this criterion is met.

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GULF ISLAND-DEER RIPS PROJECT	)	
RILEY-JAY-LIVERMORE PROJECT	)	
LOWER BARKER MILL PROJECT	)	
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- The licensees have violated laws administered by the Department, in that the lack of safe eel passage violates the Clean Water Act and causes the Androscoggin and Little Androscoggin Rivers to violate Maine water quality standards.

Petitioner Friends of Merrymeeting Bay specifically requests that the Board: (1) require temporary dusk-to-dawn shutdowns of all turbines from September 1 through November 30, 2005, along with at least temporary safe downstream passage; (2) require the submission by project owners of a proposed eel and fish passage plan by March 1, 2006; and (3) by September 1, 2006, require permanent eel passage consisting of either seasonal nighttime turbine shut downs or punch plate eel excluders over intakes, in combination with deep gate passage.

## 9. RESPONSES TO PETITIONS

The owners of the dams that are the subject of the pending petitions all recommend that the petitions be dismissed.

- a. Miller Hydro Group. In its response to the petition of Friends of Merrymeeting Bay, Miller Hydro Group argues that the petitioner has presented no evidence of harm to the American eel (or other species) from the operation of the Worumbo Project specifically or in the Androscoggin River generally.<sup>16</sup> Miller Hydro Group further argues that the water quality certification for the Worumbo Project contains no language authorizing the Board to “reopen” it for amendment and that, as a consequence, the Board has no authority to reopen and amend the certification. Finally, Miller Hydro Group argues that the petitioner has presented no evidence regarding the economic impact of the relief it seeks, and that the significant economic costs and loss of generation that would result from the actions requested by the petitioner must be evaluated.
- b. Topsham Hydro Partners. In its response to the petitions, Topsham Hydro Partners argues that the petitions provide no specific evidence with respect to the Pejepscot dam, or its alleged impact upon the American eel. Topsham Hydro Partners further argue that there is “a substantial probability” that the United States Supreme Court will conclude that the State lacks the legal basis to order federally-licensed hydroelectric facilities to

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<sup>16</sup> Miller Hydro Group’s response to the petition filed by Friends of Merrymeeting Bay is dated November 17, 2005, and thus was written before the November 10, 2005 filing of the petition of Douglas H. Watts. Miller Hydro Group has not submitted a response to the Watts’ petition.

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GULF ISLAND-DEER RIPS PROJECT	)	
RILEY-JAY-LIVERMORE PROJECT	)	
LOWER BARKER MILL PROJECT	)	
UPPER BARKER MILL PROJECT	)	
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MARCAL HYDRO PROJECT	)	

issued for the Riley-Jay-Livermore Project, all legal requirements were met, and that no new legal requirements have arisen since then. International Paper further argues that the current review being conducted by the Department of the Interior concerning the status of the American eel has no legal import nor does it constitute a change in condition or circumstance in and of itself. Finally, International Paper argues that the Riley-Jay-Livermore Project has been, and will continue to be, operated in compliance with the terms and conditions of the water quality certification and any other federal and state licenses, permits and orders related to the project, and that the company has not violated any law administered by the Department in connection with the project.

- f. Rumford Paper Company. In response to the petition of Douglas H. Watts, Rumford Paper Company states that it has no substantive comments at this time and that it reserves the right to participate in the future as an interested party.<sup>18</sup>
- g. Ridgewood Maine Hydro LLC. In its response to the petition of Douglas H. Watts, Ridgewood Maine Hydro LLC argues that the petitioner does not describe any project-specific facts, or what project-specific evidence he would offer, to support the contention that eel passage is necessary at the Lower Barker Mill, Upper Barker Mill, and Marcal projects. Ridgewood further argues that the petitioner has provided no project-specific evidence to show that there are changed circumstances or conditions at the projects since the water quality certifications were issued or to show that the applicable water quality standards are no longer being met. Finally, Ridgewood argues that the petition is not a permissible means to challenge the water quality certifications for the projects.
- h. Hackett Mills Hydro Associates. In its response to the petition of Douglas H. Watts, Hackett Mills Hydro Associates argues that the petitioner does not describe any project-specific facts, or what project-specific evidence he would offer, to support the contention that eel passage is necessary at the Hackett Mills Project. Hackett Mills Hydro Associates further argues that the petitioner has provided no project-specific evidence to show that there are changed circumstances or conditions at the project since the water quality certifications were issued or to show that the applicable water quality standards are no longer being met. Finally, Hackett Mills Hydro Associates argues that the petition is not a permissible means to challenge the water quality certification for the project.

