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IN THE MATTER OF

FPL ENERGY MAINE HYDRO LLC)	MAINE WATERWAY DEVELOPMENT AND
Brunswick and Topsham	)	CONSERVATION ACT PERMITS AND
Cumberland and Sagadahoc Counties	)	WATER QUALITY CERTIFICATIONS
BRUNSWICK HYDRO PROJECT)	
#03-4458-05030)	
)	
TOPSHAM HYDRO PARTNERS)	
Topsham and Brunswick)	
Cumberland and Sagadahoc Counties)	
PEJEPSCOT HYDRO PROJECT)	
#L-007867-35-A-A)	
)	
MILLER HYDRO GROUP)	
Lisbon and Durham, Androscoggin County)	
WORUMBO HYDRO PROJECT)	
#L-10930-35-A-N	)	PETITIONS FOR REVOCATION, MODIFICATION,
	)	OR SUSPENSION
	)	FILED BY
FPL ENERGY MAINE HYDRO LLC	)	FRIENDS OF MERRYMEETING BAY
Lewiston and Auburn, Androscoggin County)	)	AND
LEWISTON FALLS HYDRO PROJECT	)	DOUGLAS H. WATTS
#L-009206-35-A-N)	
)	
FPL ENERGY MAINE HYDRO LLC)	
Lewiston, Auburn, Turner, Greene, Leeds,)	
and Livermore, Androscoggin County)	
GULF ISLAND-DEER RIPS PROJECT)	
#L-17100-33-O-N)	
)	
INTERNATIONAL PAPER COMPANY)	
Canton, Jay, Livermore & Livermore Falls)	
Androscoggin County)	
RILEY-JAY-LIVERMORE PROJECT)	
#L-18829-33-A-N)	
)	
	)	FINDINGS OF FACT AND ORDER
RIDGEWOOD MAINE HYDRO)	
PARTNERS, L.P.)	
Auburn, Androscoggin County)	
LOWER BARKER MILL PROJECT)	
#L-08-4287-01010)	

RIDGEWOOD MAINE HYDRO	)	DRAFT
PARTNERS, L.P.)	
Auburn, Androscoggin County)	
UPPER BARKER MILL PROJECT)	
#L-02/49-6848B-01010)	
)	
HACKETT MILLS HYDRO ASSOCIATES)		
Poland and Minot, Androscoggin County)	
HACKETT MILLS HYDRO PROJECT)	
#L-10052-35-A-N)	
)	
RIDGEWOOD MAINE HYDRO)	
PARTNERS, L.P.)	
Mechanic Falls, Androscoggin County)	
MARCAL HYDRO PROJECT)	
#L-17778-33-C-N)	

Pursuant to the provisions of 38 M.R.S.A. Sections 341-D(3), 464 et seq., 630 et seq., and 06-096 CMR Chapter 2 (Rules Concerning the Processing of Applications and Other Administrative Matters), the Board of Environmental Protection has considered the petitions of FRIENDS OF MERRYMEETING BAY and DOUGLAS H. WATTS with their supportive data, the responses of the permit/certification holders and other interested parties, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. INTRODUCTION

Friends of Merrymeeting Bay has filed a petition requesting that the Board revoke, modify or suspend the Maine hydropower permits and water quality certifications for the Brunswick, Pejepscot, Worumbo, Lewiston Falls, Upper Androscoggin, and Gulf Island-Deer Rips Hydro Projects on the Androscoggin River to provide for immediate safe upstream and downstream passage for American eel and, within the scope of their historic range, for American shad, blueback herring, alewife, and Atlantic salmon.

Douglas H. Watts has filed a petition requesting that the Board modify the water quality certifications for the same projects as well as for the Livermore, Riley and Jay Hydro Projects on the Androscoggin River and the Lower Barker Mill, Upper Barker Mill, Hackett Mills, and Marcal Hydro Projects on the Little Androscoggin River to provide immediate safe and effective upstream and downstream passage for American eel. Douglas H. Watts also requests that the Board modify the water quality certifications issued for the Brunswick, Pejepscot, and Worumbo dams to require safe passage for sea lamprey.

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2. REGULATORY HISTORY

Brunswick Hydro Project

On August 8, 1962, the Federal Power Commission (predecessor to the Federal Energy Regulatory Commission) issued an initial license to Central Maine Power Company for the constructed Brunswick-Topsham Hydro Project (No. 2284), located on the Androscoggin River in the Towns of Brunswick and Topsham. No fish passage facilities were required at the project under the terms of this license.

By Orders #03-4458-05030 dated August 23, 1978 and April 11, 1979, the Board and Department approved a Coastal Wetlands Alteration Act permit and water quality certification for the redevelopment of the existing Brunswick Hydro Project. The approved project consisted of a new 40-foot-high concrete dam, a new powerhouse with an installed generating capacity of 12 MW, a 300-acre impoundment, and appurtenant facilities. Upstream and downstream fish passage facilities were approved as part of the redevelopment. No substantive conditions were attached to the permit or certification.

On February 9, 1979, FERC issued a new 50-year license to Central Maine Power Company for the redeveloped Brunswick Hydro Project. The license approved the construction of upstream and downstream fish passage facilities at the project.

On September 21, 1981, FERC amended the license for the Brunswick Hydro Project to increase the approved installed generating capacity from 12 MW to 19 MW.

Finally, on December 28, 1998, FERC transferred the license for the Brunswick Hydro Project from Central Maine Power Company to FPL Energy Maine Hydro LLC.

Pejepscot Hydro Project

By Orders #02/49-7867-23080 dated May 26, 1982 and May 27, 1982, the Department approved a Great Ponds Alteration Act permit and water quality certification for the redevelopment and licensing of the existing Pejepscot Hydro Project, located on the Androscoggin River in the Towns of Topsham and Brunswick. At the time, the project was owned by the Androscoggin Water Power Company. The approved project consisted of an existing concrete-filled timber crib dam with a maximum height of 41.5 feet, a new powerhouse with an installed generating capacity of 10 MW, a 203-acre impoundment, and appurtenant facilities.

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The 1982 Department orders included conditions requiring that downstream fish passage facilities be constructed concurrent with project redevelopment and that upstream fish passage facilities be constructed at such time as deemed appropriate by the Department of Marine Resources and the Department of Inland Fisheries and Wildlife.

On September 16, 1982, FERC issued an initial 40-year license to Androscoggin Water Power Company for the proposed Pejepscot Project (No. 4784). The license included a condition requiring the construction of downstream fish passage facilities. The license did not include any project-specific condition relating to the construction of upstream fish passage facilities at the project. However, the license did include a standard condition providing authority for FERC to require the installation of such upstream fish passage facilities when needed.

By Order #L-007867-35-A-A dated June 12, 1985, the Board approved a Maine Waterway Development and Conservation Act permit and water quality certification for the amendment of license for the Pejepscot Hydro Project. As amended, the project consisted of a concrete dam with a maximum height of 44.5 feet, a powerhouse with an installed generating capacity of 13.88 MW, a 225-acre impoundment, and appurtenant facilities.

The 1985 Board order included conditions requiring that downstream fish passage facilities be constructed and operational concurrent with the commencement of operation of the approved project and that upstream fish passage facilities be constructed and operational no later than May 1, 1988.

