Exhibit GLH-18

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF

Hydro Kennebec Limited Partnership	)	Petitions for Modification,
Waterville and Winslow, Kennebec Co.	)	Revocation, or Suspension
#L-11244-35-A-N	)	

AFFIDAVIT OF MATTHEW D. MANAHAN

1. My name is Matthew D. Manahan. I received an A.B. degree from Bowdoin College in Brunswick, Maine in 1986 and a J.D. from Cornell University in 1989. In 1989, I joined the law firm of Pierce Atwood LLP and currently am a partner in its Environmental Practice Group. I also am the chair of its Hydropower Team.

2. I have focused my legal practice in the area of environmental law for over 17 years (since 1989). I represent clients in the area of hydropower licensing and other hydropower regulatory issues, including water quality certifications.

3. I served as counsel of record for S.D. Warren Co. before the Maine Supreme Judicial Court in *S.D. Warren Co. v. Board of Environmental Protection*, 2005 ME 27 (February 15, 2005), and then as counsel of record in the subsequent proceedings before the U.S. Supreme Court, which issued its decision on May 15, 2006.

4. Attached hereto as Exhibit GLH-19 is my analysis of the legal arguments presented in the Testimony of Petitioners Douglas H. Watts and Friends of Merrymeeting Bay, both dated January 17, 2007, which constitutes my sworn pre-filed rebuttal testimony in this matter.

Matthew D. Manahan

Date: February 7, 2007

STATE OF MAINE
Cumberland, ss. February 7, 2007

Personally appeared the above-named Matthew D. Manahan before me, and swore to the truth of the above statements and information based upon his information and belief, which information he believes to be true.

Notary Public

Print Name:

DIANNE C. URSIA

My commission expires:

4/16/13

Exhibit GLH-19

ANALYSIS OF
PRE-FILED DIRECT TESTIMONY OF PETITIONERS
DOUGLAS H. WATTS AND FRIENDS OF MERRYMEETING BAY

BY MATTHEW D. MANAHAN
FEBRUARY 7, 2007

I. Introduction

On January 17, 2007, Petitioners Douglas H. Watts ("Watts") and Friends of Merrymeeting Bay ("FOMB") submitted their pre-filed direct testimony in support of their petitions to modify, revoke, or suspend the water quality certification for the Hydro-Kennebec Project, which is owned by Hydro-Kennebec Limited Partnership ("HKLP"). Because much of their testimony presents their legal interpretation of the requirements of Maine's water quality laws, as those laws relate to the provision of fish passage facilities at hydropower projects, HKLP has asked me to provide an analysis of Maine's water quality requirements with respect to fish passage at hydropower projects.

As I will discuss in detail below, Petitioners have failed to demonstrate (1) that the Hydro-Kennebec certification does not include any standard or limitation legally required on the date it was issued, or (2) that HKLP has violated any law administered by DEP.

II. Petitioners' Testimony

In their testimony, Petitioners present two water quality-related arguments in a variety of different forms. In one argument, they assert that the operation of the Hydro-Kennebec facility does and will kill eels and anadromous fish, thus violating Maine's water quality standards. In the other argument, they assert that the existence of the project blocks the passage of eels and anadromous species, thus violating the State's water quality standards -- particularly the

standards for aquatic habitat. Consequently, the Petitioners assert, the DEP issued the water quality certification for the Hydro-Kennebec Project in violation of Maine's water quality laws, and HKLP is in violation of Maine's water quality laws.

Petitioners' testimonies also address whether the BEP has the authority to modify, revoke, or suspend the water quality certifications subject to this proceeding. FOMB argues that 38 M.R.S.A. § 341-D(3) gives the BEP such authority. FOMB also argues that the certifications and FERC licenses for the four Kennebec River projects at issue here contain reopeners.

Consequently, Petitioners request immediate (the date this certification is approved by the BEP), "safe" (all fish migrating upstream can pass the dam and no fish migrating downstream are killed or injured by the dam), and "effective" upstream and downstream passage for all indigenous migratory species, including shad, Atlantic salmon, alewife, blueback herring, American eel, and sea lamprey.[1]

III. Maine's Water Quality Laws

Title 38 M.R.S.A. § 465 identifies four classes of waters – AA, A, B, and C – and for each class provides "a list of designated uses, a set of numerical criteria for water chemistry (dissolved oxygen and bacteria counts), and a set of narrative criteria on the permissible level of pollutant discharges." *Bangor Hydro-Electric Co. v. BEP*, 595 A.2d 438, 442 (Me. 1991) (see Exhibit GLH-20). The Kennebec River in the vicinity of the Hydro-Kennebec facility is classified as Class C. 38 M.R.S.A. §§ 467(4)(A)(10). Section 465 provides that Class C waters "shall be of such quality that they are suitable for the designated uses of drinking water supply after treatment; fishing; recreation in and on the water; industrial process and cooling water

[1] Watts, at ¶ 1; FOMB, at ¶ 2. The testimony of Petitioner Watts is the first time in this proceeding in which either Petitioner has requested fish passage for sea lamprey. The BEP's determination to hold a public hearing was based on evidence on which Petitioners stated they would rely only with respect to Atlantic salmon, shad, alewives, blueback herring, and American eel.

supply; hydroelectric power generation, except as prohibited under Title 12, section 403; and navigation; and as a habitat for fish and other aquatic life." 38 M.R.S.A. § 465(4)(A). Section 465 also provides that "discharges to Class C waters may cause some changes to aquatic life, except that the receiving waters must be of sufficient quality to support all species of fish indigenous to the receiving waters . . . ."

A. The *Warren* Decision

The Petitioners focus on the designated use prong of Class C waters to support their argument that the water quality certification and the Hydro-Kennebec facility violate Maine's water quality laws. *S.D. Warren Co. v. Board of Environmental Protection*, 2005 ME 27 (February 15, 2005) (see Exhibit GLH-21), the Maine Supreme Judicial Court (the "SJC") decision relied on by Petitioners, discussed the designated use prong of the standard for each class of waters. In *Warren* the SJC repeated its earlier statement, in its 1991 *Bangor Hydro* decision, that the "Legislature's purpose for the language 'suitable for the designated uses' was 'that the designated uses actually be present.'"[2] The SJC further repeated that "when those uses are not presently being achieved, the Legislature intended that the quality of the water be enhanced so that the uses are achieved."[3]

The SJC in *Warren* stated that "[w]hether compliance has been achieved and whether the conditions imposed are necessary to ensure future compliance are factual determinations to be made by the BEP." With respect to S.D. Warren's hydropower facilities on the Presumpscot River, the SJC then relied on the BEP's factual determination that compliance had not been

[2] *Warren*, 2005 ME 27, ¶ 21, 868 A.2d at 217-18. It is unlikely that the SJC meant that every designated use must always be present. Section 465(4)(A) identifies a host of designated uses for Class C waters, including uses for drinking water supply after treatment, fishing, recreation, industrial cooling water, and hydroelectric power generation. It is doubtful that the Legislature intended that each of those designated uses – such as industrial cooling water – must be present in order for the water to meet the applicable water quality standard. Thus, most likely the Law Court meant that the DEP could require that the designated use must be present in order to provide the factual evidence needed to demonstrate that the water is of such quality that it is suitable for the designated use.

achieved in that case and that the conditions imposed were necessary to ensure future compliance. The SJC found that S.D. Warren had not sufficiently challenged those factual determinations.[4]

Contrary to the implications of Petitioners' testimony, the *Warren* decision did not hold that immediate installation of fish passage facilities was required to achieve compliance with Maine's water quality standards.[5] The *Warren* decision also did not hold that fish passage at hydropower projects must result in zero fish mortality or injury in order for a hydropower project to be in compliance with water quality standards. Finally, by stating that whether compliance with water quality standards has been achieved is a factual determination to be made by the BEP, the *Warren* decision rejected the notion that what is required for fish passage at one hydropower project is required at all hydropower projects. This is because the applicable standard is that the water must be of such quality that it is suitable for the designated use, and, to demonstrate "suitability," the *Bangor Hydro* case held that the DEP may require that the use be present in the water. The *Warren* case held that it is up to the BEP to determine if the evidence demonstrates that the use is present in the water. Thus, if the facts show that a certain type of fish passage is needed to ensure that the designated use of fish habitat is present in the water, then the DEP may require that type of fish passage. On the other hand, if the facts show that the designated use of fish habitat is already present in the water, then fish passage is not needed to meet the water quality standard.

---

[3] *Id.*

[4] The SJC in *Warren* confirmed that the BEP's findings must be based on substantial record evidence, and the Court will overturn them only if the appellant can show that they are clearly erroneous. *Warren*, 2005 ME 27, ¶ 22, n.10.

[5] The water quality certification for the S.D. Warren projects, which the SJC upheld, does not require immediate installation of fish passage facilities for anadromous species at S.D. Warren's dams.

B. Compliance With Maine's Water Quality Standards Does Not Require That Hydropower Projects Must Pass All Native Migratory Species With No Mortality or Injury.

Although there is no evidence that the turbines of the Hydro-Kennebec facility result in eel or anadromous fish mortality or injury, even if there were such mortality or injury it would not mean that the Hydro-Kennebec facility causes the Kennebec River to fail to meet the fish habitat standard. First, under Petitioners' argument -- that fish mortality or injury means that the waters are not suitable for fish habitat and that by blocking fish from migrating upstream dams cause a violation of water quality standards -- every hydroelectric facility in Maine, even those that have state-of-the-art fish passage, would cause the water to fail to meet aquatic habitat standards. Petitioners have not presented any site specific evidence of fish mortality or injury, but they instead argue that all dams kill and block fish. In essence, Petitioners are arguing that the only way to achieve compliance with aquatic habitat standards is to have entirely dam-free rivers.[6]

Maine's water quality laws for Class A, B, and C waters, however, provide that the waters must be suitable for the designated use of hydroelectric power generation.[7] In addition, the Legislature, when it enacted the Maine Waterway Development and Conservation Act to allow for the construction of new and modified hydropower projects, found that hydropower projects can augment downstream flow to improve fish and wildlife habitats, water quality, and recreational opportunities."[8] Petitioners' argument results in the "paradoxical proposition" (in

[6] At FOMB ¶ 27, FOMB compares the effects of dams blocking fish passage and the effectiveness of trap and truck to a "no dam" condition.
[7] 38 M.R.S.A. § 465(2)-(4).
[8] 38 M.R.S.A. § 631(1)(B).

Mr. Watts's words) that the Legislature's intent in allowing – and encouraging – hydroelectric power generation on Class A, B, and C waters could not be effectuated.[9]

Second, as noted above, *Warren* did not address whether or at what point mortality or injury to fish at a hydroelectric project may be a violation of water quality standards. DEP, however, has interpreted the aquatic habitat "suitability" standard to limit such mortality or injury to a reasonable amount, based on input from state and federal fisheries management agencies.[10] When the DEP issued the water quality certification for the Hydro-Kennebec facility in 1998, it found that compliance with water quality standards would be achieved through the imposition of the conditions contained in the KHDG Agreement, because they imposed reasonable timelines for the construction of fish passage facilities, based on reasonable fish management goals set by the fisheries management agencies. Thus, even though the DEP's water quality certification for the facility pre-dated the *Warren* decision, the certification contains conditions to ensure compliance, as permitted and contemplated by *Warren*.

C. DEP's Actions with Respect to Fish Mortality or Injury at Other Projects

The Petitioners point to water quality certifications issued by the DEP for other hydroelectric facilities as evidence that the DEP is inconsistent in its interpretation of Maine's water quality laws and therefore the water quality certification in this case is unlawful.[11]

For instance, Petitioners note that the water quality certification at issue in the *Warren* proceeding requires nighttime shutdowns to accommodate downstream migrating American eel, that the DEP required the owners of the American Tissue dam to stop nighttime generation to

---

[9] On the other hand, the Legislature did not include hydroelectric generation as a designated use on Class AA waters and outstanding rivers and river segments as specified in 12 M.R.S.A. § 403.

[10] Because the evidence in this proceeding does not demonstrate that the Hydro-Kennebec Project has caused any significant injury or death to fish at the Hydro-Kennebec Project, and because the DEP reasonably relied on the fisheries management agencies to conclude to the contrary, the Board does not need to reach the issue of whether the water quality standard prohibits activities that result in significant fish mortality or injury. HKLP preserves the argument, however, that the water quality standards do not contain such a prohibition.

prevent further eel mortality, and that the DEP fined the owners of the Benton Falls dam for causing a fish kill of alewives. But the fact that other certifications require nighttime shutdowns or that DEP has taken enforcement action when there has been clear evidence of significant fish mortality at a particular project does not mean that this water quality certification is unlawful or that HKLP is operating the facility in violation of Maine's water quality laws. In accordance with the *Warren* decision, what is required with respect to one hydroelectric facility to ensure compliance with water quality standards may not be necessary or appropriate at another hydroelectric facility.

