STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN RE PETITIONS FOR REVOCATION, MODIFICATION OR SUSPENSION OF PERMITS AND WATER QUALITY CERTIFICATIONS FOR THE LOCKWOOD, HYDRO-KENNEBEC, SHAWMUT AND WESTON HYDRO PROJECTS

Merimil Limited Partnership Lockwood Hydro Project #L-20218-33-C-N	)	
Hydro Kennebec Limited Partnership Hydro-Kennebec Project #L-11244-35-A-N	)	**PRE-FILED DIRECT TESTIMONY OF F. ALLEN WILEY ON BEHALF OF FPL ENERGY MAINE HYDRO, LLC AND MERIMIL LIMITED PARTNERSHIP (LOCKWOOD, SHAWMUT AND WESTON PROJECTS) – PART I**
FPL Energy Maine Hydro, LLC Shawmut Hydro Project #L-19751-33-A-M	)	
FPL Energy Maine Hydro, LLC Weston Hydro Project #L-17472-33-C-M	)	

PRE-FILED DIRECT TESTIMONY AND EXHIBITS OF

F. ALLEN WILEY

PART I

- Role of State Agencies for Fisheries Management in Maine;
- Role of State Agencies for Requiring Fish Passage in Maine; and
- Overview of the Hydro Licensing Process.

January 17, 2007

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MAINE BOARD OF ENVIRONMENTAL PROTECTION

KENNEBEC RIVER PETITIONS

PRE-FILED DIRECT TESTIMONY AND EXHIBITS OF

F. ALLEN WILEY

PART I

QUALIFICATIONS OF WITNESS

My name is F. Allen Wiley. I am currently employed by FPL Energy as Director of Business and Regulatory Affairs for its Northeast Region. I am also Vice President of FPL Energy Maine Hydro LLC (FPLE) and Vice President for Kennebec Hydro Resources, Inc. (KHR).

FPLE owns the Shawmut and Weston Hydroelectric Projects that are part of the subject of this proceeding. FPLE also owns KHR which in turn is the General Partner and owns a 50% interest in the Merimil Limited Partnership (MLP), the owner of the Lockwood Hydroelectric Project which is also included in this proceeding.[1]

I graduated from the University of Maine with a Bachelor of Science Degree in Civil Engineering in 1982, and in 1990 I received a Masters Degree in Business Administration from the University of Southern Maine. I am a Licensed Professional Engineer in the State of Maine.

In 1982, I started employment with Central Maine Power Company ("CMP") as a Civil Engineer in its Engineering Department. During my 17-year tenure at CMP I also held the following positions - Assistant to the Vice President of Engineering; Supervisor of Civil Engineering,

[1] See EXHIBIT FPLE-1 for a map of the Kennebec River and major tributaries that shows the location of the Lockwood, Shawmut and Weston projects.

Manager of Engineering Support; Manager of Civil and Mechanical Engineering; Director of Environmental and Licensing; Director of Hydro Operations; and Managing Director of Generation. In this latter position, I was responsible for overseeing CMP's hydroelectric, fossil and biomass generating plants as well as its interests in the Maine Yankee, Connecticut Yankee, Vermont Yankee, Yankee Atomic, and Millstone 3 nuclear power plants.

Since 1999, I have been employed by FPL Energy coincident with its purchase of the CMP generating assets.

During my 24-plus years of employment between CMP and FPL Energy, I have been intimately involved at the state and federal level on a number of regulatory and legislative proceedings dealing with fish passage, water quality laws and hydro licensing issues. I was also the lead negotiator on behalf of CMP and other hydro developers in the formation of the 1998 Kennebec Hydro Developers Group Agreement ("1998 KHDG Agreement") which outlines the fish passage obligations of the projects that are the subject of this proceeding.[2]

PURPOSE AND SCOPE OF TESTIMONY

The purpose of Part I of my testimony is to 1) provide the Board an overview of the role of State agencies for fisheries management in Maine; 2) describe the role of State agencies for requiring fish passage in Maine; and 3) provide the Board an overview of the hydro licensing process. Each of these items is pertinent to the Board as it considers the petitions to revoke, modify or suspend the water quality certifications for the Lockwood, Shawmut and Weston projects.

[2] See Part II of my testimony for a discussion of the KHDG Agreement.

SUMMARY OF TESTIMONY

1) The Department of Marine Resources (DMR), the Maine Atlantic Salmon Commission, (MASC) and the Department of Inland Fisheries and Wildlife (DIFW) have primary responsibility for fisheries management policies, goals and objectives in Maine.

2) DMR and the DIFW have primary responsibility for determining fish passage requirements in Maine.

3) The Federal Energy Regulatory Commission (FERC) is authorized by Congress to regulate hydropower projects in the United States, including Lockwood, Shawmut and Weston.

