

**STATE OF MAINE
KENNEBEC, ss.**

**SUPERIOR COURT
CIVIL ACTION
DOCKET NO. AP-05-76**

**Friends of the Kennebec Salmon
Petitioner**

v.

**Maine Board of
Environmental Protection
Respondent**

**Appeal of Water
Quality Certification and
Permit for Reconstruction
of the Union Gas dam,
Messalonskee Stream,
City of Waterville, Maine.
Permit # L-22230-34-A-N.**

**PLEADING OF THE PETITIONER
FRIENDS OF THE KENNEBEC SALMON, INC.
AUGUSTA, MAINE.**

FEBRUARY 3, 2006.

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4. The Findings of Fact fail to establish the project will allow for attainment of the legal water quality standards for Messalonskee Stream.
5. The Findings of Fact are so vague as to provide no meaningful basis for judicial review.
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9. The Findings of Fact are insufficient to discern the basis for which the BEP determined the

project will not result in significant harm to fish and wildlife resources.

10. Because the instant water quality certification allows the Applicant to violate Maine's water quality laws, the certification is not valid.

11. The permit violates the Maine Waterways Development and Conservation Act (MWDCA) by failing to provide "reasonable assurance" the project will not violate Maine water quality standards.

12. The permit will cause Messalonskee Stream to fall from full attainment of its legal water quality classification into full violation of its water quality classification.

13. The permit violates Maine's antidegradation statute by failing to protect and maintain the existing in-stream water use of Messalonskee Stream by native American eel, Atlantic salmon and sea lamprey.

14. The Maine BEP's limited scope of review for the project is absurd and contrary to the goals and intent of the statutes the BEP administers.

15. Maine BEP improperly relied upon evidence and arguments offered by Maine DEP technical staff during the BEP's vote on November 3, 2005 that was not part of the official record for the proceeding.

G. RELIEF REQUESTED BY PETITIONER (§38)

CASES CITED

1. Town of Jay v. Androscoggin Energy LLC., 2003 ME 64, ¶10.
2. Melanson v. Sec'y of State, 2004 ME 27, ¶¶ 7-8, 861 A.2d 641, 643-44.
3. Town of Eagle Lake v. Commissioner of Dept. of Education, 2003 ME 27, ¶7, ¶8.
4. Kurlanski v. Portland Yacht Club, 2001, ME 147. 782 A.2d 783, ¶7, ¶13.
5. CLF v. Town of Lincolnville, 2001 ME 175, ¶6.
6. Widewaters Stillwater Co. LLC v. BACORD., 2002 ME 27, ¶11, ¶13, ¶15.
7. Wells, 2001 ME 20, 771 A.2d at 375, ¶10.
8. Christian Fellowship and Renewal Center v. Town of Limington, 2001 ME 16, ¶12, 769 A.2d 834, 838.
9. Lentine v. Town of St. George, 599 A.2d 76, 80 (Me. 1991)
10. CLF v. Maine Dept. of Environmental Protection, 2003 ME 62, ¶36.
11. Handyman Equipment Rental v. Portland, 724 A.2d 605, 607-608 (Me. 1999).
12. S.D. Warren v. Board of Environmental Protection., 2005 ME 27, ¶12, ¶19, ¶28,
13. Bangor Hydroelectric. v. Board of Environmental Protection, 595 A.2d 438, 442 (Maine 1991)
14. Butterfield v. Norfolk & Dedham Fire Ins. Co., 2004 ME 124, ¶3.

ADMINISTRATIVE ACTIONS CITED

1. Maine BEP. August 28, 1995. Findings of Fact and Order Approving Water Quality Certification for the Union Gas Project, Messalonskee Stream.
2. Maine DEP. May 10, 2005. Findings of Fact and Order Approving Dam Repair at Union Gas Project, Messalonskee Stream. Permit # L-22230-34-A-N.
3. Maine BEP. Nov. 3, 2005. Findings of Fact and Order Denying Appeal of Friends of the Kennebec Salmon.
4. Maine BEP. Sept. 21, 2005. Findings of Fact and Order Approving Water Quality Certification Order for the Gulf Island and Deer Rips Dams, Androscoggin River.
5. State of Maine. Feb 6, 2004., Respondent's Brief, S.D. Warren Company v. Maine Dept. of Environmental Protection, Docket No. AP-03-70.
6. Maine Board of Environmental Protection. October 2, 2003. Findings of Fact and Order Denying Appeal of S.D. Warrren Company of Water Quality Certificates for Presumpscot River Hydroelectric Projects.

STATUTES CITED

1. Maine Waterways Development and Conservation Act. 38 MRSA §633 *et seq.*
2. Maine Water Classification Law. 38 MRSA §§464-465.
3. Federal Clean Water Act. 33 U.S.C. §§1251-1387 (West 2001 & Supp. 2004).

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Permit # L-22230-34-A-N.**

1. Pursuant to M.R. Civ. P. 80 and 5 MRSA §11001, Petitioner Friends of the Kennebec Salmon (FKS) here appeals a permit issued May 10, 2005 by the Maine Department of Environmental Protection (Maine DEP) allowing a new and impassable concrete dam to be constructed in the bed of Messalonskee Stream in Waterville, Maine; and the November 3, 2005 Order by the Maine Board of Environmental Protection (Maine BEP) denying an appeal by FKS of this permit.

2. Petitioner FKS claims the permit will violate the legal water quality standard

established for Messalonskee Stream; cause Messalonskee Stream to fall out of full attainment of its legal water quality classification; violate Maine's antidegradation statute; and violate the Maine Waterways Development and Conservation Act.

3. Through its Denial Order, Maine BEP states all of these violations are lawful because Maine BEP issued a permit at the site 10 years ago which allowed these violations.¹ Through this construction, Maine BEP has forwarded the following new legal precedents: (a) Existing violations of Maine's water quality laws can be grandfathered; (b) Future violations of Maine's water quality laws can be grandfathered; (c) Maine BEP water quality certifications at hydroelectric dams supercede those Maine water quality laws the certifications are intended to enforce. Petitioner requests the Court vacate Maine DEP's May 10, 2005 permit allowing construction of a new dam at Messalonskee Stream; and vacate Maine BEP's November 3, 2005 denial of Petitioner's appeal of this permit.

BACKGROUND

4. The sustained engagement of Petitioner Friends of the Kennebec Salmon in the welfare of Messalonskee Stream since 1997 results from a sobering conclusion: the extensive damming and impoundment of Messalonskee Stream during the early 20th century and the lack of interest by the State of Maine in restoring Messalonskee Stream to health has doomed the stream and its native life to oblivion. This conclusion has forced Friends of Kennebec Salmon to acknowledge

¹ Maine BEP. August 28, 1995. Finding of Facts and Order Approving Water Quality Certification for the Union Gas Project, Messalonskee Stream. This Order requires no safe passage for indigenous American eel, Atlantic salmon and sea lamprey at the project; nor does it protect American eels living above the project from being killed in the project turbines during their migration to the Atlantic Ocean to give birth. This Order remains in effect at the project today even though no dam or hydroelectric generation has existed at the project since 2001.

that unless and until the impacts of these four hydroelectric dams are addressed, Messalonskee will never come back to life. These dams control the future of Messalonskee Stream.

5. Messalonskee Stream is very old, dating back to the melting of the Laurentian Ice Sheet which covered central Maine until 12,000 years ago. The highly polished bedrock and boulders which form the bed of Messalonskee Stream attest to the influence of this mile thick sheet of ice. People have lived along Messalonskee Stream for millennia -- its Indian name is testament to that. Until the middle of the 19th century, natural forces controlled which animals called Messalonskee Stream their home. Since this time, humans, businesses and governments have supplanted this authority with their own. By the early 20th century, many of the native fish of Messalonskee Stream were driven to extinction by the pollution of its waters and the construction of impassable dams they could not ascend. Atlantic salmon are an example. No scientific surveys were made to document the native fish which lived in Messalonskee prior to the 20th century; and no scientists were present to witness their final disappearance from the stream. The people who lived along Messalonskee in 1780 did not know the stream would be dead in several generations and the salmon and trout and shad and herring they took for granted outside their doors would soon be gone.

6. Without necessarily trying, by 1995 the citizens, businesses and government of Maine had succeeded in driving most of the native fish species of Messalonskee Stream to complete extinction. In 1995, few people cared about Messalonskee Stream because there was not much left of it to care about. Its falls and rapids were flooded or blasted. Its water was brown and polluted. Its bed was filled with rusted metal, broken glass and tires. No memory existed of Atlantic salmon in the stream. Little hope existed of Atlantic salmon ever returning. In 1995, Messalonskee Stream was considered doomed to oblivion. Then several things happened. The

severe pollution which had plagued Messalonskee Stream was greatly abated due to enforcement of the federal Clean Water Act and the closure of the Cascade Woolen Mill in Oakland, Maine. In 1999, the impassable Edwards Dam was removed from the bed of the Kennebec River in Augusta, 17 miles downstream from Messalonskee. Atlantic salmon and other migratory fish quickly returned to Messalonskee. In the fall of 2000 several Atlantic salmon spawned in Messalonskee Stream for the first time in 160 years. In 2003, adult sea lamprey dug their nests in the gravel bed of Messalonskee; none had been seen doing this for 160 years. In 2004, thousands of native, migratory blueback herring crowded below the Union Gas dam and spawned. None had been seen there in 160 years. In 2005, anglers flocked to Messalonskee to catch striped bass. None had been caught in Messalonskee for 160 years.² Within only five years after removal of the Edwards Dam in Augusta, nearly all of the native fish of Messalonskee Stream had returned to the stream and were reproducing successfully in the stream for the first time in 160 years. Things were changing fast on Messalonskee Stream.

7. In June 2001, a large section of Union Gas dam suddenly collapsed into the stream it had blocked since 1924. Several months later the dam's owner removed a 66-foot section of the dam down to bedrock, exposing the natural course of Messalonskee Stream for the first time

² Documentation of spawning Atlantic salmon in Messalonskee Stream since the removal of the Edwards Dam in Augusta in 1999 has been made by fisheries scientists with the Maine Atlantic Salmon Commission (MASC) and noted in their February 25, 2005 comments to Maine DEP regarding the instant project. This discovery was cited by the National Academy of Sciences in its 2004 study, Atlantic Salmon in Maine, as direct evidence of the immediate and positive benefits of the Edwards Dam removal for the native Atlantic salmon of the Kennebec River. Documentation of sea lamprey, blueback herring, American eel and striped bass in Messalonskee Stream in the vicinity of the Union Gas site has been made by Petitioner FKS through numerous field observations at the stream since 2000. FKS has published photographs and descriptions of these animals in Messalonskee Stream on its website (kennebecriver.org) and has repeatedly informed Maine fisheries agencies of these discoveries in writing, at meetings and in personal conversation. Our observation of the rapid recolonization of Messalonskee Stream by its native sea-run fish species since removal of the Edwards Dam in 1999 has been the driving force of our public outreach and advocacy efforts to protect the health of Messalonskee Stream.

since before the Great Depression. Nobody protested the sudden absence of the dam and its narrow, pond-like impoundment. Few people even noticed. Fish and animals quickly noticed. At once they began to explore and recolonize the rushing stream. By spring 2005, trees nearly 20 feet high were growing in spots along the stream that had been under 30 feet of water just five summers earlier. A young woodchuck built a burrow in what had used to be deeply submerged mud. Baby American eels climbed the bedrock ledges at the former dam site by the thousands. Spawning blueback herring filled the water directly below it. A young boy with a net stood on a rock for hours scooping up the swarming herring and let them go again. Sea lamprey clung to the 400 million year old rock of the ledges with their strange, sucker-like mouths, using the deeply folded rock as hold-fasts to move upstream. Small trout and fallfish filled the polished potholes of the ledges, so numerous their backs could be felt and grasped by hand. Local parents and children came down to the former dam site and caught striped bass, which were attracted by the thousands of baby eels moving upstream. The baby eels were attracted by the lack of a dam. The striped bass were attracted by the baby eels. Children and their Dads were attracted by the stripers. The water was clear, strong, free-flowing and clean. Song sparrows warbled from the young silver maples. A white-tailed deer tiptoed alongside the new underbrush. Around a bend from the deer, a father stood fishing with his son. They each caught a fish.

8. Except for the earthen abutments, chain-link fence and the old stone powerhouse beside them, none of these fathers, mothers, sons, daughters, fish and animals along the stream in 2005 seemed to know the Union Gas hydroelectric project had once existed. What used to be called a "project impoundment" was now a free-flowing stream. Nobody who stood in or alongside the stream seemed to care why the Union Gas "project" no longer existed. Nobody seemed to miss it. This one sunny spring day in 2005 is now imprinted in the memories of many small children. Next spring they will beg their Dads to bring them back to the banks of Messalonskee, where the

fish are so plentiful you can catch them with your hands. Memories so faded as to evade recollection have now become fresh again.