Furthermore, the Petitioners have misconstrued the DEP's findings with respect to the American Tissue and Benton Falls dams.[12] In referring to a "Cease and Desist Order" for the American Tissue Dam, Mr. Watts appears to be referring to a letter from DEP to the dam owner in which the DEP thanks the dam owner for taking corrective action and requests that the dam owner continue to take corrective action to prevent fish mortality due to downstream migration. The DEP stated its position that the dam owner "is in violation of 38 M.R.S.A. § 464 for rendering the receiving waters 'unsuitable as habitat for fish and other aquatic life.' *Our position is supported by the ongoing fish kill and evidence of other significant fish kills that occurred at the facility* over the past several years" (emphasis added). In a follow-up letter to Petitioner Watts on this matter, the DEP noted that it could not take enforcement action because there was no certification to enforce. DEP further noted that if the dam owner did not continue to take corrective actions to minimize impacts to fish migration, DEP, in consultation with the Attorney General's Office would choose more aggressive options. See GLH-22 for copies of both letters.

---

[11] Watts, at ¶ 28-32, 54, 72-73; FOMB at ¶ 8.

[12] Only Petitioner Watts presents testimony on the American Tissue dam. His testimony with respect to that dam and any arguments made in reliance thereon should be treated with skepticism because he does not include in their entirety the DEP letters from which he quotes.

With respect to Benton Falls, in the Administrative Consent Agreement and Enforcement Order included as FOMB-2, DEP found that the dam owner had violated the MWDCA permit and water quality certification for the project because it had failed to adhere to the requirements of the DEP-approved downstream fish operating plan for the project.[13] "As a result, *a significant number of juvenile alewives were killed on injured in attempting to migrate downstream*" (emphasis added). Thus, DEP issued a Notice of Violation, which led to the Administrative Consent Agreement and Enforcement Order. In other words, in both cases DEP took the position that water quality standards were violated and took action when it found that there was a significant fish kill caused by the project.

There is no specific evidence with respect to the Hydro-Kennebec Project that there has been any fish mortality or injury, much less significant fish mortality or injury. Importantly, the fisheries management agencies agree that the progress being made on fish passage at the Hydro-Kennebec Project is appropriate.

In accordance with *Warren*, DEP is responsible for making the factual determination of whether conditions should be imposed to ensure compliance with water quality standards. *Warren* also requires that there be substantial evidence in the DEP's record to support its factual determination. Thus, when a water quality standard, such as the suitability of the water for fish habitat, is based on fishery resource needs, DEP should look to the state fishery agencies' assessment of appropriate conditions, and whether there is compliance with those conditions, for fisheries' management, conservation, and restoration. That is what DEP did with respect to the

[13] According to the Consent Agreement, the operating plan required the dam owner to check downstream passage twice per day, or more frequently during heavy run-off, to keep the fish passage intake free from debris, and to operate the downstream fish passage facilities 24 hours a day from June 15 to November 30. The DEP found that the dam owner failed to adhere to these conditions on at least two occasions in 1999.

water quality certification for the Hydro-Kennebec facility and the other three dams subject to these petitions.

IV. The Legal Effect of Modification of a Water Quality Certification

Petitioners' testimonies also address whether the BEP has the authority to modify, revoke, or suspend the water quality certifications subject to this proceeding. FOMB argues that 38 M.R.S.A. § 341-D(3) gives the BEP such authority.[14]

While the BEP possesses the authority to modify a license if the statutorily established criteria are satisfied, such action has no effect with respect to a water certification that does not include a reopener, or one whose reopener condition has not been included in the federal license for which the certification was issued. This is because the purpose of the certification is to allow the federal agency to issue a permit for an activity that may result in a discharge into navigable waters. *See* 33 U.S.C. § 1341(a). If the state issues the certification its conditions generally are incorporated into the conditions of the federal license. Once the federal agency issues its license the certification has no further effect independent of the federal license, and it is the federal licensing agency that has regulatory oversight over the conditions contained in its license, including the conditions incorporated from the certification, as provided by the terms of the federal license.[15]

In this case there are two reasons modification of the certification would have no effect. First, the Hydro-Kennebec Project's certification does not contain a reopener authorizing the

[14] FOMB, at ¶¶ 12-15; Watts, at ¶ 70.

[15] Section 401(a)(5) provides that the federal license (in this case, the FERC license) for which the certification was issued may be suspended or revoked by the federal agency – not the state – if a judgment is entered that the licensed activity violates specified provisions of the CWA. 33 U.S.C. § 1341(a)(5). Although CWA Section 401(d) allows states to include conditions to ensure that the federally-permitted activity will comply with state water quality standards, those conditions are enforceable by the federal agency, not by the state. *See* 33 U.S.C. § 1341(d), *Great Northern Paper, Inc.*, 77 F.E.R.C. ¶ 61,066 (1996) ("once a state has issued certification, the Clean Water Act contemplates no further role for the state in the process of issuing, and ensuring compliance with the terms of, a federal license, except in specified circumstances where a new certification is required").

state to modify some or all of its conditions.[16] FOMB argues that the certifications at issue here contain a "reopener" clause with respect to eel passage. The condition FOMB references, however, simply acknowledges that any consulting party may petition for appropriate conditions relating to eel passage if no consensus on eel passage measures has been reached by June 30, 2002.[17] That condition is **not** a "reopener" because it does not give DEP any authority to change the certification in any way.

Second, FERC did not incorporate the certification conditions into the FERC license for the Hydro-Kennebec Project. Instead, FERC simply amended the project license "to include the fish passage requirements set forth in the 1998 KHDG Agreement." See FERC's 1998 order at Exhibit GLH-23, ordering paragraph D (page 14). Thus, modifying the certification would have no effect on the FERC license.

The limited authority of the Board in this case is an additional reason to Board should defer to the determinations of the fisheries management agencies.

V. Conclusion

Petitioners have failed to demonstrate (1) that the Hydro-Kennebec certification does not include any standard or limitation legally required on the date it was issued, or (2) that HKLP has violated any law administered by DEP, because:

- The *Warren* decision did not hold that immediate installation of fish passage facilities is required to achieve compliance with Maine's water quality standards.

[16] BEP has acknowledged that, "in the absence of specific relevant reopeners in water quality certifications," the legal effect of a BEP attempt to modify a certification "is highly questionable." *Findings of Fact and Order Re: Petitions for Revocation, Modification, or Suspension Filed by Friends of Merrymeeting Bay and Douglas H. Watts,* Maine Board of Environmental Protection, February 2, 2006, at p. 24.
[17] FOMB, at ¶ 15.

- The *Warren* decision did not hold that fish passage at hydropower projects must result in zero fish mortality or injury in order for a hydropower project to be in compliance with water quality standards.
- The *Warren* decision rejected the notion that what is required for fish passage at one hydropower project is required at all hydropower projects.
- The applicable water quality standard is that the water must be of such quality that it is suitable for the designated use, and, to demonstrate "suitability," the *Bangor Hydro* case held that the DEP may require that the use be present in the water. The *Warren* case held that it is up to the BEP to determine if the evidence demonstrates that the use is present in the water.
- If the facts show that a certain type of fish passage is needed to ensure that the designated use of fish habitat is present in the water, then the DEP may require that type of fish passage. On the other hand, if the facts show that the designated use of fish habitat is already present in the water, then fish passage is not needed to meet the water quality standard.
- In accordance with *Warren*, DEP is responsible for making the factual determination of whether conditions should be imposed to ensure compliance with water quality standards. *Warren* also requires that there be substantial evidence in the DEP's record to support its factual determination. Thus, when a water quality standard, such as the suitability of the water for fish habitat, is based on fishery resource needs, DEP should look to the state fishery agencies' assessment of appropriate conditions, and whether there is compliance with those conditions, for fisheries' management, conservation, and restoration.

- When the DEP issued the water quality certification for the Hydro-Kennebec Project in 1998, it found that compliance with water quality standards would be achieved through the imposition of the conditions contained in the KHDG Agreement, because they imposed reasonable timelines for the construction of fish passage facilities, based on reasonable fish management goals set by the fisheries management agencies. That is all the law requires.

In addition, the Board does not have authority to modify the Hydro-Kennebec certification because it does not contain a reopener condition that has been incorporated into the FERC license for the project.

Maine Supreme Judicial Court Reports

BANGOR HYDRO-ELECTRIC v. BD. OF ENV. PROT., *595 A.2d 438* (Me. 1991)

BANGOR HYDRO-ELECTRIC COMPANY, ET AL. v. BOARD OF ENVIRONMENTAL PROTECTION.

Supreme Judicial Court of Maine.

Argued May 1, 1991.

Decided July 30, 1991.

Appeal from the Superior Court, Kennebec County, Alexander, J.
Page 439

[EDITORS' NOTE: THIS PAGE CONTAINS HEADNOTES. HEADNOTES ARE NOT AN OFFICIAL PRODUCT OF THE COURT, THEREFORE THEY ARE NOT DISPLAYED.]
Page 440

Michael E. Carpenter, Atty. Gen., Thomas Harnett, Asst. Atty. Gen. (orally), Augusta, for appellant.

Jeffrey D. Thaler, Berman, Simmons & Goldberg, Lewiston, Joanne Freund Lesher, Boston, Mass., Todd R. Burrowes, Falmouth, for Amici Curiae Conservation Law Foundation, Maine Audubon Soc.

Robert G. Dreher, Deborah S. Smith, Sierra Club Legal Defense Fund, Inc., Washington, D.C., for amici curiae Atlantic Salmon Federation, American Rivers, and Sierra Club.

Virginia E. Davis (orally), John P. McVeigh, Joseph Donahue, Preti, Flaherty, Beliveau & Pachios, Augusta, for appellee.

Gordon H.S. Scott (orally), Eaton, Peabody, Bradford & Veague, Augusta, for Nat. Hydropower Assoc.

William Laubenstein, Sarah Verville, Augusta, for intervenor Central Maine Power Co.

Before ROBERTS, WATHEN, GLASSMAN, CLIFFORD and COLLINS, JJ.

ROBERTS, Justice.

The Board of Environmental Protection (the Board) appeals from a judgment of the Superior Court (Kennebec County, *Alexander, J.*) vacating the Board's denial of water quality certification for the Milford Hydroelectric Project (the Project) operated by Bangor Hydro-Electric Company (Bangor Hydro) on the Penobscot River. The principal issue on appeal is whether the Board exceeded its authority under the water classification statute, **38 M.R.S.A. § 464**(4)(F)(3) (1989),**[fn1]** in seeking to examine the fish passage and recreation facilities planned to meet designated uses, rather than limiting its certification to the Project's compliance with numerical standards for water chemistry. We hold that the Board's requests for information did not go beyond the scope of the water quality standards then applicable to the Penobscot River. **38 M.R.S.A. § 465**(4) (1989).**[fn2]**

Page 441
Bangor Hydro supplied some of this information too late to allow review and never supplied other portions of it. Accordingly, we vacate the judgment of the Superior Court and reinstate the Board's order denying certification without prejudice to Bangor Hydro's right to reapply.

I.

This litigation arises from Bangor Hydro's efforts to obtain a new, forty-year operating license for the Project from the Federal Energy Regulatory Commission (FERC) to replace a license that expired on December 31, 1990.**[fn3]** While FERC is the licensing authority under the Federal Power Act, 16 U.S.C.A. § 797(e) (Supp. 1991), the state must provide certification of compliance with its water quality standards under section 401(a) of the Federal Water Pollution Control Act, 33 U.S.C.A. § 1341(a)(1986), as a prerequisite to the issuance of a license. State resource agencies also provide consultation to support FERC's decision. *See* 16 U.S.C.A. § 803(j) (Supp. 1991).

In December, 1986 Bangor Hydro began the consultations with state agencies required for FERC relicensing. The Department of Environmental Protection (DEP) commented that the Project currently met the Class C water chemistry standards and that Bangor Hydro should coordinate its impact studies with other agencies. The Atlantic Sea Run Salmon Commission, Department of Inland Fisheries and Wildlife, Department of Marine Resources, and Penobscot Indian Nation expressed continuing concerns about plans for anadromous fish passage facilities and about the impact of the Project on water quality in the Stillwater River. These concerns remained unresolved after Bangor Hydro's second stage of consultation and meetings with the agencies in March, 1988 and November, 1988. The Penobscot Indian Nation also raised concerns about the Project's impact on recreational access to the river. On March 31, 1989 FERC accepted Bangor Hydro's relicensing application for processing subject to the provision that additional information would be furnished within 180 days on thirteen topics identified from state agency comments. Bangor Hydro was required to submit this additional information to the Board as well as to FERC.

On December 28, 1988 Bangor Hydro filed with the Board the application for state water quality certification that led to this appeal. The application relied entirely upon Bangor Hydro's FERC relicensing application to describe planned water quality protection measures. DEP circulated the certification application to the state agencies, which reiterated the concerns they had raised in the FERC consultations. On August 1, 1989 DEP forwarded these agency comments to Bangor Hydro, requesting response within thirty days. After receiving an extension to October 31, Bangor Hydro finally filed its response to the agency comments on November 13, 1989. At the same time Bangor Hydro filed a partial response to the FERC information request, due September 30. In its response Bangor
Page 442
Hydro requested an additional sixty days to provide its plans for fish passage facilities and an indefinite postponement of its study of the Stillwater River.

