Ed Friedman • 42 Stevens Rd. • Bowdoinham, ME 04008
207-666-3372 • edfomb@gwi.net

May 17, 2006

Matt Scott, Board Chair
C/o Terry Hanson
Board of Environmental Protection
#17 State House Station
Augusta, Maine 04333-0017
Phone (207) 287-2811
Fax (207) 287-2814
Terry.hanson@maine.gov

Mr. Scott and all members of the Board,

Attached please find pursuant to Chapter 2, §27 of the Rules of the Maine Department of Environmental Protection (Revocation, Modification or Suspension of Licenses), our petition requesting immediate safe downstream and upstream passage of American eel [*Anguilla rostrata*] at specified hydro-electric dams located in Maine on the Androscoggin and Little Androscoggin Rivers.

As you know, the Board admitted in its Findings of Fact of February 2nd, 2006 that eels exist throughout the Androscoggin watershed, no safe and effective eel passage exists at these dams and migrating eels are most likely being killed at these dams as they migrate to spawn in the Sargasso Sea.

Petitioners come to the Maine BEP because substantial evidence shows the Androscoggin River and its tributaries are in non-attainment of their state water quality standards and designated uses as fish habitat due to the impact of the subject dams on the indigenous American eel (*Anguilla rostrata*). This non-attainment is due to the lack of any protective measures for the species at the subject dams or within §401 water quality certifications issued for these dams by the State of Maine. Recent experience in Maine shows dam induced harm to the species can be prevented through cost-effective, technological methods as well as minor operational changes.

The American eel population is in great decline, in no small part due to the adverse effects of dams. Furthermore, the lack of safe eel passage violates at least four sections of Maine law as well as the federal Clean Water Act. In part because the Board decided to move forward with the Kennebec petition but not the Androcoggin, the Board is faced with a lawsuit based on the arbitrary and capricious nature of its decision.

Just as the effects of gravity are no different in Augusta than Bangor, or the effects of an icy road in Biddeford no different than Lewiston, eels are fundamentally the same in the Androscoggin as they are in the Kennebec and the effects of dams on eels the same whether the Kennebec, Androscoggin, Sebasticook, Presumpscot or Susquehanna.

Lest it be tempting as the petitioners think it may be for the Board Chair, the Assistant Attorney General [AAG] and all the dam owners to urge, in part because of the pending appeal of the Board's last decision, the immediate dismissal of this petition without even preliminary hearing, we must remind you this is a totally different petition submitted by, in large part, different petitioners who deserve consideration of their concerns before the Board.

Different dams are included in this petition by different petitioners. While FOMB and Douglas Watts are represented here there are approximately sixty individual signers, not in the least of whom are virtually the entire Lewiston/Auburn legislative delegation, legislators from the Merrymeeting Bay region and the Senate Chair of the Marine Resources Committee.

Much of the basis for this petition can be found in earlier arguments by Maine's own Attorney General, the Maine Supreme Court and the Supreme Court of the United States, all of whom are cited herein. The Attorney General simply cannot argue, with any credibility [as has been attempted], one side of the issue in front of the US Supreme Court and the opposite side in front of the Board. All three bodies have, in fact, held that the State has the continued and predominant right and obligation to uphold and enforce the Clean Water Act and State Water Quality Certificates and to make necessary modifications to dam licenses as needed.

Most lately, in Respondent Maine BEP's Response to Motions to Dismiss of Parties-in-Interest FPL Energy, Maine Hydro LLC, Hackett Mills Hydro Associates, Ridgewood Maine Hydro Partners, L.P., Topsham Hydro, International Paper and Miller Hydro Group [Superior Court Civil Action Docket No. AP-06-19] the AAG argued in support of the continued existence of water quality certifications: "The independent existence of a water quality certification, moreover, has implications beyond the validity of reopeners. For example, the continuing viability of a certification means that the Department may enforce the conditions of certification pursuant to its general enforcement authorities. 38 M. R. S. A. §§ 347-A to 349 (2001 & Supp. 2005)."

On page 35-36 of the new Deer Rips 401 Water Quality Certification [now under appeal] the Department of Environmental Protection [DEP] notes that: "…pursuant to 38 MRSA Section 341-D (3), after written notice and opportunity for hearing, the Board may modify any water quality certification whenever it finds that, among other things, the approved activity poses a threat to the environment or there has been a change in any condition or circumstance that requires modification of the terms of the certification. Thus, the DEP already has statutory authority to re-open this WQC to impose new conditions regarding eels as may be warranted in the future."

There is no legal or common sense basis for license changes to be limited only to those licenses containing re-opener clauses. This is an untested and purely hypothetical argument put forth by the AAG and in error by the dam owners which could result in grandfathering, for many years of adverse conditions unknown at the time, of licensure or that have been created since. Maine law does not allow for the grandfathering of water quality violations in dam licenses.

The presence/ absence of reopeners are not even relevant at this point. *The only question for the Board right now is whether or not the petitioners have offered up enough evidence to justify moving forward with an adjudicated public hearing on the issue*.