9. The first paragraph of the federal Clean Water Act states that is "the objective of this Act to *restore* and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. §1251(a) (emphasis added). The Maine Legislature declares it is the State of Maine's objective "to *restore* and maintain the chemical, physical, biological integrity of the State's waters ..." and to "enhance water quality," where standards are not being achieved. 38 M.R.S.A. §464(1) (emphasis added). The goals of these two statutes are aimed precisely at the severely degraded condition of Messalonskee Stream. Prior to 2001, Messalonskee Stream resembled thousands of rivers and streams across the United States. It was polluted, forgotten and devoid of its native life. It was a trash dump with current.

10. The goals of the federal Clean Water Act and Maine's Water Classification Laws are not to clean up those rivers which are already pristine. The federal Clean Water Act, by its common name, was enacted to clean up those rivers which have been most severely polluted and degraded. While both of these statutes expressly protect the lives of native fish and wildlife which inhabit rivers, these laws place a premium on ensuring that people may always use these waters for swimming, boating, recreation and fishing. Since the ancient human activity of fishing requires fish to catch, and this requires fish being able to live in rivers, these federal and state laws require rivers to be in a condition where the fish native to these rivers are allowed to exist, to grow and to successfully give birth. If fish cannot give birth, there can be no fishing for them. These laws explicitly recognize that government for more than a century allowed rivers to be degraded and polluted and their degraded condition prevented citizens from using them; and fish from living in them. This is why both federal and state clean water laws have an explicitly

restorative goal, structure and function. These laws were enacted to restore our rivers back to a condition of health.

11. To operationalize these explicit restorative goals, the federal Clean Water Act and Maine's water quality laws require all waterbodies to support all of the fish species they historically supported. When these laws were enacted, the United States Congress and the Maine Legislature recognized many rivers had been degraded for so long that they utterly failed to meet the water quality standards contained in these laws. The Clean Water Act and Maine's water quality statutes were enacted expressly to place these rivers on the road to restoration -- and to prohibit governments from allowing them to stay in a degraded condition forever. The Clean Water Act and Maine's water quality statutes were written expressly for streams like Messalonskee. In 1995, Messalonskee Stream had been left behind. The State of Maine and dam owners had left it for dead. Few people cared if Messalonskee Stream would ever be alive again. The Clean Water Act and Maine's water quality laws were enacted to stop this societal amnesia. The goals and plain language of the Clean Water Act and Maine's water quality laws require that Messalonskee Stream comes back to life again. For the first time in 160 years, Messalonskee Stream is coming back to life. In the instant proceeding, Maine BEP has ruled that Messalonskee Stream must be killed again.

PROCEDURAL HISTORY

12. In 1993, all four of the Messalonskee Stream hydroelectric projects, including the Union Gas project, were required to be re-licensed by the Federal Energy Regulatory Commission (FERC) pursuant to the Federal Power Act. 16 U.S.C.A. §797(e) (West 2000). Under §401 of the federal Clean Water Act, a new federal license for a hydropower project

cannot be issued unless the State certifies the project will not cause violations of state water quality standards in the waterbody where the project resides. 33 U.S.C. §1341(a)(1).

13. The Maine Dept. of Environmental Protection (Maine DEP) issued a state water quality certificate for the Union Gas project on August 28, 1995 -- two years before Petitioner Friends of the Kennebec Salmon was incorporated. (Denial at 1). This water quality certificate contains no requirements for the safe passage of indigenous migratory fish species to and from their habitat above and below the Union Gas project (or at any of the four Messalonskee stream dams). The certification document makes no reference to any of Messalonskee's native, migratory fish species nor does it discuss the present or future impact of the Union Gas project on these fish during the recommended 40-year federal license for the project. At the Maine BEP's meeting on Nov. 3, 2005 Maine DEP technical staff confirmed this fact, telling the Board that during the mid 1990s "nobody was thinking about American eels."³

14. On July 28, 1999 the Federal Energy Regulatory Commission issued a new 37-year federal license for Union Gas Dam project. Soon after this, the Union Gas project was sold by Central Maine Power to Florida Power & Light (FPL Energy Maine). (Denial at 1). In June 2001, a large portion of the granite block face of the Union Gas Dam collapsed into Messalonskee Stream. Upon discovering the failure, dam owner FPL Energy Maine drained the project

³ Statement of Mr. Dana P. Murch, Maine DEP, at the Nov. 3, 2005 Maine BEP meeting. Mr. Murch wrote much of the August 28, 1995 Maine water quality certification for the Union Gas project as well as the water quality certifications for the other Kennebec River drainage hydroelectric dams issued by the DEP during the mid 1990s. Petitioner cites this statement only because it corroborates our April 29, 2005 and June 8, 2005 claim that the existing Maine water quality certification for the Union Gas project is flawed and seriously out of date with respect to American eels. Since 1998, Maine DEP and fisheries agencies have begun appreciating the acute need for safe upstream and downstream passage for American eels at hydroelectric dams in Maine and have begun requiring safe passage for eels at numerous Maine hydroelectric dams where American eels are known to be present. In this proceeding, Petitioner seeks similar protection for the American eels which now live in Messalonskee Stream and now have safe passage at Union Gas dam site because there has been no dam at the Union Gas site since 2001.

impoundment. After inspection revealed significant structural flaws in the remaining portions of the dam face, FPL Maine sought and received a permit from the State of Maine to completely remove a 66 foot wide section of the dam. The remaining dam abutments were stabilized with sprayed-on concrete. This work was completed in fall 2001. (Denial at 2) With the 66 foot wide center section of the dam removed down to bedrock, the one mile reach of Messalonskee Stream returned to its natural channel, depth and flow. This section of the stream became accessible to indigenous migratory fish species capable of negotiating the natural bedrock ledge at the dam site.

15. In 2003, the inoperable Union Gas dam hydropower project was sold by FPL Energy Maine to Maine Renewables LLC, a subsidiary of Synergics of Annapolis, Maryland. Federal and state permits for the project were also transferred to Synergics and its subsidiary, Maine Renewables LLC. (Denial at 2) In February 2005, Messalonskee Stream Hydro LLC, a subsidiary of Maine Renewables, submitted an application to the Maine DEP under the Maine Waterway Conservation and Development Act to construct a new dam and impoundment at the Union Gas project site for the purpose of generating hydroelectric power. At the time this application was submitted, the Union Gas project had not been capable of generating hydroelectric power since June 2001, a period of nearly four years. (Denial at 2) In response to requests by local citizens on April 6, 2005 the Maine DEP held an informational public meeting at Waterville City Hall regarding the application filed by Messalonskee Stream Hydro LLC to

rebuild the Union Gas dam.⁴ Written public comments and supplemental information regarding the application were invited by the Maine DEP. Friends of the Kennebec Salmon (FKS) submitted timely written comments to the Maine DEP on April 29, 2005. On May 10, 2005 the Maine DEP issued a permit approving the application of Messalonskee Stream Hydro LLC to rebuild the Union Gas dam. On June 8, 2005 FKS filed a timely appeal of this permit before the Maine BEP. In comments filed July 7, 2005 the project applicant argued FKS had no standing to bring the appeal and asked the Maine BEP to dismiss the appeal. (Denial at 3) On November 3, 2005 the Maine BEP voted 6-3 to deny FKS' appeal. In its Finding of Facts and Order, Maine BEP ruled FKS had standing to bring the appeal. (Denial at 3-4). FKS now asks the Court to review Maine BEP's Finding of Facts and Order of November 3, 2005.

SUMMARY OF PETITIONER'S CLAIM

16. Petitioner's claims fall into three categories. First, Petitioner claims the Findings of Fact accompanying the Nov. 3, 2005 BEP Denial of Petitioner's Appeal are so vague as to prevent meaningful judicial review of whether the BEP's decision is supported by substantive evidence in the record. Second, Petitioner claims uncontested evidence in the record shows the instant permit will cause annual fish kills of adult American eels and other severe violations of

⁴ On February 25, 2005 Petitioner FKS wrote to the Maine DEP Commissioner formally requesting she hold a public hearing on this application due to the severe impacts of the project on the health of Messalonskee Stream. The Commissioner denied the request. In March 2005, FKS began a letter-writing campaign to encourage concerned citizens to request the Maine DEP *at least* hold an "informational" meeting on the application. Maine DEP received requests for such a meeting from a number of local citizens as well as the organizations Maine Rivers, the Kennebec Valley Chapter of Trout Unlimited and the Somerset County Chapter of Trout Unlimited. In response to these requests, Maine DEP convened the April 6, 2005 meeting which was attended by more than 20 concerned citizens. At this meeting, Mr. Dana P. Murch of the Maine DEP told the citizens the proposed new dam was effectively 'grandfathered' and the DEP was not allowed to consider any comments regarding the impact of the new dam on the health of Messalonskee Stream. Because of Mr. Murch's statement that their comments would not be considered, none of the participants at the April 6, 2005 meeting provided written comments on the application except FKS.

Maine's water quality standards and violate the legal water standards established by the Maine Legislature for Messalonskee Stream. Third, Petitioner claims the BEP improperly relied upon evidence and information provided by Maine DEP staff just prior to their vote that was highly prejudicial to the Petitioner and not part of the official record for the proceeding. For these reasons, Petitioner requests the Court vacate the Maine BEP's Nov. 3, 2005 denial of our Appeal and remand the permit proceeding to the Maine BEP for clarification of the Findings of Fact; or in the alternate, the Court vacate the May 10, 2005 dam reconstruction permit as unlawful under the Maine Waterways Development and Conservation Act.

STANDARD OF REVIEW

17. The Court reviews an agency's decision for abuse of discretion, errors of law, or findings not supported by the evidence. Town of Jay v. Androscoggin Energy LLC., 2003 ME 64, ¶10. The court reviews an agency's decisions for findings of fact not supported by the record. Melanson v. Sec'y of State, 2004 ME 27, ¶¶ 7-8, 861 A.2d 641, 643-44. In interpreting a statute, courts will seek to give effect to the Legislature's intent. Town of Eagle Lake v. Commissioner of Dept. of Education, 2003 ME 27, ¶7. To determine legislative intent, the court "look[s] first to the statute's plain meaning and, if there is ambiguity, ... beyond that language to the legislative history ... Id. (citation omitted). The court will avoid results that are "absurd, inconsistent, unreasonable or illogical." Id. (citations omitted). The court will further "consider the whole statutory scheme for which the section at issue forms a part so that a harmonious result, presumably the intent of the Legislature, may be achieved." Id. (citations omitted).

ARGUMENT

The Findings of Fact are insufficient to discern the basis of the BEP's finding that all of the evidence provided by Petitioner is unpersuasive. (Denial at 6, 8, 10)

18. The Findings of Fact at 6, 8 and 10 state the BEP found the evidence provided by Petitioner was “unpersuasive.” The Findings do not define unpersuasive. The Findings do not describe the specific evidence to which this term refers. Did the Board find all of the evidence unpersuasive or was just some of the evidence unpersuasive? Did the BEP find *any* of the evidence persuasive? Did the BEP find the evidence unpersuasive because it was false? How did the Board decide the evidence was false? Was *all* of the evidence false or was just some of the evidence false? Did the BEP find any of the evidence true? What evidence did the BEP find true? How did the the BEP decide this evidence was true? Did the BEP find some of the evidence was true but not germane? What evidence was true but not germane? Why did the BEP find this true evidence not germane? These are the questions and answers a properly constructed Finding of Facts would carefully address. A properly constructed Finding of Facts would objectively summarize the evidence provided to the record and clearly explain the methods by which the Board concluded each piece of evidence proffered was either true or false, relevant or irrelevant. For example, a properly constructed Finding of Facts in this proceeding would *at least* state: “The appellant claims the project will kill American eels every fall.” Then the Finding of Facts would discuss this claim and all evidence in the record relating to that claim. Then the Board would explain how it concluded the claim was true or false and relevant or not relevant. The Finding of Facts do not this. The Findings of Facts avoid making *any* mention of Petitioner’s repeated claim that the new dam at the Union Gas site will kill American eels but simultaneous declare all of Petitioner’s evidence to be “unpersuasive.” The Court reviews an agency's decisions for findings not supported by

substantial evidence in the record. Kurlanski v. Portland Yacht Club, 2001, ME 147, ¶7, 782 A.2d 783. The 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). See Widewaters Stillwater Co. LLC v. BACORD., 2002 ME 27, ¶11: “ The majority of the Board should have stated the basis of denial of the permit and should have made factual findings underlying the decision.”; Id at ¶13: “We review, in this case, the Planning Board’s findings of fact to determine whether those findings are supported by substantial evidence. When a board’s findings of fact are insufficient to apprise us of the basis of the Board’s decision, it is impossible for us to determine whether that decision is supported by substantial evidence.” Id at ¶15: “Rather than to have considered a blanket motion to approve, to permit effective appellate review, the Board should have voted separately on each of the applicable standards or in some manner indicated which standards the applicant satisfied and which the applicant did not. In this manner, a reviewing court can determine whether there is substantial evidence in the record to support the Board’s decision.” See Wells, 2001 ME 20, ¶10, 771 A.2d at 375 (“[I]f an agency's findings of fact are insufficient to apprise us of the basis of the agency's decision and whether it is supported by substantial evidence, we should usually remand to the agency for further findings of fact.”) and Christian Fellowship and Renewal Center v. Town of Limington, 2001 ME 16, ¶12, 769 A.2d 834, 838 ([T]he remedy for an agency's failure to act on all matters properly before it or to make sufficient and clear findings of facts is a remand to the agency for findings that permit meaningful judicial review.”)

