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July 26, 2006

Matt Scott, Board Chair
c/o Terry Hanson
Board of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

RE: Kennebec River Eel and Fish Passage Proceeding

Dear Chair Scott:

As discussed at the pre-hearing conference last Wednesday afternoon, I enclose the Joint Response of Merimil Limited Partnership, Hydro Kennebec Limited Partnership, and FPL Energy Maine Hydro LLC to the Motion to Limit the Scope of Hearing and Preclude Evidence. Please let me know if you have any questions about this filing.

Sincerely,

A handwritten signature in black ink, appearing to be "M. Manahan", written over a horizontal line.

Matthew D. Manahan

Enclosure

cc: Service List

**STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

IN THE MATTER OF

Merimil Limited Partnership)	
Lockwood Hydro Project)	
#L-20218-33-C-N)	
)	
Hydro Kennebec Limited Partnership)	
Hydro-Kennebec Project)	Joint Response of
#L-11244-35-A-N)	Merimil Limited Partnership,
)	Hydro Kennebec Limited
FPL Energy Maine Hydro LLC)	Partnership, and FPL
Shawmut Hydro Project)	Energy Maine Hydro LLC to
#L-19751-33-A-M)	Motion to Limit the Scope of
)	Hearing and Preclude
FPL Energy Maine Hydro LLC)	Evidence ¹
Weston Hydro Project)	
#L-17472-33-C-M)	

On July 19, 2006, Friends of Merrymeeting Bay (“FOMB”) moved to limit the scope of the hearing in this proceeding and to preclude certain evidence from being introduced at the hearing. Specifically, FOMB argues (1) that any discussion of the role of the Federal Energy Regulatory Commission (“FERC”) with respect to a Board of Environmental Protection (“Board”) decision to modify the water quality certifications (the “Certifications”) should be excluded from the hearing and (2) that the Licensees should not be able to introduce at the hearing any evidence pertaining to the economics of implementing eel and fish passage protection measures.

The Presiding Officer should deny the motion for the reasons set forth below.

I. The Role of FERC

FOMB states that it is concerned that advice from the Attorney General’s Office

¹ Merimil Limited Partnership, Hydro Kennebec Limited Partnership, and FPL Energy Maine Hydro LLC are hereinafter referred to as the Licensees.

regarding whether FERC has the ability to amend the FERC licenses in the event the Board modifies the Certifications could impact the Board's decision on whether to modify the Certifications. FOMB argues that, because "it is settled that FERC has the authority to amend its licenses to incorporate the terms of modified water quality certifications" (FOMB Motion at 2), "raising the issue of FERC's ability to amend its licenses would be a red herring." *Id.* at 3.

A. FERC's authority is relevant to the Board's decision in this proceeding.

FERC's authority with respect to these proceedings is relevant because the statute makes it relevant. The statute permitting the Board to modify the Certifications gives the Board discretion to take action if certain criteria are met. The statute states as follows: "After written notice and opportunity for a hearing, pursuant to the Maine Administrative Procedure Act . . . the board *may* modify in whole or in part any license . . . whenever the board finds that . . ." 38 M.R.S.A. § 341-D(3). The statute does not state that the Board *shall* modify a license if it finds any of the criteria satisfied. Even if the Board found that one or more of the criteria listed in Section 341-D(3) were met, the Board would not automatically be required to modify the Certifications.

In other words, while the Board must find that the statutory criteria are met in order to take action under Section 341-D(3), there may be other relevant factors the Board should consider when making its determination. For example, the Board may decline to modify the Certifications, even if it finds one or more of the criteria listed in Section 341-D(3) are met, if it determines that such action would be pointless. FERC's ability to amend its licenses to incorporate modified Certifications is one such relevant consideration, and it should be available for the Board's consideration.

B. The Certifications do not include “reopener” conditions.

FOMB claims that the conditions in the Certifications providing that if no consensus is reached on eel passage by June 30, 2002, the applicant or any consulting party shall be free to petition DEP or FERC “to approve appropriate conditions relating to eel passage at the project” is a valid reopener clause,² giving FERC the ability to amend the FERC licenses to incorporate the terms of modified Certifications.