On November 17, 1985 and December 26, 1985, FERC approved the amendment of license for the redeveloped Pejepscot Hydro Project. The amendment of license states that the licensee has agreed to install both upstream and downstream fish passage facilities as part of project construction.

On January 31, 1986, FERC transferred the license for the Pejepscot Hydro Project from Androscoggin Water Power Company to Topsham Hydro Partners.¹

¹ After several subsequent partial transfers, the current co-licensees for the Pejepscot Hydro Project are Topsham Hydro Partners Limited partnership, Teton Power Funding LLC, and DaimlerChrysler Services North America LLC.

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Finally, by Order #L-007867-35-E-M dated February 10, 1986, the Department transferred the permit and certification for the Pejepscot Hydro Project from Androscoggin Water Power Company to Topsham Hydro Partners.

Worumbo Hydro Project

By Order #L-10930-35-A-N dated June 12, 1985, the Department approved a Maine Waterway Development and Conservation Act permit and water quality certification for the redevelopment and licensing of the existing Worumbo Hydro Project, located on the Androscoggin River in the Towns of Lisbon and Durham. The project was then and is currently owned by Miller Hydro Group. The approved project consisted of an existing concrete and timber-crib dam with a maximum height of 17 feet, a new forebay, a new powerhouse with an installed generating capacity of 14 MW, a 180-acre impoundment, and appurtenant facilities.

The 1985 Department order included conditions requiring that downstream fish passage facilities be constructed and operational concurrent with the commencement of operation of the approved project and that upstream fish passage facilities be constructed and operational no later than May 1, 1988.

On December 24, 1985, FERC issued an initial 40-year license to Miller Hydro Group for the proposed Worumbo Hydro Project (No. 3428). The license stated that upstream and downstream fish passage facilities should be constructed concurrent with the redevelopment of the project.

By Order #L-10930-35-G-M dated January 1, 1988, the Department modified the permit and certification for the Worumbo Hydro Project to change the operational deadline for upstream fish passage facilities from May 1, 1988 to May 1, 1989.

By Order #L-10930-35-K-M dated August 22, 1989, the Department modified the permit and certification to reflect the as-built generating capacity of the new powerhouse of 19.1 MW.

On October 3, 1990, FERC amended the license for the Worumbo Hydro Project to reflect the as-built generating capacity of the new powerhouse of 19.1 MW.

By Order #L-10930-35-N-M dated July 13, 1998, in conjunction with a pending application for a FERC license amendment, the Department modified the permit and certification for the

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Worumbo Project to increase the approved impoundment elevation by 1.5 feet and to increase the installed generating capacity by 0.2 MW.

Finally, on August 13, 1998, FERC amended the license for the Worumbo Hydro Project to increase the approved impoundment elevation by 1.5 feet.

Lewiston Falls Hydro Project

On December 2, 1963, the Federal Power Commission (predecessor to the Federal Energy Regulatory Commission) issued an initial license to Central Maine Power Company and Union Water Power Company for the constructed Lewiston Falls Hydro Project (No. 2302), located on the Androscoggin River in the Cities of Lewiston and Auburn. No fish passage facilities were required at the project under the terms of this license.

By Order #L-009206-35-A-N dated June 6, 1986, the Board approved a Maine Waterway Development and Conservation Act permit and water quality certification for the redevelopment and relicensing of the existing Lewiston Falls Hydro Project. The approved project consisted of an existing dam with a maximum height of 23 feet, a new powerhouse with an installed generating capacity of 25 MW, a 200-acre impoundment, the Lewiston Canal System, six existing generating stations within the Canal System with a total installed capacity of 7.3 MW, and appurtenant facilities.

In its 1986 order, the Board found that the applicants proposed to subsequently convey the existing Upper Androscoggin Station, located within the Lewiston Canal System, to the City of Lewiston, such that the City will own and operate this facility after the new powerhouse began commercial operation.²

The 1986 Board order included a condition requiring that, based on recommendations from the Department of Marine Resources or the Atlantic Sea Run Salmon Commission, the applicants provide such fish passage facilities as may be required by the Board, after notice to the applicants and opportunity for public hearing, to allow the migration of anadromous fish into and out of the watershed upstream from the project.

² The Upper Androscoggin generating facility was to be a replacement for the City of Lewiston’s former municipal power facility, which was decommissioned and razed to make way for the new Lewiston Falls powerhouse (known as Monty Station).

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On September 29, 1986, FERC issued a new 40-year license to Central Maine Power Company and Union Water Power Company for the redeveloped Lewiston Falls Hydro Project. The license did not include any project-specific condition relating to the construction of fish passage facilities at the project. However, the license did include a standard condition providing authority for FERC to require the installation of fish passage facilities when needed.

By letter dated August 27, 1990, the Department waived water quality certification for the proposed transfer of ownership and separate licensing of the Upper Androscoggin Station.^{3,4}

On February 26, 1991, FERC amended the license for the Lewiston Falls Hydro Project to approve the transfer of the 1.695 MW Upper Androscoggin Station from Central Maine Power Company and Union Water Power Company to the City of Lewiston and to re-designate the Upper Androscoggin Station as Project No. 11006.

On May 13, 1992, FERC amended the license for the Lewiston Falls Hydro Project to reflect the as-built generating capacity of the new powerhouse of 28.44 MW.

On December 23, 1998, the Department transferred the permit and certification for the Lewiston Falls Hydro Project from Central Maine Power Company and Union Water Power Company to FPL Energy Maine Hydro LLC.

Finally, on December 28, 1998, FERC transferred the license for the Lewiston Falls Hydro Project from Central Maine Power Company to FPL Energy Maine Hydro LLC.

Gulf Island-Deer Rips Project

On July 5, 1962, the Federal Power Commission (predecessor to the Federal Energy Regulatory Commission) issued an initial license to Central Maine Power Company for the constructed Gulf Island-Deer Rips Hydro Project (No. 2283), located on the Androscoggin River in the Cities of Lewiston and Auburn and the Towns of Turner, Greene, Leeds and

³ Because there is no permit or water quality certification in effect for the Upper Androscoggin Project, there is no reference to this project in the caption of this order.

⁴ In its letter waiving water quality certification, the DEP stated that “there are no specific permit or certification conditions that pertain to the operation of the Upper Androscoggin Station, and thus no conditions that need to be attached to a separate license for the Upper Androscoggin Station. Furthermore, CMP’s regulatory obligations for the operation of the Lewiston Falls Hydro Project will not change with the transfer of ownership of the Upper Androscoggin Station.”

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Livermore. No fish passage facilities were required at the project under the terms of this license.

On December 28, 1998, FERC transferred the license for the Gulf Island-Deer Rips Hydro Project from Central Maine Power Company to FPL Energy Maine Hydro LLC.

By Order #L-17100-33-O-N dated September 21, 2005, the Department approved water quality certification for the relicensing of the Gulf Island-Deer Rips Hydro Project. The approved project consisted of two existing dams (Gulf Island Dam and Deer Rips Dam, with maximum heights of 92 feet and 50 feet, respectively), three powerhouses with a total installed generating capacity of 32.5 MW, two impoundments (2,862-acre Gulf Island Pond and 130-acre Deer Rips impoundments), and appurtenant facilities.

