

STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

IN RE PETITIONS FOR REVOCATION, MODIFICATION OR SUSPENSION OF PERMITS
AND WATER QUALITY CERTIFICATIONS FOR THE LOCKWOOD, HYDRO-
KENNEBEC, SHAWMUT AND WESTON HYDRO PROJECTS

Merimil Limited Partnership)	
Lockwood Hydro Project)	
#L-20218-33-C-N)	
)	
Hydro Kennebec Limited Partnership)	POST-HEARING BRIEF ON BEHALF
Hydro-Kennebec Project)	OF FPL ENERGY MAINE HYDRO, LLC
#L-11244-35-A-N)	AND MERIMIL LIMITED
)	PARTNERSHIP (LOCKWOOD,
FPL Energy Maine Hydro, LLC)	SHAWMUT AND WESTON PROJECTS)¹
Shawmut Hydro Project)	
#L-19751-33-A-M)	
)	
FPL Energy Maine Hydro, LLC)	
Weston Hydro Project)	
#L-17472-33-C-M)	

No federal or state agency has supported either of the pending petitions. Every state agency to file comments or testimony in this proceeding opposes the petitions, and strongly urges their denial. All of the major environmental groups involved in the Kennebec River restoration efforts over the past 10 years -- American Rivers, Inc., Atlantic Salmon Federation, Kennebec Valley Chapter of Trout Unlimited, Natural Resources Council of Maine, and Trout Unlimited -- vigorously oppose the petitions. The Independent Energy Producers of Maine also testified in opposition. DEP staff in January 2006 recommended dismissal of the Petitions. For all of the many reasons articulated by the agencies and environmental groups, as well as for the

¹ FPLE solely owns the Shawmut and Weston projects; FPLE and Merimil jointly own the Lockwood project. For brevity sake, throughout this brief, the reference "FPLE" will apply to both FPLE and Merimil. Additionally, FPLE's post-hearing brief incorporates by reference its prefiled direct and rebuttal testimonies and those of Hydro-Kennebec, as well as the legal arguments of Hydro-Kennebec in its post-hearing brief.

many legal and evidentiary reasons set forth below, the Board of Environmental Protection likewise should deny the pending Petitions.

I. The Board's Scope of Review and Jurisdiction is Limited by Petitioners' Tactical Choices, Prior Board Orders, and Federal Law

Two of the four claims upon which Petitioners base their request for revocation, modification or suspension - - that on the date issued FPLE's licenses failed to include any standard or limitation legally required, and that FPLE has violated any law administered by the DEP - - are either time-barred or precluded by Petitioners' pre-hearing actions and by this Board's Pre-Hearing Orders. It is undisputed that the Shawmut, Lockwood and Weston Water Quality Certifications ("WQCs") were amended on July 31, 1998, as well as their FERC licenses on September 16, 1998 to incorporate the KHDG Agreement's provisions; that as part of its relicensing a new Lockwood WQC was issued on August 26, 2004 and its FERC license on March 4, 2005; that the terms of the 1998 Lower Kennebec River Comprehensive Accord (including the KHDG Agreement) were incorporated into FPLE's WQCs and licenses; that none of the Petitioners filed objections to or appeals of any of the FPLE WQCs or licenses, nor to the KHDG Agreement; and that the Maine Supreme Judicial Court has previously ruled-- in a case involving another party to this proceeding-- that efforts to challenge any terms of the KHDG Agreement are time-barred. See Save Our Sebasticook, Inc., et al. v. Department of Marine Resources, et al., No. Mem-05-142 (Oct. 12, 2005) (attached hereto as Attachment A).

Consequently, Petitioners' attack on FPLE's 1998 and (Lockwood) 2004 WQCs, as well as their collateral attack on the provisions of the KHDG Agreement relating to anadromous fish and eels passage schedules and requirements likewise are untimely.

Moreover, after the original filing of the pending petitions all parties requested that the hearing be held in abeyance pending issuance of condition compliance orders and the deadline

for any appeal from those orders. See November 30, 2006 Board's Third Procedural Order at p. 2, §3 (attached hereto as Attachment B). The Department issued condition compliance orders pertaining to eel passage on August 8 and September 14, 2006

indicating that, subject to certain conditions, the dam owners were taking appropriate steps to comply with the conditions of their water quality certifications. Similarly, condition compliance orders for upstream fish passage at the Lockwood Project were issued on March 3, 2005 and February 16, 2006; and for downstream fish passage at the Hydro-Kennebec Project on September 14, 2006. **No appeals of the condition compliance orders were filed.**

Third Procedural Order at pp. 3-4 (emphasis added). Moreover, the Third Procedural Order went on to adjudicate that all of the condition compliance orders

were not appealed and are now final. Given these undisputed facts, the issues of whether the Water Quality Certifications should be modified to require immediate upstream eel passage facilities at each of the dams, immediate upstream fish passage facilities at Lockwood, and immediate downstream fish passage facilities at Hydro-Kennebec are moot.

Id. at p. 4.

Petitioners appealed only as to the Lockwood and Hydro-Kennebec portions of Third Procedural Order's adjudication, and their appeal was denied by the full Board. Petitioners did **not** appeal any other adjudications in the Third Procedural Order, including footnote 3 of that Order:

The [condition compliance] orders further found that the dam owners are currently taking appropriate steps to comply with their existing Water Quality Certifications with respect to upstream and downstream eel passage and upstream fish passage at Lockwood, and downstream fish passage at Hydro-Kennebec. These orders were not appealed and are now final. **The issue of whether the dam owners are in compliance with their existing Water Quality Certifications is not before the Board in this proceeding.**

Id. at p. 4, fn. 3 (emphasis added). Consequently, this Board has already adjudicated and determined that FPLE is “in compliance” with its “existing Water Quality Certifications,” and Petitioners therefore have no basis in this pending proceeding to argue legal non-compliance. Indeed, Petitioners deliberately chose **not** in their petitions the first criterion for possible license modification: “A. The licensee has violated any condition of the license.” Thus, for one or more reasons, Petitioners have waived any claim that FPLE has violated or is violating its WQCs contrary to law.

