

# BERNSTEIN SHUR

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January 17, 2007

## *VIA HAND DELIVERY*

Virginia N. Plummer, Chairwoman  
Maine Board of Environmental Protection  
Ray Building – AMHI State Office Complex  
17 State House Station  
Augusta, ME 04333-0017

**Re:   Petitions for Revocation, Modification or Suspension of Permits and Water Quality Certification for the Lockwood, Hydro-Kennebec, Shawmut and Weston Hydro Projects**

Dear Chairwoman Plummer:

Please find enclosed the pre-filed direct testimony of FPL Energy Maine Hydro LLC (FPLE) and Merimil Limited Partnership (MLP) in regards to the petitions from Douglas H. Watts and Friends of Merrymeeting Bay (FOMB) to revoke, modify or suspend the water quality certifications for the Lockwood, Shawmut and Weston projects on the lower Kennebec River.

As outlined in the testimony that follows, FPLE owns the Shawmut and Weston Hydroelectric Projects that are part of the subject of this proceeding. FPLE also owns Kennebec Hydro Resources, Inc. (KHR) that in turn is the General Partner and owns a 50% interest in the MLP, the owner of the Lockwood Hydroelectric Project which is also included in this proceeding.

The four witnesses presenting testimony on behalf of FPLE and MLP collectively have over a century of biological and/or operational experience with hydro and fisheries issues. Additionally, they have several decades of experience with Maine and Federal agencies concerning the licensing and operation of these and other Maine projects.

Two of our witnesses, Mr. Wiley and Mr. Richter, have intimate knowledge of the operations and regulatory issues surrounding the Lockwood, Shawmut and Weston projects.

Mr. Wiley and Mr. Richter also were directly involved in the negotiations surrounding the Lower Kennebec River Comprehensive Hydro Settlement Accord and the 1998 Kennebec Hydro Developers Group Agreement which have been instrumental in supporting the State's fisheries restoration efforts in the Kennebec River basin. The 1998 KHDG Agreement also formed the basis for the fish passage conditions outlined in the certifications issued by the Department for these projects.

Our other two witnesses, Mr. Kulik and Mr. Ault, are biologists specializing in the fields of anadromous and catadromous (eel) fish passage. Their expertise in these fields should be helpful to the Board as it evaluates the petitions.

For the convenience of BEP members, the following table lists in order the witnesses and specific topic(s) that each will be covering:

<b>FPL Energy Maine Hydro LLC and Merimil Limited Partnership Kennebec River Petitions Pre-Filed Direct Testimony Witness List and Topic(s) of Testimony</b>	
<b>Witness</b>	<b>Topic</b>
1. F. Allen Wiley, Director of Business and Regulatory Affairs – Northeast Region, FPL Energy	<b>Part I</b> <ul style="list-style-type: none"> <li>▪ Role of State Agencies for Fisheries Management in Maine</li> <li>▪ Role of State Agencies for Requiring Fish Passage in Maine</li> <li>▪ Overview of the Hydro Licensing Process</li> </ul> <b>Part II</b> <ul style="list-style-type: none"> <li>▪ Overview of the Lower Kennebec River Comprehensive Hydro Settlement Accord</li> <li>▪ Overview of the 1998 Kennebec Hydro Developers Group Agreement</li> </ul>
2. Robert C. Richter III, Senior Environmental Specialist, FPL Energy Maine Hydro LLC	<ul style="list-style-type: none"> <li>▪ Implementation of Upstream Anadromous Fish Passage Measures at the Shawmut and Weston Projects</li> <li>• Implementation of Downstream Anadromous Fish Passage Measures at the Weston, Shawmut and Lockwood Projects</li> <li>▪ Implementation of Downstream Eel Passage Measures for the Weston, Shawmut and Lockwood Projects</li> </ul>
3. Brandon H. Kulik, Senior Fisheries Scientist, Kleinschmidt Associates	<ul style="list-style-type: none"> <li>▪ Upstream anadromous fish passage at the Shawmut and Weston projects.</li> <li>▪ Downstream anadromous fish passage at the Weston, Shawmut and Lockwood projects.</li> <li>▪ The petition for listing Atlantic salmon under the Endangered Species Act.</li> </ul>
4. Scott R. Ault, Senior Fisheries Biologist and Project Manager, Kleinschmidt Associates	<ul style="list-style-type: none"> <li>▪ Downstream American eel passage at the Weston, Shawmut and Lockwood hydro projects.</li> <li>▪ The petition for listing of American eel under the Endangered Species Act.</li> </ul>

