

**STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION**

IN THE MATTER OF

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

**PETITION OF FRIENDS OF MERRYMEETING BAY TO INTERVENE
IN PETITIONS TO MODIFY WATER QUALITY CERTIFICATIONS
FILED BY FRIENDS OF MERRYMEETING BAY AND DOUGLAS WATTS
(FILED UNDER PROTEST)**

Friends of Merrymeeting Bay (“FOMB”) requests to intervene in the petitions to modify the above-captioned water quality certifications for four dams located on the Kennebec River that were filed by FOMB and Douglas Watts (“Petitions to Modify”). Grounds for intervention are set forth below and in the accompanying affidavit of Ed Friedman, Chairman of FOMB.

- I. **AS A MATTER OF LAW, FOMB IS A “PARTY” TO
THIS PROCEEDING, AND IS NOT REQUIRED TO
INTERVENE IN A HEARING ON ITS OWN PETITION.**

As an initial matter, FOMB objects to being forced to file a request to intervene in a proceeding *on its own petition*. Compounding the unfairness, the dam operators are in the proceeding *as a party* and do not have to intervene.

It is settled that statutes and regulations are not to be construed so as to create absurd, illogical or unreasonable results. E.g., Darling’s v. Ford Motor Company, 1998

ME 232, 719 A.2d 111, 114 (Me. 1998) Woodcock v. Atlass, 393 A.2d 167, 170 (Me. 1978); Thiboutot v. Maine, 405 A.2d 230, 234, n.4 (Me. 1979). Requiring FOMB to intervene in its own petition violates this bedrock principle.

The adjudicatory hearing is occurring only because FOMB filed the Petition to Modify. How can an agency have a hearing on a petition and not automatically allow the petitioner to present its case? Worse, those who oppose the Petition to Modify – the dam operators and Department of Environmental Protection (“DEP”) staff¹ – *are* automatically participants in the proceeding and, in theory, if intervention were denied would then be free to oppose the petition with no one advocating the other side.

Laws and rules governing the Board of Environmental Protection (“Board”) cannot be interpreted to establish such an unfair system. FOMB had a right to petition the Board. Ch.2, Rule 27 of the Board rules. The Board granted a hearing on FOMB’s petition. The Board cannot now treat FOMB as an outsider who must ask for permission to come in.

Furthermore, the dam operators already argued that FOMB does not have standing to file the Petition to Modify, and that argument was rejected by the Board, which found FOMB does have standing. FOMB should not be required to go through the effort to establish its interest in this matter a second time.

A. The Maine APA Governs And Provides That FOMB Is A “Party.”

Maine statutes provide that a hearing on a petition to modify a water quality certification is governed by the Maine Administrative Procedures Act (“APA”). 38 M.R.S.A. § 341-D(3) (“After written notice and opportunity for a hearing pursuant to the

¹ The Board voted to hold an adjudicatory hearing on the Petitions to Modify over the objections of DEP staff.

Maine Administrative Procedure Act, Title 5, chapter 375, subchapter IV, the board may modify in whole or in part any license...”)² 38 M.R.S.A. § 345-A(2) (“Except as provided elsewhere, all hearings of the department must be conducted in accordance with the procedural requirements of the Maine Administrative Procedure Act, Title 5, chapter 375.”).³

Board rules are in accord that the APA governs the hearing on a petition to modify a water quality certification. Under Ch. 2, Rule 27 of the Board rules, a hearing on a petition to modify a water quality certification must be held in accordance with Rule 7(C). Rule 7(C) in turn provides that the hearing shall be held in accordance with the APA.

The definition of “party” in the APA includes: “The specific person whose legal rights, duties or privileges are being determined in the proceeding.” 5 M.R.S.A. § 8002(7)(A). The same language is used in the definition of “party” in the Board’s rules. Ch. 2, Rule 1(M)(1).

Here, FOMB is clearly a “party.” FOMB had the absolute right to petition the Board to modify the water quality certifications, and had the absolute right to a ruling on whether to hold a hearing on the petition. FOMB’s rights were not extinguished when the Board granted FOMB a hearing on its petition. Ch.2, Rule 27. Any other result would be absurd.