DEP notified Bangor Hydro that there was insufficient information for water quality certification and insufficient time to review the submittals before certification would be waived under a one year federal deadline. Bangor Hydro declined to withdraw its application and resubmit it to restart the one year review period. On December 13, 1989 the Board met and voted unanimously to deny water quality certification without prejudice to Bangor Hydro's right to reapply. Bangor Hydro filed a timely appeal in the Superior Court where two additional parties, Central Maine Power Company and the National Hydropower Association, were granted leave to intervene on the issue of federal preemption of the Board's authority. The court agreed with Bangor Hydro's arguments and ordered that the Board issue water quality certification. The court also entered a declaratory judgment limiting the scope of certification to the numerical water quality standards of section 465(4)(B). This appeal followed.

II.

The water standards for each class of Maine waters contain three parts: a list of designated uses, a set of numerical criteria for water chemistry (dissolved oxygen and bacteria counts), and a set of narrative criteria on the permissible level of pollutant discharges. *See* **38 M.R.S.A. § 465**(4)(A), (B), & (C). For Class C waters the designated uses include fishing, recreation, and habitat for fish and other aquatic life, in addition to hydroelectric power generation. The statute provides that the waters "shall be of such quality that they are suitable for the designated uses. . . ." *Id.* § 465(4)(A). Bangor Hydro contends that there is an irrebuttable presumption that waters are "suitable for" their designated uses if they meet the numerical criteria of section 465(4)(B) and that the Board has no charter to inquire whether the designated uses actually exist, or can exist, in a river. We disagree.

In interpreting a statute we seek first to ascertain the real purpose of the legislation, *State v. Niles,* **585 A.2d 181**, 182 (Me. 1990), discerning this purpose if possible from the plain meaning of the language. *Paradis v. Webber Hospital,* **409 A.2d 672**, 675 (Me. 1979). We cannot conclude that the designated uses included in section 465 are mere surplusage. The level of detail bespeaks a considered determination of the public interest. This legislative determination would be rendered a nullity if the agency responsible for reviewing compliance could consider only the numerical criteria and not whether the designated uses actually were achieved in a particular river.**[fn4]** Although there may be some ambiguity in the requirement that waters be "suitable for" the designated uses, we conclude that this language contemplates that the designated uses actually be present. Our interpretation is reinforced by the legislative history, which reveals an intent that designated uses "are supported" in water meeting the classification standards. *See* Report of the Joint Standing Committee on Energy and Natural Resources, on Water Reclassification 6, 10, 80 (March, 1986) (hereinafter *Committee Report*).

The classification statute recognizes that all water quality standards may not be achieved at a given time and includes the intent "where water quality standards are not being achieved, to

enhance water quality." **38 M.R.S.A. § 464**(1) (1989).**[fn5]** The designated uses provide goals for the
Page 443
state's management of its classified waters.**[fn6]** We hold that it is proper for the Board to consider such goals in reviewing a forty year license for compliance with the classification standards pursuant to section 464(4)(F)(3).**[fn7]**

We need not decide in this appeal to what extent the Board may condition water quality certification upon measures designed to promote the future attainment of designated uses. In the present posture of Bangor Hydro's application the Board has merely sought information about its planned mitigation measures. Those measures clearly bear on the attainment of the designated uses of fishing, recreation, and fish habitat. Based upon the concerns raised by several agencies on the record, the Board had adequate evidence to support a conclusion that such information should be included in its certification review. *See Gulick v. Board of Envtl. Protection,* **452 A.2d 1202**, 1209 (Me. 1982). Because Bangor Hydro did not provide the information within the time allotted for review the Board properly denied certification. *Long Lake Energy Corp. v. New York State Department of Envtl. Conservation,* **164 A.D.2d 396**, ___, **563 N.Y.S.2d 871**, 875-76 (N.Y.App. Div. 1990).

III.

The arguments of Bangor Hydro and the intervenors that Board action is preempted by FERC's broad jurisdiction likewise is pretermitted by the preliminary nature of the Board's denial. In the overlapping schemes of the Federal Power Act and the Federal Water Pollution Control Act, the Board's veto is confined to the narrow question whether there is a reasonable assurance that the Project will comply with state water quality standards. *Arnold Irrigation Dist. v. Department of Envtl. Quality,* **79 Or. App. 136**, 140-41, **717 P.2d 1274**, 1278 (1986); *Power Auth. v. Williams,* **60 N.Y.2d 315**, 324-27, **457 N.E.2d 726**, 729-30, **469 N.Y.S.2d 620**, 624 (1983). But the Board's information requirements were based upon designated uses that we hold are an integral part of the state water quality standards. The Board was within its jurisdiction in reviewing Bangor Hydro's measures for future compliance with those standards under section 401(a) of the Federal Water Pollution Control Act, 33 U.S.C.A. § 1341(a)(1986). Because the Board has had no opportunity to set any conditions of certification the question whether it has exceeded its jurisdiction under section 401(d), 33 U.S.C.A. § 1341(d), is not before us.

Bangor Hydro also contends that its right to due process was violated because the Board never requested the information that Bangor Hydro failed to provide. The record reveals two years of preliminary consultations in which several state agencies raised concerns about the details of the planned fish passage facilities and the Project's long term impact on the Stillwater River. Bangor Hydro's application for water quality certification relied almost entirely upon its FERC relicensing application for technical detail. Both the FERC information request of March, 1989 and the certification comments of August, 1989 reiterated the prior state agency comments. Bangor Hydro had ample notice of the state's concerns and must have known that section 401(a),

33 U.S.C.A. § 1341(a), required a certification decision by December, 1989. As the applicant Bangor Hydro had the duty to provide the requested information in time to enable review. Its submittals were made just before the deadline and much of the required information never was provided. We conclude that Bangor Hydro's due process argument is without substance. No other issue raised by Bangor Hydro in this appeal merits further discussion.
Page 444

The entry is:

Judgment vacated.

Case remanded with direction to enter a judgment affirming the decision of the Board of Environmental Protection.

[fn1] At the time of Bangor Hydro's application for water quality certification the water classification statute provided in pertinent part:

> (3) the board may only issue a discharge license pursuant to section 414-A or approve water quality certification pursuant to the United States Clean Water Act, Section 401, Public Law 92-500, as amended [33 U.S.C.A. § 1341] if the standards of classification of the water body and the requirements of this paragraph will be met.

38 M.R.S.A. § 464(4)(F)(3) (1989). Subsequent amendments to this provision are not applicable to Bangor Hydro's petition. **1 M.R.S.A. § 302** (1989).

[fn2] At the time of Bangor Hydro's application the Penobscot's waters were designated as Class C in the vicinity of the Project. **38 M.R.S.A. § 467**(7)(A)(1) (1989). The water quality standards for Class C water were as follows:

> **4. Class C waters.** Class C shall be the 4th highest classification.
>
> **A.** Class C waters shall be of such quality that they are suitable for the designated uses of drinking water supply after treatment; fishing; recreation in and on the water; industrial process and cooling water supply; hydroelectric power generation, except as prohibited under Title 12, section 403; and navigation; and as a habitat for fish and other aquatic life.
>
> **B.** The dissolved oxygen content of Class C water shall be not less than 5 parts per million or 60% of saturation, whichever is higher, except that in identified salmonid spawning areas where water quality is sufficient to ensure spawning, egg incubation and survival of early life stages, that water quality sufficient for these purposes shall be maintained. Between May 15th and September 30th, the number of Escherichia coli bacteria of human origin in these waters may not exceed a geometric mean of 142 per 100 milliliters or an instantaneous level of 949 per 100 milliliters. The department shall promulgate rules governing the procedure for designation of spawning areas. Those rules shall include provision for periodic review of designated spawning areas

and consultation with affected persons prior to designation of a stretch of water as a spawning area.

C. Discharges to Class C waters may cause some changes to aquatic life, provided that the receiving waters shall be of sufficient quality to support all species of fish indigenous to the receiving waters and maintain the structure and function of the resident biological community. **38 M.R.S.A. § 465**(4) (1989). The river has since been upgraded to Class B in the vicinity of the Project. **38 M.R.S.A. § 467**(7)(A)(4) (Supp. 1990).

[fn3] Bangor Hydro simultaneously sought the Board's approval under the Maine Waterway Development and Conservation Act, 38 M.R.S.A. § 630-637 (1989 & Supp. 1990) (MWDCA) to install an additional turbine in the Project. The Board tabled the MWDCA permit application pending resolution of the water quality certification issue and that application is not before us. We note that the Public Utilities Commission granted its approval for this expansion in a separate proceeding. *Bangor Hydro-Electric Co. v. Public Utilities Commission,* **589 A.2d 38**, 40 n. 2 (Me. 1991).

[fn4] Focusing solely on the numerical criteria also would ignore the statute's narrative criteria, which include a requirement for waters "of sufficient quality" to support all indigenous fish species, **38 M.R.S.A. § 465**(4)(C) (1989), separately defined to include those species that historically were present. *Id.* § 466(8). The statutory statement of purpose suggests the intent to include the narrative criteria as an integral part of the water quality standards that the Board must consider in its review. *Id.* § 464(1)(C).

[fn5] *See Committee Report* at 5 ("resolve of Legislature to improve, where appropriate, the waters of the State over the course of time").

[fn6] *See Committee Report* at 6 (classification serves purpose of establishing water quality goals); Joint Standing Committee on Energy and Natural Resources, hearing on L.D. 1503, at 3 (May 20, 1985) (testimony of H. Warren, DEP Commissioner) (classification is goal oriented as required by federal Clean Water Act).

[fn7] The Project's compliance with the state antidegradation policy, section 464(4)(F)(1), is not challenged.

Maine Supreme Judicial Court Reports

S.D. WARREN v. BD. OF ENVIRONMENTAL PRO., *2005 ME 27*

868 A.2d 210

S.D. WARREN COMPANY v. BOARD OF ENVIRONMENTAL PROTECTION.

Docket: Cum-04-314.

Supreme Judicial Court of Maine.

Argued: November 16, 2004.

Decided: February 15, 2005.

Appeal from the Superior Court, Cumberland County, Cole, J.
Page 211

[EDITORS' NOTE: THIS PAGE CONTAINS HEADNOTES. HEADNOTES ARE NOT AN OFFICIAL PRODUCT OF THE COURT, THEREFORE THEY ARE NOT DISPLAYED.]
Page 212

Matthew D. Manahan, Esq. (orally), Catherine R. Connors, Esq., Pierce Atwood, LLP, Portland, for plaintiff.

G. Steven Rowe, Attorney General, Carol A. Blasi, Asst. Atty. Gen. (orally), Augusta, for defendant.

Sean Mahoney, Esq. (orally), Verrill & Dana, LLP, Portland, Ronald A. Kreisman, Esq., Hallowell, for intervenors American Rivers and Friends of the Presumscot River.

Panel: SAUFLEY, C.J., and CLIFFORD, RUDMAN, ALEXANDER, CALKINS, and LEVY, JJ.

RUDMAN, J.

[¶ 1] S.D. Warren Company appeals from a judgment entered in the Superior Court (Cumberland County, *Cole, J.*), affirming the decision of the Board of Environmental Protection (BEP) approving Warren's application for water quality certification pursuant to section 401 of the Clean Water Act (CWA) of 1972,
Page 213
33 U.S.C.A. § 1341 (West 2001), and **38 M.R.S.A. § 464** (2001 & Supp. 2004), subject to certain conditions imposed by the BEP pursuant to section 401(d) of the CWA. **33 U.S.C.A. § 1341**(d). Warren asserts that the BEP's order should be reviewed de novo without deference to its legal interpretations; that the BEP exceeded its authority when it found that certification was required under the CWA; and that the BEP exceeded its authority when it imposed the specific conditions that it did. We disagree and affirm the judgment of the Superior Court.

I. BACKGROUND

[¶ 2] Warren owns and operates five contiguous hydroelectric

dam projects on the Presumpscot River in Cumberland County. The waters involved in Warren's projects are variously classified as Class A (from the outlet of Sebago Lake to its confluence with the Pleasant River, excluding Dundee Pond), Class B (from its confluence with the Pleasant River to Saccarappa Falls), Class C (from Saccarappa Falls to tidewater), and Class GPA (Dundee Pond). The projects have a combined generating capacity of 7450 kW and provide electricity for Warren's paper mill in Westbrook. The projects operate in the run-of-river mode.**[fn1]**

[¶ 3] All of the projects were constructed in the 1900s. The projects were originally licensed separately between 1979 and 1981. The licenses were to expire in 1999, but were modified in 1996 to continue until 2001. Applications for certification were filed in 1999, subsequently withdrawn and refiled in 2000, 2001, and 2002. In April of 2003 the Department of Environmental Protection (DEP) approved water quality certification for the continued operation of Warren's projects, subject to a number of conditions. In May of 2003 Warren filed a timely appeal from the DEP's decision to the BEP. The BEP adopted the findings of the DEP and affirmed the decision of the DEP in October of 2003. Warren appealed from the decision of the BEP to the Superior Court, which affirmed the decision of the BEP in May of 2004. Warren now appeals from that judgment.

