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September 8, 2006

Matthew Scott, Chair
c/o Terry Hanson
Board of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

Re: Petition Regarding Water Quality Certifications – Androscoggin River Hydroelectric Power Projects

Dear Chairman Scott:

On September 1, 2006, this office¹ received a copy of the letter to you from Bruce Merrill, which was faxed to you on August 30, 2006. In his letter Mr. Merrill “moves,” allegedly pursuant to Chapter 30, Section 24 of the Department’s rules, to have the full Board consider your June 9, 2006 decision to defer action on the May 17, 2006 petition (the “Andro II Petition”) to modify the water quality certifications for the Androscoggin River hydroelectric projects. For the reasons set forth below, you should deny Mr. Merrill’s motion.

Although Chapter 30, Section 24 provides that the Chair may be overruled by a majority vote of the Board on any decision or ruling relating to a hearing, Chapter 30 does not apply in this case because the Board has not yet voted to hold a hearing in response to this petition; Chapter 30 does not apply if the Board has not yet voted to hold a hearing.² Thus, the provision that applies is the statute addressing the administrative power of the Chair in general, 38 M.R.S.A. § 341-F. According to that statute, “responsibility for administration of the board lies with the chair”; there is no provision for appeals to the Board of the Chair’s decisions on administrative matters – including scheduling decisions.

To allow an appeal to the Board in this case would establish a precedent allowing appeals to the full Board of any and all of the Chair’s administrative decisions. That would be unworkable, and would undermine the Board’s ability to act efficiently and fairly, and would be inconsistent with DEP statutes.

¹ We represent FPL Energy Maine Hydro LLC, Hackett Mills Hydro Associates, Ridgewood Maine Hydro Partners, L.P., and Rumford Falls Hydro LLC. I am authorized to inform you that CMP Androscoggin LLC, the City of Lewiston, Miller Hydro Group, and Topsham Hydro Partners, L.P. join in this letter.

² This also is true of Chapter 20, Section 15; Chapter 20 is the rule that applies to hearings held pursuant to Chapter 2, Section 27. Chapter 30 applies to hearings on applications of significant public interest.

Even if your June 9 letter were appealable to the full Board, Mr. Merrill delayed for almost three months before filing his “appeal.” Even the most generous appeals periods provided in the Department’s statutes and rules are no more than 30 days. *See, e.g.*, 38 M.R.S.A. § 341-D(4). In similar circumstances at the local level, where no appeal deadline is stated, the Maine Law Court has imposed a 60-day appeal deadline. *Viles v. Town of Embden*, 2006 ME 107, ¶ 6 (“When zoning ordinances are silent on the time period by which an aggrieved person must file an appeal from the issuance of a permit, we have set sixty days as that time period”). To allow an appeal now, after well over 60 days have passed, would further undermine the orderly conduct of the Board’s business.

Thus, Mr. Merrill’s motion should be denied.³

In addition to denying Mr. Merrill’s motion, you should summarily dismiss the May 17 petition in its entirety, for the reasons outlined in my May 24, 2006 letter to you. Specifically, the May 17 petition is, in effect, a petition for reconsideration of the Board’s February 2, 2006 decision dismissing the prior petitions filed by Friends of Merrymeeting Bay (“FOMB”) and Douglas H. Watts, and, as such, the May 17 petition must be dismissed because it was filed after the 30-day deadline in Chapter 2, Section 25 for petitions for reconsideration. The following facts demonstrate that this is merely a petition for reconsideration of the Board’s February 2 decision on the prior FOMB and Watts petitions:

1. The May 17 petition raises the same issue as the prior FOMB and Watts petitions -- whether the Board should modify the water quality certifications for the hydroelectric projects on the Androscoggin and Little Androscoggin rivers to require eel passage. Although the May 17 petition is limited to eels, the prior petitions also addressed eels. The fact that the Board’s prior decision may not have addressed all the arguments raised by the May 17 petitioners in a way that was satisfactory to them is not a basis to call this a “new” petition.
2. The May 17 petition was submitted by the same principals as the prior FOMB and Watts petitions. The May 17 petition was filed by Ed Friedman, who filed the prior FOMB petition as “Ed Friedman, Chair” of FOMB. The May 17 petition also lists FOMB and Douglas H. Watts as petitioners. It would make no sense to allow losing petitioners to avoid the reconsideration deadline merely by adding other petitioners to their “new” petition.

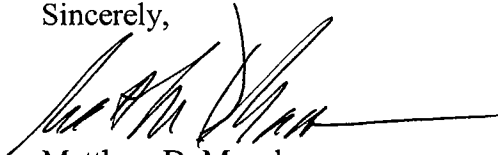
³ In any case, the 30-day deadline contained in Chapter 2, Section 27 is for the benefit of licensees, not a petitioner. The purpose of the 30-day deadline is to protect licensees from a lengthy and uncertain cloud on the licensee’s ability to operate as licensed. If the licensee does not object to a delay beyond 30 days, the 30-day deadline is not mandatory, and the Chair may choose to deviate from it for practical reasons.

3. Nothing has changed since the prior FOMB and Watts petitions. It is specious to argue that the U.S. Supreme Court's May 15 decision in the *S.D. Warren* case somehow changes the applicable law, because that decision merely affirmed the Maine Law Court's February 15, 2005 decision, which had been decided when the Board dismissed the prior FOMB and Watts petitions on February 2, 2006.
4. The May 17 petition attaches and incorporates by reference the prior FOMB and Watts petitions.

Thus, the May 17 petition is a request for reconsideration, and, if it were allowed, it would be late. But Chapter 2 does not allow petitions for reconsideration at all in this situation; petitions for reconsideration are limited to Board decisions "approving or denying a license application." See 38 M.R.S.A. § 341-D(5); Chapter 2, Section 25. Thus, the May 17 petition is a request for reconsideration in a situation in which no such request is permitted.

Thank you for considering this letter.

Sincerely,



Matthew D. Manahan

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