4) FERC is obligated to incorporate appropriate terms of a state water quality certification into a new FERC license when it is issued.

5) Once a state has issued its water quality certification and FERC has incorporated those conditions in a license, those conditions are enforceable only by FERC, not by the State.

6) A state may modify its certification after the FERC license is issued only when the FERC license includes a "re-opener" condition authorizing the state to modify said conditions, or if the licensee proposes to amend its license in a way that requires a new certification.

7) The FERC licenses for the Lockwood, Shawmut and Weston projects do not include re-opener provisions for the State to modify the water quality certifications for the projects.

8) Once a FERC license is issued, the license may be modified only upon the mutual consent of FERC and the licensee.

9) There is no regulatory mechanism available to the Board to revoke, modify or suspend the water quality certifications for the Lockwood, Shawmut or Weston projects.

10) The petitions to revoke, modify or suspend the water quality certifications for the Lockwood, Shawmut or Weston projects should be dismissed.

ROLE OF STATE AGENCIES FOR FISHERIES MANAGEMENT IN MAINE

- ***Overview***

Pursuant to 1981 directives from the State Energy Policy, a *Statewide River Fisheries Management Plan* was developed in 1982 by DIFW, DMR and the Atlantic Sea Run Salmon Commission, now known as the Maine Atlantic Salmon Commission. Separate plans were developed throughout the State for anadromous fisheries; Atlantic salmon; and inland fisheries by these agencies. These plans have been updated periodically and reflect the State's policy on how its waters are to be managed for fishery resources.

- ***Department of Marine Resources***

DMR is responsible for managing diadromous fish species for the State of Maine. DMR is also directed to conserve and develop marine and estuarine resources, to conduct and sponsor scientific research, and to promote and develop the Maine coastal fishery industries. They are responsible to advise and cooperate with local, state, and federal officials concerning activities in coastal waters, and to implement, administer, and enforce laws and regulations necessary for those enumerated purposes.

In the case of eels, DMR regulations allow up to 50 eels to be taken per person per day throughout the year. An unlimited number of eels may be taken each day by 1) individuals holding eel harvester licenses; 2) members of the Passamaquoddy tribe; 3) wholesale seafood license holders; and 4) retail seafood license holders. (Chapter 32.06 of DMR regulations.)

In 1986, DMR developed a *Strategic Plan* for the restoration of shad and alewives to their historical habitat in the Kennebec River above Augusta. This plan was dependent on the installation of a collection, sorting, trapping, and trucking passage facility at the then-existing Edwards Dam in Augusta. The plan contains information concerning DMR's goals and objectives, the amount and location of spawning and nursery areas for shad and alewives, and the potential production of shad and alewives within discrete areas of the watershed.

Also in 1986, DMR developed an *Operational Plan* that detailed how DMR intended to implement the first phase of its *Strategic Plan* for the period from 1986 through 1998. This plan included proposed stocking schedules in the rivers and ponds covered under the plan as well as a description of where and when fish passage action would be requested at the 69 dams in the Kennebec watershed that were included in the plan.

Both the *Strategic Plan* and *Operational Plan* make note of the importance of the cooperative efforts of dam owners in the ability for DMR to carry out its fisheries management plans for the Lower Kennebec River.

- ***Maine Atlantic Salmon Commission***

The predecessor to MASC was established by the State Legislature in 1947 and given sole authority under State law to regulate restoration and conservation of Atlantic salmon to the waters of the State.

> *"The Atlantic Salmon Commission … is established to protect, preserve, enhance, restore and manage the Atlantic salmon and its habitat; to secure a sustainable recreational*

> *fishery in the State; and to conduct and coordinate all projects involving research, planning, management, restoration or propagation of the Atlantic salmon."* (12 M.R.S.A. §9901(1))

> "*The commission has the sole authority to introduce Atlantic salmon into the inland waters…The commission has the sole authority to limit or prohibit the taking of Atlantic salmon…"* (12 M.R.S.A §9902) [emphasis added]

The Commissioners of DIFW and DMR and a public member appointed by the Governor comprise the Commission. Overall administration is the responsibility of the Commissioner of DIFW. The Atlantic Salmon Technical Advisory Committee provides advice and technical assistance to the Commission. This Committee was formed through a cooperative agreement between the State and the U.S. Fish and Wildlife Service.

In 1986, the MASC issued *A Status Report and Interim Management Plan* describing its restoration objectives for the Kennebec River. The MASC's strategic plan for Atlantic salmon targets the Kennebec River and other Group "C" rivers for Atlantic salmon restoration when resources can be made available without detracting from existing management and resources from higher priority Group "A" and "B" rivers.

