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**Board of Environmental Protection
Report to the Joint Standing Committees on
Marine Resources and Natural Resources
in Response to Resolve 2007 Chapter 109 (LD 1528)**

Petitions to Modify, Suspend or Revoke a License

I. Introduction

Section 4 of Resolve 2007, chapter 109 “Resolve, To Require State Agencies with Jurisdiction over Dams to Review and Update Plans for the Passage of Diadromous Fish” directs the Department of Environmental Protection (DEP) to, among other things, determine the need and feasibility of establishing or modifying timelines within which the Board of Environmental Protection (Board) must respond to a citizen petition related to water quality issues and if the Board accepts a petition, a timeline within which it must issue a decision on the merits of that petition. This report presents the BEP’s findings and recommendations on the petition process to the Joint Standing Committees on Marine Resources and Natural Resources. The Board recommends that it revise the DEP’s Chapter 2 rules to better specify how citizen initiated petitions will be processed by the Board.

II. Background

The petition process is a mechanism to re-open a license and to modify the license, issue an order prescribing corrective action, or to act to suspend or revoke a license that was issued by the DEP, is no longer subject to appeal, and upon which the licensee has relied in the conduct of his affairs. It is a powerful tool to address situations, such as a threat to human health or the environment, which, if proven at hearing, the Legislature has determined warrant such action.

Statutory and Regulatory Provisions Governing Petitions: Title 38, section 341-D(3) provides:

After written notice and opportunity for a hearing pursuant to the Maine Administrative Procedure Act, Title 5, chapter 375, subchapter IV [Adjudicatory Proceedings]¹, the board may modify in whole or in part any license, or may issue an order prescribing necessary corrective action, or may act in accordance with the Maine Administrative Procedure Act to revoke or suspend a license whenever the board finds that:

- A. The licensee has violated any condition of the license;
- B. The licensee has obtained a license by misrepresenting or failing to disclose fully all relevant facts;
- C. The licensed discharge or activity poses a threat to human health or the environment;
- D. The license fails to include any standard or limitation legally required on the date of issuance;

¹ Under provisions of the Maine Administrative Procedure Act, an adjudicatory proceeding is one in which “the legal rights, duties or privileges of specific persons are required by constitutional law or statute to be determined after an opportunity for hearing.” [5 MRSA section 8002(1)]. Adjudicatory hearings require opportunity for intervention by interested persons and involve the presentation of technical witnesses who are subject to cross-examination.

- 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;
- F. The licensee has violated any law administered by the department; or
- G. The license fails to include any standard or limitation required pursuant to the federal Clean Air Act Amendments of 1990.

For the purposes of this subsection, the term "license" includes any license, permit, order, approval or certification issued by the department and the term "licensee" means the holder of the license.

Further, Chapter 2, section 27 of the DEP's Rules Concerning the Processing of Applications and Other Administrative Matters provides that "Any person, including the Commissioner, may petition the Board to revoke, modify or suspend a license."

While the Board's statute does not specify a timeline for considering a petition, Chapter 2 states that unless otherwise provided by law,

- No later than 30 days following the filing of a petition and after notice and opportunity for the petitioner to be heard, the Board shall dismiss the petition or schedule a hearing; and
- The hearing must be scheduled within 45 days of the decision to hold a hearing.

Recent History:

Historically, the petition process provided for in statute has rarely been used; however, the Board has received seven such petitions in the past two years, one related to residential development and six seeking modification of the water quality certifications for hydropower projects to require immediate upstream and downstream passage for American eel and certain other species of migratory fish. A description of these petitions is included as Attachment A.

