

Petition for Judicial Review of Final Agency Action

June 15, 2007

The petitioner, Ed Friedman, residing at 42 Stevens Rd., Bowdoinham, ME 04008 is aggrieved by a recent decision [May 17, 2007] of the Maine Board of Environmental Protection [BEP] to dismiss, in the face of substantial evidence presented, without an adjudicatory hearing, a **Petition to the Maine Board of Environmental Protection Requesting a Public Hearing to Consider Modification of Maine Water Quality Certificates at Androscoggin River and Little Androscoggin River Hydroelectric Dams to Provide Immediate Safe Passage for the American Eel** [the petition known to all parties as Andro2] and seeks here review of the agency's final action.

Grounds for Review & Remedy Sought

Petitioner asserts that the BEP decision to dismiss Andro2 is "unsupported by substantial evidence on the whole record" [Title 5, Part 18, Chapter 375, subchapter 7, §11007 C. (5)], is "arbitrary and capricious and characterized by abuse of discretion" [§11007 C. (6)] and seeks judicial review of the merits. This petition was rejected in the face of an overwhelming body of evidence and after the BEP had granted a public hearing following the presentation of a similar petition dealing with the Kennebec River.

In ultimately and just recently [still not formally signed] rejecting the Kennebec petition, the BEP made much of the fact that some fish and eel passage does occur on the river now, there are newly issued DEP Condition Compliance Orders that dictate fish passage in the near future and that the Kennebec Hydro Developers Group [KHDG] agreement provides a framework and time-line for passage where lacking [we disagreed with many aspects of their conclusions]. **The Androscoggin River in contrast, has no agreements for eel passage, no upstream or downstream eel passage at any of its dams and no Condition Compliance Orders dictating passage.**

The petitioner requests the court to take such actions as it deems necessary to correct what can best be described as abuse by the BEP of the discretionary power vested in it. To this end, the petitioner suggests a court order for safe and effective eel passage at the named dams, pursuant to state water quality *standards* [currently violated by BEP/DEP issued water quality *certifications*]. If the court is hesitant to intercede directly in dam license modifications at this point despite continued inaction by resource agencies, then the petitioner requests the court to direct the BEP to hold an adjudicatory hearing on the matter at which proffered evidence may be thoroughly examined in the light of day.

Standing

The Andro2 petition was submitted to the BEP May 17, 2006 by the petitioner, approximately 60 other individuals and Friends of Merrymeeting Bay [FOMB]. The petitioner is volunteer Chairperson of Friends of Merrymeeting Bay but does not represent the organization in this proceeding. As a long-time Chair and member of Friends of Merrymeeting Bay concerned with fishery restoration issues, as a petitioner and as a Maine Guide and owner of a kayaking business on Merrymeeting Bay at the confluence of six rivers including Kennebec and Androscoggin, the petitioner has more than adequate standing to bring this action.

Final Agency Action & Agency Discretion

The definition of final agency action is: "Final agency action" means a decision by an agency which affects the legal rights, duties or privileges of specific persons, which is dispositive of all issues, legal and factual, and for which no further recourse, appeal or review is provided within the agency.

[It is well known that agencies are accorded exceedingly large degrees of discretion as they perhaps should be (though citizen suit provisions should be in statute as well). Taken to its fundamental root, a citizen governing board optimally might be a relatively pure example of what our democracy should look and act like. The reality is that most often, citizen boards and agency leaders are political appointees and their objectivity may be thus encumbered. In my casual review of case law and in the experience of every environmental attorney with whom I have spoken (all of whom are extremely frustrated by this), the courts have yet to recognize that the system appears broken-that important decisions are not being made on their merits. In my mind, this calls for a sea change in the form of a more active role of the judicial branch. The issue here is really not one of separation of powers but of checks and balances].

This petition under appeal is Andro2. There was an earlier set of petitions collectively known as Andro1 and somewhat similar in nature. Andro1 was also dismissed by the BEP [February 2, 2006] and that dismissal appealed by petitioner Douglas Watts [who submitted his petition to the BEP on November 10, 2005]. Justice Marden in Superior Court Civil Action Docket No. AP-06-19 upheld motions to dismiss the Watts appeal, primarily because he deemed the BEP 30 page finding of fact and order to dismiss, a non-final action since Watts could always re-petition the agency.

I believe this decision was in error. Upon dismissal, Andro1 was dead in the agency. There was "no further recourse, appeal or review ... provided within the agency." The only recourse was judicial review, which was denied. We did in fact go back to the agency with a new petition [Andro2] that differed from Andro1 [not that it statutorily needed to]. Andro2 differed from Andro1 in a number of ways besides the sixty or so individual additional [to FOMB] petitioners:

1. It included additional dams.
2. It included previously excluded evidence.
3. It included additional evidence.
4. It included and details historical precedents.
5. It included responses to earlier motions to dismiss that Board members were not permitted to see or hear.
6. It included BEP/DEP Findings of Fact supporting our arguments.
7. It included citations disputing the AAG efforts to dismiss based on jurisdictional issues.
8. It included US Supreme Court arguments from *SD Warren v. BEP* that point to inconsistencies in the AAG's arguments for dismissal and support the Board's authority to dictate water quality standards.
9. Petitioners included virtually the entire Lewiston/Auburn legislative delegation, the Senate Chair of the Marine Resources Committee and an assortment of other legislators who are very concerned with both the eel/dam mortality issue and the

manner in which the issue has been considered by the Board, the AAG and the DEP.

We came back to the BEP with this and were quickly dismissed with a cursory finding of fact stating that Andro2 was basically the same as Andro1. The BEP has and uses no standard of evidence in judging whether to move forward with a petition. The petitioner requests the court break what clearly seems to be an endless, fruitless and repetitive cycle that is a waste of time and money for all parties involved. As things stand now after the Marden decision, the BEP can just continue to dismiss petitions brought to it knowing that as supposedly non-final actions [at least for the court] they can never be independently reviewed by a judge on their merits.

Maine's narrative water quality standards, on which required certifications are supposed to be based, contain language including:

"suitable for the designated use of . . . habitat for fish and other aquatic life",

"the habitat shall be characterized as unimpaired."

"shall not cause adverse impact to aquatic life in that the receiving waters shall be of sufficient quality to support all aquatic species indigenous to the receiving water without detrimental changes in the resident biological community",

"provided that the receiving waters shall be of sufficient quality to support all species of fish indigenous to the receiving waters and maintain the structure and function of the resident biological community" ,

"Existing in-stream water uses and the level of water quality necessary to protect those existing uses must be maintained and protected",

"water quality certifications can be issued only if the standards of the water quality classification are met and the project does not cause or contribute to a failure of those standards."

For most of us it would seem reasonable for this to mean native migratory fish will have access to and from historical territories and turbine mortality and other anthropogenic forms of mortality will not be acceptable. Unfortunately this is not the interpretation of the executive branch or dam owners.

All of the scientific evidence supports the fact that dams without passage block upwards of 90% of eel habitat. **The DEP/BEP admit that on the Androscoggin River there is no upstream or downstream eel passage at any of the many dams, and that eels are in all likelihood being killed by turbines.**

How can a court determine abuse of discretion by an agency if it refuses to look at the merits? When the courts choose not to recognize final agency actions as such, and sentence us to re-petitioning, we are caught on an endless not-so-merry-go-round. More aptly a vicious cycle that in fact can lead to species extinction within a watershed.

