

**STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION**

IN THE MATTER OF

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

**POST-HEARING BRIEF OF
FRIENDS OF MERRYMEETING BAY**

Petitioner Friends of Merrymeeting Bay (“FOMB”) submits this brief in support of its petition to modify the water quality certifications for the above-referenced dams, located on the Kennebec River.

I. **THE BOARD IS RESPONSIBLE FOR ISSUING WATER QUALITY CERTIFICATIONS THAT SAFEGUARD THE BIOLOGICAL INTEGRITY OF THE KENNEBEC RIVER.**

The objective of the Clean Water Act (“CWA”) “is to restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). One of the keys to meeting that objective is the ability of states to establish water quality standards. The Clean Water Act requires that in setting water quality standards, states must protect the designated uses of a waterbody, and consider a waterbody’s value for propagation of fish and wildlife. 33 U.S.C. § 1313(c).

Maine’s water quality standards do just that. The State’s water quality standard law provides: “The Legislature declares that it is the State’s objective to restore and maintain the chemical, physical and biological integrity of the State’s waters and to preserve certain pristine state waters. The Legislature further declares that in order to

achieve this objective the State's goals are. . . [t]hat water quality be sufficient to provide for the protection and propagation of fish, shellfish and wildlife and provide for recreation in and on the water.” 38 MRSA 464(1) and (1)(c). Maine law further provides that the stretches of the Kennebec in the vicinity of the subjects dams (classified as “B” in the vicinity of Weston and “C” in the vicinity of the other three dams) are required to “be of such quality that they are suitable for the designated use[] of . . . habitat for fish and other aquatic life.” 38 MRSA § 465(3)(A) and 4(A). In addition, in Class B waters such as near Weston, “[t]he habitat shall be characterized as unimpaired.” 38 MRSA § 465(3)(A). 38 MRSA § 466(11) provides: “‘Unimpaired’ means without a diminished capacity to support aquatic life.”

Maine law also provides:

Discharges to Class B waters shall not cause adverse impact to aquatic life in that the receiving waters shall be of sufficient quality to support all aquatic species indigenous to the receiving water without detrimental changes in the resident biological community.

38 MRSA 465(3)(C). With respect to Class C waters:

Discharges to Class C waters may cause some changes to aquatic life, provided that the receiving waters shall 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 MRSA § 465(4)(C).¹ In addition, the State’s antidegradation law provides: “Existing in-stream water uses and the level of water quality necessary to protect those existing

¹ “‘Without detrimental changes to the biological community’ means no significant loss of species or excessive dominance by any species or group of species attributable to human activity.” 38 MRSA 38 § 466(12). “‘Community function’ means mechanisms of uptake, storage and transfer of life-sustaining materials available to a biological community which determines the efficiency of use and the amount of export of the materials from the community.” 38 MRSA § 466(3). “‘Community structure’ means the organization of a biological community based on numbers of individuals within different taxonomic groups and the proportion each group represents of the total community.” 38 MRSA § 466(4).

uses must be maintained and protected.” 38 MRSA § 464(4)(F).²

Under § 401 of the Clean Water Act, 33 U.S.C. § 1341, states are charged with the responsibility to protect the quality of their navigable waters when a discharger, such as a hydroelectric dam, requires a federal license. The mechanism to accomplish this is issuance of a water quality certification. Under § 401(d) of the Clean Water Act, 33 U.S.C. §1341(d), a state must set forth limitations in a certification that will assure a federal licensee will not cause a violation of state water quality standards. As stated in the legislative history of § 401:

[The] provision [§ 401] makes clear that any water quality requirements established under State law, more stringent than those requirements established under this Act, also shall through certification become conditions on any Federal license or permit. The purpose of the certification mechanism provided in this law is to assure that Federal licensing or permitting agencies cannot override State water quality requirements.

S. Rep. No. 92-414, 92d Cong., 2d Sess., reprinted in 1972 U.S. Code Cong. & Admin. News 3735. State water quality standards cannot be weaker than federally required minimum standards. Ohio Valley Coalition v. Horinko, 279 F. Supp. 2d 732 (S.D. W. Va. 2003).

In Maine, the Department of Environmental Protection (“DEP”) and the Board of Environmental Protection (“Board”) are responsible for administering the water quality standards and for issuing water quality certifications. 38 MRSA § 635-B. Under 38 MRSA § 341-D, the Board may modify a water quality certification when one of seven criteria is met.

² The antidegradation law also 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 MRSA § 464(4)(F)(3).

The Board has jealously protected its right to safeguard water quality through issuance of certifications. The Board successfully defended its primacy in regulating water quality in the Supreme Court. S.D. Warren Company v. Maine Board of Environmental Protection, 126 S. Ct. 1843 (2006). In the S.D. Warren case, a paper company challenged the very ability of the Board to issue water quality certifications to hydroelectric dams. The Court, in upholding the ability of this Board to issue certifications, stated:

Changes in the river like these [e.g., harm to migrating eels and fish] fall within a State's legitimate legislative business, and the Clean Water Act provides for a system that respects the State's concerns. See 33 U.S.C. § 1251(b) ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution") [other cites omitted].

126 S. Ct. at 1853. The Board itself stated in its S. D. Warren Supreme Court brief: "But for § 401, the states would have no control over the water quality impacts of federally licensed hydropower facilities." 2006 U.S. S. Ct. Briefs LEXIS 186, * 7.

Water quality certifications contain eel and fish passage requirements when necessary to protect water quality standards. E.g., S.D. Warren, 126 S. Ct. at 1847; American Rivers, Inc. v. Federal Energy Regulatory Commission, 129 F.3d 99, 104, n. 8 (D.C. Cir. 1997). As set forth below, the evidence is clear that a requirement to provide safe and effective eel passage is required for the Kennebec to attain water quality standards, and that the current certifications must be modified accordingly.

Fish passage requirements – while independently required by the CWA and State water quality standards – are consistent with the Federal Power Act ("FPA"), which provides that when licensing a hydroelectric dam, the Federal Energy Commission ("FERC")

must 'give equal consideration to . . . the protection, mitigation of damage to, and enhancement of, fish and wildlife . . . and the preservation of other aspects of environmental quality,' 16 U.S.C. § 797(e), and must impose conditions, based on recommendations of relevant federal agencies and affected states, to 'protect, mitigate damages to, and enhance, fish and wildlife . . . affected the development, operation, and management of the project . . .,' 16 U.S.C. § 803(j)(1).

