

IN THE MATTER OF

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

AFFIDAVIT OF ED FRIEDMAN IN SUPPORT OF PETITION OF FRIENDS OF MERRYMEETING BAY TO INTERVENE IN PETITIONS TO MODIFY WATER QUALITY CERTIFICATIONS

Ed Friedman, under the penalty of perjury, states as follows:

1. I am Chairman of, and a member of, Friends of Merrymeeting Bay (“FOMB”).

I live in Bowdoinham, Maine.

BACKGROUND ON FOMB

2. Merrymeeting Bay is the 9,000 acre confluence of six rivers: the Kennebec, Androscoggin, Cathance, Muddy, Eastern and Abbagadasset Rivers. Over 35% of Maine’s waters, including the Kennebec and Androscoggin Rivers, drain through Merrymeeting Bay. FOMB is a 501(c)(3) nonprofit organization dedicated to protecting the ecological, aesthetic, recreational and commercial values of Merrymeeting Bay. FOMB works to preserve and protect ecosystems of Merrymeeting Bay through education, research, advocacy and land protection. FOMB is a membership organization with well over 300 members.

3. FOMB leads a variety of outings on and around Merrymeeting Bay that are offered to the general public as well as members. FOMB has led paddling trips, shoreline

clean ups, archaeology digs, and plant walks, to name just a few of the types of activities we lead. FOMB also hosts a speaker series. Topics have included eels, seal strandings, conservation goals, anadromous fish, historical talks, etc.

4. In addition, FOMB conducts research on Merrymeeting Bay. This research includes: the use of caged mussels for the biomonitoring of contaminants (dioxin, PCBs, endocrine disrupters) in the Kennebec and to some extent the Androscoggin, contaminant analyses of sediments, land use changes and aquatic vegetation changes over time (1956-present), study of circulation patterns in the Bay and all of its tributaries, chemical analyses of turbine-killed eels, bald eagle monitoring, monitoring of invasive plant species, etc. Much of this work is done with partner agencies-DEP, DMR, USFWS and USGS.

5. FOMB provides in-school and in-the field environmental education opportunities to approximately 1000 Bay area children each year. Without exception, children understand instantly that it is wrong to deny migratory fish safe and effective passage around dams and are aghast that adults allow for fish kills at these dams.

6. FOMB is also a land trust. In the last approximately 6 years FOMB has protected over 1000 acres around the Bay. Highest on FOMB's criteria list are those lands that provide habitat protection for wildlife and that protect the significant wetland areas of the Bay that in turn provide spawning and nursery habitat for our fishery resources.

7. Advocacy work in which we have engaged includes defense of Right-to-Know laws, toxic use reduction programs, gravel pit enforcement, dam removal, fishery restoration and passage, opposition to sludge spreading on aquifers, and filing an ESA petition to list the Kennebec population of Atlantic salmon.

FOMB'S WORK ON EELS

8. A variety of FOMB's activities have involved efforts to protect the American eel. Included in these activities are: providing testimony and evidence to the federal government to support the proposed listing of the American eel as an endangered species; documenting eel kills; funding chemical contaminant analyses of turbine-killed eels; sponsoring lectures on eels; engaging in radio and television broadcasts on the plight and biology of eels and, of course, filing the petition to modify the water quality certifications for dams on the Kennebec and Androscoggin Rivers ("Petition to Modify").

FOMB'S DIRECT AND SUBSTANTIAL INTEREST

9. There are a number of ways FOMB has a direct and substantial interest which may be affected by this proceeding:

10. First, and most obvious, it is FOMB's Petition to Modify that is one of the petitions being decided on. Thus we have a direct and substantial interest in the outcome of the proceedings which will lead to a ruling on our own petition.

11. Second, FOMB has a direct and substantial interest that is affected by this proceeding because our members use, enjoy, engage in and fund work to protect Merrymeeting Bay, and our use, enjoyment and mission are diminished by the dams, which are interfering with upstream and downstream passage for American eel, American shad, blueback herring, alewife and Atlantic salmon and striped bass. Below, I detail how this proceeding affects me, and knowing FOMB's members as I do (on the Board since 1993 and Chair since 1996), state that my experience is a common one amongst our membership.

12. It is important to me that the biodiversity of Merrymeeting Bay be as healthy as possible. The four dams that are the subject of this proceeding are harming the

biodiversity of Merrymeeting Bay by interfering with upstream and downstream passage of a variety of fish species. Knowing that the diversity and abundance of fish is diminished by the dams in turn diminishes my enjoyment of the Bay, is contrary to the mission of FOMB (to preserve, protect and improve the unique ecosystems of Merrymeeting Bay) and violates the goals of the Clean Water Act and the Maine BEP that speak to ensuring the “chemical, physical and biological integrity” of our waters.