Recent experience has shown that a time period of 30 days from filing is not sufficient for the Board to consider a petition and determine either to dismiss the petition or schedule an adjudicatory hearing. With the exception of relatively simple cases, significantly more time is required. The time elapsed between filing of a petition and its consideration by the Board in the recent cases was: 51 days for the Natural Resources Protection Act (NRPA) permit, 112 and 113 days respectively for a consolidated proceeding on the two Kennebec River petitions involving 4 hydropower projects, 84 and 122 days respectively for a consolidated proceeding on the two Androscoggin River I petitions involving 11 hydropower projects, one year for the Androscoggin River II petition involving 13 hydropower projects², and 157 days for the Messalonskee Stream / Union Gas Hydro Project petition.³

² In the case of the Androscoggin River II Petition, the Board Chair determined that the petition was substantially the same as the two Androscoggin River I Petitions and, in consultation with the Office of the Attorney General, determined it was appropriate to hold the petition in abeyance pending the decision of the Superior Court on the appeals filed in the matter of Androscoggin River I Petitions. Following the court's decision, the petition was further postponed with the consent of the parties because many of the same parties were preparing for the public hearing on the Kennebec River Petitions.

³ Consideration of the Messalonskee Stream Petition was delayed by two adjudicatory hearings which were scheduled prior to the filing of the petition: 1) the public hearing on the appeals of the wastewater discharge licenses issued to Verso Paper Jay and Rumford Paper Company and the water quality certification for Gulf Island

III. Discussion

Existing Processing Timelines: As discussed above, Chapter 2 of the DEP's rules states that within 30 days of the filing of a petition the Board shall either dismiss the petition or schedule a hearing. Issues encountered with this existing processing timeline include:

- 1) Due Process: It does not provide the licensee with an opportunity to review the petition and proffered evidence and submit a written response to the petition prior to the Board's consideration of the matter.
- 2) Complexity of the Petition: It does not take into consideration the complexity of the petition including factors such as the number of facilities challenged, the number of licensees involved, or the amount of information which must be reviewed by the Board, DEP staff and the licensees prior to consideration of the petition at a Board meeting. For example, the Androscoggin River I Petitions challenged the water quality certifications for 11 separate hydropower projects, and involved multiple licensees.
- 3) Substantially Similar Petitions: It does not specifically provide a mechanism to postpone consideration of a petition that is substantially the same as another recently filed petition, the outcome of which may bear on the newly filed petition. In the case of the Androscoggin River II Petition, the Board determined that the petition was substantially the same as the Androscoggin River I Petitions and held the petition in abeyance pending a decision by Superior Court on an appeal of the Board's decision on the Androscoggin River I Petitions.
- 4) Other Pending Matters: It does not allow for consideration of other matters on the Board's agenda. The Board holds regular meetings every two weeks, and the agenda is generally established well in advance of the meeting. The Board cannot, as a matter of regular practice, give petitions the highest priority and postpone scheduled matters whenever a petition is filed in order to consider that petition within 30 days. In determining its agenda, the Board must consider limitations on Board member, DEP staff, and licensee availability as well as the fact that other matters pending before the Board may be time sensitive for the parties involved in those proceedings. Additionally, the Board may have scheduled hearings on other matters which have been noticed in accordance with the Maine Administrative Procedure Act and which cannot be postponed without substantial costs to the state and the parties involved.
- 5) Other Regulatory Mechanisms: Changes to the existing schedule for processing of petitions should take into consideration the fact there are other regulatory mechanisms apart from the petition process that can, and perhaps should, be used in an emergency situation. If there is a substantial and immediate danger to public health or safety or to the environment, the Commissioner may issue an emergency order or the Office of Attorney General may initiate injunction proceedings. [38 M.R.S.A. § 347-A and 348].

- 6) Other Regulatory Requirements: With respect to any deadline for holding of a public hearing on a petition, the rule must take into consideration requirements set forth in the Maine Administrative Procedure Act and DEP statutes regarding adjudicatory hearings including provisions for intervention by interested persons and public notice. With respect to specifying a deadline for a decision when a hearing has been scheduled, rules generally do not specify such a deadline since the time needed to prepare for the hearing and to render a decision will vary with case specific factors such as the number of parties involved, the time needed for preparation of testimony by expert witnesses, and the technical and legal complexity of the issues raised by the petition.