While the Board has no set standard of evidence, that of the DEP, according to Commissioner Littel at the Kennebec hearing, is such that "*when there is conflicting technical evidence a public hearing is generally called*." The Maine Supreme Court has defined substantial evidence as *'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'* CLF v. Town of Lincolnville, 2001 ME 175, ¶6 quoting Gorham v. Cape Elizabeth, 625 A.2d 898, 903 (Me. 1993). By virtually any standard of evidence, the petitioners have far exceeded any evidentiary burden we might need to overcome and have most probably far exceeded the level of evidence in most matters brought before the Board.

The Maine Supreme Court noted in SD Warren v BEP that BEP jurisdiction can supercede FERC in the application of certification conditions and approval of project changes. The Maine Law Court decision was just upheld unanimously by the Supreme Court of the United States [congratulations!].

In short, this U.S. Supreme Court decision affirms for the State the necessary legal basis to immediately bring a halt to the eel killing. The Maine Supreme Court notes in their S.D. Warren ruling the BEP's goal to ***"restore and maintain the chemical, physical and biological integrity of the State's waters…"*** And also: ***"Because water quality standards are not presently being met, the BEP may impose any conditions necessary to ensure compliance with those standards."***

FOMB requests a full public hearing before the Board on this issue based on the facts above and of the "substantial public interest" involved. For the convenience of all parties we request that should an adjudicatory hearing be granted the Petitioners, it be combined with the hearing on Kennebec dams.

Thank you for your consideration.

Sincerely,

Ed Friedman

C.C.

Mr. Douglas H. Watts
131 Cony St.
Augusta, Maine 04330
Phone: 622-1003
Email: fks@gwi.net

Bruce Merrill (for FOMB)
Law Offices of Bruce M. Merrill
225 Commercial Street, Suite 501
Portland, Maine 04101
Phone: (207) 775-3333
Fax: (207) 775-2166
Email: Mainelaw@maine.rr.com

Friends of Merrymeeting Bay
P.O. Box 233
Richmond, ME 04357

Licensees

Brunswick, Lewiston Falls, Deer Rips/Gulf Island Pond

Sarah Verville (for FPLE)
Pierce Atwood
One Monument Square
Portland, Maine 04101-0111
Phone: 791-1371
Fax: 791-1350
Email: sverville@pierceatwood.com

FPL Energy Maine Hydro LLC
ATTN: F. Allen Wiley
160 Capitol Street
Augusta, ME 04330
Phone: (207) 623-8413
Fax: (207) 623-1016
Email: al_wiley@fpl.com

Pejepscot

Jeffrey Thaler (for Topsham Hydro Partners)
Bernstein Shur
100 Middle Street
PO Box 9729
Portland, Maine 04104-5029

Phone: (207) 228-7312
Fax: (207) 774-1127
Email: jthaler@bernsteinshur.com

Chuck Lucas
Topsham Hydro Partners
c/o ARIA
11900 Wayzata Boulevard, Suite 232
Minnetonka, MN 55305
Phone: 952-545-0975
Fax: 952-545-3483
Email: chuck.lucas@ariacallsandcards.com
Home Email: Pike4530@aol.com

Worumbo

Miller Hydro Group
ATTN: Mark Isaacson
148 Middle Street
Portland, ME 04101
Phone: (207) 772-6190
Fax: (207) 772-6320
Email: misaacson@energymaine.com

Upper Androscoggin

City of Lewiston
ATTN: David Jones
27 Pine Street
Lewiston, ME 04240
Phone: (207) 784-5753 (ext. 202)
Fax: (207) 784-5647
Email: djones@ci.le

Riley-Jay-Livermore & Otis Hydroelectric

International Paper Company
ATTN: Tom Saviello
PO Box 20
Jay, ME 04239
Phone: (207) 897-3431
Fax: (207) 897-1783
Email: tom.saviello@ipaper.com

and

Sean Mahoney, Esq. (for IP)
Verrill & Dana
One Portland Square
P.O. Box 586
Portland, Maine 04112-0586
Phone: (207) 774-4000
Fax: (207)774-7499
Email: Smahoney@verrilldana.com

Rumford Falls

Rumford Falls Hydro LLC
ATTN: Brian Stetson
c/o Brookfield Power
1024 Central Street
Millinocket, ME 04462

Barker Lower, Barker Upper, Marcal

Matthew Manahan for Ridgewood & Hackett
Pierce Atwood
One Monument Square
Portland, Maine 04101
Phone (207) 791-1189
Fax (207) 791-1350
mmanahan@pierceatwood.com

Ridgewood Maine Hydro Partners
ATTN: Charles Wemyss, Jr.
86 Winthrop Street, Suite 3
Augusta, ME 04330
Phone: (207)
Fax: (207) 621-9779
Email:

Hackett Mills

Hackett Mills Hydro Associates
ATTN: Art Hagood
Maine Renewables LLC
191 Maine Street
Annapolis, MD 21401
Phone:
Fax: (410) 269-1530