

Eel Weir Hydropower Project WQC

- S.D. Warren's Response to the Appeals

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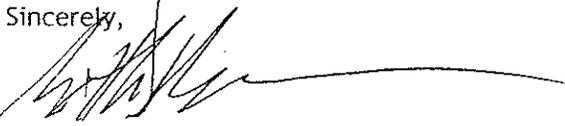
Susan M. Lessard, Chair
Maine Board of Environmental Protection
c/o Terry Dawson
17 State House Station
Augusta, ME 04333-0017

RE: S.D. Warren Co., Appeal of Water Quality Certification #L-19937-33-J-N

Dear Chair Lessard:

Enclosed is the Response of S.D. Warren Company to the Appeals of Charles M. Frechette and Douglas H. Watts.

Sincerely,



Matthew D. Manahan

Enclosure

cc: Service List
Patricia Aho

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
IN THE MATTER OF

S.D. WARREN COMPANY)	
Standish, Windham, Sebago, Naples, Casco,)	
Raymond, and Frye Island)	WATER QUALITY
Cumberland County)	CERTIFICATION
EEL WEIR HYDROPOWER PROJECT)	
#L-19937-33-J-N)	

**RESPONSE OF S.D. WARREN COMPANY TO THE APPEALS OF
CHARLES M. FRECHETTE AND DOUGLAS H. WATTS**

These appeals challenge the Commissioner’s August 31, 2011 Water Quality Certification (the “Certification” or “WQC”) for the relicensing by the Federal Energy Regulatory Commission (“FERC”) of S.D. Warren Company’s (“Warren’s”) Eel Weir Hydropower Project (the “Eel Weir Project” or the “Project”), which controls water levels and flows out of Sebago Lake into the Presumpscot River.

These appeals request diametrically opposite relief – Mr. Watts requests that Sebago Lake water levels be lowered and that flows into the Presumpscot River be increased, while Mr. Frechette requests that Sebago Lake water levels be raised and that flows into the Presumpscot River be reduced. Of course, when managing a resource like Sebago Lake not everyone is going to be happy. In fact, the nature of compromise is that no one is going to be entirely happy. The fact that these appeals are polar opposites demonstrates that the revised Sebago Lake Level Management Plan (“LLMP”), as incorporated into the WQC, is a compromise crafted to address the concerns of as many users as possible. Although the revised LLMP has not made everyone happy, it has satisfied most stakeholders. It is a good compromise that protects natural resources in both Sebago Lake and the Presumpscot River while providing for all reasonable uses of those

resources, balanced against each other so that both lake resources and river resources are protected, and no one gets their maximum possible use. Again, that is the nature of compromise.

The real issue in these appeals, however, is whether the revised LLMP operating regime, as modified by the Certification, meets State water quality standards. There is no single operating regime that alone meets water quality standards. Rather, many different operating regimes would meet water quality standards; there is a spectrum of lake levels and flows that would meet standards.¹ So the question isn't whether there may be some operating regime that is "better" for Mr. Watts or Mr. Frechette – it's whether Warren's proposal, as modified by the Certification, meets water quality standards. Unquestionably, it does. Therefore, although Mr. Watts and Mr. Frechette would like the operating regime to be different, there is no basis in the law to change that operating regime to give either of them what he wants. Instead, because the operating regime set forth in the Certification meets water quality standards, the Board should uphold the Certification.

I. Background

Sebago Lake is twelve miles long and about eight miles wide with an area of approximately 45.6 square miles or 29,184 surface acres, and a watershed of approximately ten times the size of Sebago Lake. The lake is used for a variety of purposes - for "power generation, municipal and local water supply, protection of fish and wildlife in the lake and its associated wetlands, and boating, swimming, and other recreational activities connected to the lake." 68 FERC ¶ 61,213 at 62,021 (1994).

¹ Dana Murch stated as follows in his August 31, 2011 letter to FERC: "The MDEP notes that, while S.D. Warren has proposed a flow-based lake level management plan with specific target lake levels and flow ranges, there are a virtually limitless number of lake level management plans and corresponding lake levels that will meet state water quality standards. It is not the MDEP's responsibility to choose among these possible plans, or to set specific lake level requirements. It is the MDEP's position that the continued operation of the Eel Weir Project will meet applicable water quality standards, subject to the conditions attached to our water quality certification and as summarized above."

