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## **Friends of Merrymeeting Bay Petitions US Supreme Court in CMP Nuisance Case**

### **BACKGROUND 4-11-22**

#### **Contacts:**

William Most: 504-509-5023 [williammost@gmail.com](mailto:williammost@gmail.com)

Ed Friedman: 207-666-3372 [edfomb@comcast.net](mailto:edfomb@comcast.net)

Petition link [here](#) or:

<http://cybrary.fomb.org/pages/FOMB%20SCOTUS%20Cert%20Petition%20and%20Appendix-Combined%20Final%204-8-22.pdf>

Background Case Documents: Second item down: <http://cybrary.fomb.org/legal.cfm>

*Richmond, Maine 4/11/22:* On Friday, Friends of Merrymeeting Bay (FOMB) and three individuals filed a petition for writ of certiorari (cert) with the U.S. Supreme Court (SCOTUS) in a nuisance case brought by the group against Central Maine Power (CMP). The original claims revolve around tower lighting and associated radiofrequency radiation (RFR) emissions, both of which the group maintains are harmful to people and the environment and entirely discretionary on the part of CMP.

Justice Michaela Murphy in Maine Business and Consumer Court agreed with CMP's motion to dismiss; that FOMB claims were subject to federal preemption by the FAA and FCC. FOMB and several co-plaintiffs disagreed because FAA obstruction lighting guidelines are advisory only and appealed to the Maine Law Court. They affirmed Murphy's ruling.

"How can a recommendation or advisory preempt actual law or ordinance?" rhetorically asked Kathleen McGee, one of the plaintiffs, appellants and now petitioners. "We believe the Maine courts committed a grievous error in judgement at a cost to all Mainers." McGee, who spends much of her time outside, working and recreating, has sensitivities to both RFR and strobe lighting. She can no longer look in the direction of Merrymeeting Bay if the towers are flashing.

Central question of the SCOTUS petition is whether issuance of a non-binding "No Hazard Determination" by the FAA preempts the application of state law, despite the Determination's text stating it "does not relieve" an entity from compliance with state law. Petitioners contend the Maine court decisions harm the cooperative federalism structure of the Federal Aviation Act and now give any federal agency the power to preempt state and local laws using only an agency advisory document.

Cooperative federalism is meant to ensure a regulatory partnership between federal and state governments. The Tenth Amendment to the constitution states specific powers not expressly delegated to the federal government or prohibited to the states are left to the states and by extension, the people.

"This is essentially a local control issue" said FOMB's Ed Friedman. "What makes it so crazy is that two Maine Courts have, despite statutory and regulatory language to the contrary,

unnecessarily (and unsolicited by the FAA), relinquished fundamental rights inherent to Maine and Mainers, to the feds.”

For 80 years unlit towers stood at this power line crossing of the Kennebec River between Woolwich and Bath at the Chops even though air traffic in the area was far higher in post WWII years than now, when it is essentially non-existent. In their past iteration even the power lines themselves were never marked. In 2019, CMP replaced the towers and with no public notice or regulatory disclosure, the slightly higher new towers were lit with three levels of strobing lights, white in the daytime and red at night totaling 600 flashes per minute.

FOMB and other residents claim the lights destroy the Bay’s previously dark sky and may adversely impact, birds, bats, insects and other important wildlife while also decreasing property values and causing seizures in anyone with photo-sensitive epilepsy. Plaintiffs have no objection to the passive marking balls now installed on a wire between the towers. Towers at this location would need to be 400’ high to be considered de facto obstructions to air navigation. These are only 240’ and minimum safe altitudes for airplanes are 1,000’ above and 2,000’ horizontally from the highest ground structures in a given area. The towers are also marked on aeronautical charts.

After nearly a year of complaints, CMP spent \$2,000,000 to install a radar-operated lighting control system to theoretically turn the lights on only when aircraft are within 3 miles and 1,000 vertical feet from the towers. Yet, overpowered radiofrequency radiation emissions from the radar, extend nearly 30 miles and in addition to aircraft, lights are triggered by precipitation and birds. In 2011, the World Health Organization classified this radiation as a possible human carcinogen and in 2018 the National Institutes of Health National Toxicology Program found whole body exposure to this low-level RFR showed clear evidence of heart tumors, some evidence of brain and adrenal tumors and significant increases in DNA damage to the frontal cortex of the brain in exposed male mice, the blood cells of female mice, and the hippocampus of male rats.

William Most, primary legal counsel for the group noted that “the Maine courts’ decisions create real problems by undermining the structure of the Federal Aviation Act.” Most, an experienced litigator believes this case may pose some far-reaching questions appealing to the Supreme Court. “Getting the U.S. Supreme Court to hear you is always a challenge,” he said, “but we hope the Court will take up the issue and allow the plaintiffs to show how CMP’s choices hurt CMP’s neighbors.”

In 2001 Merrymeeting Bay was designated a Globally Important Bird Conservation Area by the American Bird Conservancy. The original complaint cites various scientific studies detailing how both CMP’s Chops tower lighting and microwave transmitting radar may be particularly egregious to the Bay’s vital bird, bat and insect populations.

Collen Moore, a third petitioner, lives in her small home at the mouth of the Androscoggin just across from the towers. As a competitive canoe racer she spends hours on the Bay practicing and is directly affected daily by both lights and radiation, both of which she is sensitive to. “What CMP has done to the Bay is unconscionable,” Moore said. “For the 4<sup>th</sup> year in a row they have come up last in JD Power’s utility customer service survey and it’s no surprise, given the way they continually stomp on Mainers and our outstanding environment.”

FOMB has suggested quite a few zero-impact and low or no-cost alternatives to lighting and radar from just turning the lights off, to passive aircraft detection and or pilot controlled lighting but all were rejected by CMP. For many including Representative Seth Berry, this leads to an inescapable conclusion:

“Follow the money,” said Berry, whose district has been especially hard-hit by CMP’s project. “Utilities in Maine receive an essentially guaranteed rate of return on equity of 10-14%, paid for through rate increases. The bigger the project and the more bells and whistles, the more profit they make. This fiasco at Merrymeeting Bay is another glaring example of Mainers being hurt by CMP and being charged for it at the same time.” Berry is House Chair of the Maine Legislature's Joint Standing Committee on Energy, Utilities, and Technology, and strong proponent of Maine converting its for-profit power utilities to not-for-profit consumer ownership.

Friends of Merrymeeting Bay and the individual co-petitioners are represented by Most & Associates (<https://mostandassociates.com/>) in New Orleans and Law Offices of Bruce M. Merrill in Portland.

*Friends of Merrymeeting Bay is a non-profit organization dedicated to preserving through research, advocacy, land conservation and education the ecological, aesthetic, historical, recreational and commercial values of Maine’s Merrymeeting Bay and its watershed, which includes the Kennebec and Androscoggin Rivers.*

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