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<sup>18</sup> Rumford Paper Company, through its subsidiary Rumford Falls Power Company, currently owns and operates the Rumford Falls Hydro Project (FERC No. 2333), which is located on the Androscoggin River above the Riley-Jay-Livermore Project.

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GULF ISLAND-DEER RIPS PROJECT	)	
RILEY-JAY-LIVERMORE PROJECT	)	
LOWER BARKER MILL PROJECT	)	
UPPER BARKER MILL PROJECT	)	
HACKETT MILLS HYDRO PROJECT	)	
MARCAL HYDRO PROJECT	)	

## 10. DISCUSSION AND FINDINGS OF FACT

### a. Current Status of eel/anadromous fish passage.

Based on the information available in the Department's permitting, certification, and condition compliance files for the projects addressed in the petitions, the Board makes the following findings of fact regarding the current status of passage for eels and anadromous fish at the dams on the Androscoggin and Little Androscoggin Rivers that are the subject of the pending petitions.

#### Eels.

There are currently no specific upstream or downstream passage facilities or operational measures in place for catadromous<sup>19</sup> eels at any dams on the Androscoggin River or Little Androscoggin River. Eels are currently present throughout the Androscoggin River watershed.

#### Anadromous fish.

A permanent vertical slot fishway, sorting and transfer facility to provide upstream passage for anadromous<sup>20</sup> fish, along with a permanent downstream anadromous fish passage facility, became operational at the Brunswick Hydro Project in 1983. Through 2004, a total of 925,000 adult river herring,<sup>21</sup> 247 adult American shad, and 654 adult Atlantic salmon have been captured at the Brunswick fishway and distributed into otherwise inaccessible habitat in the Androscoggin and Little Androscoggin Rivers.<sup>22</sup> Studies are currently underway in an attempt to improve the effectiveness of the fishway in attracting and passing shad. The Brunswick fish sorting and transfer facility is operated by the Department of Marine Resources. Since 1983, DMR has operated the facility to exclude sea lamprey from passing into the river above the Brunswick Dam.

<sup>19</sup> Catadromous fish migrate from freshwater to the ocean to spawn, and then migrate back to freshwater as juveniles to grow to maturity.

<sup>20</sup> Anadromous fish migrate from the ocean to freshwater to spawn, and then migrate back to the ocean as juveniles to grow to maturity.

<sup>21</sup> The term "river herring" includes both alewife and blueback herring.

<sup>22</sup> Source: 2005 Brunswick Fishway Report, Maine Department of Marine Resources (March 2005).

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A permanent fish lift to provide upstream passage for anadromous fish, along with a permanent downstream anadromous fish passage facility, became operational at the Pejepscot Hydro Project in 1988.

A permanent fish lift to provide upstream passage for anadromous fish, along with a permanent downstream anadromous fish passage facility, became operational at the Worumbo Hydro Project in 1989.

There are currently no upstream or downstream passage facilities for anadromous fish at any other dams on the main stem Androscoggin River.

On the Androscoggin River, the historic range of Atlantic salmon extended to Rumford Falls, while the Great Falls (Lewiston Falls) presented a barrier to other sea-run species (e.g., alewives and shad). On the Little Androscoggin River, the historic range of Atlantic salmon, alewife and American shad extended upstream above the site of the Marcal Project.

Permanent downstream anadromous fish passage facilities have been installed at the Lower Barker Mill, Upper Barker Mill, Hackett Mills, and Marcal projects on the Little Androscoggin River.

There are currently no upstream passage facilities for anadromous fish at any dams on the Little Androscoggin River.

Compliance.

Based on the above findings of fact, the Board concludes that the Brunswick, Pejepscot, Worumbo, Lewiston Falls, Gulf Island-Deer Rips, and Riley-Jay-Livermore projects on the Androscoggin River and the Lower Barker Mill, Upper Barker Mill, Hackett Mills, and Marcal projects on the Little Androscoggin River are currently in compliance with the terms and conditions of their permits and/or water quality certifications with respect to providing passage for eels and anadromous fish.

- b. The Legal Effect of Modifying a Water Quality Certification That Does Not Contain a Specific Reopener.