Other Procedural Issues: DEP rules governing petitions should address other procedural issues in addition to processing time including the following:

- Consolidation of Petitions: The rules should clarify that the Board has the ability to consolidate multiple petitions that are similar in nature.
- Limitations on Filing: There is currently no limit on how frequently a person may file a petition involving the same license and the same issues. The issue of whether a limitation is appropriate should be explored and any such limitation should be specified in rule.
- Relationship of Petitions to the Appeal Process and Requests for Reconsideration: The rule should contain provisions to help ensure that the petition process is not used as a substitute for the timely filing of an appeal or request for reconsideration. The Maine Administrative Procedure Act, DEP statute and DEP rule impose time limits on the filing of an appeal of a licensing decision or a request for reconsideration of a licensing decision. These time limits on the challenges to a licensing decision are intended, in part, to provide for finality of decisions and are based on the premise that a licensee should be able to act upon a license with reasonable assurance that the license will not be disturbed without good cause. While the statute does not place, and perhaps should not place, any time constraints on the filing of a petition to revoke, modify or suspend a license, the rule should contain provisions that help to ensure that a person who fails to timely appeal a licensing decision does not simply resort to the petition process to challenge a license that is final agency action.
- Discretionary nature of the decision: The Superior Court affirmed the discretionary nature of the Board's decision on a petition in the following decisions: *Watts v. Maine Board of Environmental Protection*, Docket No. AP-06-19 (December 6, 2006) (Marden, J.); *Ed Friedman v. Maine Board of Environmental Protection*, Docket No. AP-07-06 (November 8, 2007) (Horton, J.); *Friends of Merrymeeting Bay v. Maine Board of Environmental Protection*, Docket No. AP-07-10 (November 8, 2007) (Horton, J.); *Douglas Harold Watts v. Maine Board of Environmental Protection*, Docket No. AP-07-73, (Me. Super. Ct., Sag. Cty., January 10, 2008)(Jabar, J.); and *Douglas Harold Watts v. Maine Board of Environmental Protection*, Docket No. AP-07-11, (Me. Super. Ct., Sag. Cty., January 17, 2008)(Horton, J.). This issue is now pending before the Maine Supreme Judicial Court. The Law Court's decision regarding judicial review of such decisions may have a bearing upon resolution of a number of issues associated with the processing of petitions; accordingly, any change to the rule regarding processing of petitions should await the Court's ruling in this matter.

IV. Recommendations

Existing rules provide little guidance on the number of issues associated with the processing of petitions to modify, suspend or revoke a license. With the increased use of the petition process, the limitations of the existing rules have become apparent. The Board believes that a change to the 30 day scheduling provision is needed and that scheduling is best addressed through the rulemaking process in conjunction with other process issues discussed above and other issues which will undoubtedly arise with the input of additional interested persons.

Amendments to the petition provisions of the DEP's rule should provide for a timely response to the petition while being mindful of the rights of the licensee and the resource limitations of the Board and DEP staff. Possible amendments to the rule include:

- Grant discretion to the Board Chair, with input from the affected persons, to consolidate similar petitions and to set a schedule that allows for, among other things, consideration of the urgency of the matter, the scope of the petition (including factors such as the number of affected persons and the amount of information to be reviewed), and the impact on other proceedings of any changes to the Board's meeting agendas so as not to have an unreasonable impact on those proceedings.
- Provide a minimum of 30 days for the licensee and interested persons to file written responses to the petition prior to the Board's consideration of the petition.
- Other processing milestones such as consideration of the petition within a specified number of days of the receipt of the licensee's response to the petition, or establishment of a hearing date within a specified number of days of a decision to hold a hearing. The establishment of specific schedule for any such milestones may depend to some extent on the decision of the Law Court regarding the nature of the petition process. For example, if the petition process is found to be analogous to an enforcement proceeding, certain timeframes may be appropriate. However, if the Court finds that the petition process is a licensing proceeding or an appeal of a licensing decision, different timeframes will be necessary to ensure consistency with other statutory or regulatory requirements for such proceedings.

