

STATE OF MAINE
Kennebec, ss.

SUPERIOR COURT
Civil Action
Docket No. CV-07-

FRIENDS OF MERRYMEETING BAY)
)
 Petitioner,)
)
 v.)
)
 MAINE BOARD OF ENVIRONMENTAL)
 PROTECTION,)
)
 Respondent,)

**PETITION FOR REVIEW OF FINAL AGENCY ACTION
BY THE MAINE BOARD OF ENVIRONMENTAL PROTECTION**

For its Petition for review of final agency action by the Maine Board of Environmental Protection, Petitioner states as follows:

INTRODUCTION

1. Dams owned by large energy conglomerates are causing a significant problem on the Kennebec River: they are killing migratory eels and fish, and blocking and ruining their habitat. This petition seeks review of a Board of Environmental Protection final action that furthers this problem.

THE PARTIES

2. Petitioner Friends of Merrymeeting Bay (“FOMB”) is a Maine non-profit corporation dedicated to protecting the ecological, aesthetic, historical, recreational and commercial values of Merrymeeting Bay (the “Bay”). FOMB works to preserve and protect ecosystems of the Bay through education, land conservation, and research, advocacy, and membership events. The geographic area of concern for FOMB is the mid-coast Maine riverine delta and watershed consisting of the Kennebec and five other

rivers. FOMB has over 400 members who use and enjoy these rivers. FOMB members are concerned about the declining American eel population and threats to eels and fish in the Kennebec, and FOMB has been active in eel and fish issues from both educational and advocacy standpoints.

3. Respondent Board of Environmental Protection (the “Board”) is a citizen board created by the Legislature to provide, among other things, independent and timely decisions on the interpretation and administration of the laws relating to environmental protection. 38 MRSA § 341-B.

NATURE OF ACTION TO BE REVIEWED

4. Section 401 of the federal Clean Water Act, 33 U.S.C. § 1341, provides that in order to obtain a federal license to operate, dischargers to navigable waters such as hydroelectric dams must be issued a water quality certification certifying that the dam will not cause violations of state water quality standards. In Maine, a water quality certification is issued by the Department of Environmental Protection (“DEP”) or the Board.

5. The Clean Water Act also provides that water quality certifications must impose limits on dam operations necessary to assure that the dams will comply with state water quality standards. 33 U.S.C. § 1341(d).

6. Water quality certifications can be modified. In Maine, 38 MRSA § 341-D(3) provides that the Board may modify, in whole or in part, any “license.” The definition of “license” includes any “certification” issued by DEP, DEP Rules Ch. 2, § 1(J).

7. DEP issued water quality certifications to four dams on the Kennebec River which are at issue here: the Lockwood Hydro Project, the Hydro-Kennebec Project, the

Shawmut Hydro Project, and the Weston Hydro Project. All are owned by FPL Energy Maine Hydro LLC (“FPL”) or an affiliate of FPL, except Hydro-Kennebec, which is owned by an affiliate of Brookfield Power.

8. The water quality certifications are not assuring that Kennebec water quality standard are being achieved because the certifications allow significant numbers of eels and fish to be killed and injured, and allow eel and fish habitat to be blocked and reduced to the point of grave concern. Accordingly, FOMB petitioned the Board to modify the certifications for the four dams so that they would require the dams to provide immediate, safe and effective passage for fish and eels (the ”Board Petition”). After a hearing, the Board denied FOMB’s Petition.

FINAL AGENCY ACTION TO BE REVIEWED

9. The Board voted to deny FOMB’s Petition to modify the water quality certifications on July 5, 2007. The reasons for the Board’s decision to deny the Board Petition were set forth in a ten page document titled “Petitions for Revocation, Modification, or Suspension,” also dated July 5, 2007 (the “Denial Order”). It is the July 5 vote and the Denial Order (collectively, the “Board’s decision”) that FOMB asks this Court to review.

GROUND UPON WHICH RELIEF IS SOUGHT

10. The Board may modify a water quality certification for any of seven reasons, set forth in 38 MRSA § 341-D(3) and DEP Rules, Ch. 2, § 27. In its Board Petition, FOMB asserted four reasons the Board should modify the water quality certifications of the dams:

- a. The licensed activity poses a threat to human health or the environment (38 MRSA § 341-D(3)(C));
- b. The license fails to include any standard or limitation legally required on the date of issuance (38 MRSA § 341-D(3)(D));
- c. There has been a change in circumstance that requires modification (38 MRSA § 341-D(3)(E));
- d. The license violates a law administered by DEP (38 MRSA § 341-D(3)(F)).

11. The hearing evidence established that the operations of the dams kill and injure a significant number of eels and fish, block their passage, and significantly reduce their habitat. The evidence also established that the types of “passage” the dams claim they are providing (sluices, gates, spillage over the top of the dam, and passage through turbines) in fact do not provide adequate safe passage.

