Friends of Merrymeeting Bay
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Dear Pat,

Last week at the Presumpscot Settlement Framework Agreement [SFA] scoping session you advised the group that the deadline for written comments would be March 7. These then are the comments from Friends of Merrymeeting Bay [FOMB].

At the scoping session, a gentleman from Friends of Sebago [FOSL] made an excellent point regarding the timetable here and how it casts a shadow over the transparency of this proposed settlement. The SFA [and the copy I'm looking at doesn't say "Draft"] was signed in June of 2007 by DMR, American Rivers, USFWS, SD Warren and Friends of Presumpscot [FOPR] but it was not until last week that there was a public scoping session held for feedback. At this time you said there would only be 9 days allowed for written comment. This certainly gives the appearance of a desire to exclude the agreement from public scrutiny.

When we had the meeting January 29th at DMR, Doug asked if you and Ron Kreisman would be open to and willing to act on public input on the SFA. It was only after a very extensive pause that you replied in the affirmative. It was disappointing but not unexpected to hear Ron say on behalf of his clients; no they would not be amenable to changes, in fact they would fight them. The document was signed by all the parties, we believe quite prematurely. I can understand the difficulty or more accurately, embarrassment that Ron might feel in going back to his clients and advising them that various groups have come forward who question both the deal and the process.

As I said at the scoping session, we need to look at the diadromous fish situation in the state with new eyes, particularly after the SD Warren case in which the US Supreme Court reinforced the State's ability to enforce the Clean Water Act [CWA]. We have a huge problem with a collapsing Gulf of Maine fishery. Forage stocks are unable to reach their historical spawning habitat in sufficient numbers because of dams without passage or with ineffective passage. Even if some are trapped and trucked or in some cases do

climb ladders or ride lifts, they are often threatened on their out-migration by unscreened turbines. We need to get in the habit of differentiating between “fish passage” and “safe and effective fish passage”-and transforming the former to the latter. Safe downstream passage was expressly mentioned in SD Warren and this is why SFA dams on the Presumpscot now have night-time shut downs for out-migrating eels.

The SFA is a cookie cutter version of the KHDG Agreement that was, as Gordon Russell, formerly director of the USFWS Maine Field Office said: “a deal with the devil.” Both agreements let the hydro operators use worthless dams as leverage to extend already insanely long FERC licenses. Both agreements delay fish passage a great deal. Both agreements lack language to suitably enforce conditions not complied with. While the DEP may claim they have that inherent enforcement ability they generally do not use it. Both agreements have vague language around specific dates, biological triggers and reporting. Both agreements have gag orders, the SFA even worse than the KHDG because in addition to language that prohibits signers from speaking against the agreement, it adds that signers will “work together to defend the SA and its implementing actions, including permit requests, against challenge from third parties.”

What the gag order in the SFA threatens to do is put the state, USFWS, American Rivers and FOPR in the absurd position of having to work against those individuals or groups that might in the future challenge or attempt to modify or suspend this agreement not only because current and planned conditions are illegal [violations of water quality certifications and CWA are not grandfathered] but because you may be put in the position of having to defend obsolete conditions against new developments in fish friendly turbine technologies, turbine substitutes, dam alternatives and advancements in the public trust doctrine. I’m not even sure it is legal for the state to tie its hands on the enforcement of possible future violations or in the acceptance of future improvements to the art and science of fish passage.

Imagine this if you will: Gorlov or similar in-stream fish friendly turbines capable of deployment in water as shallow as three feet gain acceptance and are proven effective. These become a substitute for traditional dams and impoundments. The Center for Biological Diversity, NRDC, FOMB, Earthjustice and a host of other groups challenge existing archaic agreements like the one you are about to sign and call for the use of new technologies. Not only do DMR, AR, FOPR and USFWS look like idiots for having signed away the future, but you are obligated to work against a healthier river, possibly a more profitable substitute, supporting instead, the probable continued extirpation [or at best marginal existence] of any diadromous fish left on the river.

Consider also a challenge to the practice of long-term FERC licenses. Unfortunately I can see and have seen the state in fact oppose such a challenge, but it would be irrational for AR to be one of the few groups to have to work against such a change when, in fact, they should be leading the charge. This is an issue that has, not to my knowledge, been taken on since SD Warren. The time is right.