V. Additional Comments Regarding Petitions for Eel and Fish Passage

The majority of the petitions filed with the Board have addressed the issue of upstream and downstream passage for American eel and certain other species of migratory fish. In considering these petitions, the Board has been presented with evidence that, as water quality improves, American eels and other migratory fish species are returning to certain Maine waters and that upstream and downstream migration of these fish is affected by the lack of appropriate passage mechanisms at hydropower facilities and other dams. With respect to eels, there is some evidence that older granite block dams (which provided a rough surface and tended to leak water) allowed eels to continue to migrate upstream with some success without specific mechanisms incorporated into the facility's design or operation. The reconstruction or replacement of these older dams with ones having smooth concrete walls has the potential to significantly impede upstream migration of eels unless the dam specifically incorporates eel passage features. However, the extent of the impact of existing hydropower facilities on migratory fish and eel populations or the overall integrity of the aquatic ecosystem is not easily quantified and the petitions before the Board have not presented a sufficient factual basis to modify a settled license.⁴

In general, the Board believes that use of the Board's petition process to address eel and fish passage on a dam-by-dam basis by re-opening settled licenses (certifications) is an inappropriate mechanism to advance fish restoration, and it subjects individual dam owners to great uncertainty. Rather, restoration of fish and eel passage on Maine rivers should be addressed on a watershed basis with input from the Departments of Marine Resources and Inland Fisheries and Wildlife, the agencies that have primary responsibility for fisheries management in Maine. Requirement for such passage at specific hydropower projects is most appropriately addressed at the time of licensing or relicensing by the Federal Energy Regulatory Commission (FERC), in conjunction with issuance of the State water quality certification, when the authority and the mechanism to collect the necessary data and impose appropriate passage requirements is clear.

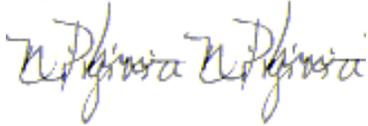
Since a FERC hydropower license is issued for a period of 30 or more years and environmental conditions will likely change over the term of the license, the Board believes that the State water quality certification for each hydropower project should either include specific eel and fish passage measures at the time of certification or include a specific re-opener to provide for eel and fish passage as passage becomes advisable from a fisheries management perspective. Inclusion of specific re-openers for fish and eel passage in all State water quality certifications for hydropower projects at the time of issuance would ensure that the ability of the DEP to require such passage in the future is legally preserved.⁵

⁴ In the cases that have come before the Board, petitioners have argued their view that upstream and downstream passage for eel and migratory fish is required to meet existing water quality standards for aquatic life and, therefore, the Board must re-open the licenses (certifications) to require such passage. The DEP does not interpret the water quality standards to universally require such passage.

⁵ Some licensees in the various petition proceedings have argued that, absent specific license re-opener provisions, there is no legal effect of a Board action to modify a water quality certification to require such passage.

Finally, in the case of existing facilities whose certifications do not include relevant re-opener provisions, the Board believes that the Departments of Marine Resources and Inland Fisheries and Wildlife should exercise their authority to petition FERC⁶ to re-open a license to address eel and fish passage when they find such passage is advisable and they have the documentation and resources necessary to pursue such a petition to FERC.

Respectfully submitted,



Virginia N. Plummer, Chair
Board of Environmental Protection

⁶ All FERC licenses contain the following standard condition: “The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain and operate, or arrange for the construction, maintenance and operation of such reasonable facilities, and comply with such reasonable modification of the project structures and operation, as may be ordered by [FERC] upon its own motion or upon the recommendation of the Secretary of Interior or the fish and wildlife agency or agencies of any State in which the project, or a part thereof is located, after notice and opportunity for hearing.” FERC Forms L-3, L-4, L-9, L-10, L-11, L-12, L-14, and L-15 (October 1975).

Attachment A: Recent Petitions

NRPA Permit-by-Rule (filed April 26, 2005) for activity adjacent to a wetland associated with construction of a house on Islesboro. The abutters petitioned to revoke the wetland alteration permit issued by DEP on December 1, 2004. The Board found that the criteria set forth in 38 M.R.S.A. § 341-D(3) were not met. The petition was dismissed at the June 16, 2005 Board meeting. Decision not appealed.