American Rivers v. FERC, 129 F.3d at 112; see also FPA § 18, 16 U.S.C. § 811 (FERC licenses must require fishways as prescribed by the Secretary of Commerce or Interior); Wisconsin Power & Light v. FERC, 363 F.3d 453 (D.C. Cir. 2004) (upholding fishway provision in FERC license).

II. CRITERIA FOR MODIFYING THE WATER QUALITY CERTIFICATIONS ARE MET.

Four of the criteria for modifying water quality certifications are met: the dams are causing a violation of a law administered by DEP (the water quality standards), 38 MRSA § 341-D(3)(F); dam operations pose a threat to the environment, 38 MRSA § 341-D(3)(C); the license fails to include any standard or limitation legally required on the date of issuance (compliance with water quality standards), 38 MRSA § 341-D(D); and there has been a change in a condition or circumstance that requires modification of the terms of the certifications, 38 MRSA § 341-D(E).

A. Dam Operations Cause A Violation Of Water Quality Standards.

The evidence proves that the four dams kill eels and fish, block their passage, and destroy their habitat. The water quality standards are thus being breached because:

- the dams render the Kennebec unsuitable as habitat for eels and fish, in violation of 38 MRSA § 465(3)(A) and 4(A);
- the Weston dam causes a Class B stretch of the Kennebec to be impaired, violating 38 MRSA § 465(3)(A), and detrimentally changes the resident biological community, in violation of 38 MRSA 465(3)(C);

- Lockwood, Hydro-Kennebec and Shawmut prevent the Kennebec from supporting all species of indigenous fish and maintaining the structure and function of the resident biological community, in violation of 38 MRSA 465(3)(C);
- existing in-stream uses (habitat for eels and fish) are not being maintained and protected, in violation of 38 M.R.S.A. § 464(4)(F).

A summary of this evidence is provided below.

1. The dams kill and injure a significant number of eels.

The conclusions from the scientific work on eels are consistently grim. The U.S. Fish and Wildlife Service (“USFWS”) concludes that when one or more turbines in a watershed are encountered during a migration, 40-60% of the eels will typically be killed. PX 29, p. 4992.³ A small study by the Department of Marine Resources (“DMR”) at Lockwood indicates a minimum of 40% of eels migrating downstream are killed. PX 7, p. 63.⁴ A peer reviewed article by Dr. James McCleave, a University of Maine professor and internationally recognized eel expert, cites studies that show up to 100% of the eels that try to pass through a turbine will be killed, depending on what kind of turbine is involved PX 6, p. 593.⁵

Eels must pass all four subject dams to migrate downstream, and the cumulative impact of deaths and injuries at each dam – graphically demonstrated by Doug Watts at the hearing – is devastating. If for example, each dam were able to pass 60% of eels

³ “PX” refers to Petitioners’ exhibit numbers. Page numbers refer to the original page number of the cited document.

⁴ DMR radio-tagged five eels above Lockwood to observe their attempted downstream passage past the dam. DMR’s report of the study states: “Two eels (40%) passed through turbines, one (20%) used the downstream bypass, and two (40%) passed by an unknown route.” The report of the study also states that eels that passed through the turbines “did not continue migrating and were presumed to be injured or dead;” the eel that used the bypass “appeared to continue its downstream migration” but was not detected three days later; and two eel signals were found later below the dam. It was not determined if these eels were dead or alive. PX 7, p. 63.

⁵ Even DMR’s Gail Wippelhauser, who opposes this Petition, admitted that passage of adult eels (and salmon) through turbines is “probably not the preferred method.” 2 Trans. 62:25-63:4.

safely, then 88% of the total population starting above Weston would be killed by the time they reached open water below Lockwood. Even using an overly optimistic assumption that 90% of the eels would pass safely at any given dam, nearly 35% of the migrating eels would still be killed trying to pass all four dams. See Wisconsin Power & Light v. FERC, 363 F.3d at 463-464 (upholding fishway requirement for dam where turbine mortality for small fish was 4-6%, and for large fish was 10-20%).

Gail Wippelhauser of DMR testified that DMR considers 50 eel deaths at a dam in one migration season to be “significant,” 2 Trans. 114:24-116:3,⁶ and that DMR tries to get the dam owners to “change their flow characteristics or their generation” when an eel kill event results in deaths that number in the twenties, 2 Trans. 115:3-9. Just last year FPL found 38 eels killed at Shawmut, Richter Direct, p. 14, and that was as a result of FPL’s essentially worthless “eel observation program,” which comes nowhere close to capturing the magnitude of eel kills at FPL’s dams.⁷ FPL’s Mr. Richter also testified that in 2004, 15 eel mortalities were observed below Shawmut and 5 were observed below Lockwood; in 2005, 27 eel mortalities were observed below Shawmut and one below Lockwood. Richter Direct, p. 14). DMR, in addition to the 2002 Lockwood study, documented ten eel mortalities at Shawmut and one at Lockwood in 2004. Agency

⁶ “Trans.” preceded by a number refers to the hearing transcript and the day of the hearing (“1” is the first day, “2” is the second). Page and line numbers in the transcript follow, as does an identification of the witness in parentheses.

⁷ FPL’s eel observation program is seriously flawed and undercounts the number of dead and injured eels because: dead eels sink; the water is deep; the water is not clear; the current is fast; and there is limited direct daylight during the migration season. 1 Trans. 102:11-104:2 (Watts); 1 Trans. 135:15-137:3 (Watts); DEP Ex. 14, David Gomeau comment. As Nate Gray of DMR stated on December 20, 2006: “The big dams with deep tailraces could hide an army of dead and you’d never know. I base that on observation and experience.” Watts Direct ¶ 51. FPL admitted it has no idea what percentage of dead eels are discovered by its eel observation program. 1 Trans. 195:25-196:10 (Richter).

Comments, p. 3.⁸ Although no mortalities have been observed at Hydro-Kennebec, its owner Brookfield does not take the position that there have been zero eel deaths at that dam. 1 Trans. 316:17-317:5 (Bernier). (The eel observation program at Hydro-Kennebec has also been worthless, as explained in the footnote below.⁹)

The U.S. Fish and Wildlife Service states that dam turbines are responsible for decreases in eel abundance on a local or regional scale. PX 29, p. 4992. The USFWS also states: “In summary, turbines, particularly multiple turbines within a watershed or turbines on terminal dams, can cause substantial mortality within those watersheds.” *Id.*

DMR has at times said it has observed no significant eel mortalities at the dams, but that does not square with Ms. Wippelhauser’s testimony about the number of eels that generates concern at the agency. Nor does it square with DMR Commissioner LaPointe’s testimony that just ten months ago, he sent a letter to FPL telling the company he was concerned about significant injury or mortality at its dams. 2 Trans. 7:12-15 (LaPointe). And it does not square with all of the studies on eel mortality conducted at other dams. In any event, the problems with the eel observation programs of the dam owners and DMR are so legion (see footnote 7) that to say no significant mortalities have been observed is to say nothing at all.

