

**STATE OF MAINE  
BOARD OF ENVIRONMENTAL PROTECTION**

IN THE MATTER OF

LOCKWOOD HYDRO PROJECT )  
#L-20218-33-C-N )  
 )  
HYDRO-KENNEBEC PROJECT )  
#L-11244-35-A-N )  
 )  
SHAWMUT HYDRO PROJECT )  
#L-19751-33-A-M )  
 )  
WESTON HYDRO PROJECT )  
#L-17472-C-M )

**MOTION TO LIMIT THE SCOPE OF HEARING  
AND TO PRECLUDE EVIDENCE**

Friends of Merrymeeting Bay (“FOMB”) moves to limit the scope of the hearing on the modification of the above-captioned water quality certifications, and to preclude certain evidence from being introduced at the hearing.

I. THE ROLE OF FERC SHOULD NOT BE AN ISSUE AT THE HEARING.

At previous Board meetings on petitions to modify water quality certifications for dams on the Kennebec and Androscoggin Rivers, the Assistant Attorney General advising the Board suggested that she could not advise the Board as to whether the Federal Energy Regulatory Commission (“FERC”) has the ability to amend the dams’ FERC licenses in the event the Board modifies the water quality certifications. It appeared that some Board members considered that issue in voting whether to grant an adjudicatory hearing for the petitions to modify the certifications.

Although the role of FERC did not prevent a hearing on the Kennebec dams from going forward, FOMB is concerned that the issue will be raised again. FOMB requests that this issue not be revisited at this hearing.

With respect to the certifications for the Kennebec dams, it is settled that FERC has the authority to amend its licenses to incorporate the terms of modified water quality certifications. The Lower Kennebec River Comprehensive Hydropower Settlement Accord (the “KHDG Agreement”) - entered into by dam operators, the State of Maine, and others, and incorporated into FERC licenses for Kennebec dams - expressly states that if the dam owners and various agencies could not reach consensus on either upstream or downstream eel passage measures by June 30, 2002, “any party [to the KHDG Agreement] *shall be free to petition FERC to amend any license to insert appropriate terms and conditions.*” KHDG Agreement, p. 3, III.G.3 (emphasis added).<sup>1</sup> It is beyond dispute that such a “reopener clause” is valid. American Rivers, Inc. v. Federal Energy Regulatory Commission, 129 F.3d 99 (2d Cir. 1997); S.D. Warren Company v. Board of Environmental Protection, 2005 ME 27, 868 A.2d 210, 218 (2005), affirmed, 128 S.Ct. 1843 (2006).

Consensus on eel passage was not reached by June 30, 2002 (and has not been reached yet). Accordingly, the State of Maine has the ability to petition FERC to amend the FERC licenses for the dams that are the subject of this hearing.<sup>2</sup>

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<sup>1</sup> The KHDG Agreement was entered into in 1998 to facilitate the removal of the Edwards Dam.

<sup>2</sup> Even without a reopener clause FERC licenses can be amended. FERC can amend a license with the consent of the dam operator. 16 U.S.C. § 799. The State of Maine certainly has the right to ask FERC to seek an amendment, and modifying a water quality certification would be a logical first step in doing so.

Because the role of FERC is settled, raising the issue of FERC's ability to amend its licenses would be a red herring. The issue should be excluded from the hearing.<sup>3</sup>

## II. ECONOMIC EVIDENCE SHOULD BE PRECLUDED AT THE HEARING.

The economics of implementing eel and fish protection measures are irrelevant and should be excluded.

The thrust of FOMB's petition is that the dams pose a threat to the environment and violate water quality standards because they kill eels and fish, and thus the water quality certifications for the dams should be modified to require protective measures. The economics of implementing eel and fish protection measures is not a factor in either the modification criteria, set forth in 38 M.R.S.A. § 341-D(3), or the determination of whether water quality standards are being violated.<sup>4</sup> Cf. Ackels v. United States, 7. F.3d

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<sup>3</sup> Even if the Attorney General's office persists in taking the position that it cannot advise the Board on whether FERC is able to amend its licenses to incorporate modified water quality certifications for Kennebec dams, that would be no reason to reject modifying the certifications. The Board has statutory authority to modify certifications, 38 M.R.S.A. § 341-D(3) and has granted a hearing to determine whether the criteria to modify have been met. The Board cannot avoid exercising its responsibility to rule on the merits of the petition simply because the Attorney General refuses to advise the Board on FERC's role.

<sup>4</sup> The dams at issue are located on waters classified as "B" and "C." Class B waters "shall be of such quality that they are suitable for the designated uses of. . . recreation in and on the water. . . and as habitat for fish and other aquatic life. The habitat must be characterized as unimpaired." 38 M.R.S.A. § 465(3)(A). "Discharges to Class B waters may not cause adverse impact to aquatic life in that the receiving waters must be of sufficient quality to support all aquatic species indigenous to the receiving water without detrimental changes in the resident biological community." 38 M.R.S.A. § 465(3)(C). Class C waters "shall be of such quality that they are suitable for the designated uses of. . . recreation in and on the water . . . and as a habitat for fish and other aquatic life." 38 M.R.S.A. § 465(4)(A). 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 M.R.S.A. § 465(4)(C). Killing and injuring eels and fish do not satisfy these standards. The amount it would cost to prevent eel and fish kills is not considered in determining whether waters are maintaining their classification. Also, killing and injuring eels and fish violates the State's antidegradation law, which provides: "Existing in-stream water uses and the level of water quality necessary to protect those existing uses must be maintained and protected." 38 M.R.S.A. § 464(4)(F). Also, the antidegradation law provides that water quality certifications can be issued only if the standards of the water quality classification are met and the project does not cause or contribute to a failure of those standards. 38 M.R.S.A. § 464(4)(F)(3). Again, economics is irrelevant.

862, 865-866 (9<sup>th</sup> Cir. 1993) (economic restraints are not a valid consideration in setting water quality based effluent limitations).

Moreover, presentation of economics evidence will be time consuming and impractical. Testimony and documentary evidence on costs, the financial condition of the dam operators, etc. could be extensive, and the opportunity for FOMB to cross examine the dam operators on any of this would be extremely difficult given the fact that there will be no “discovery” (pre-trial exchange of relevant documents and pre-trial depositions) in this proceeding as there would be in a civil litigation in court.

Accordingly, FOMB requests that economics evidence be precluded.

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Respectfully submitted,

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