Additionally and alternatively, with respect to all four grounds upon which the pending petitions rest, this Board has previously stated that where the certifications do not contain “relevant reopener clauses,” then the “Attorney General’s Office has counseled the Board during consideration of the Petitions to modify that this represents a substantial issue of law that has not yet been tested in court.” August 30, 2006 Board Second Procedural Order at §3, p. 3 (attached hereto as Attachment C). Moreover, the Second Procedural Order held:

The provision in the KHDG agreement referenced by FOMB simply permits the parties to the KHDG agreement, which does not include the DEP or the Board, to request that FERC take action to amend a license to insert appropriate terms and conditions. Even if the BEP or the DEP were such a party, this provision, which arguably reserves *FERC’s authority* to amend the license upon receiving such a petition, does not reserve a similar authority to the parties to the agreement. All FERC licenses also include a standard reopener that requires a licensee to take such action as is necessary for the conservation and development of fisheries resources “as may be ordered by [*FERC*] upon its own motion or upon the recommendation of [*the USFWS*] or the fish and wildlife agency or agencies of any State.” This reopener similarly does not reserve any authority to the Board or DEP.

Id. at p. 4, fn 1 (emphasis in original).

Neither Petitioner FOMB nor Watts subsequently challenged or appealed these determinations in the Second Procedural Order.

Furthermore, in the parallel Androscoggin River proceedings in which both FOMB and Watts filed similar petitions to revoke, suspend or modify Water Quality Certifications of dam owners on that river, this Board previously adjudicated that “in the absence of specific relevant reopeners and Water Quality Certifications,” the legal effect of any attempt to modify a certification “is highly questionable.” February 2, 2006 BEP Findings of Fact and Order at p. 24. That Board Order was appealed by Mr. Watts to the Maine Superior Court. On December 6, 2006 Justice Donald H. Marden granted the Motion to Dismiss of the Maine Board of Environmental Protection; Justice Marden went on to note the importance of licensees of being able to rely upon the finality of their licenses and that therefore the Board, “as a gatekeeper to ensure that thoroughly investigated final licenses are **only** disturbed under certain circumstances,” should “necessarily deny most petitions, reserving public hearings for only those select petitions which raise enough evidence as to call into question the reasoning for **granting the license.**” *Watts v. Maine Board of Environmental Protection*, Docket No. AP-06-19 (Me. Super. Ct., Ken. Cty., 12/8/06) (Marden, J.), at pp. 3-4 (emphasis added). In this case, the certifications were granted in 1998 and (Lockwood only) 2004, were not appealed by Petitioners, nor were the 2006 condition compliance orders appealed. Nor, as will be discussed in more detail in Section IV of this brief, have there been legally sufficient changes in circumstances since the granting of the certifications or licenses to warrant modifying, suspending or revoking the certifications.

II. Alternatively, FERC is the Only Legally Proper Forum For Any Challenge to the License Conditions of the Lockwood, Shawmut and Weston Hydro Projects

It is undisputed that FERC has jurisdiction over all generating and storage dams on navigable waters in Maine, including the Lockwood, Shawmut and Weston projects. (A. Wiley

Pre-Filed Direct Part I at pp. 12-13.) Section 401(a) of the Federal Water Pollution Control Act (the Clean Water Act or “CWA”) prohibits FERC from issuing a federal permit for a hydro project that results in a discharge to navigable waters until the State certifies that the activity will comply with the State’s water quality standards or otherwise waives certification. The Maine Department of Environmental Protection is the agency responsible for certifying that the hydro projects comply with applicable water quality standards of pursuant to Section 401 for the licensing and re-licensing of all existing hydropower projects outside of the unorganized territories, such as the Lockwood, Shawmut and Weston projects. (A. Wiley Direct Part I at p. 15.) Thus, Mr. Watts conceded that the CWA certifications must be obtained from, or waived by, the State before a new FERC license can be issued, and that both his and FOMB’s pending petition proceeding has to do with the FERC licenses. March 15, 2007 Hearing Tr. at p.69:9-15.

Pursuant to Section 401(d) of the CWA, 33 U.S.C. §1341, the water quality certification (“WQC”) is incorporated as a condition to the FERC license. Those license conditions are enforceable only by the federal agency issuing the permit (in this case, FERC), not by the State. See 33 U.S.C. § 1341(d), *Great Northern Paper, Inc.*, 77 FERC ¶¶ 61,066 (1996), *aff’d*, *Conservation Law Foundation v. FERC*, 216 F.3d 41 (D.C. Cir. 2000): “[O]nce 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”.²

While FERC must incorporate the appropriate conditions included in a State certification in a FERC license, only FERC has the authority to require an applicant to undertake such activities. (A. Wiley Pre-filed Direct Part I at p. 16, citing *First Iowa Hydro-Electric*

² Also, Section 401(a)(5) provides that the federal license (in this case, the FERC license) for which the certification was issued may only 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).

Cooperative v. Federal Power Commission, 328 U.S. 152 (1946).) Furthermore, the FERC license and the water quality certifications incorporate the terms of the 1998 KHDG Agreement. *See* 1998 KHDG Agreement section III.B.1 at p.2 (stating that the applicable terms of the Agreement be incorporated into the existing or proposed FERC licenses for FERC licensees); January 2006 Draft BEP Finding of Facts and Order for Petitions for Revocation, Modification or Suspension of the Lockwood, Hydro-Kennebec, Shawmut and Weston Hydro Projects (“Draft BEP Finding of Facts and Order”) at pp. 3, 5, 6 (stating that FERC amended the licenses for Lockwood, Shawmut and Weston to be consistent with the KHDG Agreement). The 1998 KHDG Agreement provides that if disputes arise among the parties, they are to be handled through the FERC process. (A. Wiley Direct Part II at pp. 11-12; 1998 KHDG Agreement §§ III.D, III.E, III.F, IV.A (stating that “Any disputes will be handled through the FERC process.”))