The dam owners have not completed eel passage studies on time, and now argue there have not been enough site-specific studies conducted to consider the number of eel deaths a problem worth addressing. This same argument was rejected in Wisconsin

⁸ “Agency Comments” refers to the comments submitted by DMR, the Atlantic Salmon Commission, and IF&W.

⁹ Brookfield’s Mr. Bernier testified that up until the time his company bought Hydro-Kennebec in 2005, with respect to eel observations “[m]y sense is that they were doing it from the dam and from the shoreline, but I – I wouldn’t guarantee that.” 1 Trans. 316:4-8 (Bernier). He also testified that from 2000-2003, the eel observation program consisted of looking for birds eating dead eels. 1 Trans. 332:9-19 (Bernier).

Power & Light v. FERC, in the context of a fishway prescription under § 18 of the Federal Power Act. In that case, the dam owner argued that existing studies did not support a FERC license provision requiring a fishway. The court stated:

WP&L nonetheless maintains that the record permits no conclusions about entrainment and turbine mortality because only one study, which did not directly evaluate entrainment, was done at the project. The record shows that further studies at the project were not completed because WP&L rescinded its proposal to do so, despite its consultant's acknowledgment that such studies were "justified." The applicable standard of review does not demand perfect information, but only requires substantial evidence, *see* 16 U.S.C. § 825l(b), which may include findings made in light of uncertainty. [Cite omitted]. Under the circumstances, the Secretary [of the Interior, who demanded the fishway] reasonably relied on data from facilities similar to the project in concluding that entrainment was harming fishery resources.

363 F.3d at 464. Similarly, in S.D. Warren Co. v. FERC, 164 Fed. Appx.1 (D.C. Cir. 2005), the court held that a § 18 fishway prescription in a FERC license could be based on "studies of similar projects [that] demonstrated the hazards of downstream [eel] migration, specifically, high mortality rates caused by project turbines." 164 Fed. Appx. at 7. In any event, a lack of site-specific studies has not prevented DMR from determining that dams should change their operations when eel kills number only in the twenties.

Lastly, it should be noted that as far as DMR is concerned, safe passage for eels and fish in the main stem of the Kennebec is no less important than safe passage for eels and fish in any other river. 1 Trans. 273-274:1 (Flagg). Thus, any discussion of the number of eels in the Kennebec compared to any other river is irrelevant.¹⁰

¹⁰ In particular, the chart in the Agency's Comments comparing the number of eels found at a dam in the Sebasticook as compared to dams on the Kennebec is irrelevant. Agency Comments Attachment 3. Moreover, (1) the Kennebec is much wider than the Sebasticook and is far more difficult to effectively, safely, and accurately monitor, so the eel numbers are bound to be less than on the narrow Sebasticook (DEP Ex. 14, David Gomeau comment), (2) the eels on the Sebasticook were counted at the *first* dam on the river, while the eels on the Kennebec were counted at the *second, third and fourth* dams on the rivers, 2

2. The dams kill a significant number of fish.

The dam owners readily admit that they consider swimming through turbines to be one form of “acceptable” fish passage. But according to a 1992 study from the Electric Power research Institute (“EPRI”), cited in the Atlantic Salmon Status Review (2006) prepared by the Atlantic Salmon Biological Review Team (which included a scientist from the Maine Atlantic Salmon Commission) appointed by USFWS and the National Marine Fisheries Service (“NMFS”), 10-30% of downstream migrating salmonids (juveniles) are killed by dam turbines, not including delayed mortalities. PX 28, p. 97. The Status Review goes on to say that because of their larger size, the turbine mortality of kelts (adult salmon out-migrating after spawning) is expected to be significantly greater than 10%-30% (citing FERC 1997). Id. The Salmon Status Review also notes that delayed mortality of turbine-passed smolts ranges from 42% in 1993 to 77% in 1992 (citing Shepard 1993). Id. The cumulative impact of four dams on mortality is significant.¹¹ Again, these mortality figures are higher than those that required a fishway in the Wisconsin Power & Light case.

3. Fish cannot swim upstream in the 25 miles of river between Lockwood and Weston because passage is blocked.

FPL installed a fish lift at Lockwood, and fish are trapped and then trucked above Weston. Thus, the Kennebec between Lockwood and Weston is devoid of fish migrating

Trans. 37:3-14 (Wippelhauser); and (3) the dam on the Sebasticook had upstream eel passage and the dams on the Kennebec did not, 2 Trans. 97: 11-21 (Hilton).

¹¹ Contrary to the findings of NMFS, USFWS and EPRI, FPL expert Brandon Kulik states 85-95% of anadromous fish that pass through turbines will survive. Kulik Direct, p. 15. With four turbines to encounter, the cumulative mortality range using Kulik’s estimates would still be 19-48%. See also Status Review, PX 28, p. 97 (“Where multiple dams exist, such as on the Penobscot River, the losses of downstream migrating smolts from turbine entrainment are often cumulative and biologically significant”).

upstream. Without fish swimming upstream for a 25 mile stretch, the Kennebec cannot legitimately be characterized as complying with water quality standards.

Worse still, the fish lift has not yet been demonstrated to work for shad. Indeed, it is an open question how well the lift works at all, because FPL cannot determine that until it conducts “efficiency studies” that may take more than two years. 1 Trans. 212:23-213:3, 213:12-18 (Wiley). This is untenable: permanent upstream passage for fish is not required until certain numbers of shad are captured by the fish lift, but so far the lift has not captured them even though they are in the river. The very idea of having such a shad “trigger” for permanent upstream fish passage is bogus, since the number was not based on biology but rather was negotiated by the dam owners. 1 Trans. 282:22-25 (Flagg); 1 Trans. 336:10-14 (Flagg) (dam owners negotiated shad trigger number to 8,000, up from 500).