The report notes the importance of passage at Edwards Dam to allow for the restoration of Atlantic salmon on the Kennebec. It also states that:

> *"transport of salmon captured at Augusta or other suitable sites to upstream habitat areas in a sequential fashion will be an acceptable alternative to permanent fishways. As part of the development of long-term Atlantic salmon restoration plans for the Kennebec River drainage, the Commission will be working with the Department of Marine Resources and dam owners to develop a comprehensive program of upstream and*

downstream passage development for the benefit of anadromous fish restoration." [emphasis added]

- ***Department of Inland Fisheries and Wildlife***

DIFW is responsible for all inland fish and wildlife in the State. It is responsible for establishing policies of the State to conserve all species and the ecosystems upon which they depend. Jurisdiction begins at the head of tide; however, even on inland waters, management of anadromous species rests with DMR and management of Atlantic salmon rests with MASC.

Regarding eels, DIFW fishing regulations allow 50 eels to be taken per person per day throughout the year.

In 1985, DIFW issued the *Lower Kennebec River Inland Fisheries Management Overview* which outlined its objectives for restoration on the Lower Kennebec River. The report also identifies the importance of fish passage at Edwards Dam and the need to properly control the passage of undesirable species throughout the drainage area.

> *"If not properly controlled, passage of undesirable fish, such as carp and lamprey eel would be allowed through these facilities into the upper sections of the drainage. Since the extension of the range of these and other undesirable species such as the northern pike, calico bass, and largemouth bass into upper section the drainage would adversely affect ongoing inland fisheries management programs, trapping and sorting facilities should be required at strategic fish passage facilities…"*

This report highlights the balancing that takes place among the resource agencies in determining the appropriate fish passage measures and the repercussions of what can take place if actions aren't developed in a unified and well thought out manner. Indeed, the concerns expressed by

resource agencies in 1985 regarding the potential for certain undesirable species to invade upper portions of the Kennebec River basin are still very relevant today.

- ***Department of Environmental Protection***

The Legislature has the sole authority for establishing water quality standards for the State pursuant to 38 M.R.S.A. §464(2)(D). The broad goals for Maine's water quality classification system are outlined in 38 M.R.S.A. §464(1):

> *"The Legislature declares that it is the State's objective to restore and maintain the chemical, physical and biological integrity of the State's waters and to preserve certain pristine state waters. The Legislature further declares that in order to achieve this objective the State's goals are:*
>
> > *A. That the discharge of pollutants into the waters of the State be eliminated where appropriate;*
> >
> > *B. That no pollutants be discharged into any waters of the State without first being given the degree of treatment necessary to allow those waters to attain their classification; and*
> >
> > *C. That water quality be sufficient to provide for the protection and propagation of fish, shellfish and wildlife and provide for recreation in and on the water."*[3]

Similar goals for restoring the water quality of Maine's waters are expressed in other statutes, including 12 M.R.S.A. §402:

> *"…the Legislature declares that the well-being of the citizens of the State depend on striking a carefully considered and well-reasoned balance among competing uses of the state's rivers and streams. Further, the legislature declares that such balance shall:*

[3] As noted in the *Water Reclassification Report of the Joint Standing Committee on Energy and Natural Resources, March 1986*, "…This subsection states in broad and general terms the Legislature's intent in adopting the new surface water classification system…It is not the intent of the Legislature that the general language of this section be used by itself to establish a water quality violation. The standards contained in other portions of the bill are the mechanisms by which water quality is to be managed and regulated…" (p.5.) [emphasis added] [EXHIBIT FPLE-2.]

1. Restoration of water. Restore waters to a condition clean enough to allow fishing and swimming in all our rivers and streams…" [emphasis added]

While the Legislature retains authority to establish water quality standards, the DEP is charged by the Legislature to oversee the management of Maine's surface waters to ensure that water quality standards are met.

ROLE OF STATE AGENCIES FOR REQUIRING FISH PASSAGE IN MAINE

- ***Department of Marine Resources***

According to Maine law, DMR has the statutory authority in Maine to require dam owners to install and maintain fishways within coastal waters for anadromous fish:

> *"In order to conserve, develop or restore anadromous fish resources, the commissioner may require a fishway to be erected, maintained, repaired or altered by the owners, lessors or other persons in control of any dam or other artificial obstruction within coastal waters frequented by alewives, shad, salmon, sturgeon, or other anadromous fish species."* (12 M.R.S.A §6121(1))

Under 12 M.R.S.A. §6121, DMR has statutory authority to examine dams, initiate fishway proceedings, and take civil action to ensure compliance with fish passage requirements.