The 2005 Department order included a condition requiring that, based on a written request from the Atlantic Salmon Commission that fish passage facilities be installed on the main stem of the Androscoggin River above Lewiston Falls to facilitate the restoration of Atlantic salmon, the applicant install such fish passage facilities as may be required by the Department, after notice to the applicant and opportunity for a hearing, to allow the migration of Atlantic salmon into and out of the river above the project.

On October 21, 2005, timely appeals to this Board of the Department’s water quality certification for the Gulf Island-Deer Rips Hydro Project were filed by FPL Energy, a coalition of environmental organizations (Maine Rivers, Androscoggin River Alliance, Conservation Law Foundation, and the Androscoggin Lake Improvement Corp.), and the Towns of Livermore and Jay.⁵

Currently, FERC action on the proposed relicensing of the Gulf Island-Deer Rips Project is pending.⁶

⁵ In its appeal, FPL Energy has, among other things, argued that the condition reserving to the DEP the right to order fish passage at the project dams is unlawful and must be deleted.

⁶ In its July 1996 Final Environmental Impact Statement for the relicensing of the Gulf Island-Deer Rips Hydro Project, FERC stated that: “[The Department of the] Interior did not file mandatory conditions pursuant to Section 18 of the [Federal Power Act]. However, because of future restoration plans, Interior requests that the Secretary of Interior’s authority to prescribe the construction, operation, and maintenance of fishways be reserved. Section 18 of the FPA provides the secretary of the Interior the authority to prescribe fishways. We recognize that future fish passage needs and management objectives cannot always be predicted at the time of license issuance. Under these circumstances, and upon receiving a specific request from Interior, it is appropriate for [FERC] to reserve Interior’s authority to prescribe fishways.” FERC/FEIS - 0100, page 4-80.

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Riley-Jay-Livermore Project

On February 18, 1965, the Federal Power Commission (predecessor to the Federal Energy Regulatory Commission) issued an initial license to International Paper Company for the constructed Otis-Livermore Project (No. 2375), located on the Androscoggin River in the Towns of Canton, Jay, Livermore, and Livermore Falls. The licensed project included dams and power stations at Riley, Jay, Otis, and Livermore. No fish passage facilities were required at the project under the terms of this license.

By Orders #L-02/49-7880-07090 dated May 12, 1978 and revised June 29, 1982, the Board and Department approved a Great Ponds Alteration permit and water quality certification for the redevelopment and amendment of license of the Otis-Livermore Hydro Project. The approved project consisted of: the existing concrete-capped, rock-filled timber crib Riley Dam (average height of 19 feet), powerhouse (installed generating capacity of 7.8 MW), 578-acre impoundment, and appurtenant facilities; the existing concrete gravity Jay Dam (maximum height of 27 feet), powerhouse (installed generating capacity of 3.0 MW), 206-acre impoundment, and appurtenant facilities; the existing concrete gravity Otis Dam (average height of 20 feet), a new powerhouse (installed generating capacity of 10 MW), 115-acre impoundment, and appurtenant facilities; and the existing concrete gravity Livermore Dam (average height of 12 feet), a new powerhouse (installed generating capacity of 12.5 MW), 46-acre impoundment, and appurtenant facilities. No fish passage facilities were required at the project under the terms of this permit and certification.

On June 4, 1982, FERC approved the amendment of license for the redeveloped Otis-Livermore Project. No fish passage facilities were required at the project under the terms of this amendment of license.

On September 19, 1984, FERC amended the license for the Otis-Livermore Project to approve the transfer of the Otis Project from International Paper Company to Otis Hydroelectric Company and to redesignate the Otis Project as Project No. 8277.

By Order #L-007880-02-B-M dated October 30, 1984, in connection with a pending application for a FERC license amendment, the Department modified the permit and certification for the renamed Riley-Jay-Livermore Project to eliminate the construction of a new powerhouse at the Livermore Dam and to instead increase the generating capacity of the existing powerhouse by 1 MW to 8.615 MW through the addition of a new generating unit.

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On November 13, 1985, FERC amended the license for the Riley-Jay-Livermore Project to reflect the modified redevelopment proposal for the Livermore Dam.

By Order #L-18829-33-A-N dated May 5, 1998, the Department approved a Maine Waterway Development and Conservation Act permit and water quality certification for the redevelopment and relicensing of the Riley-Jay-Livermore Hydro Project and approved water quality certification for the relicensing of the Otis Hydro Project. The approved projects consisted of the existing Riley, Jay, Otis, and Livermore dams, powerhouses, and impoundments, and 4.46 MW of new generating capacity at the Livermore Dam.⁷

The 1998 Department order included a condition requiring that, based on a written request from the Atlantic Salmon Commission that fish passage facilities be installed on the main stem Androscoggin River above Lewiston Falls to facilitate the restoration of Atlantic salmon, the applicant shall install such fish passage facilities as may be required by the Department, after notice to the applicant and the opportunity for a public hearing, to allow the migration of salmon into and out of the river in and above the project area.⁸

On September 16, 1998, FERC issued a new 50-year license to International Paper Company for the redeveloped Riley-Jay-Livermore Hydro Project and a new 50-year license to Otis Hydroelectric Company for the constructed Otis Hydro Project. The licenses included a condition reserving FERC's authority to require the licensee to construct, maintain and operate such fishways as may be prescribed by the Secretary of the Interior under Section 18 of the Federal Power Act.

By Order #I-18830-35-B-M dated July 26, 2002, in connection with a pending application for a FERC license amendment, the Department modified the permit and certification for the

⁷ Neither Petitioner has requested that the Board revoke, modify or suspend the May 5, 1988 water quality certification for the Otis Hydro Project. However, the regulatory history of this project is discussed herein so as to provide a complete description of the regulatory history and fish passage requirements at all of the dams on the Androscoggin River below Rumford. The Board notes that the Otis Dam is located between the Jay and Livermore dams.

⁸ The following findings are included in the Department's May 5, 1998 Order: "To enhance and expedite the relicensing process for the Riley-Jay-Livermore Project and the Otis Project, the licensees formed a Collaborative Team consisting of interested federal, state and local agencies, various non-governmental organizations and the public. Beginning in 1994, the Collaborative Team met regularly to address resource concerns, to assist and guide the licensees in the completion of studies and the timely filing of relicensing applications, and to develop an enhancement package that protects and improves the natural and human environment by balancing the needs of the public, regulatory agencies, and the licensees. DEP staff participated as members of the Collaborative Team."

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Riley-Jay-Livermore Hydro Project to reduce the approved increase in generating capacity at the Livermore Dam from 4.46 MW to 1.0 MW.

Finally, on September 30, 2002, FERC amended the license for the Riley-Jay-Livermore Hydro Project to reflect the modified generating capacity of the Livermore Dam. As a result of this amendment, the total approved installed generating capacity of the project was reduced to 19.725 MW.