A. 1997 LLMP

The Eel Weir Project's FERC license originally contained no requirements for managing the level of Sebago Lake. Following extended discussions with resource agencies and stakeholders, a proposed plan for managing the lake level was filed with FERC with the stated goal of recognizing the differing interests at and downstream of the lake, including recreation, fishing, public safety (downstream), and power generation.

As noted in the Certification, the original LLMP "was developed by DEP, DOC and DIFW in consultation with other interested parties and had been accepted by S.D. Warren, Friends of Sebago Lake, Portland Water District, Sebago Lake Anglers Association, Sebago Lake Boating Club, Sebago Lake Landowners and Users Coalition, Sebago Lake Marinas Association, Maine Marine Trades Association, Maine State Bass Federation, and Frye Island Corporation." See Certification, p. 3 n.7. That LLMP was based on a DEP plan "which was developed in response to complaints about erosion due to high water levels [and] was devised as a compromise among competing water level interests that would (1) be workable, (2) reduce erosion and septic system pollution due to high water, (3) restore reasonable use of the State Park beaches during the prime visitation months of July and August, (4) encourage beach rebuilding, and (5) maintain historic water levels during the late boating and fishing season (September 1 to October 15)." Certification, p. 11 n.21.

By order issued April 21, 1997, FERC approved the original LLMP, describing it as providing a balance of the interests of the numerous parties affected (79 FERC ¶ 61,064 at 61,311 and 61,316-17), including fisheries, recreation, public safety (downstream), fishing, and water supply. In 2000 and 2001 FERC made several amendments to the LLMP, to form the LLMP that exists today.

Under the existing LLMP Warren is directed to manage outflows from the lake through the Eel Weir Project to achieve specified target lake elevations and to remain within specified target ranges of lake elevations for different seasons, with specific operating parameters (describing "normal" and "abnormal" conditions and actions to be taken). In addition to the requirements under the existing LLMP based on lake elevations, under the existing LLMP Warren is also to manage outflows under specific operating parameters, and is to minimize duration of releases into the Eel Weir Project Bypass (the "Bypass") above 4,500 cfm (75 cfs) from April 1 to July 1 and September 1 to November 1 to permit fishability of the Bypass. Furthermore, under the existing LLMP Warren is to cap outflows at 60,000 cfm (1,000 cfs) from mid-October to mid-November to accommodate salmon spawning season unless the lake elevation is above the target range and is rising.

Over the following years there were numerous concerns expressed by users of Sebago Lake and the Presumpscot River about water levels and flows. The Certification recites on pages 2-9 a history of the LLMP and FERC's resolution of complaints and issues with implementation of the LLMP. As demonstrated by that chronology, lake levels and flows, and the LLMP, have been contentious issues for more than a decade.

B. 2002 Proposed LLMP

In its 2002 application filed with FERC, Warren proposed several modifications to the LLMP, including the removal of the 2-in-9 year low-lake requirement, a modification to the November 1 target point, and the addition of a tolerance around the August 1 target point. Comments were filed by resource agencies and other stakeholders in response to Warren's proposed modifications to the LLMP.

On November 29, 2005, FERC issued its Final Environmental Assessment ("FEA") for the Eel Weir Project relicensing. The FEA accepted Warren's proposal for a tolerance around the August 1 target point. In addition, the FEA acknowledged Warren's proposal to lower the November 1 target point to 262.0 feet msl and the State's concurrence. However, the FEA recommended continuing the 2-in-9 year low-lake level protocol and also recommended requiring minimum lake elevations during the January to March period, and reducing the full pond level permitted in the spring.

After Warren's filing of the application and issuance of the FEA, stakeholders made filings periodically requesting that FERC modify the provisions of the proposed LLMP.

C. 2011 Proposed LLMP Modifications

In its May 26, 2011 application supplement (revised June 6, 2011) to the March 2002 Application for New License, Warren proposed to operate the project under a modified flow-based LLMP. Under Warren's modified proposal, outflows would be maintained within a specified range during established periods, with adjustments to higher or lower flows if lake levels rise above 266.65 feet msl (spillway crest elevation) or fall below 262.0 feet msl (4.65 feet below spillway crest elevation). The Certification discusses the specifics of the revised LLMP at pages 14-16.