The fact that there might be fish migrating upstream elsewhere on the Kennebec does not, as the dam owners suggest, mean that water quality standards are being met. This very issue arose in S.D. Warren’s appeal of its water quality certifications for five of its dams on the Presumpscot River. In the Matter of S.D. Warren Company, #L-19713-33-E-N through #L-19717-33-E-N (October 2, 2003) (ultimately upheld by the U.S. Supreme Court). This Board stated:

The record in this case demonstrates that Warren’s dams have caused long stretches of the natural river bed to be essentially dry and thus unavailable as habitat for indigenous populations of fish and other aquatic organisms; that the dams have blocked the passage of eels and sea-run fish to their natural spawning and nursery waters; that the dams have eliminated the opportunity for fishing in long stretches of the river, and that the dams have prevented recreational access to an use of the river. *Appellant’s contention that water quality standards are being attained as long as the designated uses of fish, fishing, and aquatic habitat are present to any degree in any portion of the river is thus contrary to the language of the [water quality] statute and to the Legislature’s stated objective “to restore*

and maintain the chemical, physical and biological integrity of the State's waters." 38 MRSA section 464(1).

In the Matter of S.D. Warren, p. 9 (emphasis added).

4. There is no evidence any of the types of "passage" the dam owners claim they are providing actually works.

The dam owners admit that eels and fish swim through turbines. 1 Trans. 158:11-15 (Richter). While they characterize this as "passage," it is ludicrous to do so given the evidence, discussed above, that turbines kill eels and fish.

FPL also insists that passage is provided through sluices, gates, and spillage over the top of the dams. This is unsupported by the evidence.

First, while FPL claimed in its direct testimony that downstream eel passage is currently provided by, among other things, deep gates (Ault Direct, p. 9), at the hearing the company admitted it has not used either its "taintor" gates or deep gates. 1 Trans. 203:6-25 (Wiley, Richter), 239:2-4 (Richter). Indeed, FPL refuses to use those gates until it conducts a study. 1 Trans. 238:25-239:5 (Richter). FPL has used only surface gates, log sluices, and turbines for passage. Brookfield Power at least has chosen to install some downstream eel passage protection at Hydro-Kennebec without waiting for the results of studies. 1 Trans. 240:6-12 (Richter); 293:16-294:20 (Stetson, Bernier).

Second, FPL's log sluice was not built to pass eels or fish. Kulik Direct, p. 23; Watts Rebuttal, p. 16.

Third, FPL has no idea how many eels or fish pass its dams using the log sluice or surface gates. 1 Trans. 238:11-17 (Richter) ("The studies that we're going to do in the next couple years will basically tell us where the fish are going"). FPL also testified that, despite the "eel observation program" it touts, it has no idea how many eels are killed by

their turbines. 1 Trans. 174:19-175:10 (Kulik).¹² The dam owners argue that some of their turbines kill eels less than other types of their turbines. Not only is this not saying much, but it is also little comfort because FPL testified that the type of turbine that supposedly kills less eels also kills more fish. 1 Trans. 178:15-21 (Ault).

Fourth, FPL refuses to install some commonsense protection measures that have been installed at other dams (including some FPL dams), such as a boom or punch plate to divert eels and fish away from turbines. 1 Trans. 238:22-240:5 (Richter) (FPL can put in a boom at Shawmut but has not); 1 Trans. 242:16-25 (Wiley) (punch plate at FPL's Fort Halifax dam). It is important to install a boom and a punch plate because in periods of normal flow 96% of the river flows through the turbines. 1 Trans. 318:9-18 (Stetson).

On the other hand, at Hydro-Kennebec Brookfield installed a diversion boom first and is conducting studies after. Brookfield installed a 10 foot Kevlar curtain hanging from a boom that angles across in front of turbines directing fish to sluice. The problem for eels and perhaps some fish is that water depth at Hydro-Kennebec's turbines is 60 feet, 1 Trans. 275:15-17 (Stetson); 1 Trans. 318:19-22) (Stetson), so any fish or eels swimming below 10 feet would not be diverted by curtain. However, Brookfield does not know how many eels and fish pass through its turbines or pass by other routes. 1

¹² The testimony was as follows:

Mr. Vanden Heuvel: Mr. Ault or Mr. Kulik, could you make an estimate of overall mortality, delayed mortality by size ration, since I haven't heard any of this information and you appear to be the experts, by dam site?

Mr. Kulik: I think we have to – as you heard earlier it's highly variable.

Mr. Vanden Heuvel: I know it's highly variable. That's why I asked for an estimate, a rough estimate.

Mr. Kulik: It really wouldn't be appropriate to try and give an estimate without having some information from a study.

Mr. Vanden Heuvel: Would you say five percent?

Mr. Kulik: I really couldn't say without doing a study.

Trans. 291:6-12 (studies will determine where fish and eels go). Nonetheless, Brookfield has set a goal of achieving 95% safe passage for eels. 1 Trans. 297:16-298:7 (Stetson).

With respect to the dam owners' claim that spillage over the top of the dams provides passage, the fact is that eels and fish may hit ledge when they fall over the dams. 1 Trans. 236: 19-25 (Richter). Further, during the important Fall migration for eels and fish, the incidence of spillage is only "variable," according to FPL expert Brandon Kulik. Kulik Direct, p. 14. And, the dam owners actually try to prevent spillage (which is considered "wasted water" because it does not go through the turbines and generate electricity that can be sold) by installing flash boards above the dam to hold back water when the river is high. 1 Trans. 12-25-99:1 (Watts).

5. The water quality certifications do not require the dam owners to do anything except study, and they have not even done that properly.

The water quality certifications do not in any way restrict the dam owners from killing as many eels as they want. 2 Trans. 11:9-17 (LaPointe) (no limit on number of eels that can be killed); PX 22-25 (water quality certifications for the four dams).¹³ Instead, they merely provide that the dam owners must study eel passage. Studies on eel passage were to be completed by December 31, 2001, but were not. The dam owners have had nearly a decade to study downstream eel passage, and they want to more time. 1 Trans. 158:16-22 (Richter) (more studies in 2007 and 2008).

Yet while the dam owners say they want more time to conduct studies, they also say that studies will be difficult because it is hard to acquire enough migrating silver eels, 1 Trans. 307:12-308: 20 (Flagg), and logistically the studies are hard to conduct, 1 Trans.

¹³ Indeed, when Benton Falls Associates killed a massive amount of eels, the Attorney General's office determined it was legal because the water quality certifications, which were similar to the ones at issue in this case, did not prevent the massive killing of eels. Watts Direct, ¶¶ 53-55; 2 Trans. 31:16-25 (Watts).

276:7-15 (Flagg). And they say the studies could result in further studies. 1 Trans. 334: 16-22 (Stetson). The dam owners are telegraphing that even more studies will be sought once the latest round is conducted.