In brief, we provide you with undisputable evidence that it is the Department of Marine Resources (DMR), the Maine Atlantic Salmon Commission, (MASC) and the Department of Inland Fisheries and Wildlife (DIFW) who have primary responsibility for establishing fisheries management policies, goals and objectives and for determining fish passage requirements in Maine; there is no Maine law requiring fish passage facilities at all Maine dams, nor any law saying that the killing of an eel or Atlantic salmon at a dam is illegal; once a state has issued its water quality certification and FERC has incorporated those conditions into a license, those conditions are enforceable only by FERC, not by the State; a state may modify its certification after a FERC license is issued only when the FERC license includes a "re-opener" condition authorizing the state to modify said conditions, or if the licensee proposes to amend its license in a way that requires a new certification—and that neither prerequisite exists for the three projects in this proceeding; once a FERC license is issued, it may be modified only upon the mutual consent of FERC and the licensee; and therefore as a matter of law you must dismiss the petitions to revoke, modify or suspend the water quality certifications for the Lockwood, Shawmut or Weston projects.

Additionally, you will read and hear undisputable evidence that the settlement which resulted in the signing of the Lower Kennebec Settlement Accord and its attendant 1998 KHDG Agreement was instrumental in resolving the long-running, contentious debate over the future of the Edwards Dam; that the Settlement Accord and its integrated settlement agreements allowed the removal of the Edwards Dam to proceed in an expeditious and cooperative manner, and for fish passage measures to be implemented at upstream dams in a rational, sequential and scientific manner; not only did all appropriate state and federal fisheries agencies support the Agreement but the DEP and FERC relied upon the Agreement when they issued water quality certifications and FERC license amendments, respectively, and were not timely appealed by any of the petitioners in this case; KHDG dam owners have invested considerable time, effort and monies to support the State's restoration efforts on the lower Kennebec River; the State's fish restoration efforts in the Kennebec River basin have been substantially enhanced by the cooperative efforts among the dam owners, State and federal resource agencies, Kennebec Coalition and other parties to the Settlement Accord; and that should the Board approve the pending petitions, then under the terms of the KHDG Agreement a) it may be terminated, b) the State may be required to refund monies to KHDG dam owners, and c) the State may not be entitled to receive additional contributions from KHDG members.

There are additional grounds for the dismissal or denial of the pending petitions. In the testimonies that follow is substantial, fact-based evidence that petitioners cannot meet their burden of proof to demonstrate 1) that the certified project activities pose a threat to human health or the environment; 2) that the certifications failed to include any standard or limitation legally required on the date of issuance; 3) that there has been a change in any condition or circumstance that requires revocation, suspension or a modification of the terms of the certifications; and 4) that the licensees have violated any law administered by the Department.

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More specifically, the testimonies of our fisheries biologists are that the Lockwood, Shawmut and Weston hydro projects do have adequate passage facilities; that there is no evidence of significant anadromous fish or eel mortality at these projects impacting the viability of those populations; that the limited number of eels mortalities documented at the three projects are insignificant, particularly in comparison to the State-authorized eel fishing limits for individual and commercial fishermen; that the fish populations in the Kennebec River appear to be increasing in abundance; that we work collaboratively with fishery agencies to monitor, refine, and expand fish passage facilities and measures in accordance with the KHDG Agreement; that additional study plans for eel passage at the three projects have been reviewed by resource agencies and filed with the DEP and FERC and will begin implementation this year; that said studies will provide state-of-the-art scientific evidence which can then be used to determine whether existing measures are effective at passing eels or if additional measures for downstream passage of eels need to be implemented at the projects.

As for petitioners' claims that circumstances have changed because of pending petitions at the federal level concerning the legal status of the American eel and the Kennebec River Atlantic salmon, there is undisputable evidence that no federal determination of those species being endangered has been made; therefore, petitioners claim is reduced to legally insufficient speculation.

In conclusion, for some or all of the reasons I have described above and which you will read in the testimonies that follow, this Board should dismiss the petitions seeking to revoke, suspend or modify the water quality certifications for the Lockwood, Shawmut and Weston projects. Thank you for your patience and consideration, and we look forward to seeing you in March.

Sincerely,



Jeffrey A. Thaler, Esq.

Enclosures  
cc: Service List