



MERIMIL LIMITED PARTNERSHIP

#L-20218-33-C-N

HYDRO KENNEBEC LIMITED PARTNERSHIP

#L-11244-35-A-N

FPL ENERGY MAINE HYDRO LLC

#L-19751-33-A-N

#L-17472-33-C-M

) MAINE WATERWAY DEVELOPMENT

) CONSERVATION ACT PERMITS and

) WATER QUALITY CERTIFICATIONS

)

) PETITIONS FOR MODIFICATION,

) REVOCATION OR SUSPENSION

)

) THIRD PROCEDURAL ORDER

### 1. Purpose of the Conference

The purpose of the conference was to discuss the scope and organization of the hearing and the procedural rules that will be followed in preparation for, and at, the hearing.

### 2. Review of Applicable Criteria and the Possible Actions Available to the Board: 38 M.R.S.A. section 341-D(3)

Assistant Attorney General Carol Blasi reviewed the criteria which are applicable to this proceeding and the possible actions available to the Board. Specifically, the water quality certifications for 4 dams are at issue: Lockwood, Hydro-Kennebec, Shawmut and Weston. At the conclusion of the hearing, the Board will assess the evidence in light of the criteria set forth in 38 M.R.S.A. section 341-D(3), and may take any of the following actions: The Board may modify the license (certification) in whole or in part; it may issue an order prescribing necessary corrective action; it may act in accordance with Administrative Procedure Act to revoke or suspend the water quality certification; or it may decide to take no further action.

Intervenors Douglas Watts and Friends of Merrymeeting Bay confirmed that they intend to present evidence relevant to the following criteria of Title 38:

- 341-D(3)(C) The licensed discharge or activity poses a threat to human health and the environment;
- 341-D(3)(D) The license fails to include any standard or limitation legally required on the date of issuance;
- 341-D(3)(E) There has been a change in any condition or circumstance that requires revocation, suspension or a temporary or permanent modification of the terms of the license; and
- 341-D(3)(F) The licensee has violated any law administered by the department.

### 3. Effect of Condition Compliance Orders on the Proceeding

At the pre-hearing conference on July 19, 2006, Department staff stated that the Department had requested that the dam owners submit documentation pertaining to eel and fish passage in accordance with the conditions of their water quality certifications. Staff noted that the dam owners were in the process of responding to the Department's request and that Department staff would be preparing condition compliance orders with respect to eel passage at the dams at issue in this proceeding. At that time the parties requested that the hearing be held in abeyance pending issuance of the condition compliance orders and the deadline for any appeal from those orders. The Board agreed to this request [Second Procedural Order, section 4]<sup>1</sup>. Condition compliance orders pertaining to eel passage at each

<sup>1</sup> The Second Procedural Order states: "The Board will hold the public hearing on the water quality certifications in question in abeyance until the Department has issued the Condition Compliance Orders and all appeal periods have run. At

|                                    |                                |
|------------------------------------|--------------------------------|
| MERIMIL LIMITED PARTNERSHIP        | ) MAINE WATERWAY DEVELOPMENT   |
| #L-20218-33-C-N                    | ) CONSERVATION ACT PERMITS and |
| HYDRO KENNEBEC LIMITED PARTNERSHIP | ) WATER QUALITY CERTIFICATIONS |
| #L-11244-35-A-N                    | )                              |
| FPL ENERGY MAINE HYDRO LLC         | ) PETITIONS FOR MODIFICATION,  |
| #L-19751-33-A-N                    | ) REVOCATION OR SUSPENSION     |
| #L-17472-33-C-M                    | )                              |
|                                    | ) THIRD PROCEDURAL ORDER       |

of the dams were subsequently issued on August 8, 2006 for upstream eel passage at all projects, and September 14, 2006 for downstream eel passage at all projects 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.

At the conference, Mr. Manahan, on behalf of the dam owners, argued that the lack of any appeal makes a motion to dismiss these hearing proceedings appropriate and asked that proceedings be held in abeyance to permit the dam owners time to file such a motion.

Mr. Watts and FOMB responded that while the condition compliance orders may have found that the dam owners were taking appropriate steps to comply with the existing certifications, this did not address their further argument that the certifications themselves are legally insufficient.