DMR and U.S. Fish and Wildlife have already gone on record stating that the dam owners did not design the study correctly. DMR Commissioner LaPointe wrote to FPL that he was concerned the passage they are studying - controlled spill via bypass gates – “will not be an effective measure for downstream eel passage, and that significant injury or mortality to eels will occur unless additional measures are taken.” PX 19. Gordon Russell of USFWS wrote to FPL:

The use of controlled spills at night via bypass gates at Lockwood and Shawmut and proposed in 2006 [sic] at the Weston Project is not an effective stand alone measure to provide safe downstream passage of adult eels. This practice can result in most adult eels being entrained into operating project turbines which will require additional measures to facilitate safe eel passage – such as night time shutdowns, or other generation restrictions to reduce approach velocity to 2 fps maximum, along with full depth intake trash rack reduced spacing 1” clear) and concurrent use of controlled spill into an adequate plunge pool.

(This letter was supplied to Board members on March 23, 2007 by Dana Murch).¹⁴

Beginning from the time eel studies were first required (1998), we are looking at 11 years or more of studies, which is patently absurd. The environment is not protected and water quality standards are not achieved with endless studies and no action. This state of affairs is made all the more confounding by the fact that downstream eel passage has been required of dams *upstream* of Weston (the farthest upstream of the four subject

¹⁴ An additional flaw of the studies is that they will not be tracking eels through multiple dams. 1 Trans. 328:14-25 (Flagg).

dams),¹⁵ even though the eels likely will be killed or injured once they reach Weston or, if they are lucky, the three dams that follow. 2 Trans. 76: 14-23 (Wippelhauser).

B. Dam Operations Pose A Threat To The Environment.

The same evidence that proves water quality standards are being violated proves that the operations of the dams pose a threat to the environment.

It should be noted that although in this case the evidence clearly shows the killing and injuring of eels and fish and the destruction of their habitat is an existing serious environmental problem, Petitioners need only show that the dams “pose a threat” to the environment. Cf. Alliance of Automobile Manufacturers v. Kirkpatrick, 2003 U.S. Dist. LEXIS 12323, **7-9 (D. Me. 2003) (auto part containing mercury poses a threat to human health and the environment because out-of-state scrap recyclers may smelt them and may emit mercury that lands in Maine).

C. The Certifications Do Not Contain A Legally Required Standard.

The purpose of a water quality certification is to assure that a state’s water quality standards are met. 33 U.S.C. § 1341. But the certifications in this case do not assure that because they do not require the dam owners to do anything to actually provide safe eel and fish passage. The certifications only require studies.

¹⁵ The fact that certifications at other dams contain eel and fish passage measures shows that DEP considers hydroelectricity and habitat to be compatible, not mutually exclusive, designated uses.

D. There Has Been A Change In Condition
Since The Certifications Have Been Modified.

There have been three important changes since the certifications were issued that warrant modification.

First, there has been a significant amount of new evidence regarding the harm dams cause to eels. Indeed, all of the evidence in this case on that subject was generated after 1998, the date of the original certifications that contained eel provisions. Cf. Oregon Natural Resources Council v. Marsh, 845 F. Supp. 758, 766-768 (D. Ore. 1994) (in a National Environmental Policy Act case, Army Corps of Engineers ordered to consider new report on the impact of a dam on fish passage even though an Environmental Impact Statement had already been written because the report was “new significant information”).

Second, the Status Review on Kennebec Atlantic salmon, prepared as part of the upcoming decision on whether to include the Kennebec Salmon on the Endangered Species List, was issued in July 2006. It documents the significant harm the dams cause to salmon.

Third, it was unanticipated that there would be a wholesale failure to complete the eel studies. Under the KHDG Agreement § III.G.1, eel passage studies were required to be completed by December 31, 2001. Ex. FPLE-6, pp. 5-6. These studies still have not been completed. Moreover, it was unanticipated that, as discussed below, that DMR, Inland Fisheries and Wildlife (“IF&W”) and the Atlantic Salmon Commission (“ASC”) would drop the ball on eel and fish passage.

III. DANA MURCH'S SUPPORT OF THE
DAM OWNERS' POSITION IS UNWARRANTED.

It was obvious by his questioning at the hearing that Mr. Murch was making the following point: the Board should not impose a limit with which the dam owners cannot immediately comply. There is a fundamental legal problem with Mr. Murch's point. Mr. Murch is asserting that the Board should adopt a *technology based* standard – *i.e.*, the dam owners should be required to do only what has been demonstrated thus far they can do with respect to eel and fish passage. But the certifications at issue are *water quality* certifications, which require that an activity not violate *water quality standards*, regardless of what technology is available. Water quality certifications are thus the ultimate safeguard of a river's health. At the hearing, the Presiding Officer touched on the distinction between technology-based and water quality based standards. Responding to Lew Flagg's testimony that 100% safe passage should not be imposed because he does not know how it will be achieved, Mr. Hilton stated:

We're looking at it from a different perspective. We, as the Members of the Board here, are sort of like surrogate society, you know. So what should society tolerate as a level of loss of natural resource which can be compounded as it goes from dam down through dam, down through dam, down through dam, four dams in this case, and actually there's six or eight dams by the time you go from the East outlet on Moose head Lake down through to Lockwood. So what should we tolerate?

1 Trans. 303:15-25 (Hilton). See U.S. Steel Corp. v. Train, 556 F.2d 822, 838 (7th Cir. 1977) (“It is clear from §§ 301 and 510 of the Act, and the legislative history, that the states are free to force technology [with water quality based effluent limitations.]”); In re Westborough and Westborough Treatment Plant Board, NPDES Appeal No. 01-2, 2002 EPA App. LEXIS 5, ** 37-38 (Environmental Appeals Board Feb. 8, 2002) (“With regard to technical or economic feasibility arguments, we have consistently held that cost

and technological considerations are not permitted under the CWA to be considered by the permit-writer when setting water quality-based effluent limits.”).

Focusing on technology rather than water quality has the effect of encouraging the dam owners to drag out their studies. The bottom line is: the dams cannot render the Kennebec unsuitable habitat for eels and fish by killing and injuring them because that violates water quality standards and is a serious threat to the environment.¹⁶

Petitioners urge the Board to view Mr. Murch’s opposition to modification with skepticism because Mr. Murch has been an integral part of the failure to date to achieve safe passage.