The Findings of Fact are insufficient to discern the basis of the BEP's finding the project will fully comply with Maine's water quality statutes and ensure attainment of the legal water quality standard established for Messalonskee Stream.

19. Petitioner has presented uncontested evidence showing:

Upstream passage.

- a) No dam or artificial obstruction to the passage of fish has existed at the site since fall 2001.
- b) Atlantic salmon, sea lamprey and American eel live in Messalonskee Stream and are indigenous to Messalonskee Stream.
- c) The removal of the Union Gas dam in 2001 has restored these animals' free and natural access to Messalonskee stream above the former Union Gas dam site
- d) The proposed new dam would be impassable to all three fish species and deprive them of their existing free and natural access to their indigenous habitat above the former dam site.
- e) These impacts of the dam would cause the legal water quality classification of Messalonskee Stream to be violated because the portion of the stream above the dam would no longer be capable of supporting all aquatic species indigenous to the stream. 38 MRSA 465(3)(C)

Downstream passage:

- a) American eel, Atlantic salmon and sea lamprey now living above the former dam site have free and natural access to the Kennebec River and the Atlantic Ocean.
- b) Because these animals are migratory fish, they require safe access to the ocean to in order to grow, give birth and complete their life cycle.
- c) The proposed dam provides no safe method for these animals to migrate past the dam because passage over the top of the dam or through the dam turbines would cause their injury or death.
- d) These impacts of the dam would cause the legal water quality classification of Messalonskee Stream to be violated because the portion of the stream above the dam would no longer be capable of supporting all aquatic species indigenous to the stream. 38 MRSA 465(3)(C)

The Findings of Fact do not dispute or discuss this evidence but merely claim all of it is “unpersuasive.” The Findings of Fact do not state a basis upon which the BEP reached its conclusion this evidence is unpersuasive. The court reviews an agency's decisions for findings of fact not supported by the record. Melanson v. Sec'y of State, 2004 ME 27, ¶¶ 7-8, 861 A.2d 641, 643-44. The Court reviews an agency's decisions for findings not supported by substantial evidence in the record. Kurlanski v. Portland Yacht Club, 2001, ME 147, ¶7, 782 A.2d 783. The 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). The absence of any dam at the site since 2001 represents substantial evidence that fish now have the ability to move up and down the stream; and applicant's proposal to construct a 35 foot high concrete dam at the site will deprive the fish of this ability. This will cause the legal water quality classification of Messalonskee Stream to be violated because the portion of the stream above the dam will no longer be capable of supporting all aquatic species indigenous to the stream. 38 MRSA §465(3)(C) Because the Findings of Fact do not discuss or contest this evidence, they state no basis upon which the BEP found all of this evidence unpersuasive; nor do they state the basis upon which the BEP found the new dam will not block passage for these fish and will not violate the legal water quality standards of Messalonskee Stream.

The Findings of Fact are insufficient to discern the basis of the BEP's finding that the project meets all eight mandatory approval criteria in the Maine Waterway Development and Conservation Act (MWDCA).

20. In order to issue an MWDCA permit for reconstruction of a dam, the BEP must find

the project meets all eight approval criteria set forth in the MWDCA. 36 MRSA §636. The Findings of Fact state the BEP found the project meets all eight criteria. Petitioner has provided detailed evidence to the contrary. The Findings of Fact do not dispute or discuss this evidence but state the BEP found all of the evidence unpersuasive. The Findings of Fact do not state a basis upon which the BEP found all of the evidence unpersuasive. The Court reviews an agency's decisions for findings not supported by substantial evidence in the record. Kurlanski v. Portland Yacht Club, 2001 ME 147, ¶7, 782 A.2d 783. The Court has defined substantial evidence as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Gorham v. Cape Elizabeth, 625 A.2d 898, 903 (Me. 1993). One of the eight approval criteria requires the BEP to find there is reasonable assurance the project will not cause violations of applicable State water quality standards. 38 MRSA §636(8). Uncontested evidence in the record shows the dam will deprive indigenous fish in the stream of their ability to swim up and downstream and use their habitat in the stream. This will cause the legal water quality classification of Messalonskee Stream to be violated because the portion of the stream above the dam will no longer be capable of supporting all aquatic species indigenous to the stream. 38 MRSA §465(3)(C). Because the Findings of Fact do not discuss or contest this evidence, they state no basis upon which the BEP found this evidence unpersuasive; nor do they state the basis upon which the BEP found there is reasonable assurance the project will not cause violations of applicable State water quality standards. The Findings of Fact do not discuss uncontested substantial evidence in the record which contradicts the BEP's decision. One remedy is to remand the ruling back to the agency to explain how the agency's decision is supported by substantial evidence. Wells, 2001 ME 20, ¶10, 771 A.2d at 375 ("[I]f an agency's findings of fact are insufficient to apprise us of the basis of the agency's decision and whether it is supported by substantial evidence, we should usually remand to the agency for further findings of fact.") *See also: Christian Fellowship and Renewal Center v. Town of Limington*, 2001 ME 16, ¶12, 769

A.2d 834, 838 ([T]he remedy for an agency's failure to act on all matters properly before it or to make sufficient and clear findings of facts is a remand to the agency for findings that permit meaningful judicial review.").

The Findings of Fact fail to establish the project will allow for attainment of the legal water quality standards for Messalonskee Stream.

21. An applicant has the burden to establish it satisfies all the requirements necessary for a permit approval. Lentine v. Town of St. George, 599 A.2d 76, 80 (Me. 1991). In the instant proceeding Petitioner has provided substantial evidence showing the project will prevent native fish in Messalonskee Stream from continuing to enjoy their free and safe access to Messalonskee Stream at the former dam site. This will cause the legal water quality classification of Messalonskee Stream to be violated because the portion of the stream above the dam will no longer be capable of supporting all aquatic species indigenous to the stream. 38 MRSA 465(3)(C) The applicant has not disputed this or provided any evidence which contests this. The BEP cannot issue a dam reconstruction permit unless it finds the project meets all eight mandatory approval criteria. 38 MRSA §636. As such, the BEP bears the burden to show the project satisfies all eight of these criteria for a permit to be issued. The BEP cannot issue a dam reconstruction permit unless it finds the project will not violate Maine's water quality statutes. 38 MRSA §636(8) As such, the BEP has the burden to show the project will not violate Maine's water quality statutes. Petitioner has provided substantial evidence showing the project will prevent native fish in Messalonskee Stream from continuing to enjoy their free and safe access to Messalonskee Stream at the former dam site. This will cause the legal water quality classification of Messalonskee Stream to be violated because the portion of the stream above the dam will no longer be capable of supporting all aquatic species indigenous to the stream. 38 MRSA 465(3)(C)

The BEP has provided no evidence which contests this, nor has the applicant. Without discussion or explanation, the BEP merely states all of Petitioner's evidence is unpersuasive. The Findings of Fact cite to no evidence showing the project will meet the MWDCR criteria at §636(8); nor is any evidence offered to dispute the substantial evidence offered by Petitioner showing project will violate applicable State water quality standards. As such, the BEP fails to meet its burden to show the project will meet all eight approval criteria in §636 of the MWDCR including criteria (8). The burden of the BEP to show the project satisfies criteria (8) of the MWDCR is essential to the BEP's obligation to enforce and uphold Maine's water quality standards. If the BEP does not have reasonable assurance the project will not violate Maine's water quality standards, the BEP cannot ensure these water quality standards will actually be met and attained in the waterbody affected by the project. Because what is at stake in this criteria is the attainment of Maine's statutory water quality standards as enacted by the Legislature, the BEP has an especial burden to make certain its findings are supported by substantial evidence in the record. Without this certainty, the BEP runs the risk of allowing Maine's water quality statutes to be violated in Messalonskee Stream and preventing the Legislature's goal of restoring and maintaining the physical, chemical and biological integrity of Maine's waterways from being achieved. 38 MRSA §464(1) Because the instant proceeding involves a hydroelectric project licensed to operate until 2036, the failure of the BEP to make certain the approval criteria at (8) are met would cause Messalonskee Stream to be in violation of its legal water quality standards for the next 21 years.

The Findings of Fact are so vague as to provide no meaningful basis for judicial review.

22. In the instant case, the former dam at the Union Gas site was issued a Maine water quality certification in 1995 and a federal operating license in 1999. Notwithstanding these

previously issued permits, all of the approval criteria in 38 MRSA §636(1-8) must be met for a dam reconstruction permit to be issued. The statute does not allow any of the eight approval criteria to be waived. The Findings of Fact do not explain how the BEP reached its conclusion the project meets all eight approval criteria. The Findings of Fact simply state the BEP made this conclusion. The Findings of Fact do not discuss how the BEP reached its conclusion that all of Petitioner's evidence to the contrary is unpersuasive. The Findings of Fact simply state the evidence is unpersuasive. The Findings of Fact imply there is a grandfathering right attached to the dam reconstruction project arising from previously issued state and federal licenses, and the BEP relied upon these licenses to waive some -- but not all -- of the approval criteria from review. For example, the approval criteria in the MWDCA requires the BEP find there is reasonable assurance the project will not violate applicable Maine water quality standards. The Findings make this conclusion but cite to no evidence in support of this finding but instead cite to findings made in previously issued state and federal licences. While the Findings suggest the BEP has grandfathered the instant project from review under criteria (8) , the Findings do not assert it outright. *See: Kurlanski v. Portland Yacht Club*, 2001, ME 147, ¶13, 782 A.2d 783. (The board's findings of facts did not state whether it accepted as grandfathered any violations of shoreland zoning provisions and the board made no findings to allow the Court to determine whether it waived certain requirements for site plan approval or approved the site plan on a demonstration the requirements were satisfied). The Findings here suggest the BEP reviewed the instant project for compliance with certain mandatory approval criteria but waived from review other mandatory criteria. The Findings suggest the BEP reviewed the applicant's financial and technical ability to undertake the project (criteria 1); to make adequate provisions for public safety (criteria 2); and to make adequate provisions for traffic movement (criteria 4). The Findings imply the BEP waived from review other criteria, ie. the project will result in significant economic benefits to the public (criteria 3); the applicant has made reasonable provisions to realize the environmental

benefits of the project, if any, and to mitigate its adverse impacts (criteria 6); the advantages of the project are greater than the direct and cumulative adverse impacts over the life of the project based on specified environmental and energy considerations (criteria 7); and there is a reasonable assurance the project will not violate applicable State water quality standards (criteria 8).

However, because the Findings are so vague there is no way to determine which of the eight criteria the BEP actually reviewed and which criteria the BEP waived from review. Even assuming the BEP is allowed under the MWDCA to waive some of the eight mandatory approval criteria, the Findings should clearly state which criteria were waived and which criteria were not. Without this information in the Findings of Fact, the Court cannot rule on whether the BEP is even allowed to waive certain mandatory criteria from review.

The Findings of Fact waive certain mandatory approval criteria from review.