12. Further, the hearing evidence established that dam operations cause a violation of water quality standards because:

- the dams render the Kennebec unsuitable as habitat for eels and fish, in violation of 38 MRSA § 465(3)(A) and 4(A);
- the Weston dam causes a Class B stretch of the Kennebec to be impaired, violating 38 MRSA § 465(3)(A), and detrimentally changes the resident biological community, in violation of 38 MRSA 465(3)(C);
- Lockwood, Hydro-Kennebec and Shawmut prevent the Kennebec from supporting all species of indigenous fish and maintaining the structure and function of the resident biological community, in violation of 38 MRSA 465(3)(C);
- existing in-stream uses (habitat for eels and fish) are not being maintained and protected, in violation of 38 M.R.S.A. § 464(4)(F).

13. The hearing evidence also established that the water quality certifications do not require the dams to assure compliance with state water quality standards.

14. Further, the hearing evidence established that after the original water quality certifications were issued, new evidence regarding eels was generated and a federal review of Kennebec Atlantic Salmon was issued documenting the significant harm the dams cause to salmon. In addition, it was unanticipated at the time the water quality certifications were issued that the dam owners would not fail to complete various studies regarding eel passage that they were obligated to conduct.

15. In short, while only one reason for modification must be met, the evidence clearly established that all four asserted bases for modification were met. However, the Board Petition was denied in a manner that meets a number of the criteria warranting a reversal or modification of final agency action under 5 MRSA § 11007(4).

The Board's Decision Was Unsupported On The Whole Record And Was Arbitrary, Capricious And Characterized By Abuse Of Discretion

16. The Board's June 5, 2007 decision and the Denial Order was unsupported on the whole record and arbitrary, capricious and characterized by an abuse of discretion for the following reasons, among others:

17. The Board found it had not been presented with evidence that the significant mortality in eels passing through dam turbines will result in a threat to the population of Kennebec River eels. However, this finding is contradicted by evidence from the Department of Marine Resources ("DMR"), the United States Fish and Wildlife Service ("USFWS"), the dam owners' own experts, and peer reviewed scientific literature, among other sources. There is no evidence to support the Board's finding.

18. The Board found it is not possible to determine suitable downstream passage strategies at each dam without additional studies. This finding is contradicted by the

evidence of proven strategies that could be implemented now, including some being used at the Hydro-Kennebec dam that the FPL-owned dams could employ. In addition, the evidence showed that other water quality certifications issued by DEP do require adequate eel and fish passage. There is no evidence to support the Board's finding.

19. The Board found compliance orders that DEP issued to the dams require owners to take measures to prevent significant eel mortality while eel passage studies are being conducted. This finding is contradicted by the evidence as to the true content of the Compliance Orders, which in fact do not require that the dam owners provide adequate safe passage for eels. There is no evidence to support the Board's finding.

20. The Board makes reference in its Denial Order to "measures in place to prevent significant eel mortality" while eel passage studies are being conducted. The evidence shows there are no such measures in place. There is no evidence to support the Board's finding.

21. With respect to the eel passage studies being conducted, the evidence shows that there is no definite end point to the studies. The studies were required to be completed five years ago, and there is no end in sight as to when they will be completed.

22. The Board found there was no reliable information demonstrating mortality of anadromous fish species on the Kennebec. The evidence from the Atlantic Salmon Biological Review Team and the dam owners' experts contradict this finding.

23. The Board found the water quality certifications provide a means for the dam owners to consult with state agencies about fish passage. The evidence established that the ability to consult is not translating into safe fish passage.

24. The Board found the evidence demonstrated that requiring immediate downstream eel passage at this time would be neither warranted nor effective. For the reasons set forth in paragraphs 11-23, above, among other reasons, the evidence contradicts this finding. Nor is there evidence to support the Board's finding.

25. The Board made no findings with respect to the need to modify the water quality certifications to provide upstream passage for migrating fish. The uncontradicted evidence established that there are no fish migrating upstream between the lowermost dam, Lockwood and the farthest upstream dam, Weston. Instead, some fish are trapped below the Lockwood dam and trucked to locations above the Weston dam. Significant reaches of the river are biologically bereft, contrary to the requirements of water quality standards.

26. The Board found that the water quality certifications do not contain a specific "reopener" allowing the certifications to be modified. This finding is erroneous. FOMB recognizes that this finding was not the basis for the Board's decision. Nonetheless, FOMB anticipates this finding may come into play in the event the dam owners intervene in this proceeding.

27. In addition, FOMB refers to paragraphs 28-38, below, as additional reasons, among others, why the Board's decision was arbitrary, capricious, and characterized by an abuse of discretion.