The LLMP revisions approved by the Certification are refinements to the original LLMP based on more than 14 years of experience (*i.e.*, since 1997), addressing the multiple interests on the lake and the river, and at the same time better enabling Warren to seek to efficiently generate power at Eel Weir and Warren's downstream hydro facilities, in recognition of this valuable renewable resource.

The goals of the existing LLMP are maintained in the revised LLMP, with the additional goal of seeking to more efficiently use the water from the lake by levelizing outflows within a band more closely fitting the average capacity of the Eel Weir Project and the downstream hydro projects on the river. The existing LLMP sets forth parameters by which Warren must manage outflows from the lake, as does the revised LLMP approved in the Certification. The existing LLMP directs Warren to avoid filling the lake before May 1 and directs Warren to seek to fill the lake by mid-June -- as does the revised LLMP. Further, the existing LLMP directs Warren to limit outflows during the fall salmon spawning season, and to minimize the duration of releases into the Bypass -- as does the revised LLMP. The change from a target point / range framework in the existing LLMP to an outflow range framework under the revised LLMP makes the LLMP easier to manage and, as noted in the August 10, 2011 comments filed by the Portland Water District ("PWD"), will allow the lake to rise and fall more as a result of weather than as a result of efforts to hit specific targets. It will therefore, as stated by PWD, result in similar or lower water levels than has been the case under the existing LLMP and more variation, year-to-year, of the water level during a particular week of the year.

1. Basis for the Revised LLMP

There are very diverse interests in and around Sebago Lake that are affected by the implementation of the LLMP. Some of the constituents of those interests are more vocal than others; however, all of the constituents on the lake hold strong positions on how the lake should be managed to benefit their specific interests. The challenge is to ensure that there is a balance in the interests on the lake, and at the same time to allow the Eel Weir Project (and the other hydro projects downstream on the Presumpscot River) to provide clean, renewable energy.

Based on its experience in operating under the LLMP since 1997, Warren believes that the proposed flow-based regime for the revised LLMP is an improvement over the existing LLMP provisions. Under the revised LLMP, in summary, Warren would maintain normal outflows within a specified range during specific time frames with adjustments outside the specified normal outflow ranges if the lake is at or above 266.65 ft. msl (*i.e.*, high lake level) or is at or below 262 ft. msl (*i.e.*, low lake level). Warren would continue to work to achieve a full pond of 266.0 ft. msl between May 1 and June 15. Further, Warren would continue to minimize the duration of releases into the Bypass of above 4,500 cfm (75 cfs) to accommodate the existing very successful fishery in the Bypass, except when it is necessary for Warren to increase outflows above the normal levels to address very high lake levels.

Under the revised LLMP, for most of the year the normal range for outflows² from the Eel Weir Project would be between 30,000 to 70,000 cfm (500 to 1,167 cfs) and would only deviate from that range when the lake is very high (*i.e.*, at or above 266.65 ft. msl, the spillway crest) or when the lake is very low (*i.e.*, at or below 262 ft. msl). Exceptions to this framework would be for the June 16 to October 15 period when the normal outflow range would be 24,500 to 60,000 cfm (408 to 1,000 cfs) to help maintain the lake at relatively high levels to accommodate boating interests and for the October 16 to November 15 period when the upper limit of the normal range would be capped at 60,000 cfm (1,000 cfs) for salmon spawning season.

In the spring, the normal minimum outflows of 30,000 cfm (500 cfs) should permit filling the lake by mid-June (responding to dry years and where there is limited or no snow melt going into the spring freshet) to support boating activities. As noted above, reducing the normal minimum outflow for the period June 16 through October 15 to 24,500 cfm (408 cfs) should

² Project outflows are the combination of flows into the canal and into the bypass.

maintain the lake at a level that supports boating interests on the lake, while assisting Warren in addressing dissolved oxygen ("DO") concentrations downstream on the river.

In the spring, the normal maximum outflow of 70,000 cfm (1,167 cfs) should better avoid overfilling of the lake during the spring freshet. In addition, the normal maximum outflow of 70,000 cfm (1,167 cfs) from November 16 through December 31 should allow Warren to respond to drawdowns from Brandy Pond and Long Lake (feeding into the lake). Further, the normal maximum outflow of 70,000 cfm (1,167 cfs) should give Warren the ability to prepare for subsequent reductions in outflows to facilitate maintenance, or construction of fish facilities, at its projects downstream on the river as those are required in the future.