Ruling: After considering the arguments of the parties, the proceedings will not be held in abeyance. The arguments of Mr. Watts and FOMB that the compliance orders do not address all of the issues they raised before the Board in their respective petitions were convincing. The Board will proceed to public hearing on the issue of eel and fish passage at the subject dams, subject to the limitations on scope listed below. The condition compliance orders will be part of the record of this proceeding and the parties are free to argue their significance and legal effect.

**4. Scope of the Hearing:** The condition compliance orders, which were not appealed and are thus final, were reviewed to determine whether the scope of the hearing could be narrowed. The condition compliance orders for each of the projects found, and such findings were not appealed, that upstream eel passage is now in place, seasonally, at the four dams at issue in this proceeding. In addition, an interim upstream fish passage (trap, lift and transfer) facility has been installed at the Lockwood Project and effectiveness studies for this facility are on-going in accordance with the terms of condition compliance orders dated March 3, 2005 and February 16, 2006. Again, these condition compliance orders were not appealed and are thus final. Finally, the condition compliance order for the Hydro-Kennebec Project found that interim downstream fish passage has been installed and began operation on August 3, 2006. In light of these findings, the parties were asked to comment on whether these issues were now moot for the purpose of the hearing.

---

that time the Board will revisit the need for a public hearing, the scope of any hearing, and whether and how any appeals of the Condition Compliance Orders should be coordinated with this proceeding.”

MERIMIL LIMITED PARTNERSHIP  
#L-20218-33-C-N  
HYDRO KENNEBEC LIMITED PARTNERSHIP  
#L-11244-35-A-N  
FPL ENERGY MAINE HYDRO LLC  
#L-19751-33-A-N  
#L-17472-33-C-M

) MAINE WATERWAY DEVELOPMENT  
) CONSERVATION ACT PERMITS and  
) WATER QUALITY CERTIFICATIONS  
)  
) PETITIONS FOR MODIFICATION,  
) REVOCATION OR SUSPENSION  
)  
) THIRD PROCEDURAL ORDER

With respect to upstream eel passage, neither Mr. Watts nor FOMB<sup>2</sup> contested the adequacy of the subject facilities, and indicated they would not be putting on evidence with regard to the issue of upstream eel passage. Rather, their concerns were addressed to the enforceability of condition compliance orders and they stated their desire to have the terms of the condition compliance orders incorporated into the Section 401 water quality certifications for each of the dams and, therefore, arguably subject to citizen suit provisions of the Clean Water Act. They were not prepared to address the upstream fish passage facility at Lockwood, or the existing downstream fish passage facility at Hydro-Kennebec, notwithstanding the request that the parties come prepared to do so.

The dam owners stated their view that upstream eel passage is now in place at all four dams and that the issue of upstream eel passage is now moot. The dam owners took similar position with respect to upstream fish passage at Lockwood.

Ruling: When the Board decided to hold a hearing to determine whether to revoke, modify or suspend the water quality certifications for the Kennebec projects, it did so in light of certain arguments presented by intervenors FOMB and Mr. Watts. Intervenors argued that there was a need for action in order to achieve immediate upstream and downstream passage facilities for eel and anadromous fish.

The condition compliance orders now issued by the Department contain findings that upstream eel passage facilities have now been installed and are operational at all dams, that upstream fish passage now exists and is operational at the Lockwood dam, and that downstream fish passage now exists and is operational at the Hydro-Kennebec dam.<sup>3</sup> These 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.<sup>4</sup> The Board, therefore, will not take any further evidence or hear argument with regard to upstream eel passage at any of the dams, upstream fish passage at Lockwood or downstream fish passage at Hydro-Kennebec.

<sup>2</sup> Mr. Watts did not raise issues with respect to upstream eel and fish passage in his petition asking the Board to hold a hearing.

<sup>3</sup> The 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.

