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September 13, 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, et al.,
Second Petition To Modify Water Quality Certifications
Of Dams On The Androscoggin River

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

This is in response to Mr. Manahan's September 8, 2006
letter regarding Friends of Merrymeeting Bay's ("FOMB") request
that the full Board consider the second petition to modify water
quality certifications of dams on the Androscoggin River ("Andro
II Petition"). FOMB's request was made in an August 30, 2006
letter to the Chairman Scott and members of the Board.

Mr. Manahan does not address the point that, pursuant to 38
M.R.S.A. Section 341-D and DEP Rules Ch. 2, Section 27, FOMB is
entitled to a decision *from the full Board* as to whether to grant
a hearing on the Andro II Petition, and that this decision was to
be made within thirty days of the petition's submission. The
issues of "appeal" to the full Board or "reconsideration" are not
implicated because the Chairman's action was *ultra vires*, that
is, without statutory or regulatory authority.

Ignoring this point, Mr. Manahan instead assumes the
Chairman has the power to hold the petition in abeyance, and
argues first, that such a decision is not reviewable because a
hearing has not been scheduled. This argument is contradicted by
Mr. Manahan's own description of Chapter 30, Section 24, which
provides for Board review of a Chairman's ruling: "Chapter 30,
Section 24 provides that the Chair may be overruled by a majority
vote of the Board *on any decision or ruling relating to a hearing*

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. . . " Obviously, the ruling at issue here "relates" to a hearing, thus the full Board has the power to review it.

Second, Mr. Manahan argues that the request for full Board review is untimely. However, Mr. Manahan does not - and cannot - point to any deadline in the rules for filing such a request. The Board is not inconvenienced, and the dam operators are not prejudiced, by the timing of the request. Nor, it should be noted, would an "unworkable" precedent be set by having full Board review, as Mr. Manahan suggests. Board rules already provide for Board review of rulings, without any limitation as to their subject matter. Certainly a review of a ruling on something as fundamental as to whether to hold a hearing would not undermine the efficiency of Board operations.

In any event, even if there is considered to be a 60-day deadline to file a request for full Board review (and FOMB maintains that no such deadline exists), the request for full Board review was filed within 60 days of FOMB learning that the full Board, in fact, did not participate in the decision to hold the Andro II Petition in abeyance. That the Board did not participate in that decision was not stated in the June 9, 2006 letter from Chairman Scott, and FOMB learned from BEP staff that this was the case only on July 5, 2006, less than 60 days before the FOMB request for full Board review was submitted.

Third, Mr. Manahan revives the dam operators' request that the Andro II Petition be denied. A response to this argument was filed on June 7, and it will not be repeated here. In any event, a decision to dismiss the petition clearly can only be made by the Board. It is apparent that the dam operators themselves want a decision as to whether or not a hearing will be granted on the Andro II Petition, and so it would seem that it is in all the parties' interests to have the full Board make that ruling.

Sincerely,

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

cc: Mr. Ed Friedman, FOMB
Mr. Douglas Watts
Androscoggin Service List