As indicated above, the normal outflows would be modified when the lake is very high or very low. Specifically, when the lake is very high (*i.e.*, at or above the 266.65 ft. msl), during the beginning and end of the year (from January 1 through June 15 and from November 16 through December 31), Warren would increase outflows to within a range of 70,000 to 90,000 cfm (1,167 to 1,500 cfs), and during the middle of the year (from June 16 through November 15) Warren would increase outflows to within a range of 60,000 to 90,000 cfm (1,000 to 1,500 cfs). During these very high lake periods Warren would consult with the State resource agencies on potentially increasing the outflows above the maximum specified to address extended high lake levels. When the lake is very low (*i.e.*, at or below 262 ft. msl), Warren would decrease and maintain outflows at 24,500 cfm (408 cfs), unless directed to go to a lower outflow by the state resource agencies.

Warren would anticipate seeking to maintain approximately the middle of the normal outflow ranges (*i.e.*, the "average") under the revised LLMP – which would enable Warren to manage the water coming from the lake for energy production at its Eel Weir Project and at the

other hydro projects downstream on the river, while at the same time accommodating environmental and recreational concerns. The proposed flow ranges would allow the lake to be managed to accomplish a lake level curve that closely matches the historic ten-year average. See Supplement to Application for New License, dated June 6, 2011, p. 10. In other words, operating the lake under a flow-based regime as proposed can result in a similar lake level curve as was accomplished in the past, while providing added benefits in terms of Bypass and downstream flows that are more protective of aquatic resources and water quality, and provide more consistent generation at hydro stations downstream on the river.

Warren believes that the revised LLMP addresses the issues and comments of the resource agencies and stakeholders, including addressing concerns previously raised by certain stakeholders of the impact of what they have called “abnormal” high flows and swings in flows. The revised LLMP will also better enable Warren to more efficiently produce power at the Eel Weir and downstream hydro stations (recognizing this valuable renewable resource) and will be easier to implement (given the difficulty of administration of the current LLMP, particularly with target points with limited, and in one case no, deviation allowed³).

2. Agency Comments

As stated in its June 17, 2011 comments to FERC, the Maine Department of Inland Fisheries and Wildlife (“DIFW”) believes that the revised LLMP “appears to offer a better management strategy to address biological and social concerns than the current LLMP.” In its July 8, 2011 comments to FERC, the Maine Department of Conservation (“DOC”) also indicated support for the revised LLMP, although expressing some concern about high water levels in the lake that might occur.

³ See, e.g., FERC’s letter to Warren dated October 23, 2006, p. 3, acknowledging that “managing a lake the size of Sebago to achieve an exact elevation on a specific date can be challenging.”

D. DEP Certification

On July 26, 2011, the DEP issued a draft Order approving water quality certification for the continued operation of the Project, finding that Warren's revised LLMP meets water quality standards with the imposition of certain conditions. Comments on the draft Order were invited from the applicant, state resource agencies, and other interested parties. Comments were received from the PWD, DIFW, Sebago Lake Marina ("SLM") / Charles Frechette, the Town of Frye Island, and Douglas Watts.

On August 30, 2011 the DEP issued the Certification, which comprises 58 pages plus attachments.

II. The Appeals

On September 26, 2011 Mr. Frechette appealed the Certification to the Board. On the same day, Mr. Watts appealed the Certification to Superior Court. On October 7, 2011 the DEP filed a motion in Superior Court to remand the Watts appeal to the Board to consolidate it with the Frechette appeal. After briefing on the DEP's motion, the Superior Court heard oral arguments on March 8, 2012, and on March 13, 2012 issued an order remanding the Watts appeal to the Board. In its order the Superior Court directed Mr. Watts to file his appeal statement by no later than April 13, 2012. Mr. Watts filed his appeal statement with the Board on that day.