Furthermore, unless specific reopener provisions are provided for in the certification and such provisions are incorporated into the FERC license, modifying, revoking, or suspending the WQCs would require the consent of FERC and the licensee because, under Section 6 of the Federal Power Act, FERC licenses may be amended or surrendered **only** upon the consent of FERC **and** the licensee.³ (A. Wiley Direct Part I at pp. 16-17.) Once the FERC licenses have been issued in reliance upon the WQCs, the WQCs for Weston, Shawmut, and Lockwood may not be revoked, modified, or suspended, without the consent of FERC **and** FPLE.

As noted above, in the Second Procedural Order this Board found that the KHDG Agreement does not contain a relevant reopener provision that give any authority to the Board or

³ 16 U.S.C. § 799.

DEP.⁴ Additionally, there is no dispute that none of the FPLE certifications contain a “reopener” clause with respect to eel passage that gives either the DEP or BEP any authority to change the certification in any way. With respect to anadromous fish passage, the FPLE certifications do contain a condition which reserves to the DEP, after notice and opportunity for hearing, the ability to require reasonable changes in design and/or operation of fish passage facilities as may be deemed necessary to adequately pass anadromous species through the project site.

However, FERC chose **not** to incorporate this condition or any of the certification conditions into the 1998 FERC license amendments for the Shawmut and Weston Projects, instead only amending the licenses “to include the fish passage requirements set forth in the 1998 KHDG Agreement.”⁵ Subsequently, during Lockwood’s relicensing FERC issued a new license in 2005, which did include the DEP “reopener;” but as this Board adjudicated in the Third Procedural Order and denial of Petitioners’ appeal thereof, upstream fish passage exists and is operational at Lockwood and therefore is not before the Board in this proceeding.⁶ As discussed in detail in the pre-filed rebuttal testimony of Matthew D. Manahan on behalf of Hydro-Kennebec, and incorporated by reference herein, the *Warren* decision in no way supports either the claims or procedural grounds for the Watts and FOMB petitions.

⁴ Petitioners’ reliance upon *S.D. Warren Co. v. Board of Environmental Protection*, 2005 ME 27, 868 A.2d 210 for the proposition that Maine can reopen and modify any WQCs is incorrect. S.D. Warren was involved in a different proceeding from the one in which FPLE now finds itself; S.D. Warren was involved in a FERC relicensing process, where it needed a new Water Quality Certification. By contrast, FPLE already has its Water Quality Certifications.

⁵ See FERC’s 1998 Order at Exhibit GLH-23 (Hydro-Kennebec), ordering paragraph D (pg. 14).

⁶ With respect to upstream and downstream eel passage at FPLE’s projects, those were all subject to the August 8 and September 14, 2006 condition compliance orders issued by the Department and, as found in the Board’s Third Procedural Order, because Petitioners chose not to appeal them the compliance orders and their finding that “the dam owners are currently taking appropriate steps to comply with their existing Water Quality Certifications with respect to upstream and downstream eel passage” are final, and thus “the issue of whether the dam owners are in compliance with their existing Water Quality Certifications is not before the Board in this proceeding.” See November 30, 2006 Third Procedural Order at p. 4 (Attachment B hereto). Significantly, Petitioners did **not** appeal from this adjudication either.

III. FPLE WQCs Contained All Required Standards or Limitations When Issued.

As discussed in Section I above, Petitioners' claim that the 1998 Shawmut and Weston, and the 2004 Lockwood Water Quality Certifications failed to include "any standard or limitation legally required on the date of issuance" was long ago time-barred. The same holds true for Petitioners' complaints about the KHDG Agreement's phased approach to the implementation of interim and then final fish passage procedures.⁷

As noted above, the DEP Commissioner issued modified WQCs for Weston and Shawmut in 1998 in which it incorporated the terms and conditions of the 1998 KHDG Agreement. In each of those WQCs, the Commissioner concluded that "there is a reasonable assurance that the modification of the fish passage conditions of the FERC license for the [Project] to be consistent with the terms of the [KHDG Agreement] will not violate applicable water quality standards." Similarly, in the 2004 WQC for the Lockwood Project, the Commissioner found that "the applicant's proposals to provide fisheries restoration support and provide eel and fish passage in compliance with the terms of the KHDG Settlement Agreement will be adequate to ensure that project waters are suitable for the designated use of habitat for fish." The Commissioner also concluded that "the continued operation of the Lockwood Hydroelectric Project will result in all waters affected by the project being suitable for all designated uses and meeting all other applicable water quality standards," subject to the conditions relating to fish passage as found in the KHDG Agreement. Again, there were no appeals of the WQCs for the projects.

⁷ Additionally, the Maine Supreme Court did not find any legal deficiency in the phased approach to fisheries restoration on the Presumpscot River, based upon KHDG-like trigger populations or returning fish, in *S.D. Warren v. Board of Environmental Protection*, 2005 ME 27, 868 A.2d 210.

Consequently, for the projects at issue here, the Department issued permits and/or water quality certifications requiring the phased installation of upstream and downstream passage facilities for eels and various species of anadromous fish in accordance with the provisions of the 1998 KHDG Agreement. This Agreement, which is the latest step in a long history of efforts to restore migratory fish to the Kennebec River, was supported by all appropriate state and federal fisheries agencies and has been approved by FERC.⁸ Petitioners have not presented any evidence calling into question the record upon which the Department based its past decisions requiring fish passage in accordance with the Agreement.⁹

IV. Petitioners Have Not Satisfied their Burden to Establish That There Has Been A Change in Condition or Circumstance that Requires Revocation, Suspension or Modification of the Terms of FPLE's Water Quality Certificates.

Petitioners have not met their burden of proving that there has been any "change in any condition or circumstance" requiring revocation or changes to the WQCs.¹⁰ In this proceeding, the Petitions relied upon the then-pending consideration by the United States Fish & Wildlife Service as to whether or not the American eel is an endangered or threatened species. However, during the pendency of this proceeding USFWS specifically found that the American eel is **not** an endangered or threatened species. See Hydro-Kennebec Exhibit GLH-13.

⁸ In approving the 1998 KHDG Agreement, FERC wrote: "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 resolved disputes regarding the provision of fish passage at the upstream projects, with concomitant environmental benefits." Order Approving Settlement, issued September 16, 1998 (84 F.E.R.C. ¶ 61,227), Exhibit FPLE-5 at pp.9-10..