<sup>4</sup> FOMB's concerns regarding enforceability of the compliance orders are unfounded given that the facilities have now been built and are operational.

|                                    |                                |
|------------------------------------|--------------------------------|
| MERIMIL LIMITED PARTNERSHIP        | ) MAINE WATERWAY DEVELOPMENT   |
| #L-20218-33-C-N                    | ) CONSERVATION ACT PERMITS and |
| HYDRO KENNEBEC LIMITED PARTNERSHIP | ) WATER QUALITY CERTIFICATIONS |
| #L-11244-35-A-N                    | )                              |
| FPL ENERGY MAINE HYDRO LLC         | ) PETITIONS FOR MODIFICATION,  |
| #L-19751-33-A-N                    | ) REVOCATION OR SUSPENSION     |
| #L-17472-33-C-M                    | )                              |
|                                    | ) THIRD PROCEDURAL ORDER       |

**5. Witness Lists and Consolidation of Parties**

A. Witness Lists: Save Our Sebasticook stated that it does not intend to present evidence and witnesses at the hearing, but rather intends to focus its resources on the cross-examination of witnesses.

FOMB and Mr. Watts stated that they have not yet selected their witnesses but anticipate that, together, they would have between 6 and 8 witnesses.

The dam owners indicated that they, collectively, will likely have 4 fact witnesses who would testify about the infrastructure and operations at each of the dams. In addition the dam owners intend to present expert witnesses who would testify about scientific issues associated with fish and eel populations and upstream and downstream passage requirements.

B. Consolidation: FOMB and Mr. Watts stated that they would coordinate their presentations and cross-examination to avoid duplication. The dam owners similarly stated that they would coordinate their presentations and cross-examination where possible and appropriate, and possibly share expert witnesses, to avoid duplication.

Ruling: Consolidation of appearance is not ordered. However, the parties are urged to coordinate their presentation of evidence and cross-examination of witnesses wherever possible to avoid duplication and facilitate the conduct of the hearing.

**6. Role of the Parties and Role of Department Staff**

A. Parties: The parties may present evidence and witnesses and cross-examine the witnesses of the other parties.

B. General Public: In addition to the parties, the Board will receive testimony from the general public. Public testimony is sworn, but members of the public are not generally subject to cross-examination, although the Board and staff may ask clarifying questions. The parties shall present their evidence and official witnesses during the times specified for that purpose, and not during the session for the general public.

However, it is recognized that members of the public may also be members of Friends of Merrymeeting Bay or Save Our Sebasticook. These persons may address the Board during the public portion, but time will likely be limited to a few minutes per person. Persons speaking during the public portion will be encouraged to speak on their own perspectives and experience and not reiterate their group's testimony or present documentary evidence which should be subject to cross-examination by the parties. Persons who are witnesses for a party may not testify again on the same issue during the portion of the hearing reserved for the general public.

|                                    |                                |
|------------------------------------|--------------------------------|
| MERIMIL LIMITED PARTNERSHIP        | ) MAINE WATERWAY DEVELOPMENT   |
| #L-20218-33-C-N                    | ) CONSERVATION ACT PERMITS and |
| HYDRO KENNEBEC LIMITED PARTNERSHIP | ) WATER QUALITY CERTIFICATIONS |
| #L-11244-35-A-N                    | )                              |
| FPL ENERGY MAINE HYDRO LLC         | ) PETITIONS FOR MODIFICATION,  |
| #L-19751-33-A-N                    | ) REVOCATION OR SUSPENSION     |
| #L-17472-33-C-M                    | )                              |
|                                    | ) THIRD PROCEDURAL ORDER       |

C. Department Staff: Department staff provides technical assistance to the Board. The role of Department staff at the hearing will be to gather facts on behalf of the Board, which includes the ability to ask questions of witnesses at the hearing. The Board may elect to ask questions of staff at any time during the course of the hearing to clarify a point or to determine what information is in the record to date. Occasionally, the Board may ask Department staff to summarize certain information which is in the record. In addition, the Board anticipates that it will ask Dana Murch to provide a brief summary of the existing provisions for eel and fish passage at each of the dams.

D. Other Governmental Agencies: The Board anticipates that it will ask representatives of the following agencies, which have fisheries management responsibilities, to comment on the pre-filed direct testimony.

- Dept. Marine Resources
- Dept. Inland Fisheries and Wildlife
- Atlantic Salmon Commission

If these agencies provide comments on the pre-filed testimony, the persons commenting will appear at the hearing to respond to questions from the Board and the parties. These resource agencies will be commenting as independent agencies as opposed to serving as staff to the Board.<sup>5</sup>

## 7. Pre-filed Testimony

Both pre-filed direct and rebuttal testimony will be required in this proceeding.

