



STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

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GOVERNOR

IN THE MATTER OF

MERIMIL LIMITED PARTNERSHIP)	MAINE WATERWAY DEVELOPMENT AND
Waterville and Winslow, Kennebec County)	CONSERVATION ACT PERMITS AND
LOCKWOOD HYDRO PROJECT)	WATER QUALITY CERTIFICATIONS
#L-20218-33-C-N))
))
HYDRO KENNEBEC LIMITED)	
PARTNERSHIP)	
Winslow and Waterville, Kennebec County)	
HYDRO-KENNEBEC PROJECT)	
#L-11244-35-A-N)	
)	PETITIONS FOR REVOCATION, MODIFICATION,
FPL ENERGY MAINE HYDRO LLC)	OR SUSPENSION
Fairfield, Somerset County)	
SHAWMUT HYDRO PROJECT)	
#L-19751-33-A-M)	
)	
FPL ENERGY MAINE HYDRO LLC)	
Skowhegan, Somerset County)	
WESTON HYDRO PROJECT)	
#L-17472-33-C-M)	

Pursuant to the provisions of 38 M.R.S.A. Sections 341-D(3), 464 et seq., and 06-096 CMR Chapter 2 (Rules Concerning the Processing of Applications and Other Administrative Matters), the Board of Environmental Protection, and as a result of September 28, 2005 and September 29, 2005 petitions¹ of Douglas H. Watts and Friends of Merrymeeting Bay ("FOMB") (collectively, "Intervenors,"), determined to hold a public hearing to consider whether the permits and water quality certifications previously issued for the Lockwood, Hydro-Kennebec, Shawmut, or Weston Hydro Projects should be modified, suspended or revoked. Following that hearing, and consideration of the testimony and written briefs of all parties, the Board has determined, in its discretion, to take no further action to modify, revoke, or suspend the certifications in issue. The Board's reasons follow.

¹ A summary of the petitions, petition proceedings, public hearing testimony, and post-hearing briefs is appended hereto and incorporated herein.



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1. FISH PASSAGE REQUIREMENTS IN EXISTING WATER QUALITY CERTIFICATIONS

On May 26, 1998, various parties² signed the Lower Kennebec River Comprehensive Hydropower Settlement Accord which, among other things, led to the removal of the Edwards Dam in Augusta. Included as part of the settlement accord was the *Agreement Between Members of the Kennebec Hydro Developers Group, the Kennebec Coalition, the National Marine Fisheries Service, the State of Maine, and the U.S. Fish and Wildlife Service (1998 KHDG Agreement)*. The *1998 KHDG Agreement* was intended to achieve a comprehensive settlement governing fisheries restoration on the Kennebec River and Sebasticook River for catadromous³ American eel and anadromous⁴ American shad, Atlantic salmon, alewife and blueback herring at the seven dams covered by the agreement. The then existing water quality certifications and FERC licenses for each of the dams⁵ were subsequently amended to be consistent with the *1998 KHDG Agreement*.

With regard to upstream passage for anadromous fish, the *1998 KHDG Agreement*, and therefore the water quality certifications, require interim upstream passage at the Lockwood Project, the first of the subject dams on the Kennebec River, by May 1, 2006, with permanent passage to be provided based on a biological trigger (2 years after 8,000 shad are passed or some appropriate alternative determined by the state and federal fisheries agencies), but in any event, no earlier than 2010. Biological triggers are also provided for permanent upstream passage at the Hydro-Kennebec, Shawmut and Weston Projects, and dates are established before which upstream passage will not be required at these dams ranging from 2010 to 2014.

Regarding downstream passage for anadromous fish, the water quality certifications require that the dam owners continue, and where needed improve, existing interim operational

² The signing parties to the *1998 KHDG Agreement* included: the City of Augusta; Edwards Manufacturing Company; the Kennebec Coalition (American Rivers, Inc., the Atlantic Salmon Federation, Kennebec Valley Chapter of Trout Unlimited, the Natural Resources Council of Maine, and Trout Unlimited); the Kennebec Hydro Developers Group (Central Maine Power Company, Merimil Limited Partnership, UAH-Hydro Kennebec Limited Partnership, Ridgewood Maine Hydro Partners, L.P., and Benton Falls Associates); the State of Maine (acting by and through the Governor of the State of Maine, the Maine Department of Inland Fisheries and Wildlife, the Maine Department of Marine Resources, and the Maine State Planning Office); the US Department of Commerce (through the National Marine Fisheries Service); and the US Department of the Interior (through the US Fish and Wildlife Service).

³ Catadromous fish migrate as adults from freshwater to the ocean to spawn, and their offspring then migrate back to freshwater as juveniles to grow to maturity.

⁴ Anadromous fish migrate as adults from the ocean to freshwater to spawn, and their offspring then migrate back to the ocean as juveniles to grow to maturity.

⁵ The certification for the Lockwood Hydro project was issued in August 26, 2004 and its FERC license will expire June, 2035. The certification for the Hydro-Kennebec project was issued June 6, 1986 and its FERC license will expire October, 2036. The certification for the Shawmut project was issued May 21, 1981 and its FERC license will expire January 25, 2021. The certification for the Weston project was issued November 17, 1992 and its FERC license will expire November 25, 2036.

measures to diminish entrainment, allow for downstream passage, and eliminate significant injury or mortality to out-migrating anadromous fish. Permanent downstream anadromous fish passage facilities are required to be operational no later than the date permanent upstream passage facilities are operational.

With regard to the American eel, KHDG dam owners and DMR, in consultation with federal fisheries agencies, were required to undertake three years of study, beginning no later than 1999, to determine the appropriate placement of upstream eel passage facilities at each project and appropriate permanent downstream eel passage measures at each project. According to the terms of the certifications, if no agreement was reached by June 30, 2002, parties were free to petition FERC to amend any license to insert appropriate terms and conditions. If studies revealed that interim downstream measures were needed to avoid significant turbine injury or mortality to downstream migrating eels at a particular site, KHDG dam owners were required to consult with the fisheries agencies and agree to undertake cost-effective measures to minimize mortality at that project.

2. STATUS OF FISH AND EEL PASSAGE UNDER EXISTING WATER QUALITY CERTIFICATIONS

An interim trap, lift, and transfer facility providing upstream passage for anadromous fish has been built at the Lockwood Project and became operational prior to May 1, 2006, as required by the Lockwood Project's water quality certification and FERC license. The lift is capable of passing up to 228,471 American shad; 164,640 river herring; and 4,750 Atlantic salmon annually.⁶ The biological trigger has not yet been reached to require upstream passage at the next dam, (Hydro-Kennebec Project). Various interim operational measures (e.g. gate openings and spillage) have been instituted at the Lockwood, Shawmut and Weston Projects to diminish entrainment and facilitate downstream passage for anadromous fish and eel. At the Hydro-Kennebec Project, an interim downstream fish passage facility (consisting of an angled guidance structure and a new gate) has been constructed and is now in operation.

All dams currently have installed upstream passage for eels. The issue of upstream eel passage, therefore, is not an issue before the Board. Prior to the initiation of these proceedings, however, efforts at providing downstream eel passage had reached an impasse. As correctly pointed out by Intervenors, the studies necessary to determine appropriate downstream passage measures that were to have been completed by 2001 had not been done, and consequently there was no agreement regarding these measures. Nor had any parties sought amendments of the licenses or certifications requiring such measures, as permitted by the terms of the water quality certification and FERC license.

⁶ After sorting at the new Lockwood lift facility, anadromous American shad, river herring and Atlantic salmon will be trucked to suitable upriver locations for release.