⁹ Indeed, as Mr. Watts conceded, it is undisputed that the DEP could have completely waived certification. March 15, 2007 Hearing Tr. at pp.69:9 to 70:9. Instead, the DEP issued WQCs that have, it is undisputed, helped enhance the Kennebec River fishery.

¹⁰ Petitioners, as the moving parties in a non-licensing proceeding, have the burden of producing substantial evidence sufficient to prove by a preponderance of the evidence any of the four legal grounds or criteria set forth in their Petitions that are prerequisite to any revocation, modification of suspension of an existing license.

The Petitions also referenced the USFWS consideration of whether or not to list the Kennebec River Atlantic salmon as an endangered species. That decision has not yet been made, and consequently mere consideration alone is not legally sufficient to constitute a “change” requiring revocation, suspension or modification of an existing license. Petitioners have provided no project-specific evidence to show that there are changed circumstances or conditions since the WQCs were issued or to show that applicable water quality standards are no longer being met. The Commissioner issued modified WQCs for Weston, Lockwood and Shawmut in 1998. There have been no significant changes at the projects since that time. Project operation is the same. The project facilities are the same. The project area fisheries have improved under the continued KHDG restoration efforts. The only changes at the projects result from compliance with the modified WQCs and amended FERC licenses which have all benefited the Kennebec’s fish restoration. See A.Wiley, Pre-filed Direct Part II at pp. 9-10. Similarly, the Commissioner issued a new WQC for the Lockwood Project in 2004, and it became effective in March 2005. The only changes at Lockwood result from FPLE’s compliance with the conditions of the new license and the WQC, and the ongoing construction of upstream passage facilities to promote fisheries restoration. Again, as stated above, the Commissioner expressly found that the operation of Lockwood as conditioned meets all applicable water quality standards.

Last, the Clean Water Act makes clear that a “change in circumstances” sufficient to revoke someone’s license or certification means adverse changes in “(A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters, or (D) applicable effluent limitations or other requirements.” CWA Section 401(a)(3), 33 U.S.C. §1341(a)(3); see also *Keating v. F.E.R.C.*, 927 F.2d 616, 624 (D.C. Cir. 1991)(FERC, not the State, shall determine whether

California's asserted revocation of a WQC satisfies any of the four predicate requirements). In this proceeding, there has been no such change in any circumstance or condition that would require modification, revocation, or suspension of the WQCs for the three projects.

V. FPLE has not violated any law administered by the DEP.

If Petitioners wanted to challenge the conclusion that FPLE's projects do not meet water quality standards, or to allege that they violate Maine's anti-degradation policy, they should have done so in 1998, when the WQCs for Weston and Shawmut were modified specifically to include provisions for fish passage, including downstream passage for American eel. Similarly, they should have done so in 2004 when the Commissioner issued the WQC for the Lockwood Project, which also included provisions for fish passage, including downstream passage for American eel. In short, the time for appealing the WQCs for the Projects has expired.

Mr. Watts also states that FPLE has violated Maine law because it is illegal to kill an anadromous Atlantic salmon in Maine waters, but provides no support for this generic statement about Maine law or whether such law is administered by the DEP-- because there is no such support.¹¹ Likewise, with respect to Mr. Watts' secondary argument, he does not provide a cite to, nor is there, any law that makes it illegal for an Atlantic salmon to be killed at any dam anywhere in the State of Maine.

Petitioners also argue that under 38 M.R.S.A. § 341-D, the Board can modify the WQCs because FPLE's hydro projects do not provide "immediate, safe and effective upstream and downstream passage" for migrating fish and eels and therefore violate state water quality laws. (FOMB Pre-Filed Direct, p.1, ¶ 2; p.2, ¶ 4b; p.4, ¶ 7; Watts Pre-Filed Direct, p. 1-2, ¶¶ 1-7; p.

¹¹ Regulations administered by the Maine Atlantic Salmon Commission ("MASC") prohibit angling for Atlantic salmon in all Maine waters and require that any salmon incidentally caught must be released immediately. But the MASC's regulations do not address incidental events unrelated to angling. Likewise, Watts' reliance on the angling provisions in 12 M.R.S.A. §12654(1) is misplaced, as 1) that statute is not one administered by the DEP, and 2) even if it was, it only relates to those seeking to catch and possess the fish.

16-20, ¶¶ 34-45.) Petitioners define “immediate, safe and effective” passage to mean that as of the date of the Board’s issuance of the water quality certificate, “all fish migrating upstream can pass the dam and no fish migrating downstream are killed or injured by the dam.” (Exhibit W/FOMB-1.)

But, contrary to petitioners’ claims, FPLE’s hydro projects do not violate the Clean Water Act or Maine’s water quality laws because hydro power is a designated use within the water classification for the Lockwood, Shawmut and Weston projects and the water classifications for each of the projects contemplates some impact to aquatic life. Furthermore, petitioners’ assertion that “immediate, safe and effective upstream and downstream passage” means that all fish and eels passing through hydro projects must survive with 0% mortality, is -- they conceded at hearing -- neither practical nor attainable short of complete removal of the dams, a remedy that is sought by neither petitioner, **and** which would squarely conflict with the Maine Legislature’s clear declaration of social and environmental policy that hydropower “makes a significant contribution to the general welfare of the citizens of the State...[and] justifies singular treatment. See 38 M.R.S.A. §631; A. Wiley Pre-filed Direct at 10.

The Weston hydro project is located in Class B waters, while Lockwood and Shawmut are located in Class C waters. (A. Wiley Pre-Filed Rebuttal at pp. 5, 7.) Unlike Class AA waters, where discharges are not allowed and where habitat characteristics are not intended to be “measurably affected by human activity,” hydroelectric power generation is a designated, and therefore, permissible use in both Class B and Class C waters and accordingly, some impacts to aquatic life as a result of that designated use are legally permissible. (See 38 M.R.S.A. §§ 465(3)(A), (3)(C), (4)(A), 4(C); A. Wiley Pre-Filed Rebuttal at pp. 5, 7.) In addition, hydroelectric power is a designated use permitted by the Clean Water Act (A. Wiley Pre-Filed

Rebuttal at p.10). Thus, under the CWA and Maine's water quality laws, hydropower is considered a designated use for the waters in question and such use is required to be maintained **and** protected along with other designated uses. (A. Wiley Pre-Filed Rebuttal at p.11.)