- ***Department of Inland Fisheries and Wildlife (DIFW)***

DIFW has the statutory authority in Maine to require dam owners to install and maintain fishways within inland waters for anadromous or migratory fish:

> *"In order to conserve, develop or restore anadromous or migratory fish resources, the commissioner may require a fishway to be erected, maintained, repaired or altered by the owners, lessors or other persons in control of any dam or other artificial obstruction within inland waters frequented by alewives, shad, salmon, sturgeon, or other anadromous or migratory fish species."* (12 M.R.S.A §12760(1))

Under 12 M.R.S.A. §12760, DIFW also has statutory authority to examine dams, initiate fishway proceedings, and take civil action to ensure compliance with fish passage requirements.

- ***Department of Environmental Protection***

Under Maine statutes, permits for the certain hydroelectric development activities are required from the DEP:

> *"The Legislature finds and declares that the surface waters of the State constitute a valuable indigenous and renewable energy resource; and that hydropower development utilizing these waters is unique in its benefits and impacts to the natural environment, and makes a significant contribution to the general welfare of the citizens of the State…The Legislature declares that hydropower justifies singular treatment…It is the purpose of this subarticle to require a single application and permit for the construction of all hydropower projects and for the reconstruction or structural alteration of certain projects…The permit application process shall be administered by the Department of Environmental Protection…"* (38 M.R.S.A. §631.) [emphasis added]

Unlike DMR and DIFW, the DEP has no explicit statutory authority under State law to order fishway construction unless an owner seeks a permit to construct a new dam or to structurally alter an existing dam in a way that changes water levels or flows above or below the dam. In particular, construction or reconstruction activities that result in changing historic water levels or flows above or below a dam require permits from the DEP:

> *"No person may initiate construction or reconstruction of a hydropower project, or structurally alter a hydropower project in ways that change water levels or flows above*

> *or below the dam, without first obtaining a permit from the department."* (38 M.R.S.A §633(1).)

Under such circumstances, the DEP may establish water level ranges, instantaneous minimum flows and fish passage provisions at existing hydropower projects, albeit with some limitations:

> *"When the proposed project involves maintenance, reconstruction or structural alteration at an existing hydropower project and when the project will not alter historic water levels or flows after its completion, the department may impose temporary terms and conditions of approval relating to paragraph A [water levels] or paragraph B [flows] but may not impose permanent terms and conditions that alter historic water levels or flows."* (38 M.R.S.A. §635(1))

A permit would be required from the DEP under State law for the construction of fishways if the construction involves dredging or filling below the normal high water line. However, normal maintenance and repair activities that do not involve any dredging or filling below the normal high water line are exempt from permitting pursuant to 38 M.R.S.A. §633(3).

OVERVIEW OF THE HYDRO LICENSING PROCESS

- ***Background***

The Federal Power Act (FPA) requires the licensing of most non-federal hydropower projects in the United States. FERC is responsible for administering the Nation's hydropower licensing program.

Obtaining a federal license for a hydroelectric project is not done in a vacuum. Hydro licensing is a long arduous task that takes years, and in some cases decades, to complete. The process typically involves dozens of state and federal resource agencies and interested parties. Many

regulatory checks and balances are provided along the way to ensure that all aspects of the public interests are considered in the process. It is not uncommon for the permitting process to cost applicants hundreds of thousands to millions of dollars to complete, even before environmental mitigation or enhancement measures are considered.

Hydro licensing begins with a 3-to-5 year pre-application study and consultation process during which applicants, state and federal resource agencies, environmental groups, and other interested parties identify environmental issues, address information needs, and explore mitigation and/or enhancement options. Detailed studies are conducted, draft applications are prepared and numerous opportunities are provided in the process to allow for public review and comment. Final applications, typically consisting of multiple volumes of environmental analyses, are filed with the FERC. For existing projects undergoing re-licensing, the final applications must be submitted to FERC at least two years prior to the expiration date of a license. If necessary, FERC will issue annual licenses until the re-licensing process is complete and a new license is issued.

When issued, FERC licenses are valid for terms ranging from 30 to 50 years.

- ***Role of the Federal Energy Regulatory Commission***

Since 1920, FERC, and its predecessor agency the Federal Power Commission, have been authorized by Congress under the FPA to regulate the construction and operation of most non-federal hydropower projects in the U.S. FERC has jurisdiction over all generating and storage dams on navigable waters in Maine, including the projects that are the subject of this proceeding.

To issue a license under the FPA, FERC must find that a project is:

> *"..best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes..."* (16 U.S.C. 803(a))

In addition,

> *"… in order to adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat) affected by the development, operation, and management of the project, each license issued under this subchapter shall include conditions for such protection, mitigation, and enhancement…based on recommendations received…from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and State fish and wildlife agencies."* (16 U.S.C. 803(j)(1))

The Electric Consumers Protection Act of 1986 directs FERC to consider power and non-power uses in making this determination. Specifically, FERC must give:

> *"…equal consideration to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of fish and wildlife, the protection of recreational opportunities, and the preservation of other aspects of environmental quality..."* (16 U.S.C. 797(e))

Thus, there is a broad array of considerations that FERC must take into account in determining the proper balance of competing interests during the hydro licensing process, including state and federal comprehensive management plans dealing with resource protection.