23. An MWDCA permit is required for dam repair or reconstruction which requires dredging or filling below the normal high water line of any waterbody. 38 MRSA §633(3). The instant project requires this. At §633(2) the statute lists numerous circumstances where a dam repair does not require an MWDCA permit. None of these circumstances apply to the proposed dam reconstruction. As such, this dam reconstruction project is subject to full review under the MWDCA. §636 sets forth the approval criteria and states "the department shall approve the project when it finds that the applicant has demonstrated that the following criteria have been met." The plain language of §636 shows the burden is upon the applicant to demonstrate that all eight of the approval criteria are met; and the BEP's approval of the project is contingent upon a finding the applicant has demonstrated all of the criteria are met. The MWDCA allows for public comment and introduction of evidence pertaining to a dam reconstruction application. The applicant, the BEP and Petitioner have exercised this right. Petitioner has submitted evidence to

the record which suggests the project does not satisfy all eight mandatory criteria. The BEP must review all evidence in the record when determining if the applicant has demonstrated all eight mandatory criteria are met. If the permit is approved, the Findings of Fact must show the basis upon which the BEP found the project meets all eight of the mandatory criteria. The Findings of Fact do not do this. The Findings of Fact suggest the BEP has waived from review some of the mandatory approval criteria based upon findings made in previously issued licenses for the hydroelectric project as a whole. If true, this is not allowed. The plain language of the MWDCR does not allow the BEP to waive from instant review any of the eight mandatory approval criteria. That the applicant has filed an MWDCR dam reconstruction application and the BEP has accepted the application is an admission the proposal is subject to review under all eight of the mandatory approval criteria. It is implicit in an MWDCR dam reconstruction permit that a dam once existed at the site or a dam is in such disrepair that it requires reconstruction. It is also implicit that the hydroelectric project as a whole must be properly licensed under state and federal laws for the BEP to accept a dam reconstruction application under the MWDCR. However, nothing in the MWDCR allows the BEP to waive from review any of the eight mandatory approval criteria on the basis the hydroelectric project as a whole has been previously issued state and federal permits. BEP correctly asserts that state and federal licenses were issued for the entire Union Gas project in 1995 and 1999 respectively. These licenses are preconditions -- not substitutes -- for the MWDCR dam reconstruction application now being sought. Here, the applicant seeks an MWDCR permit to construct a brand new concrete dam so the Union Gas project can resume operation. This new concrete dam is the subject of the instant MWDCR application. Nothing in the MWDCR states or implies that the existence of state and federal licenses issued for the hydroelectric project as a whole provide satisfaction the dam reconstruction project meets all eight of the mandatory approval criteria. Today, the applicant has a license to operate a hydroelectric project at the site in the same sense a restaurant owner

has a license to operate a restaurant. The existence of a valid restaurant license does not allow the holder to build any type of structure she wants so as to use the license. The actual structure which houses the restaurant must still meet all building codes and other applicable standards. The mere possession of a restaurant license does not compel a reviewing agency to grandfather the proposed building from compliance with applicable standards or to waive any of the standards from its review. Implicit in an MWDCA dam reconstruction permit is that the applicant wishes to rebuild a dam. The BEP cannot accept a hydroelectric dam reconstruction application under the MWDCA unless the applicant shows it has title to the property and has been issued state and federal licenses allowing the applicant to operate a hydroelectric project at the site. Without such items the dam reconstruction application cannot be accepted by the BEP. However, the possession of these items does not waive the dam reconstruction project from MWDCA review. Instead, these items are necessary preconditions for an MWDCA review to even commence. Once the MWDCA review commences, the applicant must then demonstrate the project meets all eight of the mandatory criteria at §636 and the BEP must find the applicant has demonstrated all eight criteria are met. While not saying so explicitly, the Findings of Fact appear to turn this process on its head. If the mere existence of previously issued state and federal licenses to operate a hydroelectric project satisfies all eight approval criteria of the MWDCA there would be no need for the MWDCA permit the applicant seeks. The submission of the instant dam reconstruction application and the BEP's review of this application admit this is not the case. The plain language of the MWDCA shows that if a dam reconstruction project triggers the need for an MWDCA application then all eight of the mandatory approval criteria must be met. In the instant case both the applicant and the BEP admit the dam reconstruction project triggers the need for MWDCA review because the project requires dredging or filling below the high water mark of Messalonskee Stream. §633(1-3). Since this trigger has been met, the application is subject to all eight of the mandatory approval criteria set forth in §636. If the project owner

wishes to repair the dam without going through the MWDCa permit process, the owner is free to design and perform the repair in such a way that no dredging or filling below the high water mark of the stream is required. §633(3-A, B)(normal maintenance and repair of an existing and operating hydropower project shall be exempt provided that the activity does not involve any dredging or filling below the normal high water mark of any great pond, coastal wetland, river, stream or brook). In their vagueness, the Findings of Fact imply the BEP wishes to have its cake and eat it too. The Findings of Fact admit the nature of the dam reconstruction project triggers MWDCa review but at the same time, the Findings imply that neither the applicant or BEP are required to show the project actually satisfies all eight of the mandatory approval criteria. Because the Findings are so vague on this topic it is impossible to determine how the BEP has found the dam reconstruction project meets all eight MWDCa criteria and whether this finding is supported by evidence in the record. See: Kurlanski v. Portland Yacht Club, 2001, ME 147, ¶13, 782 A.2d 783. (The board's findings of facts did not state whether it accepted as grandfathered any violations of shoreland zoning provisions and the board made no findings to allow the Court to determine whether it waived certain requirements for site plan approval or approved the site plan on a demonstration the requirements were satisfied). In their vagueness, the Findings of Fact mirror those found deficient in Kurlanski, *ie.* the Findings fail to clearly state if the BEP has grandfathered the project from certain approval criteria, has waived certain approval criteria or has otherwise relieved the applicant from demonstrating all eight of the approval criteria are met. If the BEP has determined the project is grandfathered from some of the mandatory approval criteria or that some of the criteria have been waived, such a determination is clearly prohibited under the MWDCa. If the BEP has not made this determination, the Findings of Fact are not sufficient to show the basis upon which the BEP has found the project actually satisfies all eight of the mandatory criteria and how its conclusion in this regard is supported by evidence in the record.

The Findings of Fact are insufficient to discern the basis for which the BEP determined the project will not cause significant harm to the public rights of navigation, fishing, recreation and other lawful public uses of Messalonskee Stream.

24. The MWDCA approval criteria for dam reconstruction projects state at §636(7-D): "The advantages of the project are greater than the direct and cumulative impacts over the life of the project based upon the following considerations ... (d) Whether the project will result in significant benefits or harm to the public rights of access to and use of the surface waters of the State for navigation, fishing, fowling, recreation and other lawful public uses." The language used in this statutory criteria (public rights to navigation, fishing, fowling) shows the criterion is based upon the public trust rights to Messalonskee Stream as a navigable waterway of the State of Maine and the United States. This criterion clearly bears upon State's public trust obligation to maintain and preserve the *jus publicum* property right the public holds on Messalonskee Stream and the extent to which the *jus privatum* privilege of the applicant to operate a dam may interfere with the public's ability to exercise its rights to navigation, fishing, fowling and other lawful public uses of Messalonskee Stream. The public trust issue is especially pertinent in this proceeding because no dam or artificial obstruction exists in Messalonskee Stream today at the Union Gas project site. For this reason, the *jus publicum* property right held by the public to navigate, fish, swim and recreate on Messalonskee Stream is intact and unhindered today. The 35-foot high concrete dam proposed for the site will dramatically affect the public's ability to exercise the property right it now possesses to navigate and travel on Messalonskee Stream. At minimum, the new dam will force the public to disembark from their watercraft and portage around the dam on land owned by the applicant in order to exercise and use its right of navigation. The project application makes no accommodation for safe and convenient portage

sites and paths above and below the proposed new dam. At present such portage sites and paths are not necessary because there is no dam or artificial obstructions on Messalonskee Stream at project site to hinder the public's right of navigation. Disconcertingly, the project application states no public access to Messalonskee Stream exists at the Union Gas site today and all of the lands surrounding Messalonskee Stream at the site are gated and posted to prevent public access. The project application states this gating and posting will continue during and after construction of the new dam. Based upon the applicant's own admissions, these conditions will prevent the public from legally disembarking from their watercraft and portaging around the proposed dam so as it exercise their right to navigation on Messalonskee Stream. In effect, the project will prevent the public from exercising its right of navigation on Messalonskee Stream because this exercise would force the public to trespass on land owned by the applicant that is posted against trespassing. At the April 6, 2005 informational meeting on the application hosted by Maine DEP, the project applicant further stated that national security regulations now require hydroelectric dam owners to limit or prohibit public access to hydroelectric project dams and appurtenant facilities due to the threat of terrorist attacks on a hydroelectric project. Based upon these statements by applicant, Petitioner has asserted reconstruction of the Union Gas dam fails to satisfy approval criteria 7-D of the MWDCa because the project would completely deprive the public of its right to navigation on Messalonskee Stream. The *jus privatum* privilege of the project owner to dam Messalonskee Stream would usurp and nullify the *jus publicum* right of property the public now holds on Messalonskee Stream for navigation, fishing and other lawful public uses. Appeal at 16-17. The Findings of Fact fail to mention or dispute this claim or to even mention criteria 7-D of the MWDCa. Instead the Findings merely state the BEP found the project satisfies all of the approval criteria and found that all of the evidence provided by the Petitioner is unpersuasive. Due to their extreme vagueness, the Findings of Fact fail to show the basis upon which the BEP determined the project satisfies criteria 7-D of the MWDCa and why

the evidence provided by Petitioner to the contrary is "unpersuasive." The plain language of criteria 7-D of the MWDCA clearly shows the Legislature intended the BEP to strike a reasonable balance between the property rights held by the public on Messalonskee Stream for navigation, fishing and swimming and the privilege granted by the State for the applicant to build a dam at the site. As proposed, the project would extinguish the public's right to fish, swim and recreate in Messalonskee Stream within the vicinity of the project and would extinguish the public's right of navigation on Messalonskee Stream by forcing the public to commit criminal trespass on posted land while disembarking from their watercraft and portaging around the dam site. In CLF v. Maine Dept. of Environmental Protection (2003 ME 62, ¶36), the Court held that a wharf constructed in the intertidal zone is subject to the public trust rights to fishing, fowling and navigation and the "right of the land owner to construct a wharf to the navigable water is subject to reasonable regulation." (citing Great Cove Boat Club v. Bureau of Public Lands, 672 A.2d 91, 95 (Me. 1996)). Criteria 7-D of the MWDCA instructs the BEP to consider the public trust rights of navigation, fishing and fowling when reviewing a dam reconstruction permit and instructs the BEP to consider whether the project will cause significant harm or benefits to these public trust rights. The Findings of Fact fail to show whether the BEP even considered the nullification of these public trust rights in its review of the instant application. Nor do the Findings of Fact provide a basis to show how the BEP has subjected the project to "reasonable regulation" to preserve these public trust rights. It is difficult to discern how the BEP's decision -- which extinguishes all of the public trust rights to Messalonskee Stream near the proposed dam site-- can be construed as a 'reasonable regulation' to preserve these same rights.

The Findings of Fact are insufficient to discern the basis for which the BEP determined the project will result in significant economic benefits to the public.

25. Approval criteria 3 of the MWDCa requires the applicant demonstrate the project will result in significant economic benefits to the public. §636(3). The May 10, 2005 Permit for the project states the BEP found the project will result in significant economic benefits to the public. Permit at 5. The applicant's proposal, the May 10, 2005 Permit and the BEP's Nov. 3, 2005 Denial Order do not mention or discuss any economic benefits to the public accruing from the dam reconstruction, let alone significant benefits. Petitioner has noted this absence of evidence and asserted the project will cause significant economic disbenefits to the public by extinguishing their public trust rights to navigate, fish and recreate on Messalonskee Stream near the dam site. Appeal at 18. The Findings of Fact do not mention or discuss this evidence. It is difficult to discern how the BEP found the applicant met its burden to demonstrate the project will result in significant economic benefits to the public when the project application does not even mention this subject. The plain language in the MWDCa shows the Legislature intended the BEP's conclusion to be supported by evidence in the record. The Findings of Fact do not do this. By this failure, the Finding of Facts render this section of the MWDCa meaningless. Handyman Equipment Rental v. Portland, 724 A.2d 605, 607-608 (Me. 1999)(words in statute must be given meaning and cannot be treated as meaningless and superfluous).

The Findings of Fact are insufficient to discern the basis for which the BEP determined the project will not result in significant harm to fish and wildlife resources.

26. Approval criteria 7-B of the MWDCa states: "The advantages of the project are greater than the direct and cumulative impacts over the life of the project based upon the following considerations ... (b) Whether the project will result in significant benefit or harm to fish and wildlife resources." §636(7-B) Petitioner has extensively discussed the significant harm the project will cause to the fish and wildlife resources of Messalonskee Stream. Appeal at 13-

16. The Findings of Fact do not mention or contest this evidence or cite to any evidence showing the project will create significant benefits to fish and wildlife resources. The plain language in the MWDCAs shows the Legislature intended the BEP to consider and review evidence showing the project may cause significant harms to fish and wildlife resources. This language shows the Legislature intended the BEP discuss their analysis of the evidence within its Findings of Fact and state the basis upon which the BEP made its ultimate conclusion. This language shows the Legislature intended the BEP's conclusion to be supported by evidence in the record. The Findings of Fact do not do this. This failure renders this section of the MWDCAs meaningless and superfluous.

Because the instant water quality certification allows the Applicant to violate Maine's water quality laws, the certification is not valid.