The amount of impact to aquatic life permitted by the hydro projects varies by the classification of the water in which the project is located. In Weston's Class B waters discharges shall not cause adverse impact to aquatic life in that there shall not be "detrimental changes in the resident biological community." (See 38 M.R.S.A. § 465(3)(C); A. Wiley Pre-Filed Rebuttal at p. 7.) Detrimental changes are defined by the statute as "no significant loss of species" attributable to human activity. (See 38 M.R.S.A. § 466(12); A. Wiley Pre-Filed Rebuttal at p. 7.) Class C waters, applicable to Lockwood and Shawmut, have a lesser standard of concern, stating that "discharges to Class C waters may cause some changes to aquatic life," provided that the receiving waters support indigenous fish species and "maintain the structure and function of the resident biological community." (See 38 M.R.S.A. § 465(4)(C))

As discussed further in the next section of this brief, petitioners have not met their burden to establish that either the Lockwood, Shawmut or Weston hydro project has resulted in a significant loss of species for fish and eel populations. No fisheries resource agency has so stated; to the contrary, they and others have said that the Kennebec River fishery has been increasingly healthy since the 1998 KHDG Agreement. See L. Flagg Pre-filed Rebuttal at pp. 3-4; 3/16/07 Hearing Tr. At 51-52. It was also undisputed that shad spawning and restoration presently is focused upon the Kennebec River below Waterville (and thus Lockwood), and that most alewife spawning habitat in the Kennebec River basin actually is in the nearby Sebec, which joins the Kennebec again downstream of Lockwood. Thus, neither alewife nor for shad

restoration presently depends upon fish passage upstream of Lockwood at Shawmut or Weston. See Pre-filed Direct Testimony of B. Kulik at pp. 9-10 and exhibits cited therein.

There is no legal requirement that immediate installation of fish passage facilities must be implemented to achieve compliance with Maine's water quality standards. As previously noted, neither the Maine Supreme Court nor the DEP nor any fishery resource agencies have ever taken that position. Rather, a phased approach has been lawfully utilized, and is in the best interest of the fishery. As both DMR and MASC officials, as well as Mr. Flagg,¹² testified it takes time for species to repopulate historic habitat. Specifically, with respect to anadromous species, the present program of trapping fish at Lockwood and then trucking them to habitat upstream of Weston have substantial biological (lawful) grounds. It is undisputed that the Atlantic salmon habitat upstream of Weston is "high value habitat which gives us the most likelihood of a successful restoration project."¹³ Given the undisputed facts that the designated use of fish habitat is already present in the water, both for anadromous and eel species, then immediate installation of additional fish passage is not needed to meet the water quality standards provided by statute.

With respect to Petitioners' claim that the required legal standard is one of "no mortality or injury" for all migratory species, neither Congress nor the Maine Legislature has ever set such a standard. Petitioners concede that their definition of safe and effective passage is "all fish," up and down the river, surviving with zero mortality". However, they also concede that they are not seeking removal of the dams from the river, **and** that even they are not aware of any 100% safe

¹² Mr. Flagg has over 31 years of experience as a marine scientist specializing in anadromous and eel fish restoration and management; even Mr. Watts conceded, "I certainly learned much of what I know about the river from Mr. Flagg." March 15, 2007 Hearing Tr. at p.269:8-15.

¹³ Patrick Keliher, MASC Executive Director, March 16, 2007 Hearing Transcript at p. 65: 22-25. See also, pp. 54: 25-55: 1-6. See also, Pre-filed Rebuttal Testimony of Lewis Flagg, GLH-17 at p. 4. Moreover, it is undisputed that the trap and truck program has been carried out with minimal mortalities to trucked fish, and that American shad have successfully used fish lifts at many locations in the Northeast. See Pre-filed Rebuttal Testimony of Brandon Kulik at 2-3; Pre-filed Rebuttal Testimony of Lewis Flagg, GLH-17 at p. 4.

passage technologies absent dam removal.¹⁴ Indeed, even a shutdown of the turbines, with the dams in place, will result in at least some mortality.

Current state-of-the-art downstream fish passage facilities are not 100% effective in safely passing fish. This means that, even in the best of circumstances, there will be some fish that are killed or injured while migrating downstream through these facilities. This fact already has been taken into account by Congress, the Maine Legislature and by state and federal fisheries agencies in the design and operation of downstream fish passage facilities and in the calculation of potential restoration populations of various migratory fish. Consequently, even the fact that fish are injured or killed during passage at a particular project is not a sufficient basis for concluding that a water quality violation exists.¹⁵ Rather, all fishery resource agencies agree with the Maine Legislature and USFWS that the goal is to pass sufficient numbers of fish so that the population can be maintained at targeted levels. See 3/16/07 Hearing Tr. At 51.

In issuing permits and/or water quality certifications for the projects at issue here, the Department made a case-by-case determination of the need for passage for eels and anadromous fish and determined that incorporating the provisions of the 1998 KHDG Agreement, as applied to these projects, would provide adequate passage to satisfy the requirements of the Maine Waterway Development and Conservation Act and Maine's applicable water quality standards.

¹⁴ March 15, 2007 Hearing Tr. pp. 128:25-129:1-2. See also DMR testimony, March 16, 2007 Hearing Tr. p. 108: 5-8 (can only achieve 100% efficiency by having no dam present); S. Ault Pre-filed Direct at pp.10-11 (night-time shutdown concept not appropriate for dams of this size).

¹⁵ As explained by the DEP to the Legislature, for Class C waters “fish species need not be present. . .significant losses and shifts in species would be allowed.” Likewise, for Class B waters, a “resident community can change, but this must not be a detrimental change such as a significant loss of species.” See Exhibit FPLE-15 at pp. 7-8 and Wiley Rebuttal at pp. 13-15. As with the statutory anti-degradation policy, a “significant” impact on the fishery requires proof that the hydro project is “impairing the viability of the existing population (see Exhibit GLH-13); just as USFWS found no such impairment of the American eel population, so there is no such evidence for anadromous species, either. Consequently, “significance” may not be measured on a fish-by-fish basis. March 16, 2007 Hearing Tr. at pp.50:18 to 51:17.