II. DISCUSSION

A. Standard of Review

[¶ 4] We review decisions made by an administrative agency for errors of law, abuse of discretion, or findings of fact not supported by the record.**[fn2]** *Melanson v. Sec'y of State*, **2004 ME 127**, ¶¶ **7-8**, **861 A.2d 641**, **643-44**. When the Superior Court acts in an intermediate appellate capacity pursuant to M.R. Civ. P. 80C, we review that agency's decision directly. *Id.*"The administrative agency's interpretation of a statute administered by it, while not conclusive or binding on this court, will be given great deference and should be upheld unless the statute plainly compels a contrary result." *Thacker v. Konover*, **2003 ME 30**, ¶ **14**, **818 A.2d 1013**, **1019** (citations and quotation marks omitted).

B. Deference to BEP

[¶ 5] Warren asserts that the BEP is not entitled to deference when it interprets

Page 214

the CWA because it is interpreting federal law. We disagree. The BEP is accorded substantial deference when it interprets certain federal statutes. The rationale underlying our deference to BEP interpretations is that the BEP has greater expertise in matters of environmental concern and greater experience administering and interpreting those particular statutes. *See Maritime Energy v. Fund Ins. Review Bd.*, **2001 ME 45**, ¶ **9**, **767 A.2d 812**, **814**. The CWA, **33 U.S.C.A. §§ 1251**-**1387** (West 2001 & Supp. 2004), concerns the environment and it is an act that the BEP has experience administering. In addition, both state and federal law contemplate that the BEP will administer and interpret section 401 for purposes of water quality certification.**[fn3]**

[¶ 6] Additionally, Warren argues that the BEP is a "lay board" and therefore not entitled to deference. We disagree. We have specifically rejected the proposition that a volunteer board is not entitled to deference. The standard is whether the subject matter is beyond the scope of the BEP's expertise. *Maritime*, **2001 ME 45**, ¶ **9** n. 2, **767 A.2d at 814**. In *Maritime*, we concluded that because the BEP relied on its expertise interpreting the statute it was charged with administering and relied upon its expertise in a field of environmental concern, the BEP's interpretation was entitled to deference. *Id.*

[¶ 7] In the present case, because the statutes involved are administered regularly by the BEP and because the subject matter is well within the BEP's expertise, the BEP's interpretations, although not conclusive or binding upon us, are entitled to great deference.

C. State Certification

[¶ 8] It is the responsibility of the Federal Energy Regulatory Commission (FERC), pursuant to the Federal Power Act (FPA), to issue licenses for the construction, operation, and maintenance of hydroelectric dams located in any body of water over which Congress has jurisdiction pursuant to the Commerce Clause of the United States Constitution.**[fn4]** **16 U.S.C.A. § 797**(e) (West 2000). Section 401(a)(1) of the CWA, **33 U.S.C.A. § 1341**(a)(1), requires an applicant for a federal license or permit to conduct any activity that "may result in any discharge into the navigable waters," to provide the licensing or permitting agency with a certification from the state in which that discharge may occur. The purpose of the certification is to confirm that the contemplated discharge will comply with the water quality standards of the CWA and the effected state. In addition,
Page 215
section 401(d) of the CWA, **33 U.S.C.A. § 1341**(d), expressly requires the FERC to incorporate "any other appropriate requirement of State law set forth in such certification" into the license.

[¶ 9] Warren posits that certification authority has not vested because the operation of its dams does not result in a discharge. We disagree. Certification rights under section 401(a)(1), **33 U.S.C.A. § 1341**(a)(1), vest in a state if an activity "`may result in' a discharge." *North Carolina v. FERC*, **112 F.3d 1175**, 1188 (D.C. Cir. 1997). Once these certification rights have vested in the state, any conditions that the state imposes become conditions on the federal license. *Alabama Rivers Alliance v. FERC*, **325 F.3d 290**, 293 (D.C. Cir. 2003).

[¶ 10] The term discharge is not expressly defined anywhere in the CWA, however, section 502(16), **33 U.S.C.A. § 1362**(16) (West 2001), provides that, "[t]he term `discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." This statement of inclusion provides "the nearest evidence we have of definitional intent by Congress." *North Carolina*, **112 F.3d at 1187**. The phrases "discharge of pollutant" and "discharge of pollutants" are defined by section 502(12):

> The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any *addition* of any pollutant to navigable waters from any point source, (B) any *addition* of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

33 U.S.C.A. § 1362(12) (emphasis added).

[¶ 11] An "addition" is the fundamental characteristic of any discharge. *See North Carolina*, **112 F.3d at 1188** (a decrease in the volume of water passing through a dam's turbines adds nothing and therefore cannot be a discharge); *Alabama Rivers Alliance*, **325 F.3d at 299** (increased flow resulting from the replacement of dam turbines is an addition and therefore a discharge).

[¶ 12] The operation of Warren's dams does result in an addition to the waters of the Presumpscot River and therefore a discharge occurs. When a substance is removed from a navigable body of water and then redeposited into that same body of water it constitutes a discharge pursuant to section 502(12), **33 U.S.C.A. § 1362**(12). *See Avoyelles Sportsmen's League, Inc. v. Marsh*, **715 F.2d 897**, 923 (5th Cir. 1983) ("The word `addition' as used in the definition of the term, `discharge,' may reasonably be understood to include `redeposit.'"), *see also Greenfield Mills, Inc. v. Macklin*, **361 F.3d 934**, 947-49 (7th Cir. 2004). *Avoyelles* involved a dispute about whether the removal and redeposit of fill materials in a wetland was a discharge.**[fn5]** *Avoyelles Sportsmen's League, Inc.*, **715 F.2d at 900**. The court dismissed the idea that the substance discharged must come from the outside world. *Id.* at 924 n. 43. "This reading of the definition is consistent with both the purposes and legislative history of the statute. The CWA was designed to restore and maintain the chemical, physical and biological integrity of the Nation's waters." *Id.* at 923. When "water leaves the domain of nature and is subject to private control rather than purely natural processes . . . it has lost its status as waters of the United States."**[fn6]** *Dubois v.*
Page 216
U.S. Dep't of Agric., **102 F.3d 1273**, 1297 (1st Cir. 1996). Because these waters have lost their status as *waters of the United States*, when they are redeposited into the natural course of the river it results in an addition to the *waters of the United States*. *See id.*

[¶ 13] Warren is not adding more water to the river. However, a discharge results because Warren's dams remove the water of the river from its natural course, exercise private control over the water and then *add* the water back into the river. This is a discharge pursuant to section 401(a)(1).
33 U.S.C.A. § 1341(a)(1).

[¶ 14] Warren argues the word "discharge" is limited to "discharge of pollutant" or "discharge of pollutants." We disagree. "Discharge" has been interpreted broadly. *See Oregon Natural Desert Ass'n v. Dombeck*, **172 F.3d 1092**, 1098 (9th Cir. 1998) ("`Discharge' is the broader term because it includes all

releases from point sources, whether polluting or nonpolluting."). It is generally accepted that a dam is a point source. *See Greenfield Mills, Inc.*, **361 F.3d at 947** n. 16 ("Here, the artificial mechanism of the dam was used to convey pollutants into the Fawn River, a navigable waterway. Consequently, we believe that the dam constitutes a `point source.'"). We agree with the holding of *Oregon Natural Desert Ass'n*, **172 F.3d at 1098**, that any discharge from a dam, whether polluting or not, is a "discharge" for purposes of section 401(a)(1), **33 U.S.C.A. § 1341**(a)(1).

[¶ 15] The term "discharge" has been broadly interpreted in the case law because the plain language of section 502, **33 U.S.C.A. § 1362**, mandates such an interpretation.

> [W]e look first to the plain meaning of statutory language as a means of effecting legislative intent. Unless the statute itself discloses a contrary intent, words in a statute must be given their plain, common, and ordinary meaning, such as people of common intelligence would usually ascribe to them.

Butterfield v. Norfolk & Dedham Mut. Fire Ins. Co., **2004 ME 124**, ¶ **4**, **860 A.2d 861**, **862** (citations and quotation marks omitted).

[¶ 16] "Includes" in section 502(16) must be given its plain meaning. The common definition of the word *includes* does not suggest it is a word of limitation. In order for *includes* to operate as a word of limitation it would have to be treated as a synonym for the word *means*.**[fn7]** Section 502, **33 U.S.C.A. § 1362**, contains the definition of twenty-three different terms and phrases occurring within the CWA. Of those twenty-three definitions, twenty-two of them use the word *means;* only one of them, "discharge," uses *includes*.

> The argument goes that unless we presume that Congress's use of the term "includes" was the result of careless drafting, it seems that Congress intentionally left the definition of discharge open. . . . Arguably, to give "includes"

Page 217

> the same meaning as "means" not only confuses the English language, but also makes a mockery of careful legislative drafting.

Alia S. Miles, Comment, *Searching For The Definition Of "Discharge": Section 401 Of The Clean Water Act*, 28 ENVTL. L. 191, 213 (1998).

[¶ 17] Accordingly, water that has left its natural state and has been subjected to man-made control constitutes an "addition" upon its return to the same navigable waterway. Any addition to water is fundamental to the definition of the term "discharge." Therefore, the water that leaves the river and runs through the dam before returning to the river constitutes a discharge for the purposes of section 1341.

D. BEP's Authority Under Maine and Federal Law

[¶ 18] Warren argues that the BEP exceeded its authority under federal and state law because it imposed conditions that seek to enhance water quality, conditions that were not properly adopted through rule-making, conditions that require an unauthorized dissolved oxygen criterion, and conditions that are subject to reopening. We disagree.

[¶ 19] The conditions do not exceed BEP authority. Because water quality standards are not presently being met, the BEP may impose any conditions necessary to ensure compliance with those standards. *See PUD 1 of Jefferson County v. Wash. Dep't of Ecology*, **511 U.S. 700**, **715**, 114 S.Ct. 1900, 128 L.Ed.2d 716 (1994); *Bangor Hydro-Elec. Co. v. Bd. of Envtl. Prot.*, **595 A.2d 438**, **442** (Me. 1991); **38 M.R.S.A § 464**(1) (2001).

[¶ 20] States are authorized to establish water quality standards pursuant to section 303. **33 U.S.C.A. § 1313** (West 2001). "Those standards shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." *PUD 1*, **511 U.S. at 714**, 114 S.Ct. 1900. Pursuant to section 401(d), **33 U.S.C.A. § 1341**(d), a state may require that applicants for federal permits or licenses comply with both the designated uses and water quality criteria of the state standards established under section 303. **33 U.S.C.A. § 1313**.**[fn8]** *PUD 1*, **511 U.S. at 715**, 114 S.Ct. 1900. A state may, in its certification, include conditions necessary to ensure that the applicant will comply with state water quality standards established pursuant to section 303, **33 U.S.C.A. § 1313**, and any other appropriate requirement of state law.**[fn9]** *Id.*

[¶ 21] Maine's law is settled in this area. In *Bangor Hydro-Electric Co.*, **595 A.2d at 442** n. 4, we concluded that narrative criteria at **38 M.R.S.A. § 465** (2001 & Supp. 2004), which requires waters "of sufficient quality to support all indigenous fish species," was intended to be an integral part of the water quality standards for the BEP to consider. We also concluded, based upon the specificity of the designated uses
Page 218
at **38 M.R.S.A. § 465**, that the Legislature's purpose for the language "suitable for the designated uses" was "that the designated uses actually be present." *Id.* at 442. We stated that when those uses are not presently being achieved, the Legislature intended the quality of the water be enhanced so that the uses are achieved. *Id.*

[¶ 22] Whether compliance has been achieved and whether the conditions imposed are necessary to ensure future compliance are factual determinations to be made by the BEP. The BEP found that the involved waters were not presently in compliance with the state water quality standards, and that the conditions imposed were necessary to ensure future compliance with Maine's water quality standards. Warren has not sufficiently challenged those factual determinations.**[fn10]**

[¶ 23] Warren argues that the BEP exceeded its authority by including "reopeners" in its certification. We disagree. The BEP included conditions in its certification that permit the

certification to be reopened and the conditions amended following notice and hearing. The inclusion of these "reopeners" is permissible under both state and federal law.

