

June 9, 2006

Matthew Scott, Chair & Members
Maine Board of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

Re: Androscoggin Eel Petition of May 17, 2006 and Request for Dismissal Letter of May 24, 2006

Dear Chairman Scott and members of the Board,

This letter is in response to the issues and recommendations presented by Mr. Matthew Manahan on behalf of various Androscoggin River dam owners in a letter to the Board dated May 24, 2006.

1. The May 17, 2006 Androscoggin Eel Petition ("Petition") is literally and substantively different than the two petitions received by the Maine BEP in Fall 2005 and dismissed by a formal vote of the Board on Feb. 2, 2006. Nothing in Maine statute or Department rules allows the Maine BEP to summarily deny these 50+ signatories their "day in court" simply because the Maine BEP has ruled upon petitions dealing with a similar subject matter in the past. Each of these 50+ Petitioners deserves the right to sit before the Maine BEP at an open, public meeting while their Petition is being considered, to address the Board at the appropriate moment, and to hear the reasons proffered by each Board member for formally voting to affirm or dismiss the Petition.

2. Considering the May 17, 2006 Petition at a formal, public BEP meeting is fully consistent with the Maine BEP's own practice and protocol regarding the two separate and independent Petitions filed in Fall 2005 for the Androscoggin River by Douglas H. Watts and Friends of Merrymeeting Bay, respectively. The Board fully considered and voted upon these Petitions at a formal, open public meeting with a legal quorum of Board members present. These two Fall 2005 Petitions both covered similar subject matter (eel passage on the Androscoggin) and similar dams, yet the Maine BEP accepted both Petitions as distinct and separate entities, fully considered both Petitions at their Feb. 2, 2006 meeting, and treated each Petition as a separate entity in its Feb. 2, 2006 Findings of Fact and Order. Petitioners here simply request the Maine BEP do likewise regarding the May 17, 2006 Petition.

3. Mr. Manahan does not cite any statute or rule which states when a past BEP decision on a specific Ch. 2 §27 Petition "sunssets" and thus allows for submission of a new Ch 2 §27 petition on the same or a similar subject matter. Without such a specific "sunset" provision and time frame, one must logically conclude from his argument that a Maine BEP dismissal of a Ch. 2 §27 Petition prohibits any future Petition on that subject from

any person or groups of persons in perpetuity. This would also mean, necessarily, that the Maine DEP Commissioner is also permanently barred from presenting his or her own license modification request to the Board on that subject matter if the Maine BEP rejected a Petition on that subject at any point in the past.

4. Department Rules plainly state that within 30 days of receipt of a Ch. 2 §27 Petition, the Maine BEP must either dismiss the Petition or schedule a public adjudicatory hearing on it. Department rules do not describe or allow the Maine BEP any "third option." If the Maine BEP wishes to dismiss the May 17, 2006 Petition for any reason, this decision must be made in a public, open meeting. If this were not the case, the Maine BEP could decide to schedule a public adjudicatory hearing on the May 17, 2006 Petition by privately caucusing over the telephone and later informing Mr. Manahan's clients of their private decision by letter. I doubt Mr. Manahan's clients would support the legality of such an action, yet they are recommending the BEP use this exact same procedure to summarily dismiss the May 17, 2006 Petition. Aside from advocating an obvious double standard, Mr. Manahan's clients also seem to be encouraging the Maine BEP to violate its own administrative rules and Maine's Open Meeting Law. In contrast, myself and other signatories to the May 17, 2006 Petition simply request the Maine BEP consider and vote to dismiss or affirm our Petition in an open, public meeting that is conducted in full compliance with Maine law.

5. A plain and objective reading of the relevant statutes and Department rules shows that the only way in which the Maine BEP can ignore or otherwise reject a Ch. 2 §27 Petition without making this decision in open, public meeting with a legal quorum is if the Maine BEP can show that it never received a physical copy of the Petition or that the document it received is so garbled and unintelligible as to prevent the Maine BEP from discerning its identity as a Ch. 2 §27 Petition. Mr. Manahan does not make this claim in his May 24 letter.

6. Mr. Manahan argues the May 17, 2006 Petition should be summarily dismissed because I am now seeking judicial review of the BEP's Feb. 2, 2006 dismissal of my Fall 2005 Petition. In April, Mr. Manahan and the Maine Dept. of Attorney General filed Motions to Dismiss in Superior Court claiming the Superior Court has no jurisdiction to review the Feb. 2, 2006 BEP dismissal of my Petition. If Mr. Manahan is correct that the Superior Court lacks jurisdiction to hear my appeal, then the May 17, 2006 Petition must be reviewed by the BEP de novo. If this is not the case, then Mr. Manahan is admitting his Motion to Dismiss is a sham. If the Maine BEP "summarily dismisses" the May 17, 2006 Petition due to my appeal of its Feb. 2, 2006 decision, the BEP is admitting the argument forwarded by the Attorney General in its Motion to Dismiss is a sham. If one accepts the Attorney General's argument in its Motion to Dismiss, my appeal is a legal nullity and cannot have any bearing on the BEP's consideration of the May 17, 2006 Petition. Because of the Dept. of Attorney General's stated legal position in its Motion to Dismiss, the BEP must review the May 17, 2006 Petition de novo.

7. A significant instigator of my participation in the May 17, 2006 Petition is the Attorney General's novel legal position that a BEP dismissal of a Ch. 2 §27 Petition

cannot be appealed to the Superior Court for any reason. This position leaves citizens with no legal redress except by filing further Petitions. If citizens cannot file future Petitions on a particular subject matter, their statutory right to seek modification of licenses administered by the BEP is extinguished. While the Attorney General may wish that citizens not have any right to seek modification of BEP licenses, the Maine Legislature has created this right and the Attorney General has no constitutional authority to revoke or limit it. To a significant extent, the Dept. of Attorney General has created this instant matter themselves.

8. On Jan 19 and Feb 2, 2006 it was obvious to any objective observer that the Assistant Attorney General staked much of her argument in favor of dismissal of my Androscoggin and Kennebec Ch. 2 §27 Petitions on a novel legal theory that the BEP could potentially be prohibited by federal law from modifying water quality certification orders in such a way that they conflict with federal hydro-electric dam licenses administered by the Federal Energy Regulatory Commission. This argument, whatever its potential truth value, had no bearing on the BEP's judgment of whether the proffer of evidence was sufficient to warrant a public adjudicatory hearing on these various license modification requests. The Assistant Attorney General's subsequent opinion that Ch.2 §27 dismissals are unappealable, if true, would prevent a Court of proper jurisdiction from determining if the Assistant Attorney General's theory of a federal-state conflict has any basis in fact or law. Under Maine's Constitution, her Courts -- not the Dept. of Attorney General -- are granted the role of interpreting statute and Legislative intent. If the Courts are not allowed to judge for themselves the soundness of legal interpretations offered by the Asst. Attorney General to the Maine BEP, the Dept. of Attorney General and BEP are free to devise any interpretation of statute they wish. This has the effect of nullifying Ch. 2 §27 and the statutory rights granted to citizens therein by giving the Executive Branch unchecked authority to interpret statute without judicial review of their interpretations. This is absurd and is yet another reason why the May 17, 2006 Petition has arisen, why I have joined it as a signatory and why I believe the BEP is obligated to rule upon the Petition in an open, public meeting.

Thank you very much for your time and your careful consideration of this matter.

Sincerely,

Douglas H. Watts
131 Cony Street
Augusta, Maine 04330