



JOHN ELIAS BALDACCI
GOVERNOR

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

Exhibit A

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CHAIR
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IN THE MATTER OF

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

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

1. PROCEDURAL HISTORY

1995 Water Quality Certification for the Union Gas Hydro Project

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

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

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



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

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

2001 MWDCa Permit and Water Quality Certification for Emergency Dam Stabilization

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

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

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

2005 MWDCa Permit and Water Quality Certification for Dam Repair

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

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

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

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

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

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

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

2. PETITION FOR REVOCATION, MODIFICATION OR SUSPENSION

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

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

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

3. APPLICABLE STANDARDS

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

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

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

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

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

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

5. SUMMARY OF PETITION

Petitioner contends that three of the statutory grounds for modification of a license⁴ are met. Specifically, Petitioner contends that:

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

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

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

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

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

6. STANDING

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

7. RESPONSE TO PETITION

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

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

8. DISCUSSION

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

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

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

b. Threat to the Environment

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

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

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

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

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

c. Failure to Include Legally Required Standard or Limitation

Petitioner argues that, because the 1995 water quality certification issued for the Union Gas Hydro Project does not include passage for migratory fish and does not allow these fish to live in their native habitat, it fails to include standards and limitations legally required on the date of its issuance within the meaning of 38 M.R.S.A. § 341-D(3)(D). Specifically, Petitioner argues that Maine's water quality standards require that all Class C water bodies⁶ be suitable habitat for all of their indigenous fish species, and that if a dam prevents indigenous fish species from gaining access to a water body, that dam is causing or contributing to the failure of that water body to meet standards.

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

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

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

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

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

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

d. Change in Condition or Circumstance

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

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

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

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

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

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

e. Other Factors

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

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

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

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

9. CONCLUSION

For all of the above reasons, the Board finds that the petition does not describe a sufficient factual basis that, if proven at a hearing, would support the requested modifications to the 1995 water quality certification and that other additional factors as articulated herein weigh against reopening and modifying the certification at this time.

Therefore, the Board in its discretion dismisses the petition submitted by Douglas H. Watts dated April 30, 2007 to modify the 1995 water quality certification for the Union Gas Hydro Project located on Messalonskee Stream in Waterville.

DONE AND DATED AT AUGUSTA, MAINE, THIS 15th DAY OF November, 2007.

BOARD OF ENVIRONMENTAL PROTECTION

BY: Virginia N. Plummer

VIRGINIA N. PLUMMER, Chair