27. Ownership of a hydroelectric dam does not create a legal right to violate Maine's water quality laws. Possession of a Maine water quality certification for a hydroelectric dam does not create a legal right to violate Maine's water quality laws. A Maine water quality certification is a legal instrument by which the Maine BEP ensures an activity does not violate water quality laws enacted by the Maine Legislature. The Maine Legislature reserves to itself the authority to enact and amend Maine's water quality laws. The sole purpose of a Maine BEP water quality certification is to ensure the activity does not violate Maine's water quality laws. Maine BEP cannot issue a water quality certification which allows Maine's water quality laws to be violated. S.D. Warren v. Board of Environmental Protection. (2005 ME 27). The most important sentence in any Maine BEP water quality certification is this: "The Board concludes based on the evidence in the record there is reasonable assurance the activity will not cause

violations of applicable State water quality standards.” This sentence is so important that a BEP water quality certification cannot be issued unless it contains this sentence. 38 MRSA §636(8). The above sentence is the “certification” in a water quality certification. In any water quality certification, the above sentence must be true. To be true, the sentence must be supported by the evidence in the record. If the sentence is not supported by the evidence in the record, the sentence is not true. If the sentence is not true, the water quality certification cannot issued. 38 MRSA §636(8) If evidence in the record of a water quality certification proceeding shows the activity may cause violations of Maine water quality standards, the BEP has an especial obligation to carefully consider and analyze this evidence before issuing a certification. If the BEP cannot show the evidence is false, the BEP will lack the “reasonable assurance” it needs to issue a water quality certification. 38 MRSA §636(8) For this reason, at the earliest stages of a water quality certification proceeding, the Maine DEP invites and solicits comments and information from the public and its sister agencies to ensure the evidentiary record is robust. If the evidentiary record is not robust, the BEP will lack the “reasonable assurance” required by statute. If the “reasonable assurance” is not based upon a careful review of all the evidence, the phrase becomes meaningless (ie. reasonable assurance based on none or some of the evidence is not reasonable assurance at all). For example, evidence in the record may show an activity will not violate the Maine’s water quality laws as they respect the blacknose dace, a common native fish in Maine rivers. Other evidence in the record may show the activity will violate Maine’s water standards as they respect the Atlantic salmon, a formerly common fish in Maine rivers. Because Maine’s water quality laws are intended to protect blacknose dace *and* Atlantic salmon, the BEP cannot ignore evidence showing the activity will harm Atlantic salmon even if evidence shows the same activity will not harm blacknose dace. The BEP may not issue a water quality certification for an activity which allows for the attainment of some Maine water quality standards but causes violations of others. To issue a water quality certification, the Maine BEP must ensure the

activity will not violate *any* of Maine's water quality standards applicable to that waterbody. S.D. Warren v. Board of Environmental Protection (2005 ME 27, ¶12) ("Maine's law is settled in this area.") For this reason, the Maine BEP must place special emphasis on examining all of the evidence in the record to ensure the activity will not cause any violations of Maine's water quality standards. For this reason, the Finding of Facts in a water quality certification must be closely tied to and logically built upon all of the facts and evidence in the record. The Findings of Fact must clearly demonstrate that *none* of the evidence in the record shows the activity will violate water quality standards applicable to the waterbody. If the BEP fails to carefully consider all of the evidence in the record in this manner, the finding of "reasonable assurance" becomes meaningless.

28. Unique among artificial structures situated near or alongside Maine's waterways, hydroelectric dams reside within the waterway itself. As a result, hydroelectric dams have unique impacts on the physical, chemical and biological character of the waterway within which they rest. Some of these impacts are obvious -- others are quite subtle. The specific impacts of a hydroelectric dam on the waterway in which it rests is greatly determined by the character of the waterway and the various ways in which its native fish and wildlife engage in the activity of living. Maine's water quality laws and standards are carefully and intricately tied to the various needs of the indigenous aquatic species of Maine's waterways. Migratory fish species are indigenous to some of Maine's waterways -- in others they are not. The life cycle of migratory fish species requires them to travel long distances from freshwater to saltwater in order to live, grow and give birth. If these animals cannot travel between fresh and saltwater they cannot live. Historically, Maine's waterways were blessed with a wealth of indigenous migratory fish which inhabited the waterways of Maine from its southernmost extreme to its most easterly and northerly extreme. Even a condensed version of the colonial and state statutes enacted in Maine

from the 18th century to present which seek to protect Maine's migratory fish would fill a thick volume. These statutes and the numerous petitions made by citizens in support of their passage show that since its first European settlement, Maine citizens and government have been highly aware of the unique life history and needs of the state's native migratory fish. For this reason, Maine's water quality laws give especial attention to ensuring the unique habits and needs of these migratory fish are not neglected.

29. In Maine water quality certification proceedings, the burden of proof is upon the certification applicant to show its proposed activities will not violate Maine's water quality laws. This is because the applicant has no legal right to violate Maine's water quality laws. If evidence in the record shows *any* aspect of the project will violate *any* state water quality standard applicable to the waterbody, the applicant must modify that part of the project so that the violation will not occur. No legal right of the applicant is violated if the proposed activity must be modified so as to ensure compliance. Maine statute does not allow "variances" or "waivers" or "spot zoning" or "grandfathering" from compliance with Maine water quality standards applicable to a waterbody. Compliance with all applicable standards must be actual and present. S.D. Warren, ¶12: ("We also concluded, based upon the specificity of the designated uses at 38 MRSA §465, that the Legislature's purpose for the language 'suitable for designated uses' was 'that the designated uses *actually* be present.'") (emphasis added). If evidence shows compliance with water quality standards is not occurring or is not occurring at all times, the non-compliance must be corrected by the Maine BEP. Id. at ¶28: ("This authority is essential because if the conditions are not as effective as planned, the water quality standards will not be met and the BEP's goal to "restore and maintain the chemical, physical and biological integrity of the State's waters ..." will not be achieved during the forty-year term of the FERC license.")
Navigable waterways of the United States are owned by the United States. U.S. Const. art. I, §8,

cl.3. The *jus privatum* privilege of owning a dam which rests in a navigable waterway of the United States never supercedes or extinguishes the *jus publicum* rights of the public to that waterway. Ownership of such a hydroelectric dam creates the *opportunity* to operate the dam within the bounds established under law. Outside of these bounds, ownership of a hydroelectric dam which rests within a navigable waterway of the United States conveys nothing. The laws and *jus publicum* always come first. The Maine Legislature has delegated to the Maine Department of Environmental Protection and the Maine Board of Environmental Protection the statutory responsibility of enforcing the water quality laws enacted by the Legislature. The burden of proof is always upon the Maine BEP to clearly show how the evidence in the record supports its finding there is “reasonable assurance” a proposed activity will *not* cause violations of water quality standards. The negative construction of the statute at 38 MRSA §636(8) demonstrates this (“the Department may not issue a permit or water quality certification unless it finds there is reasonable assurance the activity will not violate applicable State water quality standards”). Due to this statutory construction, the BEP must default to finding there is *not* reasonable assurance unless affirmative evidence shows there is. This construction is essential to the Legislature’s goal of restoring and maintaining the physical and biological integrity of the state’s waterways and to “enhance water quality” where standards are not met. 38 MRSA §464(1). S.D. Warren, ¶28. The BEP must deny water quality certification if evidence in the record shows there is no “reasonable assurance” the activity will not violate State water quality standards. 38 MRSA §636(8). Water quality certification is not a right or entitlement -- it is a privilege. Water quality certifications exist to ensure *compliance* with Maine’s water quality statutes and *attainment* of the water quality standards within the statutes. A water quality certification does not alter, amend or supercede the underlying statutes and standards. For this reason an existing water quality certification can be revoked, suspended or modified by the Maine BEP at any time. 38 MRSA §341(D); §343(B). This right of the BEP is essential to achieving the

statutory goal of Maine's water quality standards. Without this right, the BEP would have no power to ensure attainment of Maine water quality standards. Water quality certification is a fact-finding process essential to BEP's statutory obligation to ensure Maine's water laws are obeyed and the water quality standards within them are attained. For this reason the concept that an activity can be 'grandfathered' from compliance with applicable Maine water quality laws is foreign to Maine's water quality statutes and directly contradicts their goals. If an activity could be 'grandfathered' or excused from compliance with water quality standards in a water quality certification, the entire purpose of the certification would be rendered meaningless. Such 'grandfathering' would create an exception that swallows the rule. A water quality certification which allowed 'grandfathering' of water quality violations would defeat the statutory purpose of water quality certification. In the instant proceeding the BEP has 'grandfathered' a number of severe violations of Maine's water quality statutes on Messalonskee Stream that will be caused by the construction and operation of the new dam proposed for Messalonskee Stream. Because the BEP has decided these violations are "grandfathered" the BEP does not review or discuss the violations or the evidence in the record which shows they will occur. The Findings of Fact claim the BEP is not required to consider these violations when finding there is "reasonable assurance" the project will not violate water quality standards. This creates an exception that swallows the rule. Under this methodology, the BEP could issue a water quality certification for *any* project no matter how many water quality violations it causes. Because there has been no dam in the bed of Messalonskee Stream at the project site for the past four years, the Union Gas project owner has applied for an MWDC permit to build a new dam in the bed of the stream. The water quality impacts of this new dam on Messalonskee Stream are the *sole subject* of the BEP's review of this new dam pursuant to 38 MRSA §636(8). If the BEP denies water quality certification for the instant project, the applicant is free to submit to the BEP a modified or new design. As such, no part of the BEP's review of this proposal or a future proposal affects the underlying "legal right"

of the applicant to continue operating the Union Gas dam as it has been operated for the past four years. At present the Union Gas project does not violate any Maine water quality statutes. The question before the BEP here is whether the project under review will cause any violations of water quality statutes. 38 MRSA §636(8) clearly states the BEP cannot issue a permit for the project if it will cause violations of Maine's water quality statutes. Here, the BEP turns the statute on its head, ie. the BEP must *ignore* any water quality violations that *prevent* the BEP from issuing the permit. This would mean the "right" of the owner to operate the Union Gas project *supercedes* Maine's water quality statutes and the BEP's obligation to enforce them. In effect, Maine BEP here asserts Maine's water quality laws must be ignored if they conflict with the dam. Because 38 MRSA §636(8) prohibits the BEP from issuing a permit for a project that causes water quality violations, the BEP asserts this statute must be ignored as well. By logical extension, BEP argues here that *any Maine statute* which interferes with the proposed new dam must be ignored. The BEP here seems to forget that its statutory duty under the MWDCA and Maine's water quality laws is to ensure the health of Messalonskee Stream -- not the "health" of the Union Gas project. This is shown in the Findings of Fact, which discuss in detail the "health" of the Union Gas project and its "legal right" to operate -- but never once mention the health of Messalonskee Stream and its "legal right" to be in attainment of its legal water quality standards. The health of the Union Gas project is none of the BEP's business. The health of Messalonskee Stream is the BEP's *only* business. No state law requires the Union Gas project to generate electricity. However, state law *requires* Messalonskee Stream to be in attainment of its legal water quality standards as established by the Legislature. Here BEP argues the opposite. If operation of the Union Gas project requires Messalonskee Stream to be in violation of its water quality classification, the BEP argues it must allow the violation to occur. BEP's reading of the MWDCA and Maine's water quality statutes is completely contrary to their plain meaning. Town of Eagle Lake, 2003 ME 37, ¶7 (to determine legislative intent, the court "looks[s] first to

the statute's plain meaning."'). The BEP's reading creates unreasonable results. Id (the court will avoid results that are "absurd, inconsistent, unreasonable or illogical.") The BEP's reading is inconsistent with the statutory objective "to restore and maintain the chemical, physical and biological integrity of the State's waters ..." and will directly prevent this objective from being achieved. 38 MRSA §464(1) Maine law requires all water quality standards to be met in order for water quality certification to issue. Bangor Hydro-Electric, 595 A.2d at 442-443. The BEP's argues here that water quality certification must be issued *regardless* of whether water quality standards are met. The BEP's claim that the new dam meets the terms and conditions of the 1995 water quality certification is of no moment. Denial at 9. The dam structure reviewed by the BEP under this 1995 certificate no longer exists. It collapsed and was torn down by its owner in 2001. The proposed new dam did not exist in 1995 because it was not proposed until 2005. Clearly, the BEP did not review the new dam back in 1995. The most important similarity between the old dam and the proposed dam is that neither dam exists in Messalonskee Stream today. Because of this fact Messalonskee Stream is in full attainment of its legal water quality classification and has been for the past four years. Once the new dam is built, Messalonskee Stream will fall into violation of its legal water quality classification. Maine law prohibits this. To get around this fact, the BEP offers several arguments. First is that from a "regulatory perspective" it is still June 2001, the old dam fell down yesterday and Messalonskee Stream has not been flowing freely at the site for the past four years. Second is that because the new dam will be "similar" to the old dam the BEP's 1995 environmental review of the old dam will suffice for the new dam. Third is that because the existing certification was not appealed in 1995 the BEP is *prevented* from examining in this proceeding if the terms and conditions of the 1995 certification actually ensure attainment of the legal water quality classification of Messalonskee Stream. Based upon these premises, the BEP concludes the only "new" thing it is *allowed* to review here is the placement of gravel in the stream while the new dam is constructed. The BEP's argument proves too much.