Lower Barker Mill Hydro Project

By Order #L-08-4287-01010 dated April 24, 1978, the Department approved water quality certification for the redevelopment and licensing of the proposed Lower Barker Mill Hydro Project, located on the Little Androscoggin River in the City of Auburn. At the time, the project was owned by Maine Hydro-Electric Development Corporation. The approved project consisted of an existing 30-foot-high concrete Ambursen dam, a new 780-foot-long penstock, a new powerhouse with an installed generating capacity of 1.5 MW, a 12-acre impoundment, and appurtenant facilities. No substantive conditions were attached to the certification.

On February 23, 1979, FERC issued an initial 40-year license to Maine Hydro-Electric Development Corporation for the proposed Lower Barker Mill Hydro Project (No. 2808). The license did not include any project-specific condition relating to the construction of fish passage facilities at the project. However, the license did include a standard condition providing authority for FERC to require the installation of fish passage facilities when needed.

On February 28, 1986, FERC transferred the license for the Lower Barker Mill Hydro Project from Maine Hydro-Electric Development Corporation to Lower Barker Hydro Company, Inc.

On June 18, 1987, FERC transferred the license for the Lower Barker Mill Hydro Project from Lower Barker Hydro Company, Inc. to Consolidated Hydro Maine, Inc.

Finally, on December 19, 1996, FERC transferred the license for the Lower Barker Mill Hydro Project from Consolidated Hydro Maine, Inc. to Ridgewood Maine Hydro Partners, L.P.

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Upper Barker Mill Hydro Project

By Order #L-02/49-6848B-01010 dated April 13, 1983, the Department approved a Small Hydroelectric Generating Facilities Act permit and water quality certification for the redevelopment and licensing of the proposed Upper Barker Mill Hydro Project, located on the Little Androscoggin River in the City of Auburn. At the time, the project was owned by Maine Hydro-Electric Development Corporation. The approved project consisted of an existing 21-foot-high masonry dam, a new powerhouse with an installed generating capacity of 0.95 MW, a 41-acre impoundment, and appurtenant facilities.

The 1983 Department order included conditions requiring that downstream fish passage facilities be constructed concurrently with project redevelopment and that upstream fish passage facilities be constructed at such time as deemed appropriate by the Department of Marine Resources to allow the migration of anadromous fish into the watershed above the project dam.

On August 22, 1983, FERC issued an initial 40-year license to Maine Hydro-Electric Development Corporation for the proposed Upper Barker Mill Hydro Project (No. 3562). The license included a condition requiring the construction of downstream fish passage facilities. The license did not include any project-specific condition relating to the construction of upstream fish passage facilities at the project. However, the license did include a standard condition providing authority for FERC to require the installation of such fish passage facilities when needed.

By Order #L-006848-35-C-M dated May 23, 1984, the Department transferred the permit and certification for the Upper Barker Mill Hydro Project from Maine Hydro-Electric Development Corporation to Barker Hydro Company.

On December 28, 1984, FERC transferred the license for the Upper Barker Mill Hydro Project from Maine Hydro-Electric Development Corporation to Barker Hydro Company.

On June 15, 1987, FERC transferred the license for the Upper Barker Mill Hydro Project from Barker Hydro Company to Consolidated Hydro Maine, Inc.

By Order #L-006848-35-G-M dated September 16, 1987, the Department transferred the permit and certification for the Upper Barker Mill Hydro Project from Barker Hydro Company to Consolidated Hydro Maine, Inc.

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On December 19, 1996, FERC transferred the license for the Upper Barker Hydro Project from Consolidated Hydro Maine, Inc. to Ridgewood Maine Hydro Partners, L.P.

Finally, by Order #L-006848-35-I-T dated June 29, 1997, the Department transferred the permit and certification for the Upper Barker Mill Hydro Project from Consolidated Hydro Maine, Inc. to Ridgewood Maine Hydro Partners, L.P.

Hackett Mills Hydro Project

By Order #L-10052-35-A-N dated April 25, 1984, the Department approved a Maine Waterway Development and Conservation Act permit and water quality certification for the redevelopment and licensing of the proposed Hackett Mills Hydro Project, located on the Little Androscoggin River in the Towns of Minot and Poland. The project was then and is currently owned by Hackett Mills Hydro Associates. The approved project consisted of an existing 8-foot-high rock-filled timber crib dam, a new powerhouse with an installed capacity of 0.47 MW, a 60-acre impoundment, and appurtenant facilities.

The 1984 Department order included conditions requiring that downstream fish passage facilities be constructed concurrent with project redevelopment and that upstream fish passage facilities be constructed at such time as deemed appropriate by the Department of Marine Resources to allow the migration of anadromous fish into the watershed above the project dam.

On September 12, 1984, FERC issued an initial 40-year license to Hackett Mills Hydro Associates for the proposed Hackett Mills Hydro Project (No. 6398). The license included a condition requiring immediate installation of downstream fish passage facilities and construction of upstream fish passage facilities at the project following the construction of such facilities at the downstream Upper Barker Mill Project.

Marcas Hydro Project

By Order #L-17778-33-C-N dated May 23, 1997, the Department approved water quality certification for the licensing of the existing Marcal Hydro Project, located on the Little Androscoggin River in the Town of Mechanic Falls. The project was then and is currently owned by Ridgewood Maine Hydro Partners, L.P. The approved project consisted of a granite and concrete gravity dam with a maximum height of 15 feet, a powerhouse with an installed generating capacity of 1.3 MW, a 27-acre impoundment, and appurtenant facilities.

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The 1997 Department order included conditions requiring that downstream fish passage facilities be constructed and operational within 2 years of issuance of a FERC license and that upstream fish passage facilities be installed, or an alternative fish passage plan provided, at such time as is deemed appropriate by the Department of Marine Resources and/or the Atlantic Salmon Commission to allow the migration of anadromous fish into the watershed above the project dam, except that upstream passage is not required until the agencies produce an anadromous fish restoration and management plan for the Little Androscoggin River Basin.

On July 17, 1997, FERC issued an initial 40-year license to Ridgewood Maine Hydro Partners, L.P. for the existing Marcal Hydro Project (No. 11482). The license included conditions requiring immediate installation of downstream fish passage facilities and reserving FERC’s authority to require the licensee to construct, maintain and operate such fishways as may be prescribed by the Secretary of the Interior under Section 18 of the Federal Power Act.

4. PETITIONS FOR REVOCATION, MODIFICATION OR SUSPENSION

On October 3, 2005, Friends of Merrymeeting Bay filed a petition (dated September 29, 2005) requesting that the Board revoke, modify or suspend the Maine hydropower permits and water quality certifications for the Brunswick, Pejepscot, Worumbo, Lewiston Falls, Upper Androscoggin, and Gulf Island-Deer Rips Hydro Projects on the Androscoggin River to provide for immediate safe downstream and upstream passage of American eel and safe ingress and egress, within the scope of their historic range, for American shad, blueback herring, alewife, and Atlantic salmon.⁹ Friends of Merrymeeting Bay also requests that the Board modify the project permits to comply with 38 M.R.S.A. Section 464(10),¹⁰ which requires existing hydropower facilities to implement reasonable changes that do not significantly affect existing energy generation capability and which would result in improvements in habitat and aquatic life.