The Petitioners ask the Board to modify permits and/or water quality certifications that were issued for six projects on the Androscoggin River and four projects on the Little



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UPPER BARKER MILL PROJECT	)	
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MARCAL HYDRO PROJECT	)	

Based on these findings, the Board finds that the Petitioners fail to make an offer of evidence sufficient to warrant a public hearing on the issue of whether the permits and/or water quality certifications issued for the projects fail to include any standard or limitation legally required on the date of issuance.

f. Change in Condition or Circumstance.

Petitioner Watts argues that petitions are now pending to declare the American eel to be endangered species, and that these circumstances did not exist at the time the Department issued water quality certifications for the projects. Petitioner Friends of Merrymeeting Bay argues that there is now a greater awareness and documentation of the consequences of no safe downstream passage.

The Board finds that the Petitioners have not offered evidence which, if proven at hearing, is sufficient to find that “there has been a change in any condition or circumstance that requires revocation, suspension or a temporary or permanent modification of the terms of the license,” pursuant to 38 M.R.S.A. § 341-D(3)(E). The fact that the American eel is being considered for listing as an endangered species does not constitute such changed circumstances. Any claim that the species is endangered is at this point speculative, and will be determined by the USFWS in due course.

Furthermore, while there may be an increased awareness of the need for safe downstream fish passage, particularly for eels, this awareness alone does not provide a sufficient change in circumstances for modifying the terms of the permits and/or certifications previously issued for the projects. In the event this “change of awareness” translates to specific facts that form a basis for the State’s fisheries agencies to recommend further passage measures, they may do so pursuant to the specific reopeners contained in the water quality certification and FERFC license.

Based on these findings, the Board finds that the Petitioners fail to make an offer of evidence sufficient to warrant a public hearing on the issue of whether there has been a change in any condition or circumstance that requires revocation, suspension or a temporary or permanent modification of the terms of the permits and/or water quality certifications for the projects.

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g. Violation of Law.

Finally, the Petitioners argue that the projects in question are currently in violation of the law because they lack fish passage for various migratory species and thus violate water quality standards. Petitioner Watts also argues that the lack of such passage violates the law by resulting in the killing of Atlantic salmon, which Petitioner Watts claims is illegal. Based on this, the Petitioners argue that they have made a sufficient showing under 38 M.R.S.A. § 341-D(3)(F) for the Board to proceed to hearing.

The Board finds that the Petitioners have not offered any evidence that, if proven at hearing, would demonstrate that the projects are currently in violation of existing law. Section 341-D(3)(F) on its face permits the Board to take action to address actual violations of law. Other criteria contained in section 341-D(3) permit the Board to act where, regardless of whether there is a violation of law, other circumstances, such as a change in conditions or a threat to the environment, support that action. The water quality certifications at issue here provide that, subject to certain conditions, there was reasonable assurance that the projects would meet Maine’s water quality standards. Petitioners have not alleged that the licensees are out of compliance with the conditions of their water quality certifications or FERC licenses. By operating in compliance with their water quality certifications and FERC licenses, the dams are currently operating in compliance with the law.

This does not mean, however, that the Department is powerless in the event of a demonstrated fish kill. The Department has in the past taken appropriate enforcement action in response to fish kills, and will continue to do so in the future.<sup>26</sup>

Based on these findings, the Board finds that the Petitioners fail to make an offer of sufficient evidence to warrant a public hearing on the issue of whether the projects have violated any law administered by the Department.

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<sup>26</sup> For example, in 2000, the Department negotiated and the Board approved an Administrative Consent Agreement, including a monetary penalty and corrective actions, following the death of and injury to numerous downstream migrating alewives at the Benton Falls Project due to the failure of the project operator to keep the approved downstream fish passage facilities clear of debris and fully operational, as required bby the terms of the permit and water quality certification for the project.

STATE OF MAINE  
KENNEBEC, ss.

SUPERIOR COURT  
CIVIL ACTION  
DOCKET NO. AP-06-19

DOUGLAS H. WATTS,

Petitioner

v.

DECISION AND ORDER

MAINE BOARD OF  
ENVIRONMENTAL PROTECTION,

Respondent

This matter came before the court on Respondent Maine Board of Environmental Protection's Motion to Dismiss. For the following reasons, the court GRANTS the motion.