In his appeal Mr. Watts requests the following relief: (A) require a minimum flow into the Bypass of 270 cfs, (B) require immediate fish passage for brook trout and salmon, (C) reduce the target lake levels from 262'-266' msl to 259'-265' msl, and (D) remove the October 16-November 16 1,000 cfs flow cap. In short, what Mr. Watts wants is lower lake levels and higher

flows into the Bypass, to more closely approximate what he says are natural conditions and to reduce beach erosion.

In his appeal Mr. Frechette requests the following relief: (A) require that the lake level trigger to reduce flows to the Presumpscot River to the minimum flow be increased from 262' msl to 264' msl from April 1 to October 15, and 263' msl from November 1 to April 1, and (B) reduce the required minimum flow to the Presumpscot River from 270 cfs to 250 cfs. In short, what Mr. Frechette wants is higher lake levels and lower flows into the Presumpscot River, to provide more water for boaters in the late summer and early fall.

III. Public Hearing Request

Mr. Frechette requests a public hearing for this appeal, but he has not explained why a hearing is necessary or appropriate. See Frechette Appeal, p. 2. Mr. Frechette has not proposed to supplement the record, and he has not provided summaries of proposed testimony, as required when a public hearing is requested. DEP Reg. 2.24(B)(5). Given that no supplemental evidence has been offered (and is therefore prohibited), that this appeal must therefore be based on the existing record, and that Mr. Frechette has not met the requirements for requesting a public hearing, the Board should deny Mr. Frechette's request for a public hearing.

IV. Response to Watts Appeal

A. Bypass Flows

Mr. Watts first argues that the Certification must increase the minimum flow in the Bypass from 75 cfs to 270 cfs to meet water quality standards. Mr. Watts breaks this argument into seven "claims," addressed at pages 5-26⁴ of his appeal, and each of those claim sections are further broken down into numerous subsections, which are addressed below. His essential

⁴ Mr. Watts did not number the pages of his appeal; Warren's references to page numbers exclude the cover page of Mr. Watts's appeal.

argument, though, is that outflows from the lake into the Bypass must approximate what he says are natural flows. But Mr. Watts is wrong, because there is nothing in the water quality standards that requires that river flows below hydropower dams must actually be natural. Rather, what the Class A water quality standard requires is that aquatic habitat and aquatic life must be comparable to what would exist in a natural condition, and the DEP has adopted rules and policies – which are part of the water quality standards – that ensure that hydropower projects achieve that standard. As will be shown below, application of those rules and policies in this case demonstrates that the Class A standard will be met with a minimum flow of 75 cfs in the Bypass.

I. Claim One: The Certification's authorized minimum flows into the Eel Weir Bypass Reach violate Class A water quality standards.

Mr. Watts's first "claim" is that the Certification's authorized minimum flows into the Bypass violate Class A water quality standards. Mr. Watts breaks this argument into six sections, lettered A through G (Claim 1(F) is missing).

a. Claim 1(A): "The DEP's 'alternate' interpretation of Class A water quality standards at the Eel Weir 'Bypass' reach is less protective than the plain language of statute."

Mr. Watts says that the DEP has enunciated an "alternate" interpretation of Class A water quality standards, in the following statement in the Certification:

Maine's water quality standards do not require that lake levels and stream flows be as naturally occurs in order to attain Class GPA and Class A water quality standards, respectively. Rather, Class GPA and Class A standards are intended to protect and maintain the ecological functions and values of natural conditions for high quality waters. These standards do not require that lake levels and stream flows be unaltered.

Certification, at 50. Mr. Watts says that this statement is incorrect because Class A water quality standards require replication of natural conditions, including natural river flows in the natural river bed (the Bypass).

In fact, Class A water quality standards do not require replication of “natural” conditions. What Class A standards say is that “the *habitat* must be *characterized* as natural,” 38 M.R.S. § 465(2)(A) (emphasis added), not that the *water flows* or the *river* must be natural. “Natural” is defined as “living in, *or as if in*, a state of nature not measurably affected by human activity.” 38 M.R.S. § 466(9) (emphasis added). Mr. Watts conveniently ignores the middle clause, “or as if in,” which means the habitat needs to be comparable to the habitat that would exist in a state of nature not measurably affected by human activity. It does not need to be identical at all times in location or size to the habitat that would exist in the absence of human activity. Such a requirement applies only to Class AA waters, which must be characterized as “free-flowing,” 38 M.R.S. § 465(1)(A), meaning they may not be subject to flow regulation by dams.

