

Friends of Merrymeeting Bay

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MERRYMEETING BAY GROUP TAKES STATE, FPL ENERGY AND HYDRO KENNEBEC TO LAW COURT IN CASE TO PROTECT KENNEBEC RIVER

Right To Judicial Review Of Executive Branch Decisions At Stake

The conservation group Friends of Merrymeeting Bay (FOMB) announced that it has today brought its lawsuit against the Board of Environmental Protection (BEP) and operators of hydroelectric dams on the Kennebec River to Maine's Law Court. FOMB filed a suit to challenge the BEP's refusal to require dam operators to provide safe passage for American eels and other migratory fish, but the case was dismissed by Sagadahoc Superior Court on the ground that the BEP's decision is unreviewable in a court. FOMB will ask the Law Court, the highest court in the State of Maine, to reinstate the case.

FOMB is in a long-running battle to secure safe passage for migratory species in the Kennebec and other Maine rivers. FOMB filed a petition with the BEP in September 2005 requesting the Board modify water quality certifications for Kennebec River dams to prevent blockage of migration routes and protect eels and fish from death and injury in turbine blades. Under the federal Clean Water Act, water quality certifications are issued by states to protect navigable waters from adverse effects of activities that require federal licenses, such as operating a hydroelectric facility. The BEP held a two day evidentiary hearing on FOMB's petition, and in June 2007 voted to keep the water quality certifications unchanged despite evidence of eel mortality and other threats to aquatic life. FOMB's appeal of the BEP's decision to Superior Court was dismissed by Justice A.M. Horton on the grounds a court cannot reverse an agency action if it is discretionary or is not "final." Justice Horton ruled the Board's decision was not "final," even though the proceeding had come to an end.

The Court's rationale on finality, that FOMB could always go back and submit a new petition to the agency, creates "a never ending merry-go-round situation because an agency can dismiss citizen petitions forever with no external review" said Bruce Merrill, one of FOMB's attorneys.

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“If the BEP can do whatever it wants for any reason, the Board would be no different than the Wizard of Oz exerting total control whilst hidden behind his curtain.” said Ed Friedman, Chair of FOMB. According to Friedman, it is crucial to have the issue of eel and fish passage ultimately decided by a court because State resource agencies have failed to address the issue on their own. “A court must be able to step in and correct a clear abdication of agency responsibility,” Friedman said. “The failure of the BEP to deal with the problems caused by dams threatens migratory fish species with extinction, putting the already collapsing Gulf of Maine fishery in further jeopardy,” Friedman added.

According to attorney David Nicholas, also representing FOMB, the issue for the Law Court should be of interest not only to river users and conservationists, but to anyone seeking oversight of a State agency, including businesses. “The system of checks and balances on which the government is based would be thrown out the window if the executive branch cannot be held accountable in court,” Nicholas said.

In addition to the BEP, Florida-based FPL Energy, Hydro Kennebec (a subsidiary of Toronto-based Brookfield Power) and Merimil Limited Partnership (which is affiliated with FPL) were parties to the BEP proceeding, and defendants in the Superior Court case brought by FOMB. FPL Energy and Brookfield are multi-billion-dollar companies.

A similar case involving modifications of water quality certifications for 16 dams on the Androscoggin and Little Androscoggin Rivers brought by sixty petitioners and FOMB has also been appealed to the Law Court. This appeal was brought by Friedman in his capacity as an individual petitioner. Absolutely no eel passage exists at any of the dams named in the Androscoggin lawsuit and only limited fish passage is in place at a few locations. In the Androscoggin case, the BEP would not even grant a public hearing to fully evaluate the petitioner’s proffered evidence.

Friends of Merrymeeting Bay is a non-profit membership organization of over 400 members dedicated to protecting the unique ecological, aesthetic, historical, recreational and commercial values of Merrymeeting Bay. They do this through research, advocacy, education and land conservation. FOMB is represented by David Nicholas of Newton, Massachusetts, and Bruce Merrill of Portland, Maine.

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Severed Alewife at Shawmut-Marshall DeMott

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Eels in Turbine [pdf]-Alex Haro

Dead Eels at Shawmut-Maine Dept. of Marine Resources