On November 10, 2005, Douglas Watts ("Watts") filed a petition with the Maine Board of Environmental Protection ("Board"), pursuant to 38 M.R.S.A. § 341-D(3) and Me. Dep't of Env'tl. Prot., 06-096 CMR Chapter 2 § 27(A), requesting that the Board schedule a public hearing to consider evidence in support of modifications to water quality certifications issued by the Board to a number of hydroelectric dams on the Androscoggin and Little Androscoggin Rivers. The Board's rules provide that "[a]ny person, including the Commissioner, may petition the Board to revoke, modify or suspend a license." Me. Dep't of Env'tl. Prot., 06-096 CMR Chapter 2 § 27 (emphasis added). Following receipt of such a petition, the Board's rules state "no later than 30 days following the filing of a petition . . . and after notice and opportunity for the petitioner and the licensee to be heard, the Board shall dismiss the petition or schedule a hearing on the petition." Id.

On February 2, 2006, the Board provided an opportunity to be heard on the petition to Watts,<sup>1</sup> owners of the dams, and staff from the Department of Environmental Protection (“Department”).<sup>2</sup> Department staff also submitted a draft decision recommending that the petitions be dismissed. After hearing the comments on the petition, the Board voted to dismiss the petition. On February 21, 2006, Watts filed a petition with the superior court pursuant to M. R. Civ. P. 80C, seeking judicial review of the Board’s decision to dismiss his petition. The Board filed a motion to dismiss<sup>3</sup> on March 24, 2006, and Watts timely responded on April 14, 2006.

The Board presents three arguments in support of its motion: (1) the court lacks jurisdiction because there is no statutory right to appeal its decision not to schedule a public hearing; (2) allowing an appeal of this decision would violate the Separation of Powers clause of the Maine Constitution; and (3) Watts has not demonstrated sufficient standing to appeal the Board’s decision. Because the court agrees that it lacks jurisdiction to hear Watts’ petition, it need not answer the Board’s remaining arguments.

The power of the court to review administrative action is statutorily prescribed. Sears, Roebuck and Co. v. City of Portland, 144 Me. 250, 255, 68 A.2d 12, 14 (1949). Absent statutory authority, courts should dismiss appeals seeking review of discretionary executive action. Herrle v. Town of Waterboro, 2001 ME 1, ¶¶ 9-10, 763 A.2d 1159, 1161-1162. In Herrle, the Law Court analyzed the enforcement authority of the Waterboro Board of Selectmen and found that “[e]ven if we were to affirm the

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<sup>1</sup> Friends of Merrymeeting Bay filed a similar petition to the Board and was also heard at the meeting.

<sup>2</sup> Department staff also acts as staff to the Board.

<sup>3</sup> A number of hydroelectric dam parties-in-interest also filed memoranda in support of the Board’s motion.

Superior Court's decision finding error in the [Zoning Board of Appeal's] legal analysis, the Board of Selectmen could still decide in their discretion not to bring an enforcement action."<sup>4</sup> Herrle, 2001 ME at ¶ 10.

The Board in this instance has similar discretionary enforcement authority, evidenced by the language granting it power to modify, revoke or suspend a license: "the board *may* modify in whole or in part any license, or *may* issue an order prescribing necessary corrective action, or *may* act in accordance with the Maine Administrative Procedure Act to revoke or suspend a license." 38 M.R.S.A. § 341-D (3) (2001) (emphasis added). Furthermore, the Board persuasively argues that its discretionary authority can be seen in how it is authorized to review petitions. The Board argues that its preliminary review of petitions amounts to a screening function, analogous to the discretion granted to prosecutors on whether or not to pursue civil or criminal charges. This function exists so that the Board (as does a prosecutor) can weigh the evidence in favor of proceeding further against the costs of proceeding and likelihood of petitioner's success in the complained of matter.

Under the Department's rules, the Board acts as a gatekeeper to ensure that thoroughly investigated final licenses are only disturbed under certain circumstances. Watts' petition concerned the Board's alleged non-enforcement of Maine's water classification and anti-degradation law, 38 M.R.S.A. § 464. However, after hearing evidence on the petition, the Board declined to take further steps to pursue the petitioner's allegations. In its Findings of Fact, the Board noted that the petitioners

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<sup>4</sup> The zoning ordinance provided that "The Selectmen acting upon the recommendation of the Code Enforcement Officer, Planning Board, or the Zoning Board of Appeals *may* protect the public interest and the reasonable expectations of private landowners by ordering violators to cease and/[sic] to remove any violating activity, use or structure and, if necessary, they *may* bring whatever legal, equitable, or injunctive action is necessary." Herrle, 2001 ME at fn. 4.

(including Watts) had failed to present sufficient evidence, which if proven at a hearing, would support a finding in their favor. This decision was prosecutorial in nature and a legitimate exercise of the Board's enforcement discretion.<sup>5</sup> Herrle, 2001 ME at ¶10.