If one accepts BEP's argument that from a "regulatory perspective" it is still June 2001 then from the same "regulatory perspective" the instant proceeding does not exist and the applicant *does not even own the project*. Because sea-run fish have enjoyed free access to Messalonskee Stream for the past four years, the BEP must consider these fish in their instant permit review. Because the project applicant proposes no mitigation for the severe impacts of its new dam on these fish, the BEP claims these impacts are somehow not relevant. And because the 1995 certification makes no mention of sea-run fish, the BEP must fault the Petitioner for not pointing this out 10 years ago. Maine BEP wants to have its cake and eat it too. The BEP wants to say it has reviewed the impacts of the new dam while not reviewing any of them. The BEP wants to claim it has followed the statutes while not following them. The BEP wants to claim it has "reasonable assurance" the dam will not violate water quality standards while having no assurance whatsoever. The BEP wants to allow severe annual fish kills of American eel at the new dam but not admit it. BEP argues that because Petitioner did not appeal the 1995 water quality certification when it was first issued, it doesn't matter today whether the 1995 certification is lawful or not. In effect, the BEP argues the 1995 certification *itself* is grandfathered, and as a result, the water quality violations it *allows* are now grandfathered. Through this action, the BEP has effectively removed Messalonskee Stream from the State's water quality classification laws and abolished the water quality standards established for Messalonskee Stream by the Maine Legislature. How can the Maine BEP abolish a statute?

The permit violates the Maine Waterways Development and Conservation Act (MWDCA) by failing to provide "reasonable assurance" the project will not violate Maine water quality standards. (Appeal at 3-6).

30. Maine BEP does not contest the numerous water quality violations Petitioner has

claimed will be caused by the proposed new dam on Messalonskee Stream. Instead, Maine BEP declares these violations to be lawful because Maine BEP issued a permit and water quality certification in 1995 which allows them. (Denial at 5) Because Petitioner did not challenge this permit when it was first issued, the permit now stands as "final agency action" and cannot be reviewed or modified in this proceeding even if the permit allows severe water quality violations (Denial at 6). Resting its argument entirely on these two claims, Maine BEP makes no effort to determine if any of the various water quality impacts resulting from the new dam alleged by Petitioner will actually occur and cause violations of the legal water quality standards established by the Legislature for Messalonskee Stream. Maine BEP states it did not review or consider these violations because they are not relevant to the proceeding. (See Denial at 10: "The Department therefore properly limited its review in this case, under both Section 401 and the MWDCA, to the repair activities proposed.") The instant dam construction permit was issued by the Maine DEP pursuant to the Maine Waterways Development and Conservation Act ("MWDCA"). 38 MRSA §633(1) ("no person may initiate construction or reconstruction of a hydropower project ... without first obtaining a permit from the Department"). The Maine DEP may issue a permit for the construction, reconstruction, or alteration of a hydropower project only if "there is a reasonable assurance that the project will not violate applicable water quality standards." 38 MRSA §636(8). The May 10, 2005 Findings of Facts and Order approving a permit for this new dam states that Maine DEP found, based on facts and evidence in the record, "there is reasonable assurance that the project will not violate applicable State water quality standards." (Permit at 6).⁵ The Denial Order makes a similar finding at 8 ("the proposed repair activities would satisfy the approval criteria of the MWDCA"). To issue a dam reconstruction

⁵ As best as we can discern, Maine BEP has limited its environmental review of the proposed new dam to the *temporary* impacts to Messalonskee Stream caused by the new dam's construction and omitted from its environmental review the *permanent* impacts to Messalonskee Stream from the new dam itself. By doing this the BEP has essentially ruled that *all* violations of Maine water quality laws caused by this new dam are 'grandfathered' and are immune from regulatory review.

permit under the MWDC, Maine BEP must find based on evidence in the record there is a reasonable assurance the project will not violate State water quality standards. 38 MRSA §636(8). If facts and evidence in the record show the project *will* cause water quality violations, reasonable assurance cannot exist. Without reasonable assurance Maine BEP cannot issue the MWDC permit. Maine BEP appears to have misconstrued the “reasonable assurance” requirement of 38 MRSA §636(8) to mean “reasonable assurance the project will not violate the existing *water quality certificate* issued for the project.” If the statute actually said this, the instant permit would be lawful. The statute does not say this. 38 MRSA §636(8) says the Maine BEP must find there is “reasonable assurance the project will not cause violations of applicable State *water quality standards*.” State water quality standards can only be created by the Legislature. 38 MRSA §464(2)(D) (“The Legislature shall have sole authority to make any changes in the classification of the waters of the State”). Uncontested evidence in the record shows the new dam will cause numerous and severe violations of Maine’s water quality *standards* as enacted by the Legislature and the legal water quality *standards* established for Messalonskee Stream as enacted by the Legislature. Maine BEP cannot, through water quality certifications, enact or modify Maine’s statutory water quality standards. 38 MRSA §464(2)(D). Water quality *certifications* are issued by the Maine BEP. Water quality *standards* are enacted by the Legislature. Water quality certifications are issued by the Maine BEP to enforce the water quality standards the Legislature has enacted. Maine BEP erroneously argues here that its 1995 water quality certification amends and supercedes the legal water quality standards for Messalonskee Stream enacted by the Maine Legislature. This is not true. 38 MRSA §464(2)(D).

31. Aside from this 1995 water quality certification, Maine BEP points to no evidence in the record which shows the proposed new dam will not cause violations of Maine’s water quality standards as enacted by the Legislature. Maine BEP has an especial obligation to be

certain its finding of "reasonable assurance" is well supported by evidence in the record because the Board is charged by the Legislature with enforcing Maine's water quality classification laws and Maine's water quality standards. If Maine BEP approves an activity under the MWDCA which causes violations of Maine water quality laws on a stream, the stream's legal water quality classification cannot be met and the express Legislative goals of Maine's water quality laws to "restore and maintain the chemical, physical, biological integrity of the State's waters ..." and to "enhance water quality" cannot be achieved on that stream. For this reason, the Maine Supreme Court has ruled the BEP may place "any" conditions in a permit or water quality certification necessary to ensure attainment of a waterbody's legal water quality classification. S.D. Warren v. Board of Environmental Protection (2005 ME 27, ¶19) Petitioner has provided factual evidence to the record showing the new dam will cause numerous violations of water quality standards (Appeal at 3-11). Maine BEP has not contested this evidence. Maine BEP argues it has no need to consider this evidence because the existing certification issued in 1995 was not appealed and now stands as "final agency action." (Denial at 5). Such an interpretation confounds the express purpose of state water quality certifications and MWDCA permits which seek to ensure a waterbody's legal water quality standards are maintained. Such an interpretation stands opposite to the goal of Maine's water quality classification laws to "restore and maintain the chemical, physical, biological integrity of the State's waters ..." and to "enhance water quality." Maine BEP's position that it is not relevant whether the existing state water quality certification for the Union Gas project *actually* provides "reasonable assurance" within the instant permit leads to unreasonable results. Town of Eagle Lake. 2003 ME 37, ¶8, 818 A.2d at 1037 (the court will avoid results that are "absurd, inconsistent, unreasonable or illogical.") Such an interpretation also renders meaningless the statutory phrase "reasonable assurance" in the MWDCA. Handyman Equipment Rental Co. Inc. v. Portland. 724 A.2d 605, 607-8. (Me. 1999) (words in statute must be given meaning and cannot be treated as meaningless and superfluous). This interpretation

contradicts the plain, ordinary meaning of "reasonable assurance" as used in the MWDCA.

Butterfield v. Norfolk & Dedham Fire Ins. Co. (2004 ME 124, ¶3) ("[We] look first to the plain meaning of statutory language as a means of effecting legislative intent. Unless the statute itself discloses a contrary intent, words in a statute must be given their plain, common and ordinary meaning, such as people of common intelligence would usually ascribe to them.") The plain language of the MWDCA shows that when the Maine BEP makes a finding of "reasonable assurance" the Maine BEP must actually *have* "reasonable assurance"; this assurance must originate from evidence in the record; and this assurance must not be contradicted by uncontested evidence in the record. The lack of any elaboration or limitations in the language of ¶8 of 38 MRS §636 suggests the Legislature intended the phrase "reasonable assurance" to have its plain, ordinary meaning (*ie.* reasonable assurance does not mean no assurance at all). In Handyman Equipment Rental Co. Inc. v. Portland, the Court ruled that words in statute must be given meaning and cannot be treated as meaningless and superfluous. The Maine BEP here treats the statutory phrase "reasonable assurance" as if it were meaningless and superfluous (*ie.* reasonable assurance can mean no assurance whatsoever). Given the goals of Maine's water quality classification laws and water quality standards, it is logical to presume that when the Legislature wrote in the MWDCA that the Maine BEP must have "reasonable assurance the project will not violate applicable State water quality standards" the Legislature meant the Maine BEP must *actually have* "reasonable assurance"; and Maine BEP's finding of "reasonable assurance" should be developed from a careful sifting and analysis of all evidence in the record. Petitioner has presented Maine BEP with uncontested evidence showing that hydroelectric dams kill migrating American eels unless the dams are equipped with specially designed passage systems to allow eels to pass the dam safely and to keep eels from entering the project turbines and being killed. Citing to the BEP's own April, 2003 water quality certifications for five Presumpscot River hydroelectric dams, Petitioner has noted that Maine BEP has found the

killing of migrating eels in dam turbines is a violation of Maine's water quality laws. Citing to S.D. Warren v. Board of Environmental Protection (2005 ME 27), Petitioner noted the Maine Supreme Court affirmed the Maine BEP's interpretation of law regarding the killing of eels at hydroelectric dams in that proceeding. Petitioner has provided evidence showing the proposed new dam on Messalonskee Stream will kill migrating American eels because the dam is not proposed to be equipped with a system designed to safely pass American eels and keep them from entering the project turbines and being killed. Petitioner has asserted this killing is a violation of Maine water laws and will cause Messalonskee Stream to fail to meet its legal water quality classification as suitable for its indigenous American eels. Petitioner has noted the existing 1995 water quality certification and permit for the Union Gas dam make no provision for the protection of American eels. Maine BEP has not contested any of the above assertions or evidence. Petitioner has asserted that for the above reasons, Maine BEP's finding there is "reasonable assurance" the new dam will not cause violations of State water quality standards is incorrect, illogical and contradicted by uncontested facts in the record. Immediately prior to the BEP's vote to approve the Denial Order on Nov. 3, 2005 Maine DEP technical staff told members of the BEP: "this proceeding is not about eels." This verbal statement corroborates the written statements made by Maine DEP and BEP throughout this proceeding and confirms Petitioner's arguments above.⁶ The plain language of the MWDCA shows the Maine DEP's assertion that this proceeding "is not about eels" is incorrect and contradicted by statute. If evidence in the record shows migrating American eels will be killed *en masse* by this new dam each fall, then these facts are highly relevant to the BEP's review of the new dam under the MWDCA. The MWDCA prohibits Maine BEP from issuing a permit *unless* the Maine BEP

⁶ Statement by Mr. Dana P. Murch, Maine DEP, at Nov. 3, 2005 BEP meeting. Statement is cited here only because throughout this proceeding Maine DEP has refused to admit or deny the new dam will cause annual kills of American eels or if the Maine DEP considers such annual fish kills to be unlawful.

finds there is "reasonable assurance" the proposed activity will not cause violations of State water quality standards. Here, Maine BEP claims that even *considering* evidence in the record which shows the new dam will cause water quality violations is tantamount to "turning back the clock" and re-visiting the BEP's 1995 water quality certification decision (Denial at 9). We disagree. Petitioner has requested Maine BEP review and consider evidence in the record which shows the new dam subject to this instant proceeding will kill American eels each fall as they migrate to the Atlantic Ocean. Maine BEP refuses to consider this evidence and essentially claims the annual killing of American eels at the dam is now "grandfathered" by the previously issued permit for the project. In essence, the BEP says "we can't review the impacts of this new dam in 2005 because it is controlled by the 1995 permit and we can't review the 1995 permit because it is now 2005." While clever, this argument is contrary to statute, the express goals of these statutes, relevant case law and recent water quality certifications made by the Maine BEP itself. This claim is directly refuted by the Maine BEP itself in its Sept. 21, 2005 Water Quality Certification Order for the Gulf Island and Deer Rips dams on the Androscoggin River at p. 26:

"Finally, FPL Energy's argument that Gulf Island Pond is somehow 'grandfathered' from meeting state water quality standards, including the state's antidegradation policy, has no basis in law. The state's antidegradation policy clearly provides that the DEP may only issue a wastewater discharge license pursuant to state law or approve water quality certification pursuant to federal law if the standards of classification of the water body are met. 38 MRSA §464(4)(F)(3). No water bodies are 'grandfathered' from meeting water quality standards, and no projects -- whether paper mills or dams -- are 'grandfathered' from appropriate regulation if determined to be causing or contributing to the failure of any water body to meet water quality standards."

