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April 10, 2007

Terry Hanson
Maine Board of Environmental Protection
Ray Building – AMHI State Office Complex
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Augusta, ME 04333-0017

Re: Typographical Corrections on Post-Hearing Brief

Dear Terry:

In our Brief submitted on April 10, 2007, unfortunately there were a couple small word glitches that need correction. I apologize for that, and would appreciate it if you would e-mail the corrected pages attached to Board members.

For convenience, the corrections are:

Pg. 4, 4th line – the words "to include" were omitted;
Pg. 12, 5th line – the words "do not" need deletion;
Pg. 24, next to last line – insert the word "occur" after "will";
Pg. 25, next to last line – before the indented paragraph, "about" should be "all but"; and
Pg. 26, 8th line – the word "not" should be inserted after "should"

At your suggestion, I have underlined any new words, and put a line through any words to be deleted.

Thank you.

Sincerely,

Jeffrey A. Thaler, Esq.

Enclosures
cc: Service List

Id. at p. 4, fn. 3 (emphasis added). Consequently, this Board has already adjudicated and determined that FPLE **is** "in compliance" with its "existing Water Quality Certifications," and Petitioners therefore have no basis in this pending proceeding to argue legal non-compliance. Indeed, Petitioners deliberately chose **not** to include in their petitions the first criterion for possible license modification: "A. The licensee has violated any condition of the license." Thus, for one or more reasons, Petitioners have waived any claim that FPLE has violated or is violating its WQCs contrary to law.

Additionally and alternatively, with respect to all four grounds upon which the pending petitions rest, this Board has previously stated that where the certifications do not contain "relevant reopener clauses," then the "Attorney General's Office has counseled the Board during consideration of the Petitions to modify that this represents a substantial issue of law that has not yet been tested in court." August 30, 2006 Board Second Procedural Order at §3, p. 3 (attached hereto as Attachment C). Moreover, the Second Procedural Order held:

> The provision in the KHDG agreement referenced by FOMB simply permits the parties to the KHDG agreement, which does not include the DEP or the Board, to request that FERC take action to amend a license to insert appropriate terms and conditions. Even if the BEP or the DEP were such a party, this provision, which arguably reserves *FERC's authority* to amend the license upon receiving such a petition, does not reserve a similar authority to the parties to the agreement. All FERC licenses also include a standard reopener that requires a licensee to take such action as is necessary for the conservation and development of fisheries resources "as may be ordered by *[FERC] upon its own motion or upon the recommendation of [the USFWS] or the fish and wildlife agency or agencies* of any State." This reopener similarly does not reserve any authority to the Board or DEP.

Id. at p. 4, fn 1 (emphasis in original).

Neither Petitioner FOMB nor Watts subsequently challenged or appealed these determinations in the Second Procedural Order.

California's asserted revocation of a WQC satisfies any of the four predicate requirements). In this proceeding, there has been no such change in any circumstance or condition that would require modification, revocation, or suspension of the WQCs for the three projects.

V. FPLE has not violated any law administered by the DEP.

If Petitioners wanted to challenge the conclusion that FPLE's projects ~~do not~~ meet water quality standards, or to allege that they violate Maine's anti-degradation policy, they should have done so in 1998, when the WQCs for Weston and Shawmut were modified specifically to include provisions for fish passage, including downstream passage for American eel. Similarly, they should have done so in 2004 when the Commissioner issued the WQC for the Lockwood Project, which also included provisions for fish passage, including downstream passage for American eel. In short, the time for appealing the WQCs for the Projects has expired.

Mr. Watts also states that FPLE has violated Maine law because it is illegal to kill an anadromous Atlantic salmon in Maine waters, but provides no support for this generic statement about Maine law or whether such law is administered by the DEP-- because there is no such support.[11] Likewise, with respect to Mr. Watts' secondary argument, he does not provide a cite to, nor is there, any law that makes it illegal for an Atlantic salmon to be killed at any dam anywhere in the State of Maine.

Petitioners also argue that under 38 M.R.S.A. § 341-D, the Board can modify the WQCs because FPLE's hydro projects do not provide "immediate, safe and effective upstream and downstream passage" for migrating fish and eels and therefore violate state water quality laws. (FOMB Pre-Filed Direct, p.1, ¶ 2; p.2, ¶ 4b; p.4, ¶ 7; Watts Pre-Filed Direct, p. 1-2, ¶¶ 1-7; p.