On November 10, 2005, Douglas H. Watts filed a petition (dated October 3, 2005) requesting that the Board modify the water quality certifications issued for the Brunswick, Pejepscot, Worumbo, Lewiston Falls, Upper Androscoggin, Deer Rips, Gulf Island, Livermore, Jay, and Riley dams on the Androscoggin River and the Lower Barker Mill, Upper Barker Mill,

⁹ The portion of the petition filed by Friends of Merrymeeting Bay dealing with fish passage at various dams on the Kennebec River is being dealt with in a separate proceeding.

¹⁰ In its petition, Friends of Merrymeeting Bay incorrectly cited this provision as 38 M.R.S.A. Section 464(1).

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Hackett Mills, and Marcal dams on the Little Androscoggin River to provide immediate safe and effective upstream and downstream passage for American eel. Douglas H. Watts also requests that the Board modify the water quality certifications issued for the Brunswick, Pejepscot, and Worumbo dams to require safe passage for Sea Lamprey.

5. APPLICABLE STANDARDS

Title 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 criteria are met.

Section 27 of the DEP's Chapter 2 Rules for the Processing of Applications and Other Administrative Matters provides that any person, including the Commissioner, may petition the Board to revoke, modify or suspend a license. The DEP's Rules further provide 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,¹¹ dismiss the petition or schedule a hearing on the petition. Finally, the DEP's Rules provide 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:

- 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;

¹¹ The Board has acted on the petitions as expeditiously as possible, given its meeting schedule, other meeting agenda commitments, and the need to give the owners of the dams sufficient time to respond to the petitions. Petitioners have agreed to the Board's schedule for consideration of the petitions.

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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.

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

The Board may only modify, or take such other actions as are listed in Chapter 2, section 27, after providing licensees with an opportunity for hearing. Whether to dismiss a petition to modify, suspend or revoke or proceed to hearing is discretionary with the Board. 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 standards listed in section 27, A through H. The Board must also consider whether there are any legal impediments to the Board taking the requested action.

7. STANDING

Section 27 of the DEP’s Chapter 2 Rules for the Processing of Applications and Other Administrative Matters provides that any person, including the Commissioner, may petition the Board to revoke, modify or suspend 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.

Petitioner Friends of Merrymeeting Bay is a 501(c)(3) non-profit organization whose mission is to preserve, protect, and improve the unique ecosystems of Merrymeeting Bay.

Petitioner Watts is a resident of Augusta, Maine, with a demonstrated interest in the native migratory fish species of the Androscoggin River.

In its response to the petition filed by Friends of Merymeeting Bay, Miller Hydro Group argues that the petitioner has not presented any evidence that it has been harmed by the alleged impact of the Worumbo Project on the American eel or other identified species of fish and thus has not established standing to petition the Board. In its response to the petitions, Topsham Hydro Partners argues that neither petitioner has established that they would suffer particularized injury as a result of the current operation of the Pejepscot Hydro

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Project or that they would have aggrieved status and standing if the Board dismissed the petitions or denied the request to modify the permit and water quality certification for the Pejepscot Hydro Project.¹²

The Chapter 2 Rules provide that “any person”¹³ may petition the Board to revoke, modify or suspend a license. The demonstration of harm or of standing as an aggrieved party that is necessary to bring an appeal is not required for a person to have standing to file a petition to revoke, modify or suspend a license. Therefore, the Board will consider the petitions of Friends of Merrymeeting Bay and Douglas H. Watts.

8. BASIS OF PETITIONS

Petitioners contend that four of the criteria set forth for the revocation, modification, or suspension of a license¹⁴ are met. Specifically, the petitioners contend that:

- The licensed activities pose a threat to human health or the environment, in that thousands of eels and other fish are being killed through passage in the turbines at the dams;¹⁵
- The licenses fail to include standards or limitations legally required on the date of issuance, in that the failure of the water quality certifications issued for the dams to require passage facilities for eels violates state water quality standards;
- There have been changes in conditions or circumstances that require revocation, suspension or a temporary or permanent modification of the terms of the licenses, in that the federal government is now considering protection of the American eel under the United States Endangered Species Act, and in that there is now a greater awareness and definitive documentation of the consequences of no safe downstream passage; and

¹² For the purposes of the DEP’ Chapter 2 Rules, “aggrieved person” means any person whom the Board determines may suffer particularized injury as a result of a licensing or other decision. See 06-096 CMR Chapter 2, Section 1(B).

¹³ For the purposes of the DEP’s 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. See 06-096 CMR Chapter 2, Section 1(O).

¹⁴ For the purposes of the DEP’s Chapter 2 Rules, “license” means any license, license amendment, license renewal, transfer, permit, variance, approval or certification issued by the Department. See 06-096 CMR Chapter 2, Section 1(J).

¹⁵ Only Petitioner Friends of Merrymeeting Bay contends that this criterion is met.

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- The licensees have violated laws administered by the Department, in that the lack of safe eel passage violates the Clean Water Act and causes the Androscoggin and Little Androscoggin Rivers to violate Maine water quality standards.

Petitioner Friends of Merrymeeting Bay specifically requests that the Board: (1) require temporary dusk-to-dawn shutdowns of all turbines from September 1 through November 30, 2005, along with at least temporary safe downstream passage; (2) require the submission by project owners of a proposed eel and fish passage plan by March 1, 2006; and (3) by September 1, 2006, require permanent eel passage consisting of either seasonal nighttime turbine shut downs or punch plate eel excluders over intakes, in combination with deep gate passage.

9. RESPONSES TO PETITIONS

The owners of the dams that are the subject of the pending petitions all recommend that the petitions be dismissed.

- a. Miller Hydro Group. In its response to the petition of Friends of Merrymeeting Bay, Miller Hydro Group argues that the petitioner has presented no evidence of harm to the American eel (or other species) from the operation of the Worumbo Project specifically or in the Androscoggin River generally.¹⁶ Miller Hydro Group further argues that the water quality certification for the Worumbo Project contains no language authorizing the Board to “reopen” it for amendment and that, as a consequence, the Board has no authority to reopen and amend the certification. Finally, Miller Hydro Group argues that the petitioner has presented no evidence regarding the economic impact of the relief it seeks, and that the significant economic costs and loss of generation that would result from the actions requested by the petitioner must be evaluated.
- b. Topsham Hydro Partners. In its response to the petitions, Topsham Hydro Partners argues that the petitions provide no specific evidence with respect to the Pejepscot dam, or its alleged impact upon the American eel. Topsham Hydro Partners further argue that there is “a substantial probability” that the United States Supreme Court will conclude that the State lacks the legal basis to order federally-licensed hydroelectric facilities to

¹⁶ Miller Hydro Group’s response to the petition filed by Friends of Merrymeeting Bay is dated November 17, 2005, and thus was written before the November 10, 2005 filing of the petition of Douglas H. Watts. Miller Hydro Group has not submitted a response to the Watts’ petition.

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take measures like those requested by the petitioners.¹⁷ Topsham Hydro Partners further argue that it would be premature for the Board to assume the outcome of the on-going federal status review of the American eel, or to presume what steps federal agencies might declare should be undertaken with respect to eels. Topsham Hydro Partners further argue that, because there is no evidence regarding the impact of the Pejepscot Hydro Project on the passage of American eels and because no State agency has recommended that eel passage be monitored or that eel passage facilities be installed at the project, neither the Department nor the Board would have any basis for including any conditions in the Pejepscot Hydro Project permit or certification addressing eels. Finally, Topsham Hydro Partners argues that the petitioner has presented no evidence regarding the economic impact of the relief it seeks, and that the significant economic costs and loss of generation that would result from the actions requested by the petitioner must be evaluated.