It would be difficult to find a more complete and unequivocal refutation of Maine BEP's

central claim in this proceeding than the above ruling made by the Maine BEP itself in September 2005.

Maine BEP's permit will cause Messalonskee Stream to fall from full attainment of its legal water quality classification into full violation of its water quality classification. Maine law prohibits this. (Appeal at 4-6)

31. Petitioner asserts Maine BEP cannot issue a permit or water quality certification for a project which uncontested evidence shows will cause severe and long-term violations of Maine's water quality statutes (including annual fish kills) and cause a water body to fall from full attainment of its legal water quality classification into full violation of it. Maine BEP disagrees. Since 2001, Messalonskee Stream in the vicinity of the Union Gas Dam site has been in full attainment of its legal Class C water quality classification. All of the stream's indigenous aquatic life living in this portion of Messalonskee Stream now have suitable habitat -- and safe access to and from this habitat -- and are able to live out their natural life cycle. For the first time in more than 100 years, all of Messalonskee Stream's indigenous fish species can live safely and freely in their native habitat in Messalonskee Stream near the Union Gas dam site. This represents the first time this portion of Messalonskee Stream has ever been in full attainment of its legal water quality classification. (Appeal at 6, 21) During the summer of 2001, the granite block dam built at the Union Gas site in 1924 collapsed and was removed by its owner. (Denial at 2) Since that time, indigenous fish species of the stream such as American eel, Atlantic salmon and sea lamprey have enjoyed full and safe access at the Union Gas dam site to their native habitat in Messalonskee Stream. Because this granite-block dam was removed from the bed of Messalonskee Stream in 2001, the explicit goals of the federal Clean Water Act and Maine's Water Classification laws have now been fully achieved on this portion of Messalonskee Stream.

(Appeal at 6-10). The May 10, 2005 permit approved by Maine BEP allows construction of a new, impassable concrete dam at the Union Gas site. This new dam will eliminate the safe and free access that native American eel, Atlantic salmon and sea lamprey fish have enjoyed at the site the past four years. This new dam will directly cause Messalonskee Stream to fail to meet its legal water quality classification by depriving these fish of their existing safe access to their habitat directly above the Union Gas dam site; and prevent those fish now living above the dam site from safely migrating to the Atlantic Ocean to complete their lifecycle. Maine BEP does not contest these factual assertions. Messalonskee Stream is a Class C waterway pursuant to Maine's water quality classification. Class C water quality standards state: "Discharges to Class C waters may cause some changes to aquatic life, except that the receiving waters must 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." 38 MRSA §465(4)(C). (emphasis added) American eel, Atlantic salmon and sea lamprey are native indigenous fish species of Messalonskee Stream and are present in the stream today. Maine BEP does not contest this. The new concrete dam at the Union Gas site on Messalonskee Stream approved by the Maine BEP May 10, 2005 will completely prevent these animals from existing in their indigenous habitat in Messalonskee Stream above the site of the proposed dam. Maine BEP does not contest this. This new dam will cause that portion of Messalonskee Stream above the dam site to fall into violation of its Class C water classification standards because its indigenous fish will no longer enjoy free and safe access to their habitat in Messalonskee Stream above the site of the proposed dam. Maine BEP does not contest this. Maine's water classification law, 38 MRSA §464 (F)(1-A)(3) states: "The department may only issue a discharge license pursuant to §414-A or approve water quality certification pursuant to the Federal Water Pollution Control Act, §401, Public Law 92-500, as amended, if the standards of classification of the water body and the requirements of this paragraph are met." The May 10, 2005 water quality certification

issued by Maine BEP for construction of a new, impassable dam at the Union Gas site is unlawful because this new dam will cause the standards of classification of Messalonskee Stream to no longer be met. The standards of classification of Messalonskee Stream will no longer be met because three of its indigenous fish species (American eel, Atlantic salmon and sea lamprey) will no longer have *any* access to their indigenous habitat in Messalonskee Stream above the proposed new dam. Today, all three species have free access to Messalonskee Stream above the site of the proposed new dam. Maine BEP does not contest this. Maine BEP makes the *exact same argument* in a Water Quality Certificate Order issued on September 21, 2005 for the Gulf Island and Deer Rips dams on the Androscoggin River. Less than two months ago, Maine BEP declared in water quality certification orders for these two dams: "The Maine Supreme Judicial Court has held that, in approving Section 401 water quality certification for an existing hydropower project, the DEP may impose any conditions necessary to ensure compliance with applicable water quality standards, including conditions requiring the installation of fishways." (Maine BEP, Sept. 21, 2005 Order at 35). And: "FPL Energy's argument that Gulf Island Pond is somehow "grandfathered" from meeting state water quality standards, including the state's antidegradation policy, has no basis in law. The state's antidegradation policy clearly provides that the DEP may *only* issue a wastewater discharge license pursuant to state law or approve water quality certification pursuant to federal law if the standards of classification of the water body are *met*. 38 MRSA §464(4)(F)(3)." *Id.* at 26. (emphasis added) Maine BEP made identical claims in Water Quality Certificate Orders issued April 30, 2003 for five Presumpscot River dams. Maine BEP re-asserted these claims in its October 2, 2003 Denial of Appeal by S.D. Warren Company. Maine BEP's Order for the Presumpscot River dams was affirmed by the Maine Superior Court on May 4, 2004 and the Maine Supreme Court on February 5, 2005. In its October 2, 2003 Denial Order for S.D. Warren's Presumpscot hydroelectric dams, the Maine BEP made the following finding in response to Warren's claim its dams are "grandfathered" from compliance

with existing statutory water quality standards: "Warren's argument also ignores the fact that water quality standards apply to *all* activities, including those that pre-date the enactment of the standards. Water quality standards have been applied since their adoption to many pre-existing activities, including the discharge of waste water from Warren's own Westbrook paper mill. It is largely through the application of water quality standards to existing waste water discharges and to the operation of existing dams that the water quality of Maine's rivers and streams has been *improved* over the last 30-plus years. To argue that Warren's dams are not subject to water quality standards is to argue the Presumpscot River is somehow exempt from meeting the standards that apply to all other rivers in the State, or that the Presumpscot River dams are somehow exempt from the kind of regulation that has been applied for over 20 years to all other dams in the State. *There is no basis in law or regulation for such an exemption.*" (emphasis added) Regarding S.D. Warren's claim that Maine BEP had improperly relied on a "draft fisheries plan" in requiring upstream and downstream fish passage for American eel, Atlantic salmon and other native, migratory fish at Warren's dams, the Maine BEP stated in the same Order: "Taking Warren's argument to its logical extension, no fishways could be required anywhere by DEP (or, by the state's own fisheries agencies) unless a final fishery management plan had been adopted, even though (1) the state's fisheries agencies are already charged under law with restoring sea-run fish to their historic habitat, and (2) the DEP is *already charged under law* with restoring the chemical, physical and biological integrity of the State's waters. Such an argument has no legal basis and could limit the restoration of sea-run fish to Maine's waters and the *attainment* of water quality standards in Maine's waters." *Id.* (emphasis added) The State of Maine's February 6, 2004 response brief before the Maine Superior Court in the S.D. Warren case declares at p. 27: "When issuing a water quality certification, the State *must* determine whether all three parts of Maine water quality standards will be *met*; the designated uses, the numerical criteria for water chemistry, and the narrative criteria. Bangor Hydroelectric Co. v. Board of Environmental

Protection, 595 A.2d 438, 442 (Maine 1991). In deciding whether a project will comply with the designated uses of a water body, it is not enough to find that the quality of water is 'suitable' for the designated uses; the agency must find 'whether the designated uses *were actually achieved* in a particular river.'" (State of Maine, Respondent's Brief, S.D. Warren Company v. Maine Dept. of Environmental Protection, Docket No. AP-03-70, Feb. 6, 2004 at 27). (emphasis added) In S.D. Warren v. Board of Environmental Protection (2005 ME 27), the Maine Supreme Court affirmed Maine's claim that provision of upstream and downstream passage at dam sites for native, migratory fish species is an integral component of Maine's water quality statutes and the designated uses of Maine's waterways as established by the Maine Legislature and the federal Clean Water Act. The Court wrote at ¶28:"Maine's law is settled in this area. In Bangor Hydroelectric Co., 595 A.2d at 442 n.4, we concluded that the narrative water quality criteria at 38 MRSA §465, which requires waters 'of sufficient quality to support all indigenous fish species' was intended to be an integral part of the water quality standards for the BEP to consider. We also concluded, based on the specificity of the designated uses at 38 MRSA §465, that the Legislature's purpose for the language 'suitable for designated uses' was 'that the designated uses actually be present.' Id. at 442. We stated that when those uses are not presently being achieved, the Legislature intended the quality of the water to be *enhanced* so the uses *are* achieved." (emphasis added). The Court further stated: "Because water quality standards are not presently being met, the BEP may impose *any* conditions necessary to ensure *compliance* with those standards The BEP found that the involved waters were not presently in compliance with the state water quality standards, and that the conditions imposed were necessary to ensure *future compliance* with Maine's water quality standards." Id. at ¶19. (emphasis added). Maine BEP does not dispute that American eel, Atlantic salmon and sea lamprey are indigenous aquatic species of Messalonskee Stream. Maine BEP does not dispute these animals are migratory and require the ability to travel freely from their freshwater and marine environments in order to exist.

Maine BEP does not dispute these animals now have safe and free access to their native habitat in Messalonskee Stream directly above the Union Gas dam site. Maine BEP does not dispute the brand new concrete dam it has approved at the Union Gas site will deprive these animals of all future access to Messalonskee Stream above the dam site. Maine BEP does not dispute this concrete dam will cause the complete extirpation of these animals from their indigenous habitat in Messalonskee Stream above the Union Gas site. In spite of all of this uncontested evidence and all of the case law and all of Maine BEP's own findings on this topic as cited above, Maine BEP here asserts it must issue a permit that will cause severe and long-term violations of Maine's water quality standards on Messalonskee Stream. This is because, Maine BEP asserts, the proposed new dam is now 'grandfathered' from any compliance with Maine water quality statutes because the BEP's 1995 water quality certification *supercedes* Maine's water quality statutes and the legal water quality standards established by the Legislature for Messalonskee Stream. Only the Legislature can enact or amend Maine's water quality standards or a stream's legal water quality standards and classification. 38 MRSA §464(2)(5).