Kennebec River Petitions: Two petitions (filed September 28, 2005 and September 29, 2005) seeking modification of the water quality certifications for four dams on the Kennebec River to require immediate upstream and downstream eel and fish passage. The existing certifications (Lockwood issued August 26, 2004; Hydro-Kennebec issued June 6, 1986; Shawmut issued May 1, 1981; and Weston issued November 17, 1992) contain requirements for phased-in eel and fish passage based on biological triggers in accordance with the terms of the 1998 KHDG (Kennebec Hydro Developers Group) Agreement. The Board consolidated the petitions, and considered them at its January 19, 2006 meeting. The Board voted to hold an adjudicatory hearing. The hearing was subsequently postponed at the request of the parties. Following a public hearing in March 2007, the Board determined that it would not modify or seek to suspend or revoke the water quality certifications for the projects. The Board's decision document was issued on July 5, 2007. Two appeals of the decision were filed: *Friends of Merrymeeting Bay v. Maine Board of Environmental Protection*, Docket No. AP-07-10, (Me. Super. Ct., Sag. Cty., November 8, 2007)(Horton, J.) and *Douglas Harold Watts v. Maine Board of Environmental Protection*, Docket No. AP-07-11, (Me. Super. Ct., Sag. Cty., January 17, 2008)(Horton, J.) The court dismissed the first appeal for lack of jurisdiction; that decision has been appealed to the Law Court. The court also dismissed the second appeal for lack of jurisdiction.

Androscoggin River I Petitions: Two petitions (filed October 3, 2005 and November 10, 2005) seeking modification of the water quality certifications for eleven (11) hydropower projects on the Androscoggin and Little Androscoggin Rivers to require immediate eel passage. The existing certifications (Brunswick issued April 11, 1979; Pejepscoot issued May 27, 1982; Worumbo issued June 12, 1985; Lewiston Falls issued June 6, 1986; Upper Androscoggin – no certification; Gulf Island-Deer Rips issued September 21, 2005; Riley-Jay-Livermore issued May 12, 1978 and revised June 29, 1982; Lower Barker Mill issued April 24, 1978; Upper Barker Mill issued April 13, 1983; Hackett Mills issued April 25, 1984; Marcal Hydro issued May 23, 1997) contain various requirements for fish passage, but none for eels. The Board considered the petitions in a consolidated proceeding at its February 2, 2006 meeting. The petitions were dismissed. The Board's decision was appealed to Superior Court, which dismissed the appeal for lack of jurisdiction in a decision dated December 6, 2006. [*Douglas H. Watts v Maine Board of Environmental Protection*, Docket No. AP-06-19. Me. Super. Ct., Ken. Cty., December 6, 2006)(Marden, J.)]

Androscoggin River II Petition: Petition (filed May 17, 2006) seeking modification of the water quality certifications for (13) hydropower projects, including those which were the subject of the Androscoggin River I Petitions. On June 9, 2006 the Board Chair found that the petition was substantially similar to the previous two petitions (Androscoggin River I Petitions) which were dismissed by the Board and determined that the petition would be held in abeyance pending the Court's decision on the appeal of the Board's decision on the Androscoggin River I Petitions. The Court's decision on the appeal of the Androscoggin River I Petitions was issued on December 6, 2006. Board consideration of the Androscoggin River II Petition was further delayed with the consent of the parties since many of the same parties were involved in the public hearing on the Kennebec River petitions. The petition was considered at the Board's May 17, 2007 meeting and was dismissed. The Board's decision was appealed to Superior Court, which dismissed the appeal for lack of jurisdiction. [*Ed Friedman v Maine Board of Environmental Protection, Docket No. AP-07-06, (Me. Super. Ct., Sag. Cty., November 8, 2007)(Horton, J.)*] That decision has been appealed to the Law Court.

Messalonskee Stream Hydro: A petition (filed April 30, 2007) to modify the water quality certification for the Messalonskee Stream /Union Gas Hydro Project (issued August 28, 1995) to require lowering of the licensed height of the dam to the elevation of the natural bedrock in order to allow for upstream and downstream eel and fish passage. The petition was dismissed on October 4, 2007. The decision document was approved by the Board on November 15, 2007. The decision, which was appealed to Superior Court, was dismissed for lack of jurisdiction [*Douglas Harold Watts v Maine Board of Environmental Protection, Docket No. AP-07-73, (Me. Super. Ct., Sag. Cty., January 10, 2008)(Jabar, J.)*] That decision has been appealed to the Law Court.