- c. FPL Energy Maine Hydro LLC. In its response to the petitions, FPL Energy Maine Hydro LLC argues that the Petitioners do not describe project-specific facts, or what project-specific evidence they would offer, to support their contentions that the water quality certifications for the Brunswick, Lewiston Falls, and Gulf Island-Deer Rips projects should be modified to provide passage for migrating fish. FPL Energy further argues that the petitions are not a permissible means to challenge the water quality certifications for these projects. Finally, FPL Energy argues, with respect to the Gulf Island-Deer Rips Project, that any challenges to the DEP's findings and conclusions with respect to fish passage should have been filed in the form of an appeal of the Department's September 21, 2005 order approving water quality certification for the project, and that neither Petitioner has appealed that decision.
- d. City of Lewiston. In response to the petitions, the City of Lewiston argues that granting the Petitioners' requests would eliminate the economic viability of the Upper Androscoggin Project and the valuable environmental and economical contribution of hydropower generation at the site. The City of Lewiston further argues that the Petitioners offer no evidence that the Upper Androscoggin Project has had any impact on the American eel.
- e. International Paper Company. In response to the petition of Douglas H. Watts, International Paper Company argues that, at the time the water quality certification was

¹⁷ The case in question here—*S.D. Warren v. Board of Environmental Protection*—is discussed in more detail in Section 10 of this Order.

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issued for the Riley-Jay-Livermore Project, all legal requirements were met, and that no new legal requirements have arisen since then. International Paper further argues that the current review being conducted by the Department of the Interior concerning the status of the American eel has no legal import nor does it constitute a change in condition or circumstance in and of itself. Finally, International Paper argues that the Riley-Jay-Livermore Project has been, and will continue to be, operated in compliance with the terms and conditions of the water quality certification and any other federal and state licenses, permits and orders related to the project, and that the company has not violated any law administered by the Department in connection with the project.

- f. Rumford Paper Company. In response to the petition of Douglas H. Watts, Rumford Paper Company states that it has no substantive comments at this time and that it reserves the right to participate in the future as an interested party.¹⁸
- g. Ridgewood Maine Hydro Hydro LLC. In its response to the petition of Douglas H. Watts, Ridgewood Maine Hydro LLC argues that the petitioner does not describe any project-specific facts, or what project-specific evidence he would offer, to support the contention that eel passage is necessary at the Lower Barker Mill, Upper Barker Mill, and Marcal projects. Ridgewood further argues that the petitioner has provided no project-specific evidence to show that there are changed circumstances or conditions at the projects since the water quality certifications were issued or to show that the applicable water quality standards are no longer being met. Finally, Ridgewood argues that the petition is not a permissible means to challenge the water quality certifications for the projects.
- h. Hackett Mills Hydro Associates. In its response to the petition of Douglas H. Watts, Hackett Mills Hydro Associates argues that the petitioner does not describe any project-specific facts, or what project-specific evidence he would offer, to support the contention that eel passage is necessary at the Hackett Mills Project. Hackett Mills Hydro Associates further argues that the petitioner has provided no project-specific evidence to show that there are changed circumstances or conditions at the project since the water quality certifications were issued or to show that the applicable water quality standards are no longer being met. Finally, Hackett Mills Hydro Associates argues that the petition is not a permissible means to challenge the water quality certification for the project.

¹⁸ Rumford Paper Company, through its subsidiary Rumford Falls Power Company, currently owns and operates the Rumford Falls Hydro Project (FERC No. 2333), which is located on the Androscoggin River above the Riley-Jay-Livermore Project.

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10. DISCUSSION AND FINDINGS OF FACT

a. Current Status of eel/anadromous fish passage.

Based on the information available in the Department’s permitting, certification, and condition compliance files for the projects addressed in the petitions, the Board makes the following findings of fact regarding the current status of passage for eels and anadromous fish at the dams on the Androscoggin and Little Androscoggin Rivers that are the subject of the pending petitions.

Eels.

There are currently no specific upstream or downstream passage facilities or operational measures in place for catadromous¹⁹ eels at any dams on the Androscoggin River or Little Androscoggin River. Eels are currently present throughout the Androscoggin River watershed.

Anadromous fish

A permanent vertical slot fishway, sorting and transfer facility to provide upstream passage for anadromous²⁰ fish, along with a permanent downstream anadromous fish passage facility, became operational at the Brunswick Hydro Project in 1983. Through 2004, a total of 925,000 adult river herring,²¹ 247 adult American shad, and 654 adult Atlantic salmon have been captured at the Brunswick fishway and distributed into otherwise inaccessible habitat in the Androscoggin and Little Androscoggin Rivers.²² Studies are currently underway in an attempt to improve the effectiveness of the fishway in attracting and passing shad. The Brunswick fish sorting and transfer facility is operated by the Department of Marine Resources. Since 1983, DMR has operated the facility to exclude sea lamprey from passing into the river above the Brunswick Dam.

¹⁹ Catadromous fish migrate from freshwater to the ocean to spawn, and then migrate back to freshwater as juveniles to grow to maturity.

²⁰ Anadromous fish migrate from the ocean to freshwater to spawn, and then migrate back to the ocean as juveniles to grow to maturity.

²¹ The term “river herring” includes both alewife and blueback herring.

²² Source: 2005 Brunswick Fishway Report, Maine Department of Marine Resources (March 2005).

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A permanent fish lift to provide upstream passage for anadromous fish, along with a permanent downstream anadromous fish passage facility, became operational at the Pejepscot Hydro Project in 1988.

A permanent fish lift to provide upstream passage for anadromous fish, along with a permanent downstream anadromous fish passage facility, became operational at the Worumbo Hydro Project in 1989.

There are currently no upstream or downstream passage facilities for anadromous fish at any other dams on the main stem Androscoggin River.

On the Androscoggin River, the historic range of Atlantic salmon extended to Rumford Falls, while the Great Falls (Lewiston Falls) presented a barrier to other sea-run species (e.g., alewives and shad). On the Little Androscoggin River, the historic range of Atlantic salmon, alewife and American shad extended upstream above the site of the Marcal Project.

Permanent downstream anadromous fish passage facilities have been installed at the Lower Barker Mill, Upper Barker Mill, Hackett Mills, and Marcal projects on the Little Androscoggin River.

There are currently no upstream passage facilities for anadromous fish at any dams on the Little Androscoggin River.

Compliance.

Based on the above findings of fact, the Board concludes that the Brunswick, Pejepscot, Worumbo, Lewiston Falls, Gulf Island-Deer Rips, and Riley-Jay-Livermore projects on the Androscoggin River and the Lower Barker Mill, Upper Barker Mill, Hackett Mills, and Marcal projects on the Little Androscoggin River are currently in compliance with the terms and conditions of their permits and/or water quality certifications with respect to providing passage for eels and anadromous fish.