¹⁶ The difference between technology-based and water quality standards was summarized by this Board in its brief to the Supreme Court in S.D. Warren v. Maine Board of Environmental Protection: “The Administrator of the Environmental Protection Agency (EPA) must promulgate technology-based limitations on individual discharges of pollutants into navigable waters from point sources, pursuant to sections 301 and 304, 33 U.S.C. § § 1311, 1314. A separate but complementary component of the CWA is found in § 303 dealing with the broader range of pollution, and requiring each State, subject to federal approval, to promulgate comprehensive water quality standards establishing water quality goals for all intrastate waters. 33 U.S.C. § 1313. These state water quality standards provide ‘a supplementary basis ... so that numerous point sources, despite individual compliance with effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels.’ *Environmental Protection Agency v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 205 n.12 (1976). Section 303 water quality standards “shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act.” 33 U.S.C. § 1313(c)(2)(A). Any such standards must take into account ‘their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also . . . their use and value for navigation.’ Ibid; 40 C.F.R. § § 131.1 to 131.13. Acting in accordance with this mandate, in 1986, Maine revised and strengthened its water quality standards to better protect its water resources.” 2006 U.S. S. Ct. Briefs LEXIS 186, *3-4.

IV. NO REGULATORY BODY EXCEPT THIS BOARD WILL ADEQUATELY ADDRESS THE EEL AND FISH PASSAGE PROBLEM.

With respect to eel and fish passage, the State agencies have dropped the ball and the Board needs to take control.

The dam owners are looking to DMR, IF&W and MASC for cover because those agencies have been most involved with the eel and fish passage issue and also oppose the Petition. But those agencies have failed to do their jobs. The evidence shows:

- The agencies did not get the eel studies completed;
- Nearly a decade after the KHDG Agreement was signed and the dam owners funded DMR fish restoration programs, DMR says it knows nothing about eels on the Kennebec, 1 Trans. 301:4-303:13 (recently retired DMR official Lewis Flagg cannot say what a reasonable safe passage figure is for the Kennebec); 2 Trans. 77:24-78:2 (Gail Wippelhauser testifies “we haven’t done anything at Shawmut” and “we don’t know where the eels are going”); 2 Trans. 52:3-11 (Wippelhauser testifies with respect to population levels, DMR “is not quite sure what the eel population is doing”); 1 Trans. 79:21-80:8 (Wippelhauser testifies “I have no idea” what the percentage of observed dead fish is out of the total number of fish in the river);
- DMR did not know that FPL found 38 eels dead at Shawmut last migration season (above the level which triggers agency concern) until the testimony in this hearing;¹⁷
- Neither DMR nor IF&W have petitioned DEP or FERC to secure eel passage measures, even though they have every right to under the water quality certifications and the KHDG Agreement. PX 22, Condition I.B.5., p. 14 (Lockwood certification); Ex. FPLE-6, § III.G.3 (KHDG Agreement);
- The agencies stocked salmon above Weston without studies demonstrating that the downstream-migrating fish can pass safely through turbines, despite those studies being required in the KHDG Agreement, Ex. FOLE-6, § B.3(2), p. 10,¹⁸ and despite Atlantic Salmon Status Review language as follows:

¹⁷ Nor does it appear that DMR knew about the number of eels killed at Lockwood and transferred to the Shawmut dump. 1 Trans. 355:22-356:9 (McGee).

¹⁸ The KHDG Agreement provides:

In the event that adult shad and/or adult Atlantic salmon begin to inhabit the impoundment above the Lockwood [or any other of the subject dams] project, and to the extent that licensee desires to achieve interim downstream passage of outmigrating adult salmon and/or shad by means of

Dams equipped with hydroelectric generating facilities entrain and impinge downstream migrating Atlantic salmon. Entrainment occurs when downstream migrants pass through turbines and die or are injured by direct contact with turbine runners, shear forces, cavitations, turbulence, or pressure changes. Impingement occurs when a fish comes in contact with a screen, a trash rack, or debris at the intake. This causes bruising, decaling, and other injuries. Impingement, if prolonged, repeated, or occurring at high velocities also causes mortality.

Status Review, p. 97. 2 Trans. 33:14-34:1 (Kelleher); Friedman Rebuttal ¶¶ 15-16.

DEP is no better. For years it has refused to enforce even the weak provisions of the current water quality certifications. It ballyhoos the “compliance orders” it issued last September (after the Board voted to hold this hearing), but those orders are insubstantial. Even if studies show significant downstream turbine mortality of eels, the dam owners are only required to “consult” with the agencies “and agree to undertake cost-effective measures designed to minimize mortality at the site.” DEP Ex. 5 (e.g., the Lockwood compliance order, p. 7, condition 5). The problem is, as DMR Commissioner LaPointe admitted, *the companies are the only ones determining what is “cost effective.”* 2 Trans. 63:24-64:21 (LaPointe). Thus, DEP is allowing the fox to guard the henhouse.¹⁹

passage through turbines(s), licensee must first demonstrate, through site-specific quantitative studies designed and conducted in consultation with the resource agencies, that passage through turbines(s) will not result in significant injury and/or mortality (immediate or delayed). In no event shall licensee be required to make this quantitative demonstration for adult shad and adult Atlantic salmon before May 1, 2006.

Ex. FOLE-6, § B.3(2), p. 10.

¹⁹ The dam owners try to make much of the fact that Petitioners did not appeal the compliance orders. But the compliance orders were only a response to the dam owners failing to comply with the current, weak water quality certifications. Petitioners seek modified certifications with provisions that will really protect eels and fish; at this point they are not interested in enforcing toothless certifications. In any event, it would have made no sense to appeal the compliance orders and have a hearing on the appeals since this hearing was already scheduled.

V. THE DAM OWNERS' LEGAL DEFENSES ARE WITHOUT MERIT.

A. The 1998 KHDG Agreement Does Not Prevent Modification Of The Water Quality Certifications.

The dam owners argue that the 1998 KHDG Agreement prevents modification of the water quality certifications. The parties to the KHDG Agreement would have the Board sanctify the agreement even at the expense of the Board's mission to protect water quality and the environment. As a matter of law, the dam owners are wrong.

Modifying the certifications to require immediate safe and effective eel passage is *consistent* with the KHDG Agreement. The agreement provides that if by June 30, 2002 consensus has not been reached between the dam owners and government agencies on eel passage (which is, in fact, the case) then DEP and FERC can be petitioned to approve appropriate conditions relating to eel passage at the facilities.