The BEP permit violates Maine's antidegradation statute (38 MRSA §464(4)(F)(1)) by failing to protect and maintain the existing in-stream water use of Messalonskee Stream by native American eel, Atlantic salmon and sea lamprey. (Appeal at 6-10)

32. This statute declares: "The existing in-stream water uses and the level of water quality necessary to protect those existing uses must be maintained and protected. Existing in-stream uses are those uses which have actually occurred on or after November 28, 1975, in or on a waterbody whether or not the uses are included in the classification of the waterbody." Petitioner FKS has repeatedly claimed the proposed new dam will violate Maine's antidegradation statute (Comments at 16-17; Appeal at 6-10). Maine BEP has not contested any of the evidence offered

in support of this claim. Petitioner asserts that because American eel live in Messalonskee Stream above and below the Union Gas site; and Atlantic salmon and sea lamprey now have free access to Messalonskee Stream above the dam site, their ability to continue using this portion of the stream is an "existing in-stream water use" which must be maintained and protected. 38 MRSA §464(4)(F)(1). Maine BEP has not contested these fish now live in the portion of the stream above the proposed dam site; nor has Maine BEP contested that the contemporary use of the stream by these fish is an "existing in-stream water use" which must be protected and maintained pursuant to 38 MRSA §464(4)(F)(1). The new and impassable dam approved by Maine BEP at the Union Gas site will prevent the existing use described above from being protected and maintained. Because Maine's antidegradation statute requires a use to "actually occur" in a water body for it to be declared an "existing in-stream use," Petitioner asked the Maine DEP in April 2005 to require the project applicant to conduct fisheries surveys of the stream in the vicinity of the proposed new dam pursuant to the "existing in-stream uses" of Messalonskee Stream as established in 38 MRSA §464(4)(F)(1). Maine DEP staff refused to honor this request, as did the applicant. As a result, neither Maine DEP or the applicant have provided any information into the record describing what species of fish are now actually using Messalonskee Stream at this time. Two of Maine's three fisheries agencies failed to respond to Maine DEP's February 2005 request for comments on the new dam proposal (Maine Dept. of Inland Fisheries & Wildlife, Maine Dept. of Marine Resources). The Maine Atlantic Salmon Commission (MASC) provided comments to the Maine DEP on February 25, 2005. In these comments, MASC said it has documented Atlantic salmon spawning in Messalonskee Stream in the vicinity of the Union Gas dam in recent years and through a 2001 habitat survey determined that approx. 100 units of Atlantic salmon growing and rearing habitat exists directly above the Union Gas site (one habitat unit is equal to 100 square meters of suitable Atlantic salmon habitat). Aside from these comments by the MASC, the *only* evidence in the record regarding the existing use of

Messalonskee Stream by various native fish species has been provided by the Petitioner in its Comments and Appeal. Maine BEP and the applicant have been afforded numerous opportunities and many months to present evidence on this topic and both have refused to do so. Because of their refusal, Petitioner requests Maine BEP and the applicant be estopped from making any claims in dispute of this evidence and from characterizing Petitioner's evidence as "anecdotal" or "dubious." The failure of the Maine BEP and applicant to meet their evidentiary burden on this topic should subject them to a Court conclusion that all *factual* assertions on this topic be construed against them. Based on uncontested evidence in the record, American eel, Atlantic salmon and sea lamprey now comprise an "existing in-stream use" of Messalonskee Stream at and directly above the Union Gas site which must be "maintained and protected" pursuant to Maine's antidegradation statute. The instant permit fails to protect and maintain this existing in-stream use because the proposed new concrete dam will eliminate the safe and free access these native, migratory animals now enjoy at and directly above the Union Gas dam site and therefore, the permit violates Maine's antidegradation statute. 38 MRSA §464(4)(F)(1). Maine BEP does not contest this. On Sept. 21, 2005, Maine BEP itself stated: "The state's antidegradation policy clearly provides that the DEP may only issue a wastewater discharge license pursuant to state law or approve water quality certification pursuant to federal law if the standards of classification of the water body are met. 38 MRSA §464(4)(F)(3)." (Maine BEP, Order Approving Water Quality Certification for Gulf Island and Deer Rips Dams, Sept. 21, 2005). In its April 2003 Water Quality Certificate Order for S.D. Warren's Presumpscot River dams, Maine BEP stated: "Antidegradation. The Department may only approve water quality certification if the standards of classification of the waterbody and the requirements of the State's antidegradation policy are met. The Department may approve water quality certification for a project affecting a waterbody in which the standards of classification are not met if the project does not cause or contribute to the failure of the water body to meet the standards of

classification." (Maine BEP, Water Quality Certification Order for Presumpscot River Dams, April 2003. Order at 9). Petitioner has supplied to the record uncontested evidence that American eel, Atlantic salmon and sea lamprey have been living in the project area for at least the past four years; these animals would be severely and negatively affected by the project; and for this reason the BEP permit for the new dam will not allow these existing uses to be protected and maintained as required under 38 MRSA §464(4)(F)(1). The Findings of Fact provide no evidence to contest this conclusion.

The Maine BEP's "limited scope" of review for the project is absurd and contrary to the goals and intent of the statutes it administers.

33. The Denial Order at 10 states: "The Department therefore properly limited its review in this case, under both section 401 and the MWDCA, to the repair activities proposed." As best as we can discern, this statement means Maine BEP limited its review of the project to the *temporary* impacts to Messalonskee Stream caused by construction of this new dam -- and omitted from review the *ongoing* impacts to Messalonskee Stream that would be caused by the new dam itself. This is no different than the BEP limiting its review of a new pump house designed to discharge toxic waste into a stream to only the *construction* of the new pump house - - while omitting from review the toxic waste itself. The proposed dam repair consists of a brand new 35-foot high concrete wall to be erected within and across the natural bed of Messalonskee Stream where no artificial structure of any type has existed since 2001. (Denial at 2) Petitioner has repeatedly requested Maine BEP conduct a thorough environmental review of this proposed

35-foot high concrete wall to determine its potential impact on American eel, Atlantic salmon and sea lamprey. Maine BEP has declined to conduct this review, claiming it has “properly limited the scope of its review to the repair activities proposed.” (Denial at 6). BEP admits the dam repair consists of a brand new 35-foot high concrete wall to be built within and across the natural bed of Messalonskee Stream where no dam exists today. (Denial at 2) Therefore, by simple logic, this brand new 35-foot high concrete wall *is the dam repair activity for which a permit is being sought*. If the dam repair did not include this brand new 35-foot high concrete wall in the bed of Messalonskee Stream, the dam repair would accomplish very little. If Maine BEP does not include in its review of the dam repair this critical part of the dam repair, then what part of the dam repair is left for the BEP to review? What’s left to review is dirt. Maine BEP limits its entire environmental review of the project to dirt that may wash into Messalonskee Stream as this 35-foot high concrete wall is built. However, the permit application does not propose to just move some dirt around Messalonskee Stream. If the applicant wishes to just move some dirt around Messalonskee Stream, they are welcome to apply for an MWDC permit to do that. Rather, the applicant here proposes to move some dirt around for the express purpose of erecting a brand new 35-foot high concrete wall across and within the bed of Messalonskee Stream where no dam exists today. The project under review here is *not* moving some dirt around Messalonskee Stream for the fun of it. The project is the construction of a very new and very large concrete dam to be constructed within and across the natural bed of Messalonskee Stream where no dam exists today. If a very new and very large concrete dam is *not the project* subject to this permit, why has the applicant supplied the Maine BEP with detailed engineering and construction plans for a very new and new large concrete dam? Do these plans and designs refer to some other dam on some other stream? In the May 10, 2005 Permit Order, Maine DEP says it fully reviewed the impacts of this dam repair and found based upon evidence in the record there is reasonable assurance the new 35-foot high concrete dam will not cause *any* violations of Maine water quality

standards (Permit at 6). In its Denial Order, Maine BEP says the review upon which this “reasonable assurance” was limited to the impacts of construction activities ancillary to the dam repair (ie. proper installation of silt fences). Through this assertion, the BEP admits their finding of “reasonable assurance” does not apply to the water quality impacts of the 35-foot high concrete wall itself. Without saying so directly, the BEP argues it is not required under the MWDCR to review the environmental impacts of this new 35-foot high concrete wall because it is grandfathered and immune from regulatory review. Either Maine BEP believes the proposed new dam is completely grandfathered from compliance with Maine water quality standards -- or the BEP has performed a very incomplete and flawed environmental review. The Findings of Fact fail to cite any statute or case law supporting either option. The surgically narrow environmental review of this project as described in the Findings of Fact is clearly an effort by the BEP to willfully avoid conducting an objective and comprehensive examination of the actual impacts of this new 35-foot high dam on the existing fish and fauna of Messalonskee Stream. DEP technical staff made this assertion to Petitioner FKS and other concerned citizens at the April 6, 2005 informational meeting conducted by the Maine DEP. At this meeting, DEP technical staff bluntly informed citizens and organizations that any comments they submitted regarding the impact of this new 35-foot high dam on the fish of Messalonskee Dam would not be considered by the DEP. It is for this reason alone that Maine DEP received no public comments on the project application except those provided by Petitioner FKS.

In making their decision on Petitioner’s Appeal, Maine BEP members improperly relied upon evidence and arguments offered by Maine DEP technical staff immediately prior to the BEP’s vote on November 3, 2005 that not part of the official record for the Appeal; Petitioner was given no opportunity to challenge this information.

34. During the BEP's deliberation of Petitioner's Appeal of the instant permit on Nov. 3 2005, DEP technical staff twice told BEP members they should deny the Appeal in part because the instant permit proceeding was not the "appropriate" regulatory vehicle for Petitioner to register concerns about the proposed project's negative impacts on American eel, Atlantic salmon and sea lamprey now living in Messalonskee Stream. DEP technical staff informed Board members that Petitioner Friends of the Kennebec Salmon, Inc. has the right to petition the BEP to amend the existing water quality certification for the Union Gas Dam pursuant to Ch. 2, §27 of the Department's regulations. DEP technical staff, as well as legal counsel for the project applicant, also informed Board members that Petitioner FKS could also request the Federal Energy Regulatory Commission amend the project license to protect these fish species at the proposed new dam. For these reasons, DEP technical staff informed BEP members, there was no need for the Board to consider Petitioner's evidence and arguments in this proceeding. These arguments apparently swayed Board members and caused several members to comment that they were willing to support a motion to deny Petitioner's Appeal because Maine DEP technical staff had given them assurance that even if Petitioner's Appeal were denied, Petitioner still had access to other regulatory avenues to protect Messalonskee Stream and its fish.

35. Maine DEP technical staff had no right or authority to introduce this new and dilatory information to the Board more than 4 months after the official record for the Appeal was closed. The official record for this proceeding, provided by the State on 29 December 2005, shows no written request by Maine DEP staff to allow staff to introduce any new information or arguments to the Board prior to its Nov. 3, 2005 meeting. As such, Petitioner had no idea Maine DEP technical staff intended to introduce this information to the Board on Nov. 3, 2005. For this reason, Petitioner was deprived of any opportunity to protest the introduction of this information into the official record or provide information and arguments in rebuttal.

36. The existence of other regulatory avenues to advance Petitioner's interest in protecting the lives of American eel and other fish in Messalonskee Stream has absolutely no relevance to the instant proceeding. At issue in this proceeding is purely and simply whether the Maine BEP's decision and Findings of Fact comport with Maine law. At issue in Petitioner's Appeal of the Maine DEP's May 10, 2005 permit decision is our contention that this permit violates Maine law.

37. At the Nov. 3, 2005 Board meeting, Maine DEP technical staff told Board members that FKS president Douglas Watts (acting as an individual) had on Sept. 28, 2005 filed a regulatory petition with the Maine BEP seeking amendment of water quality certifications at four Kennebec River hydroelectric dams. DEP technical staff stated this recent action by Mr. Watts was evidence that Friends of the Kennebec Salmon was fully aware of "other regulatory avenues" to pursue their interest in protecting the fish of Messalonskee Stream and was actively using these avenues at several other dams. One problem with Maine DEP's assertion is that Friends of the Kennebec Salmon and Mr. Douglas Watts, a private citizen and FKS member, are not the same entities. The Petitioner in this instant proceeding is Friends of the Kennebec Salmon, Inc. (FKS). Friends of the Kennebec Salmon is a non-profit corporation with a board of directors and individual members who sanctioned and approved our instant Appeal of this permit on Messalonskee Stream. Douglas Watts of Augusta, Maine is president of FKS and has represented the organization throughout this instant proceeding.. The information provided to the Board by DEP technical staff on Nov. 3, 2005 referred to a wholly separate and regulatory action undertaken by Mr. Watts as a private citizen without the knowledge, sanction or participation of Friends of the Kennebec Salmon, Inc.. For this reason alone, Maine DEP technical staff had no reason or justification to mention the existence of this recent private action by Mr. Watts to the

Maine BEP during its deliberation of the Appeal by Friends of the Kennebec Salmon, Inc. These statements constituted the introduction of new information into the record by Maine DEP nearly five months after the record for this proceeding had been closed. The statements had no relevance to the proceeding because they related to individual actions by Douglas Watts which had no connection to Friends of the Kennebec Salmon, Inc and its Appeal of the instant permit on Messalonskee Stream. The statements were made when BEP members were deliberating on a motion to deny Petitioner's Appeal -- at the precise moment when Board rules do not allow any rebuttal or challenge from the Petitioner. The introduction of this new information demonstrably influenced the voting decisions of several Board members, enough to turn the vote from a 6-3 or 5-4 vote in favor of Petitioner's Appeal to a 6-3 vote against it. These actions by Maine DEP staff are especially egregious because the Maine BEP in July 2005 refused to allow FKS to introduce photographs of American eels climbing the ledges at the Union Gas site on June 12 and 13, 2005 because the official record for the proceeding was already closed. Yet Maine DEP technical staff on Nov. 3, 2005 introduced new evidence and new arguments to the Maine BEP that had no relevance to the issue at hand, had no connection to Friends of the Kennebec Salmon, Inc., no connection to Messalonskee Stream, and was introduced for the specific purpose of influencing the Board's final deliberations on the merits of the Petitioner's Appeal.

CLAIM FOR RELIEF

38. For the above reasons, Friends of the Kennebec Salmon requests the Court vacate the Maine BEP's Nov. 3, 2005 denial of our Appeal and remand the permit proceeding to the Maine BEP and Maine DEP for clarification of the Findings of Fact; or in the alternate, the Court vacate the May 10, 2005 dam reconstruction permit as unlawful.

February 3, 2006

Douglas H. Watts, President
Friends of the Kennebec Salmon, Inc.
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