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

The Petitioners ask the Board to modify permits and/or water quality certifications that were issued for six projects on the Androscoggin River and four projects on the Little

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Androscoggin River. None of the permits/certifications have requirements for upstream or downstream eel passage facilities or operational measures. None of the permits/certifications contain conditions that reserve the Department’s right to require such passage in the future (so-called “reopener” provisions). Thus, none of the FERC licenses issued for the projects contain conditions reserving the right of the Department to “reopen” the certification to include passage for eels.

On the Androscoggin River, the permit and certification for the Lewiston Falls Project contains a reopener for passage facilities for anadromous fish but only upon request from the Department of Marine Resources (DMR) or the Atlantic Salmon Commission (ASC), while the permits and/or certifications for the Gulf Island-Deer Rips Project and the Riley-Jay-Livermore Project contain reopeners for passage facilities for Atlantic salmon but only upon request of the ASC. On the Little Androscoggin River, the permit and/or certifications for the Barker Mill Upper, Hackett Mills, and Marcal Projects contain reopeners for passage facilities for anadromous fish but only upon request from DMR or ASC. None of the permits/certifications for the other projects that are at issue here contain reopeners for passage for anadromous fish. In the case of those projects with a reopener for the installation of fish passage facilities, neither DMR nor ASC has to date requested that fish passage be installed.

Under the Federal Power Act (FPA), Congress created a “broad federal role in the development and licensing of hydroelectric power.” *American Rivers v. FERC*, 129 F.3d 99,111 (2nd Cir. 1997). The Clean Water Act, however, has “diminished” the reach of the FPA by “expressly requiring the Commission to incorporate into its licenses state-imposed water-quality conditions,” under section 401, including reopener provisions. *Ibid.*

Once a FERC license is issued, it generally may not be altered except upon “mutual agreement between the licensee and the Commission.” 16 U.S.C. § 799. However, specific reopeners in a water quality certification for hydroelectric dams are a proper exercise of the State’s authority under section 401, *S.D. Warren Company v. Board of Environmental Protection*, 2005 ME 27,²³ ¶¶ 23-26, and FERC has taken the position, rightly, that “a state may modify a water quality certification when the state has reserved such authority in the certification.” *Central Maine Power Company*, 82 F.E.R.C. ¶

²³ The Maine Supreme Court’s decision regarding the authority of the State to issue water quality certification in connection with the relicensing of hydroelectric dams is currently pending on a writ of *certiorari* before the United States Supreme Court.

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61,191 (1988). In effect, action to modify a FERC license based on a specific reopener contained in a water quality certification does not alter the license because the reopener is part of the license and the licensee is on notice that the reopener will be invoked of certain conditions occur.

The Board's statute permits it to modify a certification after a hearing if certain criteria are met. The legal effect of any such action, however, in the absence of specific relevant reopeners in the water quality certifications, incorporated into the FERC licenses for these projects, is highly questionable. For all the reasons stated above, in the absence of such a reopener, it is unlikely that FERC would see itself as bound to make the modifications in question, or that a court would impose this requirement on FERC.

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 petitions before it.

c. Upper Androscoggin and Gulf Island-Deer Rips Projects.

As noted above, in 1990 the Department waived water quality certification for the separate licensing of the Upper Androscoggin Project. Because there is no permit or certification for this project, the project is not properly subject to the pending petitions for revocation, modification or suspension.

As further noted above, the Department's September 21, 2005 order approving certification for the Gulf Island-Deer Rips Project is currently on appeal before the Board. Because the certification may change as a result of this appeal, the project is not properly subject to the pending petitions for revocation, modification or suspension.

d. Threat to Human Health or the Environment.

Petitioner Friends of Merrymeeting Bay argues that the lack of downstream fish passage facilities at the projects results in fish and eels being killed and injured and that this poses a threat to the environment. Petitioner Friends of Merrymeeting Bay further argues that the killing of downstream migrating adult eels releases long-sequestered toxins into the water and food chain.

When the Department issued the permits and/or water quality certifications for the projects at issue here, it determined that, subject to enumerated conditions, there was

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reasonable assurance that water quality standards would be met. These conditions did not include requirements for eel passage but did in some cases include requirements for anadromous fish passage. The public had an opportunity to participate in the certification process and aggrieved parties had an opportunity to appeal those certifications. Based on the information available to the Department, the licensees are in full compliance with these certifications.

The Department agrees that there are eel throughout the Androscoggin watershed and it is likely that there is some mortality of eel and other anadromous fish as a result of the existence and operation of the dams at issue here. If these dams were being certified today, the evidence presented by the Petitioners would clearly be relevant to whether fish passage was required in order to provide “reasonable assurance” that water quality standards are being met.

This is not, however, a proceeding with regard to an application for a new water quality certification, but rather a petition to modify an existing water quality certification. Under 38 M.R.S.A. § 341-D(3)(C), the Petitioner must show that the projects, as certified, *pose a threat* to human health or the environment. The Board finds that this standard requires more than that certain fish exist in the watershed and that there is a likelihood that some number of these fish are being killed. A “threat to the environment” suggests that the evidence offered must, if proven, demonstrate that the activity is affecting or will affect the viability of fish populations or the overall integrity of the aquatic ecosystem. Petitioner Friends of Merrymeeting Bay has not offered evidence which, if proven at a hearing, would support a finding that the certified activity causes a “threat to...the environment.” The Board notes that, as Petitioner points out, there is currently pending before the United States Fish and Wildlife Service a petition to list eels as an endangered species. The issue of whether eel populations are endangered is an open question that will be addressed by the USFWS in the course of its proceeding.

Similarly, Petitioner Friends of Merrymeeting Bay has not offered evidence which, if proven at a hearing, would show that toxins released as a result of any eels being killed at the dams at issue here pose a “threat to human health.” Petitioner Friends of Merrymeeting Bay cites to the results of a contaminant analysis done on dead eels recovered at the Benton Falls Project in 2004, but makes no offer of evidence that similar levels of contaminants are found in eels collected at the Brunswick, Pejepscot, Worumbo, Lewiston Falls, Upper Androscoggin, or Gulf Island-Deer Rips projects. Nor does Petitioner Friends of Merrymeeting Bay make an offer of evidence regarding the overall mortality of eels at these projects. The Board finds that a “threat to human health”

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requires more than that there is a likelihood that some eels are killed as a result of the certified activity and that toxins have been released as a result of eels being killed on another river system.

The Board notes that legal mechanisms exist for state and federal fisheries agencies to petition FERC for the installation or improvement of fish passage facilities at any licensed project in order to protect and provide passage for migrating fish,²⁴ and that no petitions have been made for any of the projects at issue here.

Based on these findings, the Board finds that Petitioner Friends of Merrymeeting Bay fails to make an offer of evidence sufficient to warrant a public hearing on the issue of whether the projects pose a threat to human health or the environment.

e. Failure to Include Legally Required Standard or Limitation

Petitioners argue that, because the water quality certifications issued for the projects do not include passage for migratory fish, they “fail[] to include any standard or limitation legally required on the date of issuance,” providing a basis for modification, suspension or revocation pursuant to 38 M.R.S. A. § 341-D(3)(D).

