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August 30, 2006

via FAX @ 207/287-2814
and by regular mail

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

Re: Friends Of Merrymeeting Bay Second Petition To Modify Water
Quality Certifications Of Dams On The Androscoggin Rivers

Dear Chairman Scott and Members of the Board of Environmental
Protection:

On February 1, 2006, this Board declined to grant
Petitioners', Friends of Merrymeeting Bay (hereinafter referred
to as "FOMB") and Douglas Watts, request for a hearing regarding
the issue of safe upstream and downstream passage of eels on the
Androscoggin River (hereinafter referred to as "the Andro I
Petition"). The deciding vote was 4 to 2 against granting an
adjudicatory hearing. In voting against the Andro I Petition,
several Board members verbalized their reservations about the
sufficiency of that Petition.

Petitioner Douglas Watts took a Rule 80(C) appeal of the
BEP's decision on that Petition. As of the date of this letter,
that appeal is still pending before the Kennebec County Superior
Court, bearing Docket No. AP-06-19.

On May 17, 2006, Petitioners FOMB and Watts, together with
approximately 60 other Petitioners, including virtually the
entire Lewiston/Auburn legislative delegation, including State

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Senator Dennis Damon, Chair of the Joint Committee on Marine Resources, filed another Petition seeking to modify water quality certifications on the Androscoggin River (hereinafter referred to as "the Andro II Petition"). Complete copies of the Andro II Petition, including supporting exhibits, were placed on computer disks and supplied to BEP support staff for submission to all of the Board members, along with the filing on May 17, 2006.

By letter dated June 9, 2006, Chairman Scott unilaterally decided to defer the Andro II Petition because, in his view, it was substantially similar to the Andro I Petition that had been appealed. Chairman Scott made this decision in spite of both Maine Statutory law (Title 38 M.R.S.A. Section 341-D) and DEP Rules (Chapter 2, Section 27), which clearly require that any petition filed with the Board shall be heard by the full Board within thirty (30) days of submission. I have recently been advised by Board Counsel, AAG Carol Blasi, that she and Chairman Scott believe that he has the "inherent authority" to withhold the Andro II Petition, pending resolution of the Rule 80(C) appeal of the denial of the Andro I Petition. There is, however, no clear provision granting the Chairman the authority to restrict Petitioners' right to have the Andro II Petition presented to the full Board membership for its consideration.

Petitioners believe that the Chairman's actions in this regard are ultra vires and without statutory or regulatory support. Assuming arguendo, that the Chairman has the necessary discretion to withhold a petition from the full Board as part of his general authority to administer the Board, Petitioners have the right under the Board's structure to challenge that decision in an appeal to the full Board. See, e.g., 06-096, ch. 30, § 24 "Ruling" ("The Commissioner or Presiding Officer may be overruled by a majority vote of the Board members present on any decision or ruling relating to a hearing.")

In deferring action on the Andro II Petition, the Chairman has assumed, and we are constrained to note that he has assumed incorrectly, that both the Andro I and Andro II Petitions are substantially similar, and, therefore, the Superior Court's decision on the Rule 80(C) appeal of the Andro I Petition will somehow affect the Board's consideration of the Andro II Petition. Petitioners respectfully submit, however, that the Andro II Petition is substantially and materially different from the Andro I Petition, and there is, therefore, no legitimate basis for deferral of the Andro II Petition.

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Moreover, how quickly other petitioners can follow up with a similar petition in the future -- a legal and policy question issue -- will not be advanced by the Superior Court's ruling on the Andro I Petition. Accordingly, there is no legitimate reason to defer the full Board's consideration of this issue. It is as ripe now as it will ever be.

Wherefore, Petitioners move, pursuant to 06-096, ch. 30, § 24, to have the full Board consider the June 9, 2006 decision of the Chairman to defer action on the Andro II Petition, in light of clear statutory and regulatory authority to the contrary.

Petitioners thank the full Board for its prompt consideration of the matter raised herein.

Sincerely,

Bruce M. Merrill,
Attorney for FOMB and on
behalf of other Andro
II Petitioners

cc: Mr. Ed Friedman, FOMB
Mr. Douglas Watts
Bruce M. Merrill, Esq.
Mr. David A. Nicholas, Consultant
Androscoggin Service List