Pre-filed testimony must be sworn. In instances where the person testifying is providing expert testimony on an issue before the Board, the credentials of that individual must be included with the testimony. All witnesses providing pre-filed testimony must be present at the hearing for cross-examination, except by leave of the Presiding Officer for good cause. Exhibits that are being entered into the record must accompany the pre-filed testimony. Reduced versions of oversized exhibits may be submitted, with the full size exhibit presented at the hearing.

Exhibits: Exhibits should be labeled in the order in which they will be introduced. The convention for labeling of exhibits will be sequentially by party as follows:

Watts: W-1

Friends of Merrymeeting Bay: FOMB – 1, FOMB – 2, etc.

FPL Energy Maine Hydro / Merimil: FPL -1, FPL - 2 etc.

Great Lakes Hydro: GLH -1, GLH-2, etc.

Parties may share a common set of exhibits if they so choose, e.g. W/FOMB-1, W/FOMB-2, etc.

<sup>5</sup> It was noted at the pre-hearing conference that these agencies were signatories to the KHDG agreement on behalf of the State of Maine.

|                                    |                                |
|------------------------------------|--------------------------------|
| MERIMIL LIMITED PARTNERSHIP        | ) MAINE WATERWAY DEVELOPMENT   |
| #L-20218-33-C-N                    | ) CONSERVATION ACT PERMITS and |
| HYDRO KENNEBEC LIMITED PARTNERSHIP | ) WATER QUALITY CERTIFICATIONS |
| #L-11244-35-A-N                    | )                              |
| FPL ENERGY MAINE HYDRO LLC         | ) PETITIONS FOR MODIFICATION,  |
| #L-19751-33-A-N                    | ) REVOCATION OR SUSPENSION     |
| #L-17472-33-C-M                    | )                              |
|                                    | ) THIRD PROCEDURAL ORDER       |

Number of Copies: Each party shall submit a minimum of 13 copies of testimony plus exhibits for Board members and staff; and a minimum of 1 copy for each party. Paper copies are required.

Distribution of Testimony to Board Members: The dam owners requested that both the pre-filed direct and pre-filed rebuttal testimony be distributed to Board members at the same time, as opposed to sequentially.

Ruling: The Board will first receive the pre-filed direct testimony of all parties, and then the pre-filed rebuttal testimony of all parties. This sequential distribution of material does not prejudice any party given that only a few weeks separate the distribution of direct and rebuttal testimony. Board members have busy schedules and prefer to receive the testimony as it becomes available.

## 8. General Organization of the Hearing

In order to facilitate the conduct of the hearing, the Board intends to group testimony which is similar in nature, with witnesses appearing in panel format, and proceed as follows:

Department staff: Brief summary of existing fish and eel passage requirements and status

### Douglas Watts and Friends of Merrymeeting Bay

- Oral Presentation: Limited summary of pre-filed testimony
- Cross-examination by other parties
- Questions from Board and Staff
- Redirect and Re-cross

### Great Lakes Hydro America and FPL / Merimil (non-site specific technical witnesses)

- Oral Presentation: Limited summary of pre-filed testimony
- Cross-examination by other parties
- Questions from Board and Staff
- Redirect and Re-cross

### Great Lakes Hydro America (facility specific witnesses)

- Oral Presentation: Limited summary of pre-filed testimony
- Cross-examination by other parties
- Questions from Board and Staff
- Redirect and Re-cross

### FPL and Merimil (facility specific witnesses)

- Oral Presentation: Limited summary of pre-filed testimony
- Cross-examination by other parties
- Questions from Board and Staff
- Redirect and Re-cross

|   |  |
|---|--|
| MERIMIL LIMITED PARTNERSHIP<br>#L-20218-33-C-N        | ) MAINE WATERWAY DEVELOPMENT                                     |
| HYDRO KENNEBEC LIMITED PARTNERSHIP<br>#L-11244-35-A-N | ) CONSERVATION ACT PERMITS and<br>) WATER QUALITY CERTIFICATIONS |
| FPL ENERGY MAINE HYDRO LLC<br>#L-19751-33-A-N         | ) )  |
| #L-17472-33-C-M                                       | ) PETITIONS FOR MODIFICATION,<br>) REVOCATION OR SUSPENSION      |
|   | ) )  |
|   | ) THIRD PROCEDURAL ORDER   |

Government Agencies

- Questions - Parties
- Questions - Board and staff

Public: afternoon or evening session

**9. Review of Chapter 20 Variations/Clarifications**

The Board will conduct this hearing in accordance with the provisions of Chapter 20, with the following variations and clarifications:

Section 2 Notice: Notice will be in accordance with the Maine Administrative Procedure Act, Title 5 sections 9051-A(2) and (3).