[¶ 24] The U.S. Supreme Court has interpreted section 401(d), **33 U.S.C.A. § 1341**(d), broadly to mean that a state may attach *any* conditions that are necessary to ensure compliance with section 303, **33 U.S.C.A. § 1313**, limitations and are appropriate under state law. *PUD 1*, **511 U.S. at 713**, 114 S.Ct. 1900. The "reopeners" were included as a precaution in case the conditions instituted are not sufficient to ensure compliance with state water quality standards and section 303, **33 U.S.C.A. § 1313**, limitations. These "reopeners" fit within both the literal language of section 401(d), **33 U.S.C.A. § 1341**(d), and the statutory interpretation of the U.S. Supreme Court. *See PUD 1*, **511 U.S. at 713**, 114 S.Ct. 1900.

[¶ 25] In *PUD 1*, the court addressed certification conditions generally and not "reopeners" specifically. In *American Rivers, Inc. v. FERC*, **129 F.3d 99** (2d Cir. 1997) "reopeners" were specifically addressed. The position of the FERC, opposing the inclusion of "reopeners," was recited in the court's opinion:

> The Commission primarily fears that "to accept the conditions proposed would give the state the kind of governance and enforcement authority that is critical and exclusive to the Commission's responsibility to administer a license under the Federal Power Act, a power the Courts have repeatedly concluded belongs exclusively to the Commission."

Am. Rivers, **129 F.3d at 111** (quoting FERC's brief).

In response, building upon the holding in *PUD 1*, the court held:

> We have no quarrel with the Commission's assertion that the FPA represents a congressional intention to establish a broad federal role in the development
> **Page 219**
> and licensing of hydroelectric power. Nor do we dispute that the FPA has a wide preemptive reach. The CWA, however, has diminished this preemptive reach by expressly requiring the Commission to incorporate into its licenses state-imposed water-quality conditions.

Am. Rivers, **129 F.3d at 111** (citations and quotation marks omitted).

[¶ 26] The court explained that, even though this result seems to subject the FPA to the whims of the states, the FERC always has the power not to grant the licenses at all. *Id.* While this may occasionally produce harsh results, particularly if construction has already begun, there is no federal statutory authority supporting FERC's position that the FPA prohibits the inclusion of "reopeners." *Id.*

The Second Circuit's decision, unanimously vacating

> FERC's orders, is significant for several reasons. First, the decision denied FERC's authority to review or reject Section 401 conditions and required the agency to include conditions in its licenses, thereby enabling states to influence the content of the licenses. *Second, it allowed states to affect licenses already issued by FERC by recognizing the validity of state certification conditions requiring ongoing state review and approval of project changes*. Third, and most important, *American Rivers I* implemented Congress' intent in the CWA to diminish FERC's role as an exclusive hydropower decision-maker by authorizing other resource agencies to condition FERC licenses through statutory provisions like Section 401.

Michael C. Blumm & Viki A. Nadol, *The Decline of the Hydropower Czar and the Rise of Agency Pluralism*, 26 COLUM. J. ENVTL. L. 81, 106 (2001) (emphasis added).

[¶ 27] Nor does the inclusion of "reopeners" violate Maine law. Under Maine law the BEP has the authority to do that which it is granted authority to do, either expressly or by implication when that authority is essential to the full exercise of its powers specifically granted.

> [P]ublic bodies . . . may exercise only that power which is conferred upon them by law. The source of that authority must be found in the enabling statute either expressly or by necessary inference as an incidence essential to the full exercise of powers specifically granted.

Hallissey v. Sch. Admin. Dist. No. 77, **2000 ME 143**, ¶ **11**, **755 A.2d 1068**, **1072**.

[¶ 28] The BEP is expressly granted the authority to issue section 401(a)(1), **33 U.S.C.A. § 1341**(a)(1), certifications pursuant to **38 M.R.S.A. § 464**(4)(F) (1-A). Considering the purpose of Maine's water quality standards, stated at **38 M.R.S.A. § 464**(1),**[fn11]** the authority to include "reopeners" is "essential to the full exercise of powers specifically granted" to the BEP. *See Hallissey*, **2000 ME 143**, ¶ **11**, **755 A.2d at 1072**. This authority is essential because if the conditions are not as effective as planned, the water quality standards will not be met and the BEP's goal to "restore and maintain the chemical, physical and biological integrity of the State's waters . . ." will not be achieved during the forty-year term of the FERC license.**[fn12]** The Board's interpretation of **38 M.R.S.A. § 464** as implicitly authorizing the inclusion of "reopeners" is reasonable and the

Page 220

statute does not plainly compel a contrary result.**[fn13]**

[¶ 29] Warren argues that the BEP applied an impermissible dissolved oxygen criteria to its certification. We disagree. This is purely an issue of statutory interpretation. The water quality standards at **38 M.R.S.A. § 465**(3)(B) are regularly administered by the BEP and as stated previously are entitled to great

deference. *See Thacker*, **2003 ME 30**, ¶ **14**, **818 A.2d at 1019**. The water quality standards at **38 M.R.S.A. § 465**(3)(B) are ambiguous as to whether an instantaneous standard is required. If the statute is ambiguous, courts review whether the agency's construction is reasonable. Courts do not "second-guess" an agency on issues within its area of expertise; rather, courts review only to ascertain whether its conclusions are "unreasonable, unjust, or unlawful." *See Town of Eagle Lake v. Comm'r, Dep't of Educ.*, **2003 ME 37**, ¶ **5**, **818 A.2d 1034**, **1037**. It does not matter whether an alternative interpretation would also have been reasonable, only that the interpretation adopted by the BEP was not unreasonable, unjust or unlawful. Given the purpose of Maine's water quality standards, the BEP's interpretation does not appear unreasonable, unjust, or unlawful.

[¶ 30] Finally, Warren argues that the BEP adopted a policy that constituted impermissible rule-making. We disagree. The BEP based its determinations of flow levels in the bypass reach sections on a case-by-case basis. The case-by-case determinations made by the BEP do not constitute impermissible rule-making. Not every decision made by an agency constitutes "rule making" despite the fact that many decisions seem, to some extent, legislative in character. *See Fryeburg Health Care Ctr. v. Dep't of Human Servs.*, **1999 ME 122**, ¶ **9**, **734 A.2d 1141**, **1144** ("[A]n agency is not required to use the formal rule making procedures every time it makes a decision interpreting an existing rule."); *Mitchell v. Me. Harness Racing Comm'n*, **662 A.2d 924**, **926-27** (Me. 1995) (an agency's interpretation of the statutes it is charged with enforcing does not amount to rule-making).

E. Conclusion

[¶ 31] In conclusion, the BEP's interpretation of statutes regularly administered by it are entitled to great deference; the BEP's determination that CWA certification rights had vested in the state was not unreasonable; and finally, the BEP did not exceed its authority under federal or Maine law.

The entry is:

Judgment affirmed.

[fn1] The outflow of the project is approximately equal to the inflow on an instantaneous basis.

[fn2] Title **38 M.R.S.A. § 341-D**(4)(A) (2001) provides that the BEP is not bound by the findings of fact or conclusions of law made by the DEP, but may adopt, modify, or reverse those findings. In this case, all findings of fact and conclusions of law were initially made by the DEP and subsequently adopted by the BEP. Throughout the rest of this opinion, where findings of fact and conclusions of law are referenced, the reference pertains to the findings of fact and conclusions of law made or adopted by the BEP.

[fn3] Maine law provides:

(1-A) The department may only issue a waste discharge license pursuant to section 414-A, or *approve a*

> *water quality certification pursuant to the United States Clean Water Act, Section 401. . . .*

38 M.R.S.A. § 464(4)(F) (2001) (emphasis added).

> Federal law provides:
>
> (a) Compliance with applicable requirements; application; procedures; license suspension
>
> (1) Any applicant for a Federal License or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency *a certification from the State in which the discharge originates or will originate*, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, *that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.*

33 U.S.C.A. § 1341(a)(1) (West 2001) (emphasis added).

[fn4] U.S. CONST. art. **I**, § **8**, cl. **3**.

[fn5] The present case does not involve fill material, but it does involve the identical statute defining discharge. **33 U.S.C.A. § 1362**(12) (West 2001).

[fn6] Section 401 of the CWA, **33 U.S.C.A. § 1341**, applies to discharges into navigable waters. Navigable waters are defined as the "waters of the United States" at section 502(7), **33 U.S.C.A. § 1362**(7).

[fn7] The U.S. Supreme Court considered the distinction between the words *includes* and *means*, outside of the CWA context, in *Helvering v. Morgan's, Inc.*, **293 U.S. 121**, **125-26** n. 1, 55 S.Ct. 60, 79 L.Ed. 232 (1934):

> [T]he natural distinction would be that where "means" is employed, the term and its definition are to be interchangeable equivalents, and that the verb "includes" imports a general class, some of whose particular instances are those specified in the definition.

[fn8] Even though section 303, **33 U.S.C.A. § 1313**, is not specifically mentioned in section 401(d), **33 U.S.C.A. § 1341**(d), it is incorporated by reference in section 301, **33 U.S.C.A. § 1311** (West 2001), which is specifically mentioned. "Section 303 is always included by reference where section 301 is listed." *PUD 1 of Jefferson County v. Wash. Dep't of Ecology*, **511 U.S. 700**, **713**, 114 S.Ct. 1900, 128 L.Ed.2d 716 (1994) (citations omitted).

[fn9] Justice Stevens, in his brief concurrence, was particularly

persuaded that states were not restricted in their regulation pursuant to section 401(d), **33 U.S.C.A. § 1341**(d), "[n]ot a single sentence, phrase, or word in the Clean Water Act purports to place any constraint on a State's power to regulate the quality of its own waters more stringently than federal law might require." *PUD 1*, **511 U.S. at 723**, 114 S.Ct. 1900.

[fn10] Warren repeatedly asserts that alternative conclusions could be drawn from certain portions of the record. However, because the Board's findings of fact are reviewed for clear error, whether alternative conclusions could be drawn is not determinative. We do not substitute our judgment for that of an agency on questions of fact provided that the record substantially supports those facts. *See Int'l Paper Co. v. Bd. of Envtl. Prot.*, **1999 ME 135**, ¶ **29**, **737 A.2d 1047**, **1054**; **5 M.R.S.A. § 11007**(3) (2002). The Board's findings of fact must be upheld, unless Warren can show that those findings are clearly erroneous. *See Bangor Hydro-Elec. Co. v. Pub. Utils. Comm'n*, **589 A.2d 38**, **40** (Me. 1991). Warren has not argued on appeal that the record does not substantially support the BEP's factual determinations.

[fn11] It is the State's objective to "restore and maintain the chemical, physical and biological integrity of the State's waters. . . ." **38 M.R.S.A. § 464**(1).

[fn12] The FERC license sought by Warren is to last forty years.

[fn13] As stated previously,

> [t]he administrative agency's interpretation of a statute administered by it, while not conclusive or binding on this court, will be given great deference and should be upheld unless the statute plainly compels a contrary result.

Thacker v. Konover, **2003 ME 30**, ¶ **14**, **818 A.2d 1013**, **1019** (citations and quotation marks omitted).

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

ANGUS S. KING, JR.
GOVERNOR

MARTHA KIRKPATRICK
COMMISSIONER

October 10, 2002

Certified No's. 7000 1670 0008 7878 4162
7000 1670 0008 7878 4155

Skip Medford
CHI Operations, Inc.
Andover Business Park
200 Bulfinch Drive
Andover, MA 01810

Thomas R. Brown
Ridgewood Maine Hydro Partners, L.P.
947 Linwood Ave.
Ridgewood, N.J. 07450

Also sent via fax to CHI on October 10, 2002 (978-681-7727)

Re: American Tissue Dam-FERC No. 2809-ME

Dear Messrs. Medford and Brown:

I want to begin by thanking you for your prompt response to our requests for corrective action at this facility. As of the time this letter is written, CHI has installed a plunge pool box for alewives and opened one of the deep gates some six inches. It is my understanding that CHI has verbally agreed to shut down the turbine, effective today, from dusk till dawn every day until November 15, 2002. It is also my understanding that today CHI installed two metal plates, each several feet high, at the base of the trash screens that will physically block eels from swimming along the bottom and into the influent to the turbines. Because eels typically travel along the bottom, hopefully this will prove to be an effective deterrent.

Although these corrective actions are very positive steps in the right direction, we need to assure that the facility is brought into compliance with Maine law and continues in compliance. Therefore, the Department continues to request that CHI Operations, Inc. and/or Ridgewood take any and all necessary measures, subject to DEP and/or DMR approval, to prevent fish mortality due to downstream migration at the American Tissue Dam (FERC No. 2809) in Gardiner, Maine. Such measures may include, but may not be limited to, temporarily shutting down the turbine and if necessary, draining the head pond until the downstream migration of eels and alewives is done for this year.

It is the Department's position that you are in violation of Title 38 M.R.S.A. § 464 for rendering the receiving waters unsuitable "as habitat for fish and other aquatic life." Our position is supported by an ongoing fish kill and evidence of other significant fish kills that occurred at the facility over the past several years.