It is clear that the Legislature intended that flows in Class A waters need not be natural, because it expressly provided that “hydroelectric power generation” is a designated use of Class A waters. 38 M.R.S. § 465(2)(A). Flows from hydroelectric power generation are not natural flows, and there are many store and release hydropower projects located on Class A rivers. The Certification discusses this point, on pages 50-51, as follows:

Mr. Watts’ basic argument is that there can be no unnatural fluctuations of the water levels of Class GPA lakes or of the flows of Class A rivers. Taken to its logical conclusion, this argument would require the removal of all dams at the outlet of Maine lakes, which Mr. Watts admits at one point in his comments, when he states that “[t]he only way in which Sebago [Lake] can be legally ‘managed’ under Class GPA standards is to remove the Eel Weir Dam and allow Sebago Lake to function as it has for the past 10,000 years as a natural glacial lake with a natural, free-flowing outlet.” There is nothing in Maine’s water quality standards that compels such a radical outcome.

With a minimum flow of 75 cfs, the habitat in the Bypass, although at times smaller and in a different location than would exist without the dam,⁵ nonetheless allows aquatic life to

⁵ At other times the habitat will be larger than would exist without the dam, because without the dam the river below Sebago Lake would be subject to drought flows of 40 cfs. See Certification at 10.

“liv[e] in” that habitat “as if in” a state of nature not measurably affected by human activity, as discussed below.

Mr. Watts asserts that interpreting Class A standards to allow a reduction in river flows, compared to a natural condition, would make the Class A habitat standard indistinguishable from the Class B habitat standard. See Watts appeal, at 7. The Class B habitat standard requires that “the habitat must be characterized as unimpaired.” 38 M.R.S. § 465(3)(A). “Unimpaired” is defined to mean “without a diminished capacity to support aquatic life.” 38 M.R.S. § 466(11). According to Mr. Watts, allowing flows in Class A waters to be regulated by a dam would mean that the habitat in Class A waters would effectively only meet the Class B standard.

What Mr. Watts fails to understand is that Class A and Class B standards need not be different with respect to flows. That is, Class A and Class B standards may be the same with respect to the impact of flows on habitat. As noted above, Class A water flows need not be natural, but the habitat must be comparable to natural habitat. Class B flows also need not be natural, but the habitat must be without diminished capacity to support aquatic life. Thus, a minimum flow of 75 cfs might be necessary to meet both Class A and Class B habitat standards, and a flow of less than 75 cfs may not meet either Class A or Class B standards, but may meet Class C standards (*i.e.*, suitable for the designated use of habitat for fish and other aquatic life). Of course, the Class A and Class B habitat standards are distinguishable, not with respect to the impact of flows on habitat, but with respect to the characteristics of the water (*i.e.*, the habitat). Flows are only one factor when considering whether habitat standards are met.⁶

⁶ For example, if there is an overabundance of macroinvertebrate (bug) life (*i.e.*, excess enrichment) the habitat may not meet the Class A habitat standard because it is not akin to natural habitat, but it may meet the Class B habitat standard because it is without diminished capacity to support aquatic life (and in fact, is has enhanced capacity to support aquatic life).

Again, the operative question is whether the habitat meets Class A standards, not whether flows are natural. Thus, Mr. Watts is correct that, with respect to flows, the Class A habitat standard may be indistinguishable from the Class B habitat standard. And flows of 75 cfs may meet both the Class A and Class B habitat standards.

In short, the statement in the Certification that “Maine's water quality standards do not require that lake levels and stream flows be as naturally occurs in order to attain Class GPA and Class A water quality standards, respectively” is not an “alternate” interpretation of the law, but an accurate statement of the law.

Once the fundamental fallacy of Mr. Watts’s argument is exposed – his argument that “natural” habitat requires natural flows – the rest of Mr. Watts’s arguments concerning the Bypass also fail.

b. Claim 1(B): The prescribed minimum bypass flow violates Class A dissolved oxygen standards in the Eel Weir bypass reach.