In addition, FOMB is a party because it has a right to enjoy waters of the State that meet designated water quality classifications. The Legislature provided:

² The definition of “license” includes “certification.” 38 M.R.S.A. § 341-D(3).

³ The “department” includes the Board. 38 M.R.S.A. § 361-A(1-H).

The Legislature finds that the proper management of the State's water resources is of great public interest and concern to the State in promoting the general welfare; in preventing disease; in promoting health; in providing habitat for fish, shellfish and wildlife; as a source of recreational opportunity; and as a resource for commerce and industry.

38 M.R.S.A. § 464(1). A system of water quality classifications was established to protect the State's waters for the public. FOMB has the right to petition to modify water quality certifications in order to ensure that water quality classifications will be maintained.

II. **IF FOMB IS NOT ALREADY A PARTY, THE BOARD SHOULD APPLY APA STANDARDS TO THE INTERVENTION REQUEST.**

As set forth above, the APA governs this proceeding. The APA rule on intervention is:

1. Intervention. On timely application made pursuant to agency rules, the agency conducting the proceedings shall allow any person showing that he is or may be, or is a member of a class which is or may be, substantially and directly affected by the proceeding, or any other agency of federal, state or local government, to intervene as a party to the proceeding.

2. Intervention; interested person. The agency may, by order, allow any other interested person to intervene and participate as a full or limited party to the proceeding. This subsection shall not be construed to limit public participation in the proceeding in any other capacity.

5 M.R.S.A. § 9054(1) and (2).

The notice that the Board gave on the hearing in this matter provided a different, more restrictive standard:

In order to be granted, a petition to intervene must demonstrate that the petitioner has a direct and substantial interest which may be affected by proceedings, the petitioner has reasonably specific contentions regarding the subject matter and the appropriate statutory criteria, and the petitioner is prepared and capable of participation in the hearing in order to support its contentions.

As discussed below, FOMB satisfies these criteria. But they are the wrong criteria.

First, the “reasonably specific contentions” and “capable of participation” criteria are not in the APA rule on intervention. Second, the APA allows both intervention as of right (§ 9054(1)) and permissive intervention of an “interested person” (§ 9054(2)), while the notice makes no mention of permissive intervention.⁴

The criteria in the Board’s notice appear to have been taken from Rule 5 of the Board’s Special Regulations For Hearings On Applications Of Significant Public Interest (“Special Regulations”). However, the Special Regulations do not apply in this case because, as far as FOMB is aware, the Board has made no finding of significant public interest.⁵ In any event, as a matter of law Board regulations could not provide for a more restrictive intervention standard than provided by statute. E.g., Larson v. New England Telephone and Telegraph Co., 141 Me. 326, 334, 44 A.2d 1, 11 (Me. 1945) (“Any regulation that conflicts with any statute must yield thereto”); McKenney v. Farnsworth, 121 Me. 450, 452, 118 A. 237, 238 (Me. 1922) (agency rule or regulation that contravenes an existing statute will be declared invalid).

⁴ In addition, it is not clear from the Board’s notice whether the Board is obligated to grant intervention if the criteria set forth in the notice are satisfied, or whether it is a matter of Board discretion. To the extent intervention is discretionary even if the criteria are met, that is a third difference from the APA intervention standards, which provide for mandatory intervention.

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Rule 1 of the Special Regulations provides: “These regulations shall be applicable to all hearings before the Board of Environmental Protection (hereinafter “Board”) on applications for new, renewed, amended or transferred licenses, permits, certificates, variances, approvals or other determinations on specific matters (hereinafter “licenses”) where the Board has determined that the subject matter of the application is of significant public interest... *These regulations shall not apply to ... Hearings on Applications where no determination of significant public interest has been made by the Board.*” (Emphasis added). FOMB is unaware of any determination of significant public interest by the Board in this case.

III. BY ANY STANDARDS, FOMB SHOULD BE ALLOWED TO INTERVENE.

Regardless of whether the intervention criteria found in the APA or the Board's notice are applied, FOMB meets the standards for intervention as a full party.