The Board finds that the fact that the certifications at issue here did not include certain fish passage requirements does not mean that they did not meet legal standards required on the date of issuance, including water quality standards. Petitioners have not identified any state or federal law that requires fish passage to be part of a certification in every case. *S.D. Warren v. BEP*, cited by Petitioners, 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.

²⁴ 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).

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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 the available information (including fishery management goals, migratory fish restoration plans, habitat suitability and availability, and current status of fish passage). These decisions 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.

In the case of the projects at issue here, the Department has issued permits and/or water quality certifications based on the evidence available in the record at the time. The Board finds that the Petitioners have offered no evidence which, if proven at hearing, would demonstrate that at the time the permits/certifications for these projects were issued, additional fish passage was required.

In addition, taken to its logical extreme, the petitioners' argument would be that fish passage is required at any dam within the historic range of anadromous fish, whether or not any fish are actually present to use the passage facilities. There is no legal or practical justification for requiring that fish passage be constructed at a dam when that passage facility is not now, and may never be, actually used by migrating fish. This is especially true where the appropriate state fishery management agency has yet to develop a specific timetable for anadromous fish restoration.²⁵ Petitioners have not offered any evidence that, if proven at hearing, would demonstrate that anadromous fish are currently present at dams for which the Petitioners would urge fish passage be installed.

The Board again notes that legal mechanisms exist for state and federal fisheries agencies to petition FERC for the installation or improvement of fish passage facilities at any licensed project in order to protect and provide passage for migrating fish, and that no petitions have been made for any of the projects at issue here.

²⁵ For example, in its September 21, 2005 Order approving water quality certification for the Gulf Island-Deer Rips Project, the Department included the following findings of fact: "Historically, the range of Atlantic salmon was to Rumford, but the Great Falls in Lewiston presented a barrier to other sea-run species...The Department of Marine Resources (DMR) is currently working to restore anadromous alewives and shad to the river below Lewiston Falls and to various tributary systems...The Atlantic Salmon Commission (ASC) plans to eventually restore Atlantic salmon to the Androscoggin River, but has yet to develop a specific timetable for restoration...Currently, upstream and downstream fish passage facilities for all anadromous species are in operation at the three main stem dams below Lewiston Falls (Brunswick, Pejepscot and Worumbo). There are no fishways in place at the Lewiston Falls, Deer Rips or Gulf Island Dams, and there are no plans by state agencies to require fishways at these dams in the foreseeable future."

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Based on these findings, the Board finds that the Petitioners fail to make an offer of evidence sufficient to warrant a public hearing on the issue of whether the permits and/or water quality certifications issued for the projects fail to include any standard or limitation legally required on the date of issuance.

f. Change in Condition or Circumstance.

Petitioner Watts argues that petitions are now pending to declare the American eel to be endangered species, and that these circumstances did not exist at the time the Department issued water quality certifications for the projects. Petitioner Friends of Merrymeeting Bay argues that there is now a greater awareness and documentation of the consequences of no safe downstream passage.

The Board finds that the Petitioners have not offered evidence which, if proven at hearing, is sufficient to find that “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,” pursuant to 38 M.R.S.A. § 341-D(3)(E). The fact that the American eel is being considered for listing as an endangered species does not constitute such changed circumstances. Any claim that the species is endangered is at this point speculative, and will be determined by the USFWS in due course.

Furthermore, while there may be an increased awareness of the need for safe downstream fish passage, particularly for eels, this awareness alone does not provide a sufficient change in circumstances for modifying the terms of the permits and/or certifications previously issued for the projects. In the event this “change of awareness” translates to specific facts that form a basis for the State’s fisheries agencies to recommend further passage measures, they may do so pursuant to the specific reopeners contained in the water quality certification and FERFC license.

Based on these findings, the Board finds that the Petitioners fail to make an offer of evidence sufficient to warrant a public hearing on the issue of whether 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 permits and/or water quality certifications for the projects.

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g. Violation of Law.

Finally, the Petitioners argue that the projects in question are currently in violation of the law because they lack fish passage for various migratory species and thus violate water quality standards. Petitioner Watts also argues that the lack of such passage violates the law by resulting in the killing of Atlantic salmon, which Petitioner Watts claims is illegal. Based on this, the Petitioners argue that they have made a sufficient showing under 38 M.R.S.A. § 341-D(3)(F) for the Board to proceed to hearing.

The Board finds that the Petitioners have not offered any evidence that, if proven at hearing, would demonstrate that the projects are currently in violation of existing law. Section 341-D(3)(F) on its face permits the Board to take action to address actual violations of law. Other criteria contained in section 341-D(3) permit the Board to act where, regardless of whether there is a violation of law, other circumstances, such as a change in conditions or a threat to the environment, support that action. The water quality certifications at issue here provide that, subject to certain conditions, there was reasonable assurance that the projects would meet Maine’s water quality standards. Petitioners have not alleged that the licensees are out of compliance with the conditions of their water quality certifications or FERC licenses. By operating in compliance with their water quality certifications and FERC licenses, the dams are currently operating in compliance with the law.

This does not mean, however, that the Department is powerless in the event of a demonstrated fish kill. The Department has in the past taken appropriate enforcement action in response to fish kills, and will continue to do so in the future.²⁶

Based on these findings, the Board finds that the Petitioners fail to make an offer of sufficient evidence to warrant a public hearing on the issue of whether the projects have violated any law administered by the Department.

²⁶ For example, in 2000, the Department negotiated and the Board approved an Administrative Consent Agreement, including a monetary penalty and corrective actions, following the death of and injury to numerous downstream migrating alewives at the Benton Falls Project due to the failure of the project operator to keep the approved downstream fish passage facilities clear of debris and fully operational, as required bby the terms of the permit and water quality certification for the project.

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Based on the above Findings, the Board concludes that the Petitioners' arguments and the offer of evidence by the Petitioners are insufficient to support granting the Petitioners' request that the Board schedule a hearing to consider revocation, modification or suspension of the permits and/or water quality certifications previously issued for the Brunswick, Pejepscot, Worumbo, Lewiston Falls, Upper Androscoggin, Gulf-Island-Deer Rips, Riley-Jay-Livermore, Barker Mill Lower, Barker Mill Upper, Hackett Mills, or Marcal Hydro Projects.

THEREFORE, the Board DISMISSES the petition of FRIENDS OF MERRYMEETING BAY to revoke, modify or suspend the permits and/or water quality certifications for the Brunswick, Pejepscot, Worumbo, Lewiston Falls, Upper Androscoggin, and Gulf Island-Deer Rips Hydro Projects located on the Androscoggin River.

FURTHERMORE, the Board DISMISSES the petition of DOUGLAS H. WATTS to revoke, modify or suspend the permits and/or water quality certifications for the Brunswick, Pejepscot, Worumbo, Lewiston Falls, Upper Androscoggin, Gulf Island-Deer Rips, and Riley-Jay-Livermore Projects on the Androscoggin River and for the Lower Barker Mill, Upper Barker Mill, Hackett Mills, and Marcal Hydro Projects located on the Little Androscoggin River.

DONE AND DATED AT AUGUSTA, MAINE, THIS ____ DAY OF _____, 2006.

BOARD OF ENVIRONMENTAL PROTECTION

BY: _____
 MATTHEW SCOTT, Chair