The Board's Decision Was Affected By Errors Of Law

28. The Board's decision was affected by the following errors of law, among others.

29. As a matter of law, a water quality certification cannot allow the licensee to violate water quality standards. The water quality certifications for the four dams at issue allow the dams to cause violations of the water quality standards for the Kennebec.

30. Similarly, as a matter of law, no long “phase-in period” to assure compliance with water quality standards is allowed, but the Board believes that such a phase-in is allowed.

31. As a matter of law, a compliance order issued with respect to a defective water quality certification, which is the case here, is not the functional equivalent of having a valid water quality certification.

32. As a matter of law, water quality standards cannot be deemed satisfied when the designated uses of the waterbody are not actually present. The designated uses of the Kennebec are not present as a result of the dam’s operations, and have not been for some time.

32. The Board stated: “Decisions regarding whether and when fish passage facilities should be required as part of a water quality certification for a given dam are made in the context of fishery management goals and objectives, habitat suitability and availability, and current status of fish passage.” This standard does not exist in the State’s water quality laws, or any applicable federal law, and is unlawful.

33. The Board found “[t]here is no legal or practical justification for requiring that fish passage be constructed at a dam when that passage facility is not now, and may never be, actually used by migrating fish.” This standard is unlawful because it allows the grandfathering of water quality standard violations, and in any event is inapplicable to the four dams on the Kennebec.

34. The agreement between dam owners, the State, the federal government and other stakeholders in 1998 as to eel and fish passage, known as the “KHGD Agreement,” cannot and does not, as a matter of law, supplant the requirement that water quality certifications assure compliance with water quality standards.

35. The Board’s decision did not take into account that the Clean Water Act requires that water quality certifications impose limits on dam operations necessary to assure that the dams will comply with state water quality standards.

36. The Board’s decision violated its mandate to independently make decisions on the interpretation and administration of the laws relating to environmental protection because it abdicated the decision as to whether to modify the water quality certifications and allowed DMR and the Atlantic Salmon Commission to make the decision. 38 MRSA § 341-B.

The Board’s Decision Violated Statutory Provisions

37. The Board’s decision violates the requirements for water quality certifications set forth in the Clean Water Act, 33 U.S.C. § 1341.

38. The Board’s decision violates its mandate to independently make decisions on the interpretation and administration of the laws relating to environmental protection. 38 MRSA § 341-B.

THE MANNER IN WHICH FOMB IS AGGRIEVED

39. A description of FOMB and its concern for the protection of eels and fish on the Kennebec is set forth in Paragraph 1.

40. The evidence established that a healthy Kennebec is of economic and personal importance to FOMB members. From both an aesthetic and economic

standpoint, the use and enjoyment of the Kennebec River and Merrymeeting Bay by FOMB members are adversely affected by the dams' operations because the dams kill and injure eels and fish, block their passage, and ruin their habitat.

41. Among other evidence, the testimony of FOMB member and Chairman Ed Friedman established that he is a long-time Maine guide with a kayaking business along Merrymeeting Bay. He has conducted kayaking tours and instruction in Merrymeeting Bay and on the Kennebec River since the mid 1980s. He has also conducted tours by skiff and provided interpretive guiding services for various groups such as Maine Audubon and Mid-Coast Senior College on charter boats coming up the river. Services Mr. Friedman conducts on the Bay and rivers are a significant part of his business. The slaughter of eels and other migratory fish by dams adversely affects his livelihood, which is based in large part on a healthy population of native fish present in the unique system of the Bay.

42. Other FOMB members made presentations to the Board as well, and discussed their personal interest and stake in the issues raised by the Board Petition.

43. FOMB and its members have a right to water quality certifications that comply with applicable law. Further, the public trust placed in the Board to administer water quality laws has been violated with the Board decision.

DEMAND FOR RELIEF

44. FOMB requests that this Court grant one or more of the following:

- a. reverse the Board decision;

b. reverse the Board decision, order the Board Petition to be granted, and direct the Board to modify the water quality certifications so as to provide immediate, safe and effective upstream and downstream passage for eels and fish;

c. reverse the Board decision, order the Board Petition to be granted, and direct the Board to modify the water quality certifications so as to provide immediate, safe and effective downstream passage for eels;

d. reverse the Board decision, order the Board Petition to be granted, and direct the Board to modify the water quality certifications so as to provide immediate, safe and effective upstream and downstream passage for fish;

e. reverse the Board decision, order the Board Petition to be granted, and direct the Board to modify the water quality certifications as this Court may determine is necessary to assure compliance with water quality standards and/or remove threat to eels and fish;

f. reverse the Board decision, order the Board Petition to be granted, and direct the Board to determine how best to modify the water quality certifications so as to assure compliance with water quality standards;

g. vacate the Board decision and remand the Board Petition to the Board for a decision on the Board Petition that will correct the errors of law made by the Board;

h. Such other relief as the Court may determine to be appropriate.

Dated at Portland, Maine, this 3rd day of August, 2007.

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