[11] Regulations administered by the Maine Atlantic Salmon Commission ("MASC") prohibit angling for Atlantic salmon in all Maine waters and require that any salmon incidentally caught must be released immediately. But the MASC's regulations do not address incidental events unrelated to angling. Likewise, Watts' reliance on the angling provisions in 12 M.R.S.A. §12654(1) is misplaced, as 1) that statute is not one administered by the DEP, and 2) even if it was, it only relates to those seeking to catch and possess the fish.

In sum, Petitioners have not met their burden to establish that FPLE's projects are a threat to either human health or the environment, even assuming that this vague standard passes constitutional muster.

VI. This Board Should Not Alter, Directly or Indirectly, the 1998 KHDG Agreement

It is undisputed by the parties, as well as by the major environmental groups and fishery resource agencies that the agreement has greatly enhanced the Kennebec River fishery resources. See State Agency Pre-Filed Testimony and Kennebec Coalition Written Statement submitted by Nick Bennett; see also, 3/15/07 Hearing Tr. 375-76 (the Agreement's value is not decreasing over time), and 3/16/07 Hearing Tr. at 51-52. A summary of what the 3 FPLE Projects have contributed is as follows:

Collective - all three projects	• Contributed $1.2 million to the State's fisheries restoration efforts under the 1987 KHDG Agreement; • Contributed $2.5 million to the State's fisheries restoration efforts under the 1998 KHDG Agreement; • Scheduled to contribute an additional $440,000 from 2007-2010 to the State's fisheries restoration efforts under the 1998 KHDG Agreement; • Contributions have been used to: o Help fund the removal of Edward's Dam, opening up 17 miles of free-flowing habitat; o Fund the removal Guilford Dam and installation of fishways at the outlet of Sebasticook Lake, Plymouth Lake and Pleasant Pond; o Fund the State's trap and truck program; and o Expand the State's shad hatchery efforts

However, many witnesses also agreed that if this Board granted any portion of the pending Petitions, then serious adverse consequences will occur not only for the Kennebec River fishery, but also potentially other river systems in Maine.

The Kennebec Coalition warned that fish passage measured would be delayed, there would likely be conflict between FERC and the State, and any future settlement negotiations between environmental and fishery groups, state agencies and dam owners would be chilled if not killed. 3/15/07 Hearing Tr. at 365-69. The State agencies who testified, as well as the State Planning Office (see Attachment 4) likewise supported the existing Agreement and warned about similar adverse consequences as those raised by the Kennebec Coalition. See Pre-filed Agency Testimony at 9 (a decision by the Board to alter the Water Quality Certifications will discourage all hydro-power owners from entering into settlement agreements with the State in the future); 3/16/07 Hearing Tr. at 94-97 (Maine is ahead of other states on eel and fish conservation efforts, it is very important not to undermine the Agreement). Likewise, FPLE testified that State efforts to alter or renegotiate terms or conditions of the KHDG Agreement would chill the desire of settling parties to enter into future agreements (A. Wiley Pre-Filed Direct Part II at p. 17).

Also, it was pointed out that the Agreement itself spells out consequences should terms of the Agreement be altered by the Maine DEP (which would include the Board). Specifically, if the DEP alters or prohibits execution of terms considered essential to FPLE or Hydro-Kennebec, then they can declare the Agreement null and void and the State would be required to reimburse KHDG members for all but ~~about~~ $140,000 of contributions made to date. Specifically, the Agreement states:

> "In the event that FERC or Maine DEP choose to alter or prohibit execution of any term and condition contained in this Agreement considered essential to any party (including all dates for performance) **or** have not issued final, non-appealable, FERC licenses and DEP water quality certifications (amended or new) for all KHDG projects by June 1, 1999...then unless all parties agree to amend this Agreement to incorporate any changes made by FERC or Maine DEP... this Agreement becomes null and void and all payments made by KHDG...will be returned to KHDG, except for $140,000..." (p. 4) (emphasis added)

Contrary to a Board member suggestion at the hearing, the first sentence makes clear in by use of the word "or" that the June 1, 1999 deadline only has to do with whether or not FERC licenses and DEP Water Quality Certifications have been issued. The first half of the provision -- relating to FERC or DEP alteration of the Agreement -- has no time limit attached to it, nor was it intended to.

Should the Board feel it needs a mechanism to control future compliance with some of the terms of the KHDG Agreement, it presently has the ability to do so through the existing Condition Compliance Orders for each of the projects in this case; the Board should not attempt to do so through revocation, suspension or modification of the Water Quality Certifications and the consequential alteration of the KHDG Agreement.

CONCLUSION

For one or more of the reasons set forth above, FPLE respectfully requests that this Board do what all State agencies and the Kennebec Coalition have requested -- deny the pending Petitions.

Dated: April 10, 2007

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