This Department's request for corrective action was initially conveyed to you via a voicemail message shortly after 5:00 P.M. on October 7. On October 8, 2002, CHI responded by increasing the opening of the deep gate nearest to the generating station intake to approximately 5 ¼ inches. Increasing the gate opening revealed that the previous opening of some three inches (opened on September 15, 2002) was partially blocked by debris. As soon as the gate was opened to 5 ¼ inches, there was a moderate increase in water through the gate. Several minutes after the gate opening was increased to 5 ¼ inches, a plume of muddy water exited through the gate and the flow increased considerably. I later learned from John Bogert that CHI staff place sandbags in front of the gates each fall to minimize leakage. Apparently, during the period September 15-October 8, 2002, although the gate was opened some three inches, the effective width of the opening was less than that.

During my site visit on October 8, I requested of Mr. Bogert that CHI place a screen below the powerhouse discharge to determine if eels continue to be killed in the turbines in spite of the increased flow through the deep gate. He refused because, as he stated, the screen would become clogged.

On October 9, CHI closed the deep gate and opened the gate furthest from the powerhouse intake to approximately six inches. It is my understanding the possibility of shutting down the turbines during the night time hours was discussed between CHI and John Perry of the Dept. of Marine Resources at this time. On this date, CHI built a structure on the dam apron to act as a plunge pool for downstream migrating alewives. After the structure was built, a small school of alewives was seen going over the dam, entering and exiting the structure, and entering the stream. During my visit to the site this afternoon, I observed that the flow to the plunge pool box had been cut off and workmen were busy repairing the box because one side wall had bowed out from the water pressure. I observed two dead alewives inside the box. Once the box was braced and the flashboard was removed, I observed that the box has considerable leakage. The integrity of the box should be closely monitored and if leakage becomes excessive, it should be repaired or replaced.

On October 8, 9, and 10, dead eels were observed and collected below the outfall of the power generation station. On October 9 alone, evidence of more than one hundred dead eels was collected and removed from the stream. Today, in excess of forty dead and dying eels were found in the stream below the power generation facility. These were still found in spite of increased stream flows that may have washed additional eels and eel parts downstream.

It is this Department's position that the corrective measures taken by CHI prior to today have not been effective with regard to the killing of eels. Conversely, there is evidence, in the form of dead and dying eels, that the corrective measures have been ineffective. Therefore, effective immediately, the Department of Environmental Protection requests that, at a minimum, you take the following corrective actions:

1) Cease all power production by shutting down the turbine every day from dusk to dawn beginning today, October 10, 2002 until November 15, 2002 (as noted above, it is my understanding that CHI has verbally committed to do this);

2) Maintain continuous downstream eel passage by keeping one or more deep gates open a minimum of six inches until November 15, 2002;

3) Due to concerns that flows into the headpond through the CHI operated New Mills dam may be cut back at night, please ensure that sufficient flow is maintained to maximize the downstream passage of eels through the deep gate during non-generating hours until November 15, 2002;

3) Maintain an effective downstream alewife fish passage device until November 15, 2002;

4) Visit the facility a minimum of once daily to monitor the effectiveness of downstream fish passage; and,

5) To determine the efficacy of these corrective measures, install a screen or other device below the outfall of the power plant, subject to approval by the Dept. of Marine Resources, and report any numbers of dead and dying eels collected to the DEP daily. This screening device is to remain in place until November 15, 2002 unless approval to remove it sooner is granted by the DEP.

It is likely that this Department will issue a formal Notice of Violation in this matter. Due to the repeat nature of these violations, the Department may propose an Administrative Consent Agreement and Enforcement Order. The Department's actions in this regard will be guided in part by your willingness to permanently correct the problems at the facility.

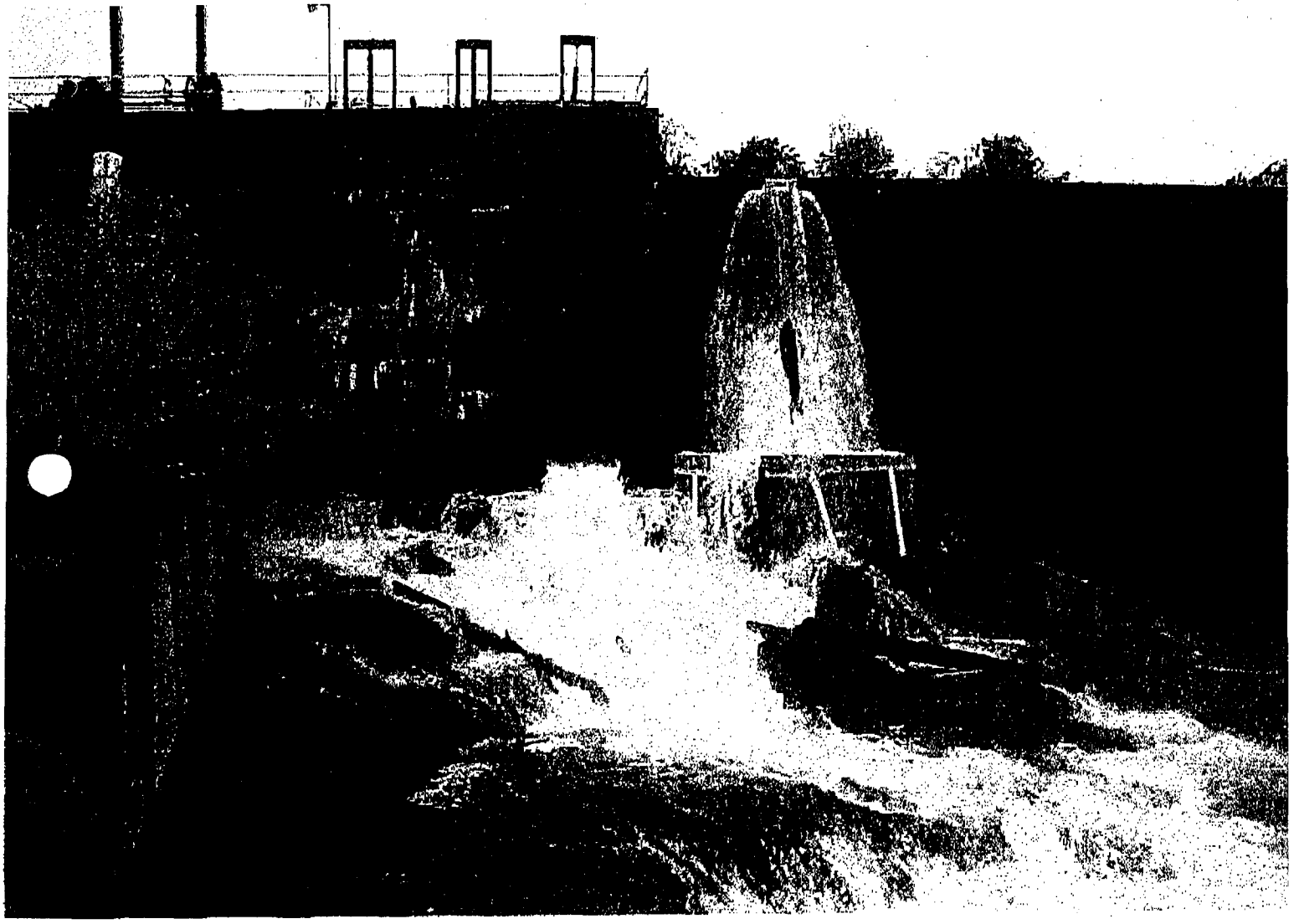
Thank you again for your very prompt response and for your anticipated continued cooperation in this matter. Please contact me within five (5) days of receipt of this letter with your response to these requests. If you have any comments or questions, please call me at (207) 287-7783. Please be advised that the State is on shutdown tomorrow and October 14. I will, however, visit the office during each of the next four days to check my voicemail and email messages.

Sincerely,

John M. Glowa, Sr

John M. Glowa, Sr.
Enforcement Section
Division of Water Resource Regulation
Bureau of Land & Water Quality

Cc: Tom Squires-DMR
Gail Wipplehauser-DMR
John Perry-DMR
Dana Murch-DEP
Carol Blasi-Dept. of Attorney General



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

JOHN ELIAS BALDACCI
GOVERNOR

DAWN R. GALLAGHER
COMMISSIONER

June 30, 2003

Douglas Watts
Friends of the Kennebec Salmon
PO Box 2473
Augusta, ME 04338

Dear Mr. Watts:

This is in response to your letters of June 5, 2003 and June 13, 2003, requesting information on the status of the complaint you submitted to the Department via-email that was received on October 7, 2002, regarding a fish kill at the American Tissue Dam (dam) on the Cobbosseecontee Stream in Gardiner.

I appreciate your interest in this matter and your efforts to document the fish kill. As outlined below, the Department and the Department of Marine Resources (DMR) have invested a significant amount of time addressing this issue. I am pleased to inform you that as a result of our efforts, the Federal Energy Regulatory Commission (FERC) has initiated the process to require fish passage at the dam.

As you know from your interactions with John Glowa, the Department's project manager for this issue, the Department immediately responded to your complaint by contacting CHI Operations, Inc. (CHI), the operators of the dam, by phone on October 7, 2002 and requested that they take any and all steps necessary to prevent future fish kills. John also contacted DMR on this date to coordinate our response with them and notified you via e-mail of our actions.

John visited the site on several occasions beginning on October 8, 2002 to monitor the progress of CHI staff in addressing the fish kill and met with you onsite during this time to discuss the corrective measures CHI was taking and the Department's actions to date.

In a letter dated October 10, 2002 from John Glowa to CHI, the Department requested that CHI take a variety of remedial measures to reduce or eliminate the fish kill and informed CHI that the Department may propose an Administrative Consent Agreement and Enforcement Order. I understand a copy of this letter was sent to you.

CHI immediately responded to the Department's requests by taking a variety of actions to improve fish passage. For alewives this included installing a plunge pool and minimizing flows over the flashboards except through the notch over the plunge pool. For eels this included increasing the deep gate opening furthest away from the intake structure, installing blinding plates along the intake structure to divert eels, and ceasing turbine operations from dawn to dusk until November 15, 2002.

AUGUSTA
17 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0017
(207) 287-7688
RAY BLDG., HOSPITAL ST.

BANGOR
106 HOGAN ROAD
BANGOR, MAINE 04401
(207) 941-4570 FAX: (207) 941-4584

PORTLAND
312 CANCO ROAD
PORTLAND, MAINE 04103
(207) 822-6300 FAX: (207) 822-6303

PRESQUE ISLE
1235 CENTRAL DRIVE, SKYWAY PARK
PRESQUE ISLE, MAINE 04769-2094
(207) 764-6477 FAX: (207) 764-1507

web site: www.state.me.us/dep

John, along with DMR staff, continued to monitor the site during the following week. DMR staff then continued to monitor the site into early December. No fish mortality was observed after October 10, 2002.

During the week of October 16, 2002, the Department conferred with DMR staff and B. Peter Yarrington of FERC on the regulatory process to ensure future fish passage. As a result of this discussion, FERC sent a letter dated November 8, 2002 to CHI requesting submittal of fish passage plans no later than May 1, 2003. CHI submitted a draft fish passage proposal to the Department and DMR for review and comment on May 22, 2003. The Department submitted comments on the draft proposal to CHI via a letter dated June 18, 2003. CHI will now submit their final proposed plan to FERC for review and approval by July 20, 2003.

In a letter dated October 23, 2002 the Department notified CHI that it was investigating the appropriateness of enforcement action and requested additional information from CHI regarding their operation of the dam and fish kills at the dam. CHI responded via a letter dated November 7, 2002.

Subsequently the Department conferred with the Office of the Attorney General on the Department's authority to take an enforcement action based on the facts of this case. As you may know, this dam was licensed by FERC in 1979. There are no requirements for fish passage in the FERC license. During the FERC licensing process the Department waived its right to issue a 401 Water Quality Certification, therefore there is no State order in place at this dam that requires fish passage. (It is noted that since 1981, except for two occasions, the Department has not waived its right to issue a 401 Water Quality Certification during a dam licensing process.) As you have noted, the dam does have a Maine Waste Discharge License for a cooling water discharge.

As noted above, the FERC process is underway to require fish passage and I am hopeful that modification to the FERC license will address this situation in the long term. In the short term, the Department will continue to work with FERC and DMR to ensure that CHI continues to take appropriate steps to minimize impacts to fish migration. If it does not, the Department may, in further consultation with Attorney General's office, choose more aggressive options.

Once again thank you for your interest in this issue and the work you have done to see that this problem is corrected.

Sincerely,

Dawn R. Gallagher

Dawn R. Gallagher
Commissioner

Cc: Brian Kavanah, John Glowa, Dana Murch - DEP
Jon Edwards - OAG
John Perry - DMR
B. Peter Yarrington - FERC

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: James J. Hoecker, Chairman;
Vicky A. Bailey, William L. Massey,
Linda Breathitt, and Curt Hébert, Jr.