Petitioners have not presented substantial evidence calling into question these determinations, nor did they appeal the WQCs or the Condition Compliance Orders.

Thus, on this record the following summary of actions already undertaken and to be undertaken by FPLE pursuant to previous Department Orders demonstrates FPLE’s compliance with laws administered by the DEP:

SUMMARY OF EEL/FISH PASSAGE REQUIREMENTS AND PROVISIONS IMPLEMENTED AT LOCKWOOD, SHAWMUT AND WESTON PROJECTS		
Project	Eel	Anadromous
Lockwood	<p>Upstream – ramp to be installed seasonally beginning in 2007. Was available for installation in 2006 but deferred due to high water.</p> <p>Downstream – provided via sluice gates and spillway. No significant injuries or mortalities observed.</p> <p>Limited telemetry studies conducted in 2002. Additional telemetry studies scheduled for 2007 to see if passage modifications required.</p>	<p>Upstream - \$2.7 million interim lift installed in 2006. Permanent facility to be installed no sooner than 2010 based on shad trigger number (2 years after 8,000 through Lockwood) or alternative biological assessment.</p> <p>Downstream – interim provided via sluice gates and spillway. No significant injuries or mortalities observed. Permanent downstream required concurrent with permanent upstream.</p> <p>Telemetry studies scheduled for 2007 in preparation for possible permanent installation in 2010.</p>
Shawmut	<p>Upstream – ramp installed seasonally beginning in 2004.</p> <p>Downstream – provided via sluice gates and spillway. No significant injuries or mortalities observed.</p>	<p>Upstream – interim provided via trap and truck program from Lockwood. Permanent facility to be installed no sooner than 2012 based on shad trigger number (2 years after 15,000 through Hydro-Kennebec) or alternative biological assessment.</p> <p>Downstream – interim provided via sluice gates and spillway. No significant injuries or mortalities observed. Permanent downstream</p>

	<p>Telemetry studies scheduled for 2007 to see if modifications required.</p>	<p>required concurrent with permanent upstream.</p> <p>Telemetry studies to be scheduled in consultation with resource agencies after Lockwood studies in preparation for possible permanent installation in 2012.</p>
Weston	<p>Upstream – ramp installed seasonally beginning in 2005.</p> <p>Downstream – provided via sluice gates and spillway. No significant injuries or mortalities observed.</p> <p>Telemetry studies scheduled for 2008 to see if modifications required.</p>	<p>Upstream - interim provided via trap and truck program from Lockwood. Permanent facility to be installed no sooner than 2014, depending on shad trigger number (2 years after 35,000 through Shawmut) or alternative biological assessment.</p> <p>Downstream – interim provided via sluice gates and spillway. No significant injuries or mortalities observed. Permanent downstream required concurrent with permanent upstream.</p> <p>Telemetry studies to be scheduled in consultation with resource agencies after 2007 Lockwood studies in preparation for possible permanent installation in 2014.</p>

VI. Petitioners Have Not Satisfied their Burden to Establish that the FPLE Hydro Projects Pose a Threat to Human Health or the Environment.

Petitioners have not proven by substantial site-specific evidence that existing interim downstream fish passage measures at the FPLE projects are significantly unsafe.¹⁶ Under the

¹⁶ In FPLE's December 19, 2005 Response to the Petitions, it preserved the argument that the criterion of "the licensed activity poses a threat to human health or the environment" is impermissibly vague. The rule provides no guidance about when the DEP may grant or deny a petition to modify, and what a licensee must prove to defeat such a petition. It thus is legally flawed pursuant to *Kosalka v. Town of Georgetown*, 2000 ME 111, 752 A. 2d 183. To some extent, any licensed activity poses some threat to or has some impact upon human health or the environment--otherwise it would not require a license in the first place. There must be reasonable limits to this inquiry, such as when the licensed activity turns out to be different than the activity that was originally licensed. Further, there must

1998 KHDG Agreement, the hydro project owners agreed to continue and where needed, improve existing interim operational measures to eliminate *significant* injury or mortality (immediate or delayed) to the out-migrating fish and eels. (B. Kulik Pre-Filed Direct at 6; 1998 KHDG Agreement (Exhibit FPLE-6) §§ III.G.4, pp. 6-7 (Eels); IV.B.3 at pp. 9-10 (Lockwood); IV.C.2 at pp. 13-14 (Shawmut); IV.C.2 at pp.14-15 (Weston).) As described above, Class B water quality standards (applicable to the Weston project), require that there be no *significant* loss of species attributable to the hydro project. (*See* 38 M.R.S.A. §§ 465(3)(C), 466(12) (emphasis added).)

Significant injury or mortality or significant loss of species is not quantified by the 1998 KHDG Agreement. However, Maine’s antidegradation statute, which is part of Maine’s water quality statutes, does shed some light on what “significant” means in this the context of Maine’s water quality laws. (*See* 38 M.R.S.A. § 464(4)(F)(1-A)(a).) The antidegradation statute defines significant impact to an existing use, including use of the water body by a population of aquatic, estuarine or marine life, as “[i]mpairing the viability of the existing population, including significant impairment to growth and reproduction or an alteration of the habitat which impairs the viability of the existing population[.]”¹⁷ *Ibid.*

Petitioners have provided no credible evidence that FPLE’s hydro projects are causing a significant loss on or impact to the anadromous fish and eel population. There is no dispute that FPLE has observed 20 eel mortalities at its three hydro projects in 2004, 28 eel mortalities in

be some way for a licensee to show that a petition to modify a license on this basis should be denied or what the DEP must find to grant or deny the petition. *Id.* at 113, 752 A. 2d at 186-87. Without waiving this argument, FPLE will discuss what it believes to be the relevant evidence and standards.

¹⁷ Pursuant to the antidegradation policy, the Department determines what constitutes a population of a particular species based upon the degree of geographic and reproductive isolation from other individuals of the same species. *See* 38 M.R.S.A. § 464(4)(F)(1-A)(a). The USFWS analysis found no such isolation for the American eel.