Section 4B(4) Testimony in written form. This section provides that the presiding officer may require that testimony be provided in written form and that all persons providing testimony in written form shall be subject to questioning. The Board will be requiring pre-filed testimony. All witnesses must be present at the hearing for cross-examination.

Section 7C Documentary and Real Evidence: Section 7C(2) provides that the record in this matter shall be available for inspection at the Department's Augusta office. This will be the case except for during the actual hearing itself when the record will be at the hearing. Special arrangements may be made to inspect the file during breaks in the hearing at the convenience of Department staff.

Section 9 Public Participation. This section provides that "[a]ny person may participate in a hearing by making oral or written statements of such person's position on the issues, and submit written or oral questions through the presiding officer, within such limits and on such terms and conditions as may be fixed by the ...presiding officer." If a member of the public wishes to pose a question at the hearing in the nature of a cross-examination question, that person will be required to submit the proposed question to the presiding officer in writing. If the presiding officer determines that the question is relevant and not repetitive, the presiding officer will read the question.

Section 10 Testimony and Questions, (C) Varying Order of Appearance. This provision allows the presiding officer to vary the order in which witnesses appear. The general sequence of presentations at hearing will be as follows:

- Department staff (Dana Murch – background)
- FOMB and Mr. Watts
- Permit Holders
- Government agencies
- Public



MERIMIL LIMITED PARTNERSHIP  
#L-20218-33-C-N  
HYDRO KENNEBEC LIMITED PARTNERSHIP  
#L-11244-35-A-N  
FPL ENERGY MAINE HYDRO LLC  
#L-19751-33-A-N  
#L-17472-33-C-M

) MAINE WATERWAY DEVELOPMENT  
) CONSERVATION ACT PERMITS and  
) WATER QUALITY CERTIFICATIONS  
)  
) PETITIONS FOR MODIFICATION,  
) REVOCATION OR SUSPENSION  
)  
) THIRD PROCEDURAL ORDER

## 10. Schedule

At the conference, the Presiding Officer set forth a schedule that required the filing of pre-filed direct testimony by December 20, 2006; pre-filed rebuttal testimony by January 17, 2007; and a public hearing in early February 2007. Mr. Watts and FOMB were agreeable to this schedule. The dam owners objected, and requested that each deadline be extended by 30 days.

Ruling: After considering the objections raised, and in light of the fact that any appeal from this Order will not be considered by the full Board until December 7, 2006, the schedule for this proceeding will be as follows:

- Pre-filed direct testimony of all parties and Department staff materials for presentation to the Board: Wednesday, January 17, 2007
- Pre-filed rebuttal testimony of all parties, state agency comments: Wednesday, February 7, 2007.
- Public Hearing: Tentatively scheduled for Thursday, March 1, 2007. The parties are asked to reserve Friday, March 2, 2007, in the event a second day is needed to conclude the hearing.

The hearing will be held in Augusta.

## 11. Ex-parte Communications

As set forth in the Administrative Procedure Act, 5 M.R.S.A. section 9055, the parties shall not communicate directly or indirectly with the decision-maker, meaning any member of the Board, in connection with any issue of fact, law or procedure pertaining to this licensing proceeding while the matter is pending. The parties may communicate with Department staff, counsel to the Board, the Board's Executive Analyst, and the Board's Administrative Assistant.

## 12. Appeal

Any appeal to the full Board from this Order must be filed by Tuesday, December 5, 2006 at 4:00 p.m. and will be considered by the Board at its regular meeting on Thursday, December 7, 2006.

DONE AND DATED IN AUGUSTA, MAINE THIS 30<sup>th</sup> DAY OF NOVEMBER, 2006.

*Matthew Scott*

---

Matthew Scott, Chair  
Board of Environmental Protection