The Federal Power Act: (16 U.S.C. Chapter 12)
Sec. 797(e)

In deciding whether to issue any license under this subchapter for any project, the Commission, in addition to the power and development purposes for which licenses are issued, *shall give equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of, fish and wildlife (including related spawning grounds and habitat), the protection of recreational opportunities, and the preservation of other aspects of environmental quality.*

Sec. 803:

All licenses issued under this subchapter shall be on the following conditions:

(a) Modification of plans; factors considered to secure adaptability of project; recommendations for proposed terms and conditions

(j) Fish and wildlife protection, mitigation and enhancement; consideration of recommendations; findings

(1) *That in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement.* Subject to paragraph (2), such conditions shall be based on recommendations received pursuant to the Fish and Wildlife Coordination Act (16 U.S.C. 661 et seq.) from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies.

Couple this with:

The Federal Water Pollution Control Act a.k.a.The Clean Water Act.
33 U.S.A §§ 125-1387

"The objective of the Clean Water Act is to *restore and maintain the chemical, physical and biological integrity of the nation's waters.* Among the national goals stated in the Act are the elimination of the discharge of pollutants into navigable waters by 1985 and, where attainable, the achievement by mid-1983 of an interim goal of water quality sufficient to provide for the protection and propagation of fish, shellfish, and wildlife and for recreation in and on the water."
"Except as otherwise provided, the Administrator of the EPA administers the Act. EPA, in cooperation with other federal agencies, states, interstate agencies, municipalities and industries, is to develop comprehensive programs for preventing, reducing or eliminating pollution and improving the sanitary condition of surface and underground waters. *Due regard must be given to the improvements necessary to conserve these waters for the protection and propagation of fish and aquatic life and wildlife, recreational purposes,* and the withdrawal of water for public water supply, agricultural, industrial and other purposes. §§ 1251 and 1252." [Maine's water quality standards echo the CWA language and our classification standards are clear- "*unimpaired*", "*biological integrity*", etc.

"Pollution: the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water."

As recently affirmed by the US Supreme Court in SD Warren, run-of the river dams are polluters and dischargers and states can regulate them via the CWA which does in fact trump the Federal Power Act though even the FPA above pays lip service to fish passage.

The proposed agreement sets forth fish passage scenarios for 2011 at Cumberland; 2018 trap and truck [T&T] [which we all know is not very efficient] for Sacarappa; no earlier than 2026 for Mallison Falls; 2031 at Little Falls; 2036 at Gambo and no passage at Dundee. As if these extensions were not ridiculous enough, the signers are agreeing to license extensions of 50 years! The river is only about 25 miles long. Given safe and effective passage, any of the species involved could swim to Sebago Lake in a day. Two at most. An eel could walk it.

Sebago Lake and the Crooked River above it once hosted one of the best Atlantic salmon runs in the state. Why is there no effort being made to reconnect the lake to the sea?

Look at what is happening in the state with regards to diadromous fish. We are losing them to a scattered, piecemeal and regressive approach that is doomed to failure. For example: the Kennebec where we are studying eels to death, exposing adult and young salmon to turbine mortality and trucking a fraction of the river herring that are below Lockwood; the Androscoggin where there is no eel passage at *any* dam and the St Croix where there will never be enough evidence for some people, to open historical habitat to diadromous species and DMR is accepting that no standard of evidence is necessary.

There needs to be a major paradigm shift in how we do fish restoration in the state. For any hope of success there needs to be a holistic approach that calls for safe and effective passage to historic ranges statewide for diadromous species. And this should be done and could be done in five years. This means an aggressive push from the state and USFWS. We have a post SD Warren opportunity to leap light years ahead and send the FERC practice of 30-50 year licenses, a holdover from the Rural Electrification program of the 1930s, back to the past.

Re-openers or lack thereof are totally irrelevant. If they are present and not used they are worthless and if they are not included the outcome is certainly extirpation. The thought and practice that one can-not provide or improve existing fish passage to make it safe and effective, flies in the face of the Federal Power Act, the CWA, state standards and common sense.

As stated in the US Supreme Court Case SD Warren v. BEP:
"…As Senator Muskie explained on the floor when what is now §401 was first proposed:
'No polluter will be able to hide behind a Federal license or permit as an excuse for violation of water quality standard[s]. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a

plant without consideration of water quality requirements.'" 116 Cong. Rec. 8984 (1970)

Continuing present fish restoration policies yields an increasingly quick trip to the bottom. Assuming there are enough fish left and it is not too late, we need to remember that given decent enough water quality, if we can provide open access to habitat, the fish will come. Our policy and agreements like this, the KHDG and the Saco hurt the fish. It's past time to help them. In helping them we help ourselves.
Thank you for the opportunity to comment.

Sincerely,

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