There is no dispute that the water in the Bypass meets the Class A DO standard of not less than 7 parts per million or 75% of saturation, whichever is higher. 38 M.R.S. § 465(2)(B). But Mr. Watts nonetheless argues (pages 7-8) that because portions of the Bypass are dewatered there is no water in those locations to meet Class A DO standards, so the Bypass must not meet those standards. As just discussed, though, Class A standards do not require natural flows. Thus, the question is what flows are necessary to meet water quality standards.

As stated in the Certification, at page 24, “the DEP also uses wetted area as an indicator of the habitat available for aquatic organisms under different flow conditions.” That practice is contained in the DEP Bureau of Land and Water Quality Hydropower Project Flow and Water Level Policy (the “Policy”), dated February 4, 2002. Under the Policy, “in determining flows . . . at hydropower projects, the Bureau of Land and Water Quality will operate under the rebuttable

presumption that a flow providing wetted conditions in a weighted average of 3/4ths of the cross-sectional area of the affected river or stream, as measured from bank full conditions, . . . will be needed to meet aquatic life and habitat standards.” The Policy provides that “bank full conditions for rivers and streams will be determined based on the available cross sectional information or, where appropriate, average summer flow conditions.”

The Certification discusses this “3/4ths wetted width” presumption at pages 25-26. The Certification notes on page 25 that a flow of 75 cfs provides wetted conditions in 73% of the cross-sectional area of the Bypass, as measured from bank full conditions. A flow of 80 cfs is needed to provide wetted conditions in 75% of the cross-sectional area of the Bypass.

The Certification then discusses why it makes sense to require a minimum flow of 75 cfs, as opposed to 80 cfs; alternative flows are expressly allowed by the Policy on a case-by-case basis based on site specific conditions and data, where those alternative flows can be shown to meet all water quality standards. See Certification at 25-26, Policy at 1:

- A year-round minimum flow release of about 70 cfs is needed to provide wetted conditions in a weighted average of about 3/4ths of the cross-sectional area of the riffle-run habitat in the Eel Weir Bypass. This is significant because the species of management interest in the Bypass are brook trout and landlocked salmon (Certification at p. 23), and those species rely primarily on riffle-run habitat during spawning and early life stages. See DIFW’s *Evaluation of Perceived Impacts to Fish and Wildlife Associated With Water Level Management at Sebago Lake During the Summer and Fall of 1991*, January 1992, p. 8.
- Minimum flow releases from the dam into the bypass will be augmented by precipitation and/or runoff from the adjacent watershed.
- To the extent that smallmouth bass compete with brook trout and landlocked Atlantic salmon, low flows in the bypass will improve habitat suitability for trout and salmon. Limiting flows to 75 cfs will reduce habitat suitability for adult smallmouth bass by 17% when compared to a flow release of 100 cfs, so keeping flows to 75 cfs will be better for trout and salmon, the species of interest.
- At flows of 79 cfs or less existing coldwater seeps provide two areas of thermal refuge flows from warm summer water temperatures for coldwater fish – trout and salmon – in the Eel Weir Bypass.

- All flows released into the Bypass are flows that cannot be used to generate electricity at the Eel Weir powerhouse. Therefore, the larger the bypass flows, the greater the lost generation.

Thus, the Certification concludes on page 26 that, in view of these site-specific conditions, increasing current minimum flow releases in the Eel Weir Bypass to 75 cfs on a year-round basis will improve overall aquatic habitat conditions, will improve habitat suitability for adult brook trout and landlocked Atlantic salmon (the species of primary fisheries management concern), and will improve angling conditions, while maintaining thermal refugia for coldwater fish and most of the existing hydropower generation. This conclusion is entirely consistent with the Policy, and thus with Class A water quality standards.

- c. Claim 1(C): DEP invertebrate studies show the bypass does not meet Class A standards at flows of 75 cfs.*

Mr. Watts makes the same argument with respect to invertebrate sampling, arguing that because portions of the Bypass are dewatered there is no water in those locations to meet Class A aquatic life and bacteria content requirements (“as naturally occurs,” 38 M.R.S. § 465(2)(B)). But again, Class A standards do not require natural flows, so the question is what flows are necessary to meet water quality standards, not whether there is no water in certain locations where water would have been located if the dam were not present. As discussed in the prior section, flows of 75 cfs meet water quality standards.