- ***National Environmental Policy Act Process (NEPA)***

Before issuing a license, FERC is required to conduct either an Environmental Assessment or an Environmental Impact Statement pursuant to National Environmental Policy Act (NEPA) and the Commission's regulations. (18 CFR Part 380) All of the pertinent environmental issues associated with hydro projects are taken into consideration by FERC when it conducts its NEPA review.

- ***Role of Maine Agencies in the FERC Licensing Process***

By Executive Order No. 13 FY 86/87, the Governor designated the State Planning Office (SPO) as the lead agency for the State of Maine in the FERC licensing process. Under the Order, SPO's role is to coordinate state agency comments and study requests to ensure that consistent positions are taken by the State.

The Order also identifies the DIFW as the State agency responsible for determining appropriate conditions for fish and wildlife resources; the DMR as the State agency responsible for determining appropriate conditions for anadromous fisheries; and the DEP as the State agency responsible for determining appropriate conditions for water quality.

Finally, the Order states that DIFW or DMR, <u>not DEP</u>, shall indicate whether or not the construction, repair, or alteration of fishways will be requested in any dam proposed to be licensed under the FPA, depending upon which agency has jurisdiction.

By Executive Order No. 3 FY 96/97, the Governor designated the DEP as the agency responsible for certifying compliance with applicable water quality standards, pursuant to Section 401 of the Federal Water Pollution Control Act (a.k.a. the Clean Water Act or CWA), for all activities not subject to the jurisdiction of the Land Use Regulation Commission, including, the licensing and re-licensing of all existing hydropower projects.

The DEP is the State certifying agency to FERC for the projects that are the subject to this proceeding when activities require such certification under Section 401 of the CWA.

- ***Mandatory Conditioning Authority for Fishways and Water Quality Certifications***

While FERC has considerable discretion to determine appropriate conditions to include in a license, certain federal and State agencies have mandatory conditioning authority that influence FERC's decision. For instance, Section 18 of the FPA reserves specific authority for certain federal agencies to require fishways to be constructed at hydro projects. Section 18 states that the Commission:

> *"…shall require the construction, maintenance, and operation by a licensee …[of] such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate..."* (16 U.S.C. §811)

In addition, for an applicant that is seeking a federal permit for an activity that may result in a discharge to navigable waters, Section 401(a) of the CWA prohibits the federal agency from issuing said permit unless the State where such activity takes place certifies that the activity will comply with the State's water quality standards or otherwise waives certification. Licensing or re-licensing of hydro projects are generally deemed to be an activities that may result in a

discharge; thus, certifications must be obtained or waived by the State before a new FERC license can be issued.

Section 401(d) of the CWA further provides that:

> *"…any other appropriate requirement of State law set forth in such certification…shall become a condition on any Federal license or permit subject to the provisions of this section."* (33 U.S.C. §1341)

In the case of a State's water quality certification, those conditions are incorporated into the federal license and are enforceable only by the federal agency issuing the permit (i.e. FERC), not by the State. *See* 33 U.S.C. § 1341(d), *Great Northern Paper, Inc.*, 77 F.E.R.C. ¶ 61,066 (1996) ("once a state has issued certification, the Clean Water Act contemplates no further role for the state in the process of issuing, and ensuring compliance with the terms of, a federal license, except in specified circumstances where a new certification is required").

- ***Modification of State Water Quality Certifications***

While FERC must incorporate the conditions included in a State certification in a FERC license, only FERC has the authority to require an applicant to undertake such activities. *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152 (1946). Additionally, once conditions in a certification are incorporated into the FERC license, the state may not, in general, revoke, modify, or suspend the certification. The only situation in which a state may modify the certification after the FERC license is issued is when the certification includes a specific "re-opener" condition authorizing the State to modify some or all of the conditions that have been incorporated into the FERC license.

As noted by the Board in the Androscoggin River Petition proceeding:

> *"in the absence of specific relevant reopeners in water quality certifications [the legal effect of a BEP attempt to modify a certification] is highly questionable."*

(*Findings of Fact and Order Re: Dismissing Petitions for Revocation, Modification, or Suspension Filed by friends of Merrymeeting Bay and Douglas H. Watts*, Maine Board of Environmental Protection, February 2, 2006, at p.24.)

The FERC licenses for the Lockwood, Shawmut and Weston projects do not include re-opener provisions for the State to revoke, modify or suspend the water quality certifications for the projects.