Edwards Manufacturing Company, Inc. City of Augusta, Maine	)	Project No. 2389-030, -031
Central Maine Power Company	)	Project Nos. 2552-032, -033; 2322-025, -026; and 2325-028, -029
Benton Falls Associates	)	Project No. 5073-054, -055
Merimil Limited Partnership	)	Project No. 2574-024, -025
UAH-Hydro Kennebec Limited Partnerships	)	Project No. 2611-033, -034
Ridgewood Maine Hydro Partners	)	Project No. 11472-003

ORDER APPROVING SETTLEMENT, TRANSFERRING LICENSE, AND AMENDING FISH PASSAGE REQUIREMENTS

(Issued September 16, 1998)

On May 28, 1998, an offer of settlement was filed by parties involved in the relicensing proceedings regarding the Edwards Hydroelectric Project No. 2389, located on the Kennebec River in Augusta, Maine; and in various Commission proceedings regarding fish passage at seven dams located upstream of the Edwards Project, on the Kennebec and Sebasticook Rivers. 1/ In essence,

---

1/ The parties filing the settlement, who will be referred to herein as "the settling parties," are: Edwards Manufacturing Company and the City of Augusta, Maine (the licensees for the Edwards Project), the U.S. Fish and Wildlife Service (FWS), the National Marine Fisheries Service (NMFS), the State of Maine, Central Maine Power Company (licensee for the Fort Halifax Project No. 2552, Shawmut Project No. 2322, and Weston Project No. 2325), Merimil Limited Partnership (licensee for the Lockwood Project No. 2574), UAH-Hydro Kennebec Limited Partnership (licensee for the Hydro Kennebec Project No. 2611), Benton Falls Associates (licensee for the Benton Falls Project (continued...)

the settlement would provide for the transfer of the license for the Edwards Project to the State of Maine, which would then, in connection with surrendering the project license, remove the dam; and the resolution of disputes regarding fish passage at the upstream projects. To these ends, the parties filing the settlement asked the Commission to (1) approve the settlement, (2) approve the transfer of the license for the Edwards Project to the State of Maine, and (3) amend the fish passage provisions of the licenses for the upstream projects. 2/

For the reasons discussed below, we approve the settlement, grant the application for license transfer, amend the licenses of the upstream projects, and take other appropriate actions, as detailed herein.

BACKGROUND

A. The Edwards Project

The Edwards Project's principal features are a 917-foot-long, 25-foot-high dam; an 850-foot-long spillway and a 67-foot-long bulkhead spillway; a 1,143-acre impoundment; an 80-foot-long, 24-foot-wide gatehouse; a 450-foot-long power canal; and three powerhouse buildings containing a total of nine turbines, for a total installed capacity of 3.5 megawatts. 3/

The Edwards Project was licensed in 1964, with a license term expiring on December 31, 1993. 4/ On December 31, 1991, Edwards Manufacturing Company (Edwards Company) filed an application for a new license for the continued operation and

---

1/ (...continued)
No. 5073), Ridgewood Maine Hydro Partners, L.P. (applicant for a license for the existing, unlicensed Burnham Project No. 11472), and a group of intervenors, collectively called the Kennebec Coalition, comprised of American Rivers, Inc., Atlantic Salmon Federation, Kennebec Valley Chapter of Trout Unlimited, Natural Resources Council of Maine, and Trout Unlimited.

2/ The parties also asked the Commission to stay certain ongoing obligations of the licensees for the Edwards Project and the upstream projects pending consideration of the settlement, and not to act on various petitions for rehearing while these matters were under consideration. The Commission issued an order granting stays and holding proceedings in abeyance on June 10, 1998. 83 FERC ¶ 61,269.

3/ See 81 FERC ¶ 61,255 at p. 62,200.

4/ 32 FPC 598.

maintenance of the project. In 1992, the City of Augusta, Maine became a co-licensee. 5/

On November 25, 1997, the Commission issued an order denying the application for new license and requiring the licensees to file a plan for decommissioning the project, including removing the dam. 6/ The Commission concluded that, while relicensing the project would maintain a reliable source of power, and would displace nonrenewable, fossil-fueled generation, very important negative impacts of the project could not be adequately mitigated through the imposition of environmental conditions. 7/

On December 29, 1997, the Edwards Company and the City of Augusta filed a timely request for rehearing of the November 25, 1997 order. Also, the American Forest & Paper Association, the American Public Power Association, the National Hydropower Association and Edison Electric Institute (jointly), and the City of Tacoma, Washington, filed requests to intervene and for rehearing. 8/

B. The Upstream Projects

The licenses for the upstream projects all contain requirements regarding the implementation of fish passage measures, including associated deadlines. 9/ On April 23, 1997, the owners of the upstream projects, collectively known as the Kennebec Hydro Developers Group (KHDG), filed a request that the Commission amend the licenses for the upstream projects to provide that the installation of fish passage facilities at those projects be delayed until permanent fish passage was available at the Edwards Project and the restoration of salmon, shad, and alewives in the Kennebec Basin had proved successful.

On June 5, 1997, the licensees for the Edwards Project filed a motion seeking to consolidate the KHDG request with the Edwards

---

5/ See 61 FERC ¶ 62,162.

6/ 81 FERC ¶ 61,255.

7/ Id. at p. 62,210.

8/ On January 14, 1998, the Commission granted the motions to intervene. 82 FERC ¶ 61,012. These parties are referred to herein as the "Non-Settling Parties."

9/ With regard to the Burnham Hydropower Project No. 11472, which is currently in the licensing process, Commission staff issued a November 1, 1996 environmental assessment recommending fish passage measures consistent with those required at the other upstream projects.

Project relicensing. By order dated September 26, 1997, the Commission denied KHDG's motion without prejudice, because considering it would have delayed well-advanced relicensing proceedings, and because delaying the installation of fish passage facilities would disrupt the comprehensive approach the Commission has taken to fisheries restoration in the Kennebec River Basin. 10/ Since the Commission was denying KHDG's motion, it also denied the Edwards licensees' motion to consolidate. 11/

On November 24, 1997, Central Maine Power, as licensee for the Fort Halifax Project No. 2252, and Merimil Limited Partnership, as licensee for the Lockwood Project No. 2574, filed preliminary drawings of fish passage facilities. On March 26, 1998, the Director, Office of Hydropower Licensing (Director), issued a letter to these licensees, stating that they had failed to engage in required consultation with fish and wildlife resource agencies regarding the drawings, and requiring them to file, within 45 days, evidence that they had done so.

C. The Settlement

On May 28, 1998, the Settling Parties filed with the Commission the Lower Kennebec River Comprehensive Accord. The settlement contemplates that the Edwards Company will donate Edwards Dam to the State of Maine, which will then remove the dam and surrender the license. In addition, KHDG and Bath Iron Works, a corporation located in Maine, will contribute $7.25 million towards the cost of dam removal and other fish restoration activities in the Kennebec River Basin. Finally, fish passage obligations at the seven upstream projects will be amended. The filing contains a number of agreements and other documents, some of which the Commission is asked to act upon, and others of which were submitted for informational purposes. The details of the filing are as follows.

The settlement establishes the framework for resolution of disputes regarding the Edwards Project and fish passage issues at the upstream projects. The settlement provides that the parties will support the transfer of the Edwards Project to Maine, consistent with the terms of and agreement among the Edwards Company, the City of Augusta, and Maine. 12/ The

---

10/ Id.

11/ Id. at p. 62,274.

12/ That agreement is appended to the settlement. We are not asked to take any action with regard to it, however.

settlement also provides for various filings and motions to be made with the Commission. 13/

The settlement also details the process by which Maine will seek authority to remove Edwards Dam. The parties contemplate that in September 1998 Maine will submit an application to surrender the Edwards Project license, including a plan for dam removal; that in April 1999 the Commission will approve that application, contingent on dam removal; and that by August 1999 the dam will be removed. Further, KHDG will provide $4.75 million toward fish restoration and dam removal, 14/ and addition, Bath Iron Works will provide an additional $2.5 million toward dam removal. 15/

In their application for license transfer, the Edwards Company, the City of Augusta, and Maine ask the Commission to approve the transfer of the Edwards Project to Maine, but ask that the transfer become effective only upon the occurrence of seven events. Five of the events involve Commission receipt of notices from Maine confirming that: (1) funding for dam removal is adequate, (2) project property interests are subject to insurable title, (3) there is adequate funding of other agreed-upon obligations, (4) Maine has received from Edwards and Augusta all environmental and property disclosures, and (5) transfer of project property has occurred. The remaining two conditions are (6) that the Commission amend the licenses for the upstream projects (which we do below), and (7) that the transfer not occur prior to January 1, 1999. With the exception of the January 1,

---

13/ These comprise the transfer application and comments in support of the application, the motion for stay of obligations in the Edwards license proceeding (which, as discussed above, has been granted), a notice by the Edwards Company and the City of Augusta withdrawing their request for rehearing of the November 25, 1997 order (effective upon Commission approval of the transfer application, and the satisfaction of the conditions contained in that application), a motion for stay of the five-year dam inspection of the Edwards Dam (which has also been granted), and a request for a technical conference regarding dam removal (which has been granted and held).

14/ The details of this undertaking are in an agreement between KHDG, the Kennebec Coalition, NMFS, FWS, and Maine, which is appended to the settlement agreement but is not before us.

15/ As with the KHDG funding, Bath Iron Works' undertakings are spelled out in an agreement that is appended to the settlement, but regarding which the Commission is not asked to take action.

1999 threshold date for the transfer, all of these events are subject to waiver by Maine, in its sole discretion.

The settlement also provides that the parties will make or support applications to amend the fish passage obligations in the licenses for the upstream projects, so as to require the licensees to do the following:

Fort Halifax Project No. 2552

- Study and implement upstream and downstream passage for American eels.
- Install fish lift by 2003.
- Install, by May 1, 2000, 16/ a temporary fish pump and trap and transport facility, if necessary to meet restoration goals for alewife and river herring established by the Maine Department of Marine Resources (DMR).
- Install, operate, and maintain facilities to capture shad for the DMR hatchery.
- Install permanent upstream fish passage by May 1, 2003.

Shawmut Project No. 2322

- Study and implement upstream and downstream passage for American eels.
- Permanent upstream passage shall not be required to be operational prior to May 1, 2012. Make upstream passage operational two years after the earlier of the following: 15,000 American shad pass in any single season in the permanent passage facility at the Hydro Kennebec Project, or resource agencies determine upstream passage is necessary for Atlantic salmon, alewife, or blueback herring.
- Begin interim downstream passage on the effective date of the fish passage agreement (May 26, 1998). Consult with state and federal agencies to develop and test a plan for interim fish passage facilities and operational measures to minimize fishery impacts.
- Make permanent downstream facilities operational on the date permanent upstream passage is in operation.

16/ No later than May 1 of the first migration season following removal of Edwards Dam.

Weston Project No. 2325

- Study and implement upstream and downstream passage for American eels.

- Permanent upstream passage shall not be required to be operational prior to May 1, 2014. Make upstream passage operational two years after the earlier of the following: 35,000 American shad pass in any single season in the permanent passage facility at the Shawmut Project, or resource agencies determine upstream passage is necessary for Atlantic salmon, alewife, or blueback herring.

- Begin interim downstream passage on the effective date of the fish passage agreement. Consult with state and federal agencies to develop and test a plan for interim fish passage facilities and operational measures to minimize fishery impacts.

- Make permanent downstream facilities operational on the date permanent upstream passage is in operation.

Benton Falls, Project No. 5073

- Study and implement upstream and downstream passage for American eels.

- Construct permanent upstream passage facilities one year following passage of alewife at the Fort Halifax Project and effective alewife passage at all of the following: Newport Dam, the outlet of Sebasticook Lake, outlet of Plymouth Lake, and below the outlet of Pleasant Pond on Stetson Stream.

- Permanent upstream passage shall not be required to be operational before May 2002.

Lockwood Project No. 2574

- Study and implement upstream and downstream passage for American eels.

- Install an interim trap, lift, and transfer facility for American shad, river herring, and Atlantic salmon at the project powerhouse. These facilities shall be operational by May 1, 2006.

- Make permanent upstream passage operational two years following the earlier of either of the following: 8,000 American shad are captured in any single season at the interim trap at the project, or resource agencies determine

upstream passage is necessary for Atlantic salmon, alewife, or blueback herring.

- Consult with state and federal agencies to develop an approved plan for interim downstream passage facilities and/or operational measures to minimize impacts to downstream migrating fish.

- If the licensee seeks to achieve downstream fish passage of outmigrating alewife, Atlantic Salmon, or shad by means of passage through the turbines, it will demonstrate, through studies designed and conducted in consultation with the resources agencies, that passage will not result in significant injury or mortality.

- Conduct studies prior to the date permanent downstream passage facilities are to be operational to determine the effectiveness of various downstream passage techniques in preparation for the design and installation of permanent facilities.

- Make permanent downstream facilities operational when permanent upstream passage is operational.