But that condition is not, in fact, a reopener clause. Rather, it merely acknowledges that a party is free to petition DEP or FERC to approve appropriate conditions with respect to eel passage. It does not reserve any authority to the DEP or the Board to do anything.³

There are no reopeners in the Certifications, so it would be pointless for the Board to modify the Certifications because FERC will not (and may not⁴) amend the licenses at issue to incorporate changes to a certification unless the authority to make that change is contained in the Certifications (as incorporated into the FERC license). Given that the Board thus may determine that it would be pointless to modify the Certifications, and that the Board has authority to decline to modify the Certifications for that reason, the legal effect of a Board decision to modify the Certifications is relevant in this proceeding. For

² In the *S.D. Warren* case, cited by FOMB in its Motion, the Maine Supreme Judicial Court concluded that inclusion of a reopener condition in a certification is permissible. *S.D. Warren Co. v. Board of Environmental Protection*, 2005 ME 27. FOMB also cites as support *American Rivers v. FERC*, 129 F.3d 99 (2d Cir. 1997). In *American Rivers*, the court did not address whether the imposition of a reopener condition in a water quality certification exceeds a state’s authority under Section 401(d) of the Clean Water Act. Instead, the court held that FERC does not have the authority to determine whether a condition in a water quality certification is valid. Rather, challenges to the validity of a state-imposed certification condition must be made in state court. *American Rivers*, 129 F.3d at 9, 13.

³ Even if this condition were construed as a reopener, it is limited to eel passage. There is no similar condition with respect to anadromous species.

⁴ Section 6 of the Federal Power Act provides that FERC licenses may be amended only upon the consent of FERC and the licensee. 16 U.S.C. § 799. FERC may not unilaterally amend its licenses to incorporate the terms of a modified certification unless a reopener clause is included in the certification, which in turn is incorporated in the FERC license.

this reason, the Presiding Officer should deny the motion to exclude discussion of this issue at the hearing.

II. The Economics of Eel and Fish Passage Protection Measures

FOMB next argues that evidence of the economics of implementing eel and fish protection measures should be excluded from the hearing because economics is not a factor in the modification criteria set forth in 38 M.R.S.A. § 341-D(3) or in the determination of whether water quality standards are being violated. FOMB's argument fails because, to the contrary, the economics of implementing eel and fish protection measures at an existing hydroelectric facility is directly relevant to Maine's water quality standards.

A key provision in Maine's water quality laws is its Antidegradation Policy, which provides as follows:

Existing in-stream water uses and the level of water quality necessary to protect those existing uses must be maintained and protected. Existing in-stream water uses are those uses which have actually occurred on or after November 28, 1975

38 M.R.S.A. § 464(4)(F)(1). This provision is directly relevant to whether the criteria in Section 341-D(3)(D) and (F) have been met.

Not only are the hydroelectric facilities at issue in these proceedings designated uses of the water, 38 M.R.S.A. § 465(3)(A) & (4)(A), but they existed as of November 28, 1975, so they are existing uses that must be maintained and protected pursuant to the Antidegradation Policy.

A Board determination to modify the Certifications to impose expensive eel or fish protection measures, depending on the nature of the protection measures, could impact the economics of the projects. If the extent of the economic or generation impact is such that the existing use of hydroelectric generation is not being maintained and

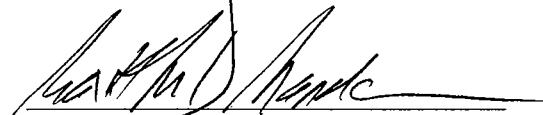
protected, then a Board decision to modify the Certifications would violate the Antidegradation Policy and Maine's water quality standards. Although there likely will be disagreement with respect to the level of economic impact that would result in a failure to maintain and protect the hydroelectric power generation use, the Licensees must at least have the right to present evidence on this issue.

In order for the Board to make the determination on whether the existing use of hydroelectric power generation will be maintained and protected it must be able to consider evidence of the economics of eel and anadromous fish protection measures and the impact of such measures on hydroelectric power generation. Thus, FOMB's motion to exclude such evidence should be denied.

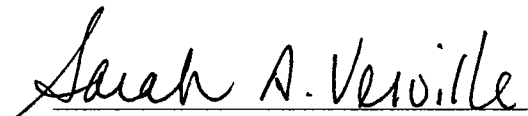
III. Conclusion

For the reasons discussed above, the Presiding Officer should deny the Motion of FOMB to limit the scope of the hearing and preclude certain evidence.

Dated: July 26, 2006



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