Other language in the Department's rules also demonstrates the discretionary authority of the Board. For example, upon receipt of a petition to modify, revoke or suspend a license, the Board "*shall dismiss the petition* or schedule a hearing on the petition" Me. Dep't of Env'tl. Prot., 06-096 CMR Chapter 2 § 27 (emphasis added). Because *any* person can petition the Board for a hearing, a hurdle was constructed to allow the Board to manage what could be numerous petitions for a public hearing. Thus, the Board screens and evaluates petitions by allowing petitioners and interested parties to appear before the Board to present evidence on whether a sufficient factual basis exists to warrant a more comprehensive public hearing on modifying, revoking or suspending a license. The court reads the construction of the rule placing "*shall dismiss the petition,*" before "*or schedule a hearing,*" as an acknowledgment that while the Board is charged with evaluating the merits of each petition, it will necessarily deny most petitions, reserving public hearings for only those select petitions which raise enough evidence as to call into question the reasoning for granting the license.

Watts' argument that the Board's Findings of Fact and Order, on its face, meets the plain language of the statute allowing the Superior Court to review "*any order or decision*" by the Board, is viscerally compelling, but nonetheless, legally insufficient. Watts argues that the Superior Court has jurisdiction under 38 M.R.S.A. § 346 to hear appeals by "*any person aggrieved by any order or decision of the board or*

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<sup>5</sup> The Law Court in Herrle, as does the Board, cited this discretionary enforcement authority as analogous to the discretion enjoyed by prosecutors in enforcing criminal laws.

commissioner" and that the 30 page document dismissing his appeal fits the plain language of the statute. However, Watts fails to recognize that the next sentence of the statute incorporates 5 M.R.S.A. § 11001 as the standard for evaluating whether the Superior Court has jurisdiction.<sup>6</sup> Title 5, section 11001(1) states "any person who is aggrieved by *final agency action* shall be entitled to judicial review thereof in the Superior Court . . . . Preliminary, procedural, intermediate or other nonfinal agency action shall be independently reviewable *only if review of the final agency action would not provide an adequate remedy.*" (emphasis added). Therefore, as a threshold matter, in order for the Superior Court to have jurisdiction to review the Board's action, Watts must show that the Board's action was either final agency action or, in the alternative, that final agency action would not provide him an adequate remedy.

Watts tries to make much of the fact that the title of the document dismissing his request for a public hearing contained the phrases "Board Order" and "FINDINGS OF FACT AND ORDER." As noted above, Watts must demonstrate that, even so titled, this document is final agency action. However, an evaluation of this document reveals that it is procedural in nature and not substantive final agency action. First, the Board notes that this document was prepared by Department staff to assist it in determining whether the petitioners evidence is sufficient to warrant a public hearing and that the staff typically provides its recommendations in the format of a draft order. In addition, a large portion of the document merely recounts information concerning the licensing process for each hydroelectric project, lays out the applicable standards the Board uses to review petitions, and presents the arguments and responses of the interested parties. While the Board did dismiss Watts' petition, this discretionary action, even if contained

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<sup>6</sup> "These appeals to the Superior Court shall be taken in accordance with Title 5, chapter 375, subchapter VII [5 M.R.S.A. § 11001]."

in a document titled "Board Order," cannot be seen as *final* agency action since the agency did not pursue action on the allegations because of an insufficiency of evidence.

As discussed earlier, courts are not in the business of reviewing discretionary enforcement action by administrative agencies absent specific statutory authority. Interpreting this document as final agency action would be rewarding form over substance. The Board should not be penalized for including in its dismissal the work of Department staff in order to comprehensively address the complex issues presented in the petition. The fact that the Board released a discretionary decision that incorporated much of the department staff's draft order does not change the underlying nature of the dismissal.<sup>7</sup>

Finally, Watts has also failed to show that final agency action would not provide him an adequate remedy. In this case, the decision by the Board not to proceed with a public hearing because of a lack of sufficient evidence does not prevent Watts from petitioning the Board at a later date with more evidence. Watts has not been foreclosed by any agency action from pursuing the same claim at a later time. As noted in the decision, "the Board finds that there is an insufficient basis *upon which to proceed to* hearings on the petitions before it."<sup>8</sup> Resp. M. Dismiss, Ex. A, p. 24 (emphasis added). In this instance, the court does not have jurisdiction to review a wholly discretionary screening decision entrusted to the Board.