- ***FERC License Amendments***

Once a FERC license is issued, Section 6 of the FPA provides that licenses may be amended only upon the consent of FERC and the licensee.

> *"…Each such license shall be conditioned upon acceptance by the licensee of all of the terms and conditions …as the Commission shall prescribe … which said terms and conditions and the acceptance thereof shall be expressed in said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this chapter, and may be <u>altered</u> or surrendered <u>only upon mutual agreement between the licensee and the Commission</u> after thirty days' public notice.* (16 U.S.C. § 799.) [emphasis added]

Under FERC's regulations, a licensee may need to seek a new certification from a state agency if the licensee proposes to amend its FERC license for a project whose discharge may have a material adverse impact on the water quality downstream of the project.

> *"…any application to amend an existing license…requires a new request for water quality certification …if the amendment would have a material impact on the water quality in the discharge from the project or proposed project."* (18 C.F.R. §4.34(b)(5)(iv))

Thus, FERC may not unilaterally amend the licenses it issues. Nor can any other State or federal agency effectuate a modification to a FERC license unless specific re-openers are included in the license that would allow such modification or unless the licensee seeks to amend its FERC license for a project whose discharge may have a material adverse impact on the water quality downstream of the project.

CONCLUSION

1) DMR, MASC and DIFW have primary responsibility for determining fisheries management policies, goals and objectives in Maine.

2) DMR and the DIFW have primary responsibility for determining fish passage requirements in Maine.

3) FERC is authorized by Congress to regulate hydropower projects in the United States.

4) FERC is obligated to incorporate appropriate terms of a state water quality certification into a new FERC license when it is issued.

5) Once a state has issued its water quality certification and FERC has incorporated those conditions in a license, those conditions are enforceable only by FERC, not by the State.

6) A state may modify its certification after the FERC license is issued only when the FERC license includes a "re-opener" condition authorizing the state to modify said conditions, or if the licensee proposes to amend its license in a way that requires a new certification.

7) The FERC licenses for the Lockwood, Shawmut and Weston projects do not include re-opener provisions for the State to modify the water quality certifications for the projects.

8) Once a FERC license is issued, the license may be modified only upon the mutual consent of FERC and the licensee.

9) There is no regulatory mechanism available to the Board to revoke, modify or suspend the water quality certifications for the Lockwood, Shawmut or Weston projects.

10) The petitions to revoke, modify or suspend the water quality certifications for the Lockwood, Shawmut or Weston projects should be dismissed.

Dated: 1/17/07

F. Allen Wiley

STATE OF MAINE
COUNTY OF KENNEBEC

Personally appeared before me the above-named F. Allen Wiley and made oath that the foregoing is true and accurate to the best of his knowledge and belief.

Dated: 1/17/2007

Notary Public
My Commission Expires:

DONNA A. SEVERANCE
NOTARY PUBLIC, STATE OF MAINE
MY COMMISSION EXPIRES AUGUST 16, 2011

EXHIBIT FPLE-1

Map of Kennebec River and Major Tributaries

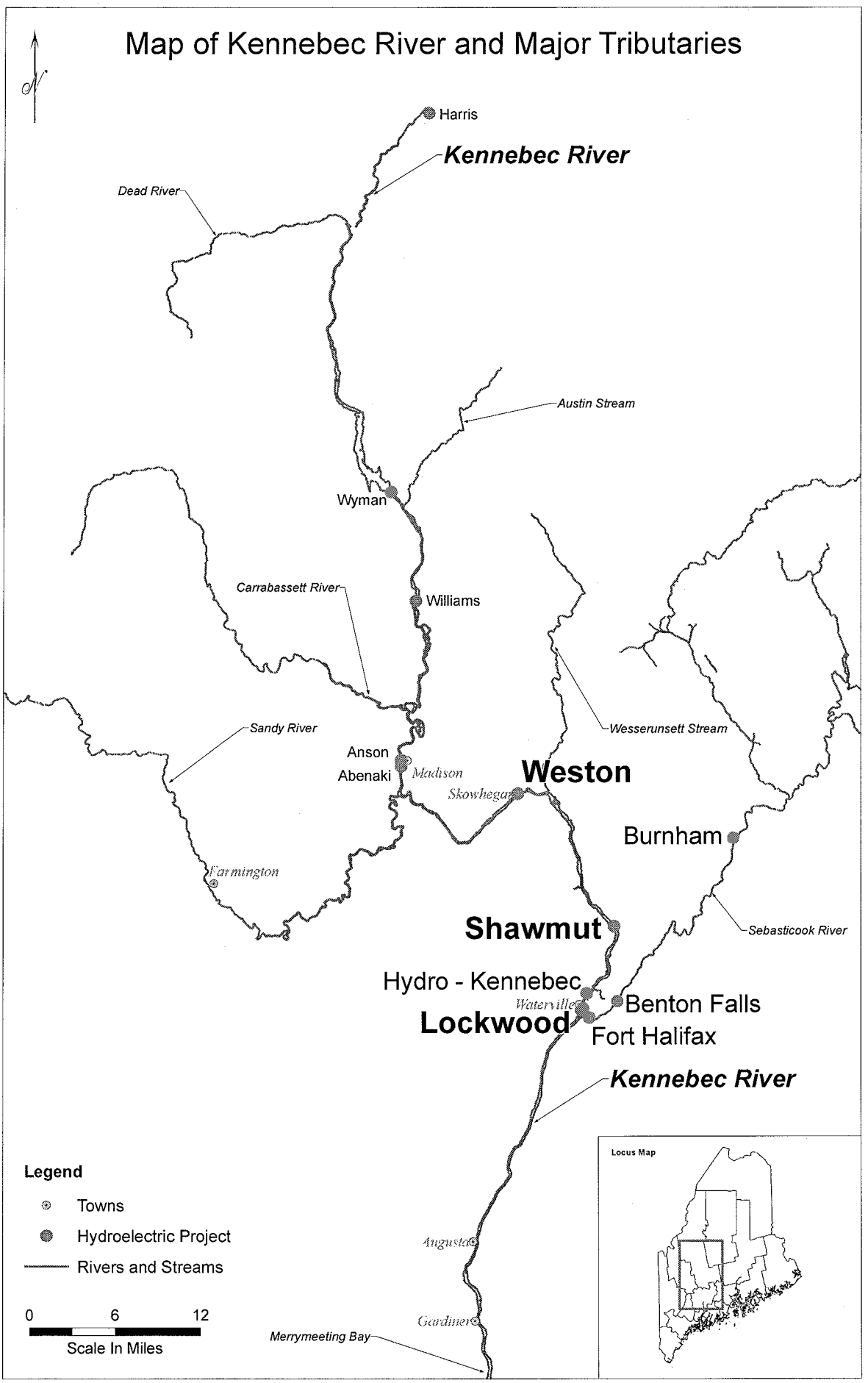
Map of Kennebec River and Major Tributaries
Harris
Kennebec River
Dead River
Austin Stream
Wyman
Carrabassett River
Williams
Sandy River
Wesserunsett Stream
Anson
Abenaki
Madison
Skowhegan
Weston
Burnham
Farmington
Shawmut
Sebasticook River
Hydro - Kennebec
Waterville
Benton Falls
Lockwood
Fort Halifax
Kennebec River
Augusta
Gardiner
Merrymeeting Bay
Legend
Towns
Hydroelectric Project
Rivers and Streams
0
6
12
Scale In Miles
Locus Map

EXHIBIT FPLE-2

Excerpt from the Water Reclassification Report of the Joint Standing Committee on Energy and Natural Resources, March 1986

STATE OF MAINE
112TH LEGISLATURE
SECOND REGULAR SESSION

WATER RECLASSIFICATION
REPORT OF THE JOINT STANDING COMMITTEE ON ENERGY AND NATURAL RESOURCES
MARCH 1986

MEMBERS:

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Sen. Judy C. Kany
Sen. Jerome A. Emerson

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Rep. Paul F. Jacques
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FORWARD

During the First Regular Session of the 112th Legislature, the Department of Environmental Protection submitted LD1503, An Act to Amend the Classification System for Maine Waters and Change the Classifications of Certain Waters. The bill was referred to the Joint Standing Committee on Energy and Natural Resources. Owing to the complexity of the bill and its late submission, the committee voted to hold the bill over until the Second Regular Session and to prepare a new draft during the summer interim.

The subject of water quality and related regulation affects a broad cross-section of Maine interests that includes almost every industry, municipality and citizen in the State. The current water quality classification and regulation system has not been comprehensively reviewed for many years. Recognizing the need for careful consideration of all Maine interests and the value of a consensus effort, the committee established an ad-hoc working group composed of parties interested in the issue. The core working group included representatives of industry, utilities, public interest environmental groups and the Department of Environmental Protection. A broader group monitored the progess of this core group. A mailing list is attached to this report. Every effort was made to create an open process with easy access to all interested parties.

This working group was charged to "achieve consensus on as many issues as possible" recognizing that "the ultimate sucess of the water quality program depends on a widely shared, common understanding of the intent of this legislation". Specific directions were to "report ... its consensus on issues with specific statutory language which:

1. Has been agreed to by the working group;

2. Is accompanied by a statement of intent developed and accepted by the working group;

3. Is consistent with existing state law;

4. Complies with applicable provisions of the Clean Water Act and EPA regulations; and

5. Embodies sound drafting techniques in which the material is arranged and numbered in an organized and useful manner; in which terms and concepts are used consistently throughout, and in which necessary terms are defined.