13. I regularly paddle and motor on Merrymeeting Bay, on the Kennebec and Androscoggin and intend to continue so doing. I also am a Maine Guide and take people on kayak tours of the Bay and offer paddle instruction. I observe many of the various diadromous fish including those subject to the Petition. My paddling experience is greatly diminished knowing there are less of these fish than there would otherwise be due to the effect of dams, including the four on the Kennebec at issue here. I fish some but would catch more if they were more abundant. I don't fish some species due to their declining population (Atlantic salmon and eels) and most are not safe to eat because of toxic contamination levels. When long-lived contaminant-filled eels are killed at dams, the body burdens of contaminants they carry are re-introduced back into the local ecosystem where they become accessible to fish and other wildlife. I enjoy bird watching and observing wildlife, but the decline of fish in the Kennebec and Merrymeeting Bay means there is less of a food source, thus less birds and wildlife to observe. I regularly assist MDIF&W in conducting nesting surveys of bald eagles in the Bay and on the Kennebec and Androscoggin. Over fairly short time spans we see declining rates of reproductive success that are most likely indicative of high body burdens of contaminants. Our membership takes great pleasure from seeing a relative abundance of bald eagles in the

area and members are hurt when eagles are adversely affected by primary or secondary contamination such as that from turbine-killed eels.

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

15. Also, trips that FOMB leads are diminished by the fact that the Bay's biological integrity is lessened by these adverse effects of the dams.

16. The Petitions to Modify submitted by FOMB and Douglas Watts seek to ameliorate the harm dams are causing to eels and other fish species by improving the prospects of the species' being able to pass upstream and downstream past the dams. This is necessary to allow for reproduction and, in the case of the eel, survival of the various species. If the Board modifies the dam's water quality certifications, the population of the species should increase, and the interests of FOMB, and its members would be significantly affected in a positive way.

FOMB HAS SPECIFIC CONTENTIONS

17. FOMB has specific contentions regarding the subject matter and appropriate statutory criteria. These are laid out in (1) FOMB's petition to modify the water quality certifications, which I incorporate by reference, (2) the petition of Douglas Watts that I

incorporate by reference and (3) in a letter to the Board which was not considered by the Board earlier, but which I attach to this affidavit.

THE PETITIONER IS PREPARED AND CAPABLE OF PARTICIPATING

18. At the public meeting already held on the petition, the Board had the opportunity to conclude that FOMB is capable of participating in a hearing to support its contentions. FOMB is prepared to present witnesses and documentary evidence, cross-examine witnesses if necessary, and submit the necessary legal filings.

FOMB SHOULD BE CONSIDERED A “PARTY”

19. I file this affidavit under protest. It is unimaginable that FOMB would be forced to intervene in its own petition. I believe this procedure affects the right of the petitioners to due process under Maine law. (a) There would be no proceeding without the petitioners. (b) The petitioners *initiated* the current process in an effort to correct violation of state and federal law. (c) Chapter 2 §27 of the DEP’s Rules for the Processing of Applications and Other Administrative matters provides that *any person*, including the Commissioner, may petition the Board to revoke, modify or suspend a license. (d) The BEP has heard the petitioner’s claims and elevated them to a full adjudicated hearing. (e) In both Kennebec and Androscoggin preliminary hearings the Board in its issued “Findings of Fact” have *affirmed* the petitioner’s standing in the matters. (f) Furthermore, the petitioners are aggrieved parties because they are harmed directly when the state does not enforce its own laws and those of the federal government it is tasked with enforcing. (g) Rules of evidence (Title 5, Chapter 375-§9057) state: “Evidence shall be admitted if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs...” In this same vein, I submit that any reasonable mind would consider the facts above and would come to the obvious

conclusion that; *the petitioners are an automatic party to the proceeding that is the sole result of their petition.*

20. I believe FOMB should be considered a “party” and, because its rights are at issue in this proceeding, should not have to petition to intervene. FOMB has a right to petition the Board to modify the dams’ water quality certificates, and the pursuit of that right has now reached the hearing stage. How can the Board not treat FOMB as a party when it is our petition that is being heard? Moreover, FOMB has a right to a Merrymeeting Bay, and Kennebec and Androscoggin Rivers, which meet water quality standards. The Petition to Modify was filed to force the dams to make changes that enable water quality standards to be met.

21. It is my understanding that the Conservation Law Foundation may seek to intervene in this proceeding. I am a member of the Conservation Law Foundation.

I declare under the penalty of perjury this seventh day of June, 2006, that the foregoing is true and correct.

Ed Friedman, Chair
Friends of Merrymeeting Bay

State of Maine
County of _____

Before me this day as a Notary Public personally appeared _____

Sworn to and subscribed before me this _____

Signature of Notary Public _____

Name of Notary Public _____

Notary Public, State of Maine

My commission expires: _____