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<sup>7</sup> One could understand the citizenry's outrage if public agencies were to summarily dismiss petitions before it *without* explanation. In this instance, Watts received a comprehensive explanation for the dismissal of his petition. Comprehensive treatment does not transform the dismissal of a petition into anything more than what it is.

<sup>8</sup> This also provides more evidence that the nature of the board's decision was procedural and not substantive.



While Watts devotes considerable energy to passionately arguing that the Board's Finding of Facts is deficient, nevertheless, the court is without power to review what is statutorily a discretionary decision entrusted to the Board

The entry will be:

The Maine Board of Environmental Protection's Motion to Dismiss is  
GRANTED.

DATED: December 6, 2006



Donald H. Marden, Justice

**Chapter 2: RULES CONCERNING THE PROCESSING OF APPLICATIONS AND OTHER ADMINISTRATIVE MATTERS**

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SUMMARY: These rules govern various administrative activities of the Department of Environmental Protection. Included within these rules are sections which apply to advisory opinions, license application requirements, application fees, public notice, public access to information, processing times, license transfers, and appeals to the Board of Environmental Protection.

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1. **Definitions.** The following terms, as used in this Chapter, have the following meanings unless the context indicates otherwise:
- A. **Abutter.** "Abutter" for the purposes of the notice provisions of this rule, means any person who owns property that is both (1) adjoining and (2) within 1 mile of the delineated project boundary, including owners of property directly across a public or private right of way.
  - B. **Aggrieved person.** "Aggrieved person" means any person whom the Board determines may suffer particularized injury as a result of a licensing or other decision.
  - C. **Amendment application.** "Amendment application" means any application to modify a license previously granted by the Department, except for minor revisions.
  - D. **Board.** "Board" means the Board of Environmental Protection.
  - E. **Chair.** "Chair" means the Chair of the Board of Environmental Protection, or his or her designee.
  - F. **Commissioner.** "Commissioner" means Commissioner of the Department of Environmental Protection, or his or her designee.
  - G. **Department.** "Department" means the Department of Environmental Protection, including the Board and the Commissioner.
  - H. **Department staff.** "Department staff" means all staff, except staff to the Board.
  - I. **Interested person.** "Interested Person" means any person who submits written comments on an application or who requests, in writing, receipt of materials related to a particular application.
  - J. **License.** "License" means any license, license amendment, license renewal, transfer, permit, variance, approval or certification issued by the Department.
  - K. **Licensee.** "Licensee" means the person named on the license.

27. **Revocation, modification, or suspension of licenses.** Any person, including the Commissioner, may petition the Board to revoke, modify or suspend a license. The petition must be addressed to the Chair of the Board and must state which of the criteria listed below is being invoked. It must specifically describe the factual basis for the petition, including what evidence will be offered to support the petition. The petition, once filed, may not be supplemented, except in a public hearing. The petitioner must serve a copy of the petition on the Commissioner and the licensee at the time the petition is filed with the Board.

Unless otherwise provided by law, no later than 30 days following the filing of a petition to revoke, modify or suspend, and after notice and opportunity for the petitioner and the licensee to be heard, the Board shall dismiss the petition or schedule a hearing on the petition. The procedure before the Board is the same as described in section 24(B)(6) of this rule. Any hearing must be scheduled within 45 days of the decision to hold a hearing and must be conducted in accordance with section 7(C) of this rule.

After a hearing, the Board may modify in whole or in part any license, issue an order prescribing necessary corrective action, or refer a license to District Court for revocation or suspension when the Board finds that:

- A. The licensee has violated any condition of the license;
- B. The licensee has obtained a license by misrepresenting or failing to disclose fully all relevant facts;
- C. The licensed activity poses a threat to human health or the environment;
- D. The license fails to include any standard or limitation legally required on the date of issuance;
- E. *(Not in use)*
- F. There has been a change in any condition or circumstance that requires revocation, suspension or a temporary or permanent modification of the terms of the license;
- G. The licensee has violated any law administered by the Department; or
- H. The license fails to include any standard or limitation required pursuant to the federal Clean Air Act Amendments of 1990.

STATUTORY AUTHORITY: 38 M.R.S.A., sections 341-D and 343-B.

EFFECTIVE DATE: August 1, 1994

EFFECTIVE DATE (ELECTRONIC CONVERSION): May 8, 1996

REPEAL AND REPLACE EFFECTIVE: April 1, 2003, filing 2003-77