When agreement on language cannot be reached, the issue should be clearly identified and options developed for subcommittee consideration".

INTRODUCTION

This report takes the form of a section by section discussion of the proposed new draft of the LD1503 recommended by unanimous committee vote. Much of this report was originally developed by the ad-hoc working group on water quality classification (see Forward) as a means of documenting its commonly shared understanding of key provisions in the draft. Comments describing additions, deletions or relocations refer to changes from the language of the original text of LD 1503. The committee has ratified the working group report adding its own comments where appropriate.

While recognizing that there is no substitute for clearly drafted statutory language, the committee feels that the report does serve as a useful statement of intent which should be consulted during the implementation of the new water quality classification system particularly during the early rule-making. Beyond this period, the committee feels that, as a record of the committee's decision-making process, this report and the accompanying committee files will be useful to those wishing to review the options considered and rejected by the committee as well as those which were adopted.

DISCUSSION

Section 1 of the proposed committee draft repeals an obsolete definition of the term "coastal stream". Sections 2 and 3 make technical changes in existing definitions and are taken directly from the original LD1503 with adjustments of the appropriate statutory cross-references.

Sections 4 - 7 repeal portions of existing law that will be replaced by the new draft of LD1503.

The next portion of this draft, section 8, is taken from the working group's efforts and has been approved unanimously by the full committee.

§464: Classification of Maine waters

This section provides the general goals and objectives of the water classification system, along with a set of general regulatory and administrative provisions. Procedures for reclassification, departmental reports to the Legislature, general provisions governing discharges and rulemaking requirements are all included in §464.

§464, sub-§1: Findings; objectives; purpose

This subsection states in broad and general terms the Legislature's intent in adopting the new surface water classification system. The adoption of this broad language is meant to reflect the resolve of Legislature to improve, where appropriate, the waters of the State over the course of time. This is an effort which has already yielded important results thanks to efforts by all segments of the economy. It is not the intent of the Legislature that the general language of this section be used by itself to establish a water quality violation. The standards contained in other portions of the bill are the mechanisms by which water quality is to be managed and regulated.

The first paragraph contains findings on the importance of water resources to Maine. The value of water to the economy is pointed out by adding reference to commerce and industry.

The second paragraph defines the State's water quality objective and goals. The language tracks closely that of section 101 of the Federal Clean Water Act by establishing an objective of maintaining and improving water quality and setting goals to achieve that objective. It also recognizes the need for some discharges to surface waters and articulates the policy of requiring treatment of those discharges to protect water quality.

The third paragraph states the Legislature's intent concerning the implementation of the surface water classification system. The system is to be used to protect

and, where a water body is not attaining its classification, to enhance water quality. Water bodies are to be protected by a 2-step classification process. First, a standard is established for each class of water quality which consists of (a) designated uses and related characteristics and (b) water quality criteria which will support those uses and characteristics. Second, each water body will be assigned a specific classification by the Legislature. That classification will serve the dual purposes of establishing water quality goals for the water body and of serving as the basis for establishment of water quality-based conditions attached to State water discharge licenses.

§464, sub-§2: Procedures for reclassification

Paragraph A. In paragraph A, the language allowing "any person" to petition the board for a classification study is not intended to require the board to conduct such a study. This intent is clear from the language retained from LD1503; "the board may...conduct classification studies".

Paragraphs B - D. Paragraphs B and C make provisions for public hearings and recommendations to the Legislature by the DEP. Paragraph D establishes the Legislature as the sole entity with the authority to reclassify water bodies.

§464, sub-§3: Reports to the Legislature

Paragraph A. This paragraph is taken verbatim from LD1503. This biennial report will summarize existing water quality.

Paragraph B. This paragraph includes a procedure to periodically review the adequacy of the classification system (as distinct from the classification of a particular stretch of water). The DEP already undertakes this review to meet EPA requirements.

Paragraph C. This paragraph requires an annual report to the Legislature of the status of existing licensed discharges.

Paragraph D. This paragraph requires a DEP study of nonpoint source pollution problems in the state with recommendations for needed action by the Legislature. The committee's intent is that the study be based on the substantial previous effort under the "208" program conducted by the DEP, LURC and the regional planning commissions.

§464, sub-§4: General provisions

Pargraph A. The general provisions of the bill relating to discharges have been organized in paragraph A. The language prohibiting discharges into Class AA and SA waters has been deleted from this subsection because it is duplicative of provisions found in the Class AA and SA sections. The term "direct" has been added to modify "discharge" in sub¶¶ 1 and 2 to distinguish those discharges from non-point source discharges. See the new definition of direct discharge. Sub¶¶