Hydro-Kennebec Project No. 2611

- Study and implement upstream and downstream passage for American eels.

- Consult with state and federal agencies to develop an approved plan for interim downstream passage facilities and/or operational measures to minimize impacts to downstream migrating fish.

- If the licensee seeks to achieve downstream fish passage of outmigrating alewife, Atlantic Salmon, or shad by means of passage through the turbines, it will demonstrate, through studies designed and conducted in consultation with the resources agencies, that passage will not result in significant injury or mortality. The results of any such study would not be required prior to May 1, 2006.

- Conduct studies prior to the date permanent downstream passage facilities are to be operational to determine the effectiveness of various downstream passage techniques in preparation for the design and installation of permanent facilities.

- Make permanent downstream facilities operational when permanent upstream passage is operational.

The parties also agreed to support a motion for a stay of current fish passage obligations (which we have already granted), pending Commission action of the requests for amendment of the upstream licenses, and that the KHDG members will withdraw pending requests for rehearing regarding their fish passage obligations, effective upon the issuance of final, non-appealable order approving the license amendments and the license transfer.

D. Notices and Comments

The Commission issued notices on June 10, 1998, requesting comments on the offer of settlement, the proposed transfer of license for Project No. 2389, the amendment of fish passage requirements for Project Nos. 2552, 2322, 2325, 2574, 2611, and 5073, and the amendment of the pending license application for Project No. 11472.

The Commission Settlement Staff and the Atlantic Salmon Authority, an agency of the State of Maine, filed initial comments supporting the settlement. 17/ The Non-Settling Parties filed comments that do not address the general thrust of the settlement, but rather are limited to a request that the Commission vacate its November 25, 1997 order and then dismiss the Non-Settling Parties' request for rehearing of that order. Certain of the Settling Parties filed responsive comments arguing that the November 25, 1997 order was an essential component of the settlement and should not be vacated. 18/ These arguments are addressed in a separate order issued today.

DISCUSSION

A. The Settlement

We approve the settlement agreement. We congratulate the parties on their successful efforts to resolve the long-running, contentious debate over the future of the Edwards Project. The settlement will allow removal of the Edwards Dam, in a manner that is acceptable to the Edwards Project licensees, federal and state agencies, and the members of the Kennebec Coalition, and will substantially enhance fish restoration efforts in the Kennebec River Basin. In addition, the settlement resolves

---

17/ FWS, NMFS, Maine, and the Kennebec Coalition filed supporting comments as part of the settlement package.

18/ The responsive comments were filed by NMFS, FWS, Maine, and the Kennebec Coalition. The Edwards licensees and KHDG did not file responsive comments.

disputes regarding the provision of fish passage at the upstream projects, with concomitant environmental benefits. 19/

B. The Transfer of the Edwards License

As discussed above, the proposed transfer is a key element of the settlement. We find that Maine is qualified to hold the license and to operate the project under the license terms. 20/ Specifically, subject to the conditions in the settlement, Maine has agreed to accept all the terms and conditions of the license and to be bound by the license as if it were the original licensee. 21/ Based on the foregoing, we find that the proposed transfer is in the public interest and consistent with the Commission's regulations, and we therefore grant the transfer application.

Consistent with the transfer application and the settlement, we will make the transfer effective only upon satisfaction of all of the seven conditions discussed above. Moreover, while the Commission's approval of a license transfer is generally made contingent upon the filing, within 60 days, of documents showing the conveyance of project property to, and acceptance of the license by, the transferee, such a deadline is inconsistent with the listed conditions and will be modified to accommodate the settlement.

C. Amendment of Upstream Fish Passage Requirements

As described above, the settlement provides for the phased construction of facilities and modifications of project operations to ensure fish passage. The license amendments proposed by the licensees of the upstream projects would implement that agreement.

19/ Our approval of the settlement does not by itself impose any obligations on the parties. The settlement requires the parties to take various actions, such as making specified filings before the Commission and other agencies, and transferring property and cash, that are beyond our authority to require or to enforce. Nonetheless, we support the concept of the settlement, and trust that the parties will fulfill their obligations thereunder. Elsewhere in this order, we take those actions requested by the parties that are within our jurisdiction (approving the transfer of the Edwards license and amending the licenses for the upstream projects).

20/ See 18 C.F.R. Part 9 (1998) (Commission's license transfer regulations).

21/ See FPA Section 8, 16 U.S.C. § 801.

The Commission has previously dealt with the issue of fish passage at these projects, in an effort to promote restoration of the Kennebec fishery. 22/ Contrary to previous occasions, where uncertainty regarding the future of the Edwards Project complicated efforts to develop firm plans, the settlement offers the opportunity to proceed with reasonable certainty.

In 1991, the Commission staff prepared an environmental assessment that discussed several alternatives for installation of fish passage facilities upstream of Edwards Dam. The EA concluded that fish passage facilities will be necessary and appropriate when fish are present, and recommended an installation timetable, based on the best available information regarding fish passage at Edwards Dam. The Kennebec River Basin Environmental Impact Statement (EIS), issued in July 1997, affirmed the need for fish passage in the basin. 23/

The settlement contemplates that fish passage facilities will be installed at the upstream projects later than was recommended by staff in the EA. However, the agreement is premised on the removal of Edwards dam in 1999 (a fact not known when the EA was prepared) and the fish passage provisions of the settlement are consistent with the EA's conclusion that fish passage facilities should be required only when fish are present at the projects.

The EA and the EIS provide an adequate basis for the analysis of environmental impacts attending implementation of the settlement. We conclude that the delay in installing the fish passage facilities at the upstream projects will not by itself have a significant environmental impact. 24/ Whether additional environmental analysis is required for Commission review of measures contemplated in the settlement must await the filing of detailed descriptions of these measures.

The settlement requires the licensees of the upstream projects to file annual reports with the Commission. To keep the Commission apprised of pending activities under the settlement, this order requires the licensees to include with the report of

---

22/ See, e.g., 61 FERC ¶ 61,095 (1992) and 80 FERC ¶61,377 (1997).

23/ The EIS dealt with the Edwards Project, the Fort Halifax Project, the Weston project, and other projects in the Kennebec Basin that are not involved in the settlement here.

24/ None of the comments filed regarding the settlement suggests the contrary.

the previous year's activities any proposed changes in project facilities or operation for fish passage.

The agreement of the parties to implement the measures will help to ensure that adequate fish protection in the Kennebec and Sebasticook River basins is implemented in a timely manner. The licenses for the Fort Halifax, Shawmut, Weston, Benton Falls, Lockwood, and Hydro-Kennebec projects will be amended to replace any existing fish passage requirements with those included in the settlement.

The applicant for the Burnham Project asks that its application be amended to include the fish passage recommendations in the settlement. The application will be amended accordingly. 25/

The Commission orders:

(A) The Offer of Settlement Filed May 18, 1998, in these proceedings is approved.

(B) Transfer of the annual license for the Edwards Dam Hydroelectric Project No. 2389 from Edwards Manufacturing Company and the City of Augusta, Maine, to the State of Maine is approved. The transfer will become effective, upon issuance of Commission order, after the occurrence of the following events:

(1) The Commission's receipt of written notice from the State of Maine that the Bath Iron Works Corporation has deposited $2.5 million for Edwards Dam removal in the appropriate trust fund at the National Fish and Wildlife Foundation, or that the State in its sole discretion has waived this precondition; [26/]

(2) The Commission's approval of the Kennebec Hydro Developers Group ("KHDG") license amendment application containing conditions consistent with the Agreement Between Members of the Kennebec Hydro Developers Group, the Kennebec Coalition, the National Marine Fisheries Service, the State

---

25/ The settling parties ask the Commission to rescind a March 26, 1998 Director's letter requiring two of the upstream licensees to consult with resource agencies prior to submitting drawings of fish passage facilities, pursuant to the schedule that then existed. Because our approval of the amendments to the licenses for the upstream projects results in a completely new schedule, we rescind the letter as moot.

26/ Maine must file any such waiver with the Commission.

of Maine, and the US Fish and Wildlife Service ("1998 KHDG Agreement") (signed May 26, 1998) relating to the rescheduling of certain fish passage obligations at KHDG hydro facilities, unless this condition is waived by the State of Maine;

(3) The Commission's receipt of written notice from the State Maine that the State has received confirmation that the title to the real property interests therein to be conveyed by Edwards to the State, including easements, has insurable title, or that the State has waived this precondition;

(4) The Commission's receipt of written notice from the State of Maine that the State has determined pursuant to Section IX.B.5 of the Settlement Agreement among Edwards Manufacturing Co., Inc., the City of Augusta and the State of Maine Concerning the Edwards Dam in Augusta, Maine ("Edwards Dam Agreement") (signed May 15, 1998) that there is adequate funding available to meet the State's obligations under the Edwards Dam Agreement, or that the State has waived this precondition;

(5) The Commission's receipt of written notice from the State of Maine that the State has received from Transferors [Edwards Manufacturing Co., Inc., and the City of Augusta, Maine] all environmental and property disclosures outlined in Section VII of the Edwards Dam Agreement, or that the State has waived this precondition;

(6) The Commission's receipt of written notice from the State of Maine that the transfer of property set forth in Section IV of the Edwards Dam Agreement has been completed, or that the State has waived this precondition;

(7) The transfer cannot occur prior to January 1, 1999.

Effectiveness of the transfer is further contingent upon: (1) transfer of title of the properties under license and delivery of all license instruments to the State of Maine, which shall be subject to the terms and conditions of the license as though it were the original licensee; and (2) the State of Maine acknowledging acceptance of this order and its terms and conditions by signing and returning the attached acceptance sheets. Within 60 days from the date that the last of the seven events listed in this paragraph occurs, the State of Maine shall

submit certified copies of all instruments of conveyance and the signed acceptance sheet.

(C) Edwards Manufacturing Company and the City of Augusta, Maine, shall pay all annual charges that accrue up to the effective date of the transfer.

(D) The licenses for Project Nos. 2552, 5073, 2574, 2611, 2322, and 2325 are amended to include the fish passage requirements set forth in the 1998 KHDG Agreement, and the current license conditions superseded by those requirements are deleted.

(E) Reports filed with the Commission as a requirement of the 1998 KHDG agreement shall be filed, for Commission approval, by February 15 of each year. The reports shall include any proposed changes in project facilities or operation for fish passage.

(F) The March 26, 1998 letter to Central Maine Power Company and Merimil Limited Partnership from the Director, Office of Hydropower Licensing, is rescinded as moot.

(G) This order is final unless a request for rehearing is filed within 30 days from the date of its issuance, as provided in Section 313 of the Federal Power Act.

By the Commission. Commissioner Bailey dissented in part with a separate statement attached.
(S E A L) Commissioner Hébert concurred with a separate statement attached.

Linwood A. Watson, Jr.,
Acting Secretary.

Edwards Manufacturing Company, Inc.) Project No. 2389-030, -031
City of Augusta, Maine)

Issued September 16, 1998

BAILEY, Commissioner, *dissenting in part*.

I respectfully dissent in part from this order approving the Edwards settlement agreement. Not surprisingly, I would have preferred to vacate our November 25, 1997 decision requiring dam removal by the licensee.

I do commend the settling parties for their efforts to resolve this very contentious proceeding. Indeed, I have publicly noted the serious social, economic, and environmental issues that underlie so many of our pending hydro cases. And I recognize that these settling parties have negotiated this agreement in full recognition of that larger backdrop. So I can understand why, in the give and take of the process, it is important to some to retain the November order. I do trust, however, that those parties will likewise understand that, while I would give them virtually all parts of their agreement, I cannot vote to leave in place an order that I believe we had no authority under the Federal Power Act to issue.

Consistent with the parties' wishes as contained in the settlement, I would have continued the obligations outlined in the November order, including FERC oversight, but would have done so by specifying those procedures in this order approving the settlement. Thus, I would have retained all of the rights and responsibilities that are a condition of the settlement, but without the need to retain the earlier November order.

As I have indicated on several occasions in the past, the fact that the Commission expects to require dam removal in only rare circumstances will make no difference when financing is at state. Wall Street will have to assume that decommissioning is an option at the licensee's expense, and this will place a risk premium on every project. For these, as well as the statutory arguments I have made in the past, I remain unwilling to assume lightly any authority to order dam removal. Thus, I would approve the Edwards settlement, but modify to vacate the November 1997 order.

Vicky A. Bailey
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Edwards Manufacturing Company, Inc.) P-2389-030, et al.
City of Augusta, Maine)

(Issued September 16, 1998)

HÉBERT, Commissioner, concurring:

I fully support this voluntary resolution pursuant to the Comprehensive Settlement. However, I do not agree with the assertions by some who are more interested in creating precedent than in a clear enumeration of the bargained for settlement. It causes me pause at the lengths certain parties will go in order to protect a ruling which is void of legal basis and in direct contradiction to the statutory language and legislative history.

With these thoughts in mind, I painstakingly concur.

Curt L. Hébert, Jr.
Commissioner