While the dam owners act as if the KHDG Agreement is some sort of contract that binds the Board, that is obviously not true *since the Board is not a party to the KHDG Agreement*. Cf. Mueller v. Penobscot Valley Hospital, 538 A.2d 294 (Me. 1988) (person not a party to a contract not liable for its breach).

In any event, contracts cannot be in contravention of law. See President and Trustees of Bates College v. Congregation Beth Abraham, 2001 Me Super. LEXIS 22, * 14-15 (Androscoggin Co. Super. Ct. Feb. 13, 2001) Here, federal regulations allow a water quality certification to be modified, 40 C.F.R. § 121(b) (see discussion below), and a contract cannot contravene that regulation. Moreover, the KHDG Agreement cannot be construed to bargain away the statutory authority of the Board to modify its own water quality certifications because such an agreement would be "contrary to public policy" and therefore "void as nonenforceable." E.g., Lewiston Firefighters Association v. City of

Lewiston, 354 A.2d 154, 163 (Me. 1976); Court v. Kiesman, 2004 ME 72 (2004); Lehigh v. The Pittston Company, 456 A.2d 355 (Me. 1983).²⁰ The Legislature in 38 MRSA § 341-D(3) provided that the Board has the power to modify water quality certifications when it finds that one of the criteria is not met. The State cannot give away that power and abdicate its responsibility to protect Maine's resources on behalf of the public.

Even if the Board were to consider itself a party to the KHDG Agreement (and FOMB strenuously argues that is legally unwarranted), the agreement still would not prevent the Board from modifying the water quality certifications because the dam owners themselves bear responsibility for breaches of the agreement: (1) eel studies have not been completed and (2) the dam owners are using turbines to pass salmon without first conducting studies to demonstrate the safety of turbine passage. 2 Trans. 33:14-34:1 (Kelliher); Friedman Rebuttal ¶¶ 15-16. Pelletier v. Dwyer, 334 A.2d 867 (Me. 1975) (one party to a contract does not have to render performance where other party has manifested no intent to tender its performance). Also because of the dam owners' breach, the State would not be obligated to return funding provided under the KHDG Agreement, as the dam owners have implicitly threatened to seek. Id.²¹

The evidence established that the KHDG Agreement simply does not work with respect to eel and fish passage at these four dams. Even the Agreement's most ardent backers – those who signed it – admit that there have been real failures under the

²⁰ Similarly, a public body cannot bind itself by any contract beyond the scope of its powers. Hallisey v. School Administrative District No. 77, 2000 ME 143, ¶ 11, n.4 (2000).

²¹ The Presiding Officer also suggested that perhaps a return of funds would have been triggered only in the limited circumstance of untimely approval to remove the Edwards Dam. 1 Trans. 219:25-220:8 (Hilton).

Agreement. The parties to the Agreement sat idly by while the June 30, 2002 deadline came and went with no completed eel studies and no consensus on eel passage.²²

The main asserted virtue of the Agreement – that it provides “certainty” – is specious. The 1998 KHDG Agreement was in fact the *second* KHDG Agreement. The first KHDG Agreement was entered into in 1986 by the dam owners and various state agencies. The 1986 agreement required permanent upstream and downstream fish passage by 1999 (or as late as 2001, depending where on the river the dam was located). PX 24, pp. 1-2 (description of the 1986 KHDG Agreement in the current Shawmut certification). As 1999 drew near, the parties agreed to get rid of the fish passage deadline in favor of the never-ending series of studies allowed in the 1998 Agreement.²³

In sum, it is not reasonable to move towards destruction of a species just because a dysfunctional agreement exists that in any event cannot trump an applicable statute.

B. It Is Not True That FERC Renders This Proceeding Meaningless.

The dam owners argue that once FERC issues a license for a dam, a water quality certification cannot be modified. However, federal regulations on water quality certifications allow modification. 40 C.F.R. § 121.2(b) provides:

The certifying agency may modify the certification in such manner as may be agreed upon by the certifying agency, the licensing or permitting agency, and the Regional Administrator.

Here, the certifying agency is the Board, the licensing agency is FERC, and the Regional Administrator is the EPA Region I (New England) administrator. 40 C.F.R. § 121.1(e),

²² Even the Kennebec Coalition, a party to the KHDG Agreement, says the agreement is “off track” with respect to eel studies. 1 Trans. 374:14-15 (Bennett).

²³ The suggestion that the benefits of the 1998 KHDG Agreement were exceptional because the Edwards Dam was being taken down is exaggerated. The Edwards Dam had to come down because FERC *would not relicense it*.

(b), and (d) (definition of terms). Thus, once this Board decides to modify the water quality certification, it can work with FERC and EPA to get the modification implemented.

Of course, even apart from this regulation, there is nothing to prevent the Board from submitting the modified certifications to FERC and asking that FERC enter into negotiations to amend the licenses. In addition, pursuant to the terms of the water quality certifications and the KHDG Agreement, DMR or IF&W can take the modified water quality certifications and use them as a basis for petitioning FERC to incorporate them into the FERC licenses.

As can be seen from the above discussion, modification need not be considered unilateral Board action that improperly impinges on FERC's role in regulating hydroelectric facilities.

Moreover, State law is clear that modification of water quality certifications is allowed. The plain meaning of 38 MRSA 341-D(3) and Ch. 2, § 27 is that certifications can be modified. Merrill v. Sugarloaf Mountain Corp., 2000 Me 16, p. 11, 745 A.2d 378, 384 (2000) ("The most fundamental rule of statutory construction is the plain meaning rule. When statutory language is plain and unambiguous, there is no need to resort to any other rules of statutory construction."); Christensen v. Harris County, 529 U.S. 576, 588 (2000) (same for construction of a regulation); see Kittery Retail Ventures, LLC v. Town of Kittery, 2004 ME 65, p. 10 (2004) (first look to plain meaning of law to determine legislative intent).

Consistent with the plain meaning of the modification statute and rule, DEP in its response to comments on the Gulf Island-Deer Rips Hydro project stated that the Board

always has the authority under 38 M.R.S.A. § 341-D(3) to modify a water quality certification. PX3, FPL Energy Maine Hydro LLC Water Quality Certification of Gulf Island-Deer Rips Hydro Project, #L-17100-33-O-N, § 11.n. Similarly, a water quality certification need not contain specific “reopener” language to be modified, as the Gulf Island-Deer Rips water quality certification makes clear. Id. (DEP specifically rejected the idea that a reopener clause is required to modify water quality certifications). To Petitioners’ knowledge, the Attorney General’s office has not stated that the DEP in the Gulf Island matter was wrong, and has not gone on record to state that the Board has no power to modify the water quality certifications. Were the DEP to now change its position and claim that modification is not allowed, the Board should not give DEP’s position deference because the agency would be flip-flopping. Cf., e.g., Mt. Graham Red Squirrel v. Madigan, 954 F.2d 1441, 1457 (9th Cir. 1992) (no deference to agency’s “expertise” when agency has fluctuated in position).