2005 and 38 mortalities in 2006, these numbers in no way rise to the level of significant impact to the eel population, especially in light of any one or more of the following:

- (1) the undisputed evidence that there are at least many tens, if not hundreds, of thousands of eels in the Sebasticook tributary to the Kennebec River utilizing the Kennebec below Lockwood (February 2006 Fisheries Management Agencies Pre-Filed Testimony at 3 and their Attachment 3, “DMR counts of eels using upstream passage”;
- (2) DMR and IF&W regulations allow any person possessing an angling license to kill up to 50 eels **every** day of the fishing season, and allow a person possessing an eel harvester license to take an unlimited number of eels per day for 365 days per year;
- (3) The USFWS exhaustive investigation and analysis leading to its conclusion that the viability of the American eel population is not being significantly impacted by hydro power turbines; and/or
- (4) DMR’s testimony that it “has not seen significant eel [or anadromous] mortality on the Kennebec River” (3/16/07 Hearing Tr. at pp. 41, 55, 92), and that a mortality event of 50 or more eels at a single facility is what DMR utilizes as a threshold to initiate case-specific fish passage investigation and any remedial measures (3/16/07 Hearing Tr. at pp.114, 118).

Petitioners have not met their burden of proving that a mortality event of 50 or more eels has occurred at any of the three FPLE facilities (3/16/07 Hearing Tr. at 48). Even at Shawmut, where in 2006 38 eel mortalities were observed, DMR counted 6,800 eels using its upstream passage that year, so the 38 mortalities represent a small percentage of just the eels using upstream passage, and an even smaller percentage of eels likely in the area. It must also be remembered that even if there were 50 mortalities at Shawmut, that does not mean there is impairment to the viability of the existing eels population or significant impairment to growth

and reproduction or an alteration of the habitat which impairs the viability of the population - - the prerequisites to a legal finding of a water quality violation.¹⁸

Just as Petitioners conceded that the “no mortality” standard is unattainable and would require dam removal, so too would be a policy claiming that injury or death to an individual eel constitutes a water quality violation. The fisheries management agencies testified that the legal and regulatory standards recognize that mortality will occur, but that the sustainability goal is to see upward population trends in restoring populations to their historic range. March 16, 2007 Hearing Tr. at 50:18-25 to 52:11. With respect to anadromous fish, even though FOMB claimed in its pre-filed testimony (¶28) that a “massive” alewife kill had occurred at Shawmut, Mr. Friedman admitted under cross-examination that he had no personal knowledge of such an event, March 15, 2007 Hearing Tr. at 65:12 to 66:12. Nor were the resource agencies aware of any such massive alewife kill at Shawmut or any other FPLE facility. See R. Richter Pre-filed Rebuttal at p. 4.

Petitioners also refer to the 2002 DMR Eel Study at Lockwood to support their contention that the hydro projects result in cumulatively significant eel mortality. As both Scott Ault and Dr. Wippelhauser (principal State investigator on the subject study) explained in testimony, the 2002 study involved only five eels, which were too small a sample size to reliably extrapolate the results for the larger eel population. (S. Ault Pre-Filed Rebuttal at pp.6-7; March 16, 2007 Hearing Tr. at p.87) Furthermore, the fate of two of the eels were inconclusive, meaning that it was just as probable that they survived as they did not (Id.) Thus, depending on whether one assumes that the glass is half full or half empty (neither assumption can be

¹⁸ Additionally, the undisputed evidence for Shawmut mortalities is that they appeared not to be connected to six of the eight turbines, but only were found near or below turbines 7 and 8, which differ from the first 6 in make. 3/15/07 Hearing Tr. at p.181: 7-20. Studies to be undertaken in the summer 2007 will further analyze eel passage routes at Shawmut, both concerning the dam as a whole and the individual turbines in particular.

supported or refuted), the results of the 2002 study shift significantly and are therefore were not conclusive findings. To adopt these findings as factual is not scientifically supportable (Id.) That is why FPLE, pursuant to its consultations with all relevant agencies and the DEP's own condition compliance orders, will be undertaking radio telemetry studies at all three of its facilities with larger sample sizes, as well as opening of the deep gate that had not been opened in 2002 -- Lockwood and Shawmut this summer, Weston next year.¹⁹ As Mr. Friedman conceded, to develop a "good" number for eel or fish passage mortality at any given facility, you cannot just extrapolate because "each facility is different, sluice ways are different, gates are different, size, how much spillage goes on would be different". March 15, 2007 Hearing Tr. at pp.141:4 to 142:1.

Petitioners repeatedly referred to the hypothetical concept of an "army of dead" underneath the river as support for their contention that Lockwood, Shawmut and Weston pose a threat to the environment. As Robert Richter and Scott Ault testified in their pre-filed direct testimony, (R. Richter Pre-Filed Direct at pp.13-14; S. Ault Pre-Filed Direct, pp.7- 8) and as Mr. Richter testified at the hearing, from 2004 to 2006, FPLE conducted systematic monitoring of all of the subject dams to identify and document any eel mortalities. Although this monitoring program is not specifically designed to provide an exact count of dead or injured eels, it does provide an indicative estimate, and there is absolutely no evidence of a significant fish or eel kill at any of the subject dams. DMR also independently monitors these locations. Dr. Wippelhauser affirmed in her testimony before the Board that neither she, nor anyone else at DMR, had observed an "army of dead eels" at any of the subject dams. 3/16/07 Hearing Tr. at p. 85. DMR

¹⁹ It was undisputed and confirmed by DMR that all 3 projects could not conduct such studies in one season (March 16, 2007 Hearing Tr. at pp. 65, 109), and that radio telemetry is the "gold standard" with greater range. See 3/15/07 Hearing Tr. at p.381, 3/16/07 Hearing Tr. at pp.81, 100). With respect to the deep gate, see 3/16/07 Hearing Tr. at p.87.

has been at Lockwood, Shawmut, Hydro-Kennebec with boats and underwater cameras, as well as running transects. 3/16/07 Hearing Tr. at p. 61.