A. FOMB Has A Direct And Substantial Interest That Will Be Affected By This Proceeding.

The direct and substantial interest of FOMB in this proceeding is fully set forth in the accompanying affidavit of Ed Friedman, Chairman of and a member of FOMB, and it will only be summarized here.

First, and most obviously, it is FOMB's Petition to Modify that is one of the petitions being decided by the Board. Thus FOMB has a direct and substantial interest in the outcome of the proceedings which will lead to a ruling on FOMB's own petition.

Second, FOMB has a direct and substantial interest that is affected by this proceeding because its members use Merrymeeting Bay.⁶ It is important to FOMB's members that the biodiversity of Merrymeeting Bay is as healthy as possible. The four dams that are the subject of this proceeding are harming the biodiversity of Merrymeeting Bay by interfering with upstream and downstream passage of a variety of fish species. Knowing that the diversity and abundance of fish is diminished by the dams in turn diminishes members' enjoyment of the Bay.

FOMB members fish in Merrymeeting Bay and on the Kennebec, but would fish more if the fish were more abundant. Some species – Atlantic salmon and eels - are not fished for at all due to their declining population. Also, members enjoy bird watching

⁶ Merrymeeting Bay is the 9,000 acre confluence of six rivers: the Kennebec, Androscoggin, Cathance, Muddy, Eastern and Abbagadassett Rivers.

and observing wildlife, but the decline of fish in the Kennebec and Merrymeeting Bay means there is less of a food source, thus less birds and wildlife to observe.⁷

Third, FOMB has a direct and substantial interest that is affected by this proceeding because the organization studies, observes and seeks to protect species that are adversely affected by the dams at issue. As the dams contribute to eel, shad, salmon, and other fish mortality, there are less of these fish to study, observe and protect, ultimately leaving few, or none left at all. Dams, without safe fish and eel passage, destroy the biological integrity of the Kennebec and of Merrymeeting Bay. Further, FOMB invests a significant amount of time and resources working to protect eels and other fish species that are the subject of the petition to modify. A decision on the Petition to Modify will directly affect that which FOMB has worked on so hard for many years.

B. FOMB Has Specific Contentions Regarding The Subject Matter And Appropriate Statutory Criteria.

FOMB has specific contentions regarding the subject matter and appropriate statutory criteria. These are laid out in (1) FOMB's petition to modify the water quality certifications, (2) the petition of Douglas Watts that was incorporated by reference in FOMB's Petition to Modify and in the Friedman Affidavit, and (3) a letter to the Board which was not considered by the Board earlier, but which is attached to the accompanying Friedman affidavit.

C. FOMB Is Prepared And Capable Of Participating.

At the public meeting already held on the petition, the Board had the opportunity to conclude that FOMB is capable of participating in a hearing to support its contentions.

⁷ Another problem is that long-lived eels can be filled with toxic contaminants. When these eels are killed at dams, the body burdens of contaminants they carry are re-introduced back into the local ecosystem where they become accessible to fish and other wildlife.

FOMB is prepared to present witnesses and documentary evidence, cross-examine witnesses if necessary, and submit the necessary legal filings.

D. At The Very Least, FOMB Should Be Allowed To Intervene And Participate As A Full Party Pursuant To 5 M.R.S.A. § 9054(2).

As discussed above, the APA at 5 M.R.S.A. § 9054(2) provides that an agency may allow any interested person to intervene and participate as a full party to a proceeding. In the event the Board does not consider FOMB a party or does not grant FOMB intervenor status under 5 M.R.S.A. § 9054(1), for the reasons set forth above FOMB requests that the Board allow FOMB to participate as a full party pursuant to § 9054(2).⁸

IV. CONCLUSION.

For all the reasons set forth above, FOMB should be granted full party status in proceedings on the petitions of FOMB and Douglas Watts to modify the above-captioned water quality certifications for four dams on the Kennebec River.

Dated: June 9, 2006

Respectfully submitted,

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⁸ FOMB also believes that to exclude it from a hearing on its own petition, while allowing opponents of the petition to have full party status, would raise a due process problem.