Any other result would gut the statutory and regulatory provisions regarding modification. 38 MRSA 341-D (3) and DEP Rules at Ch. 2, § 1.J. define “license” to include any “certification issued by the Department.” There are no exceptions. To rule that water quality certifications cannot be modified would impermissibly read “certification” out of § 341-D(3) and Ch. 2, § 1.J and render that term superfluous in the statute and regulation. State of Maine v. White, 2001 ME 65, ¶ 4 (2001) (statutes are to be interpreted as being free from unnecessary and superfluous language).

The dam owners’ argument that a water quality certification can never be changed during the life of a FERC permit is an argument that leads to an absurd result. Saucier v. Portland, 1980 Me. Super. Leixs 1, *7 (Cumberland Co. 1980) (“There is a well accepted

principle of interpretation that statutes, and here governmental guidelines, will not be given an interpretation which will produce an absurd result.”). The term of a FERC license is 30-50 years. According to the dam owners, even if it turns out their operations kill every living thing in the river, nothing can be done about it until the license is renewed in 30-50 years.

The absurdity of such a situation was recognized by the Maine Supreme Judicial Court in the *S.D. Warren* case. In *S.D. Warren*, the company argued that the Board had no power to include a “reopener” clause in a 401 certification. The court, in rejecting that argument, articulated a rationale equally applicable here:

The BEP is expressly granted the authority to issue section 401(a)(1), 33 U.S.C.A. § 1341(a)(1), certifications pursuant to 38 M.R.S.A. § 464(4)(F)(1-A). Considering the purpose of Maine's water quality standards, stated at 38 M.R.S.A. § 464(1), the authority to include “reopeners” is “essential to the full exercise of powers specifically granted” to the BEP. See *Hallsisey*, 2000 ME 143, P11, 755 A.2d at 1072. *This authority is essential because if the conditions are not as effective as planned, the water quality standards will not be met and the BEP's goal to “restore and maintain the chemical, physical and biological integrity of the State's waters . . .” will not be achieved during the forty-year term of the FERC license.* The Board's interpretation of 38 M.R.S.A. § 464 as implicitly authorizing the inclusion of “reopeners” is reasonable and the statute does not plainly compel a contrary result.

S.D. Warren v. Board of Environmental Protection, 2005 ME 27, ¶ 28 (2005) (footnotes omitted) (emphasis added).²⁴ In this case, the biological integrity of the Kennebec will not be met if the Board cannot exercise its statutory powers to modify a water quality certification.²⁵

Further, contrary to the dam owners’ suggestion, water quality certifications *do* impose ongoing independent obligations. DEP and the Board have the power to enforce

²⁴ This part of the *S.D. Warren* case was not the subject of the appeal heard by the U.S. Supreme Court.

²⁵ To be consistent with the position it took in *S.D. Warren*, the Attorney General’s office cannot argue otherwise in this case.

their own water quality certifications, even if they cannot enforce the terms of FERC licenses. The Board and the Attorney General's Office have never claimed otherwise. In addition, the terms of a water quality certification are enforceable by private parties or a state in federal court under the "citizen suit" provision of the federal Clean Water Act.²⁶

In previous filings, the dam owners have cited Great Northern Paper, Inc., 77 F.E.R.C. ¶ 61,066 (1996), a FERC administrative decision, to suggest that the Board cannot modify the water quality certifications. But Great Northern Paper does not actually hold that; rather, it states that the Clean Water Act contemplates no role for the state in issuing or ensuring compliance with the terms of a federal license once water quality certifications are issued. It is true that the Board does not issue or enforce FERC licenses. But it *does* issue and enforce State water quality certifications. In any event, the federal Court of Appeals for the Second Circuit expressly held in a case decided after Great Northern paper that "FERC's interpretation of § 401, or any other provisions of the CWA, receives no judicial deference . . . because the Commission is not Congressionally authorized to administer the CWA." American Rivers v. FERC, 129 F.3d at 107. Moreover, Great Northern Paper did not cite or discuss 40 C.F.R. § 121.2(b), the regulation on modification, or undergo any of the analysis discussed in this brief.

²⁶ Section 505(a)(1)(A), 33 U.S.C. § 1365(a)(1)(A), of the CWA provides that private parties and states may commence a civil action against any person "who is alleged to be in violation of an effluent standard or limitation under this chapter..." The definition of "effluent standard or limitation" includes "certification under section 1341 [401] of this title." 33 U.S.C. § 1365(f)(5). Thus, a citizen suit can be brought against any person who is alleged to be in violation of a 401 certification. North Carolina Shellfish Growers Association v. Holly Ridge Associates, 200 F. Supp. 2d 551, 558 (E.D. N.C. 2001).

VI. THE BOARD SHOULD ADOPT PETITIONERS' PROPOSED MODIFICATION LANGUAGE.

FOMB urges the Board to adopt Petitioners' proposed language in modifying the certifications. (The exact language is set forth in PX 1). Given the cumulative adverse effects of the four dams, a requirement that dams provide immediate, safe and effective upstream and downstream passage with no kills or injuries is needed. Dam removal would not be required to meet this standard. The American Tissue dam on Cobbossee Stream is achieving 100% survival, or close to it, by using a perforated steel plate over the turbine intake. 1 Trans. 83:7-19 (Watts). It may take turbine shutdowns at key times or proper screening in front of the turbines to meet this standard at the four subject dams. 1 Trans. 42:17-24, 93:17- 96:7 (Friedman). As FOMB's Ed Friedman stated after reviewing the various methods to protect eels and fish, "So this technology is not pie in the sky. It's out there." 1 Trans. 96:6-7 (Friedman).

As it is, Brookfield Power has set a goal of 95% safe passage, although FPL refuses to set any goal for a level of safe passage.


In any event, such a 100% safe passage requirement will force the passage problem to be solved quickly. FPL and Brookfield are billion dollar companies that make substantial profits from harnessing the Kennebec. They should be forced to provide safe passage. As private users of an important public resource it should be required of them to meet the highest possible environmental standards using the best available technologies to do so.

CONCLUSION

For the reasons set forth above, and based on the record in this matter, the water quality certifications should be modified by this Board.

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