Finally, Mr. Watts' pre-filed testimony and his testimony at the hearing speculatively inflated the level of cumulative impact to migrating fish and eels through the subject hydro projects. He had assumed that the entire stock of Kennebec migratory fish must pass all the FPLE dams and that they can only pass through the turbines, both of which are untrue given 1) the 10-100 times more eels utilizing the Sebasticook River **below** FPLE's projects than are using the mainstem Kennebec River from Lockwood and up; this is consistent with both the State and USFWS studies which now document that most eels are using lower stretches of rivers and intertidal estuaries. Consequently, the overwhelming majority of eels using the Kennebec River at all are not exposed to multiple downstream passages at dams, and certainly not FPLE's projects.

Mr. Watts also erred in that eels do pass through FPLE's projects other than through the turbines. For example, river flow goes through FPLE's sluice gates which are opened to provide downstream passage in addition to times when water passes over the spillways. See B. Kulik Pre-filed Direct at pp.13-15. Moreover, Petitioners conceded, and the agencies confirmed, at hearing that downstream efficiency and survival rates vary widely site to site. See S. Ault, Pre-filed Direct at p.10; 3/16/07 Hearing Tr. at pp.46-7, 100. Thus, for example, before any agency would consider whether the diversionary boom proposed for testing by Hydro-Kennebec should be tried and installed at FPLE's locations, there must first be studies of the particular flows, project configuration, and eel passage routes at each such location. Indeed, DMR testified that a premature "one modification fits all" approach could well cause more harm to the fishery, not less. 3/16/07 Hearing Tr. at pp.78, 100, 121.

In sum, Petitioners have not met their burden to establish that FPLE's projects are a threat to either human health or the environment, even assuming that this vague standard passes constitutional muster.

VI. This Board Should Not Alter, Directly or Indirectly, the 1998 KHDG Agreement

It is undisputed by the parties, as well as by the major environmental groups and fishery resource agencies that the agreement has greatly enhanced the Kennebec River fishery resources. See State Agency Pre-Filed Testimony and Kennebec Coalition Written Statement submitted by Nick Bennett; see also, 3/15/07 Hearing Tr. 375-76 (the Agreement's value is not decreasing over time), and 3/16/07 Hearing Tr. at 51-52. A summary of what the 3 FPLE Projects have contributed is as follows:

<p>Collective - all three projects</p>	<ul style="list-style-type: none"> • Contributed \$1.2 million to the State's fisheries restoration efforts under the 1987 KHDG Agreement; • Contributed \$2.5 million to the State's fisheries restoration efforts under the 1998 KHDG Agreement; • Scheduled to contribute an additional \$440,000 from 2007-2010 to the State's fisheries restoration efforts under the 1998 KHDG Agreement; • Contributions have been used to: <ul style="list-style-type: none"> ○ Help fund the removal of Edward's Dam, opening up 17 miles of free-flowing habitat; ○ Fund the removal Guilford Dam and installation of fishways at the outlet of Sebasticook Lake, Plymouth Lake and Pleasant Pond; ○ Fund the State's trap and truck program; and ○ Expand the State's shad hatchery efforts
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However, many witnesses also agreed that if this Board granted any portion of the pending Petitions, then serious adverse consequences will not only for the Kennebec River fishery, but also potentially other river systems in Maine.

The Kennebec Coalition warned that fish passage measured would be delayed, there would likely be conflict between FERC and the State, and any future settlement negotiations between environmental and fishery groups, state agencies and dam owners would be chilled if not killed. 3/15/07 Hearing Tr. at 365-69. The State agencies who testified, as well as the State Planning Office (see Attachment 4) likewise supported the existing Agreement and warned about similar adverse consequences as those raised by the Kennebec Coalition. See Pre-filed Agency Testimony at 9 (a decision by the Board to alter the Water Quality Certifications will discourage all hydro-power owners from entering into settlement agreements with the State in the future); 3/16/07 Hearing Tr. at 94-97 (Maine is ahead of other states on eel and fish conservation efforts, it is very important not to undermine the Agreement). Likewise, FPLE testified that State efforts to alter or renegotiate terms or conditions of the KHDG Agreement would chill the desire of settling parties to enter into future agreements (A. Wiley Pre-Filed Direct Part II at p. 17).

Also, it was pointed out that the Agreement itself spells out consequences should terms of the Agreement be altered by the Maine DEP (which would include the Board). Specifically, if the DEP alters or prohibits execution of terms considered essential to FPLE or Hydro-Kennebec, then they can declare the Agreement null and void and the State would be required to reimburse KHDG members for about \$140,000 of contributions made to date. Specifically, the Agreement states:

“In the event that FERC or Maine DEP choose to alter or prohibit execution of any term and condition contained in this Agreement considered essential to any party (including all dates for performance) or have not issued final, non-appealable, FERC licenses and DEP water quality certifications (amended or new) for all KHDG projects by June 1, 1999...then unless all parties agree to amend this Agreement to incorporate any changes made by FERC or Maine DEP... this Agreement becomes null and void and all payments made by KHDG...will be returned to KHDG, except for \$140,000...” (p. 4) (emphasis added)

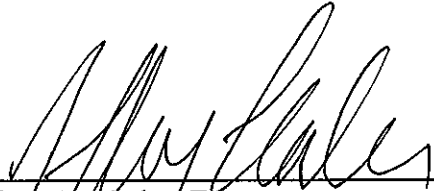
Contrary to a Board member suggestion at the hearing, the first sentence makes clear in by use of the word “or” that the June 1, 1999 deadline only has to do with whether or not FERC licenses and DEP Water Quality Certifications have been issued. The first half of the provision -- relating to FERC or DEP alteration of the Agreement -- has no time limit attached to it, nor was it intended to.

Should the Board feel it needs a mechanism to control future compliance with some of the terms of the KHDG Agreement, it presently has the ability to do so through the existing Condition Compliance Orders for each of the projects in this case; the Board should attempt to do so through revocation, suspension or modification of the Water Quality Certifications and the consequential alteration of the KHDG Agreement.

CONCLUSION

For one or more of the reasons set forth above, FPLE respectfully requests that this Board do what all State agencies and the Kennebec Coalition have requested -- deny the pending Petitions.

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