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GOVERNOR

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COMMISSIONER

**MEMORANDUM**

TO: Board of Environmental Protection  
FROM: Bill Hinkel, Division of Water Quality Management, Bureau of Land and Water Quality  
DATE: November 15, 2012  
RE: Douglas H. Watts and Charles M. Frechette Appeals of Department Order Approving Water Quality Certification for S.D. Warren’s Eel Weir Hydropower Project

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**Statutory and Regulatory References:** The proposed continued operation of the Eel Weir Hydropower Project is an activity which may result in a discharge into the navigable waters of the United States under Section 401 of the Clean Water Act (CWA), 33 USC § 1341. The CWA requires that any applicant for a federal license or permit to conduct such an activity obtain a certification from the State in which the discharge occurs that the activity will comply with applicable state water quality standards. The Department may approve water quality certification pursuant to Section 401 of the CWA provided (a) the standards of classification of the affected waterbodies and the State’s antidegradation policy are met, or (b) where standards of classification are not met, provided the project does not cause or contribute to the failure of the affected waterbodies to meet the standards of classification. 38 M.R.S.A. § 464(4)(F)(3).

The Department’s *Rules Concerning the Processing of Applications and Other Administrative Matters*, 06-096 CMR 2 describe the requirements and procedures for processing applications and for processing appeals of a Commissioner’s license decision.

38 M.R.S.A. § 341-D(4) provides that, in acting on an appeal of a Commissioner’s license decision, “[t]he board is not bound by the commissioner’s findings of fact or conclusions of law but may adopt, modify or reverse findings of fact or conclusions of law established by the commissioner. Any changes made by the board under this paragraph must be based upon the board’s review of the record, any supplemental evidence admitted by the board and any hearing held by the board.” In its decision on appeal, the Board “may affirm, amend, [or] reverse” the Commissioner’s license decision, “or remand to the commissioner for further proceedings.”

**Project Location:** S.D. Warren’s Eel Weir Hydropower Project is located at the outlet of Sebago Lake and controls water levels in Sebago Lake and flows in the downstream Presumpscot River, which runs about 25 miles to head-of-tide in Falmouth. A dam has existed at the site since at least 1827. The project includes a dam, an impoundment (Sebago Lake), a power canal, a powerhouse, tailrace channel, and ancillary facilities.

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The receiving waters that are or may be affected by the Eel Weir Project are: Sebago Lake and Dundee Pond; the Presumpscot River from the outlet of Sebago Lake to tidewater; the Presumpscot River estuary; and Casco Bay. The Project and affected waters are located in the towns of Standish, Windham, Sebago, Naples, Casco, Raymond, and Frye Island.

**Description:** The Project was initially licensed by the Federal Energy Regulatory Commission (FERC) in 1984 under the Federal Power Act for the continued operation and maintenance of the existing Project. Minimum flow requirements for the Eel Weir Bypass were established in a 1992 FERC order, and a lake level management plan was established in a 1997 FERC order, which was amended in 2000 and 2001. In March 2002, Warren filed applications with FERC for a new license for the continued operation of the existing Project and with the Department for water quality certification in conjunction with the proposed FERC relicensing of the Project. Warren supplemented its water quality certification application on May 26, 2011 (as revised June 6, 2011) with a proposed lake level management plan. On August 30, 2011, the Department issued Department Order #L-19937-33-J-N approving water quality certification, with conditions, for the Eel Weir Hydropower Project.

Submission of Warren's application for water quality certification in 2002 initiated what would become a nearly decade long process of discussions, meetings, public involvement opportunities, and environmental study analyses that ultimately led to the terms and conditions established in the August 30, 2011 water quality certification.

On September 26, 2011, Charles M. Frechette filed with the Board a timely administrative appeal of Department Order #L-19937-33-J-N. On September 27, 2011, Douglas H. Watts timely filed with the Maine Superior Court a Petition for Review of Department Order #L-19937-33-J-N. On March 8, 2012, in response to a request from the Department and after hearing from all parties, the Maine Superior Court remanded Douglas H. Watt's appeal to the Board for consideration together with the administrative appeal filed by Charles M. Frechette, and provided Mr. Watts with a deadline of April 13, 2012 to file a more detailed written appeal statement with the Board.

The appellants argue the water quality certification is erroneous as a matter of law and is not supported by the evidence in the record. Appellant Watts primarily objects to the findings, conclusions and conditions pertaining to water flows and conditions in the Eel Weir Bypass and the target water levels for Sebago Lake while Appellant Frechette primarily objects to the findings, conclusions and conditions as they relate to the target lake water levels and required outflows from Sebago Lake to the Presumpscot River. The conditions of the water quality certification under appeal provide for changes in the operation of the Project by, among other things, specifying only one target lake level (266.0 feet msl between May 1 and June 15 annually) within an annual target lake level range of 266.65 feet msl to 262.0 feet msl. The water quality certification also requires certain minimum flows to the Bypass and to the Presumpscot River as a whole, minimizes flows greater than 300 cfs to the Bypass, and caps total outflow from Sebago Lake between October 16 and November 15 annually to accommodate landlocked salmon spawning.

**Environmental Issues:** The environmental issues related to this appeal focus on whether State water quality standards are met in each of the affected waterbodies, particularly Sebago

Lake and the Eel Weir Bypass. The appellants argue that certain water quality standards related to habitat for fish and aquatic life, recreation in and on the water, and navigation will not be met if the Project is operated as proposed as further modified by the terms and conditions of the water quality certification.

**Department Recommendation:** After consideration of the appellant’s arguments and a review of the evidence in the record, the Department recommends that the appeal of Department Order #L-19937-33-J-N approving water quality certification, with conditions, for the Eel Weir Hydropower Project be denied.

**Estimated Time of Agenda Item:** 2 hours

**The Packet contains the following documents:**

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| • Staff Recommendation / Draft Board Order .....   | _____       |
| • Bureau of Land and Water Quality Hydropower Project Flow and Water Level Policy, February 4, 2002 .....  | _____       |
| • Chapter 579 Classification Attainment Evaluation Using Biological Criteria for Rivers and Streams .....  | _____       |
| • Transmittal Letter and Department Order #L-19937-33-J-N Eel Weir Hydropower Project Water Quality Certification, August 30, 2011.....  | _____       |
| • Charles M. Frechette’s Appeal, September 26, 2011  |             |
| Section 1: Specific Response to Eel Weir 401 Water Quality Assessment.   | _____       |
| Section 2: Supporting Documents for Wetlands and Aquatic Habitat.....  | _____       |
| Section 3: Supporting Documents for Lake Level and Navigation.....   | _____       |
| • Douglas H. Watts’ Appeal, August 30, 2011.....   | _____       |
| • Response of S.D. Warren Company to the Appeals of Charles M. Frechette and Douglas H. Watts, June 13, 2012 .....   | _____       |
| • Chair Lessard’s July 18, 2012 response to Mr. Watts’ request to submit U.S. EPA’s decision governing river herring passage on the St. Croix River..  | _____       |
| • Letter from Stephen S. Perkins, U.S. EPA Region I, dated July 9, 2012 to Maine Attorney General William J. Schneider concerning Maine law governing river herring passage on the St. Croix River ..... | _____       |
| • Title 12, Section 6134 Alewives Passage .....  | _____       |
| • S. D. Warren’s August 6, 2012 response to Mr. Watts’ submission of EPA’s July 9, 2012 letter .....   | _____       |
| • Eel Weir Hydropower Project / Index to Agency Record as of 08-31-2011  | _____       |