- d. Claim 1(D): DEP invertebrate studies show the wetted bypass reach at 75 cfs only meets Class B standards.*

Mr. Watts next argues that even if reduced flows in the Bypass meet water quality standards, the water itself does not meet Class A standards because, as the Certification acknowledges on page 24, macroinvertebrate data indicate that “the sampled community attains Class B standards and is indeterminate for attainment of Class A standards.” Mr. Watts

acknowledges that Chapter 579.5(A) allows the use of best professional judgment to supplement macroinvertebrate data, and Mr. Watts does not dispute that if best professional judgment is used it supports the conclusion that Class A standards are met. But Mr. Watts argues that best professional judgment may not be used to conclude that the Bypass meets the Class A aquatic life standard because, he asserts, the Bypass does not support indigenous brook trout and salmon, as also required in Chapter 579.5(A).⁷ See Watts appeal, p. 10.

In support of his argument, Mr. Watts cites the Certification itself, which states on page 20 that “the main stem river does not currently support self-sustaining populations of coldwater fish.” What Mr. Watts ignores is the term “self-sustaining.” There is nothing in the Class A aquatic life standard that requires that aquatic life must be “self-sustaining.”⁸ As the Certification also notes on page 20, “several species of coldwater fish (including brook trout, brown trout, and landlocked Atlantic salmon) are present in the river, and are supported primarily by annual stocking,” and “the Eel Weir Bypass currently provides a very popular year-round fishery for stocked coldwater fish (including brook trout, brown trout, and landlocked Atlantic salmon) and for indigenous landlocked Atlantic salmon that drop down from Sebago Lake.” In other words, although the Bypass does not support self-sustaining populations of brook trout and salmon, it does support those indigenous species – which is all that is required by Chapter 579.5(A) to allow the use of best professional judgment in determining whether the Class A aquatic life standard is met.

⁷ Chapter 579.5(A) provides that, notwithstanding the other provisions of that paragraph, “other standards and criteria pertinent to protecting the aquatic life uses of the classification [must be] attained (including, but not limited to, support of indigenous fish or other aquatic species, as required in the water quality classification law).”

⁸ The Class A aquatic life standard provides that the aquatic life and bacteria content of Class A waters shall be “as naturally occurs.” 38 M.R.S. § 465(2)(B). “As naturally occurs” means “conditions with essentially the same physical, chemical and biological characteristics as found in situations with similar habitats free of measurable effects of human activity.” 38 M.R.S. § 466(2).

- e. *Claim 1(E): Fish habitat utilization studies show Class A dissolved oxygen standards and aquatic life standards are not attained in the bypass at 75 cfs.*

Notwithstanding his heading for this claim (which actually is addressed in his subsequent claim), Mr. Watts next argues that the DO and invertebrate sampling (rock basket) studies are invalid because they were not conducted at a variety of river flows, “so that meaningful comparisons could be made about the effects of various flows on dissolved oxygen and aquatic life throughout the river’s natural channel.” Watts Appeal, p. 13. But the question is not one of comparison, it is whether the water meets DO and aquatic life standards.

As noted in the Certification (page 17), the DO content of Class A waters must be not less than 7 parts per million or 75% of saturation, whichever is higher, and the aquatic life and bacteria content of these waters shall be as naturally occurs. 38 M.R.S.A. § 465(2)(B). The Certification further notes, on page 27, that “dissolved oxygen and temperature sampling was conducted at two locations (immediately upstream of the Route 35 bridge near the upper end of the bypass, and about 150 feet upstream of the powerhouse near the lower end of the bypass) on six days during periods with extended releases of 50 cfs from the dam into the bypass and with no significant precipitation or runoff. Sampling was conducted in both early morning and mid-afternoon to determine the maximum diurnal fluctuation in dissolved oxygen levels.” At these low flows DO would be expected to be at its lowest levels.

The Certification then notes on page 27 that “analysis of the monitoring data indicates that dissolved oxygen concentrations in the Eel Weir Bypass met or exceeded minimum Class A numeric criteria of 7 parts per million and 75% saturation, whichever is higher, during all sampling events.” Based on this, the Certification concludes that “dissolved oxygen standards

are currently met in the Eel Weir Bypass under critical low flow / high water temperature conditions.” There is no reasonable argument that the DO standard is not met.

With respect to the aquatic life and bacteria content of these waters, which shall be as naturally occurs, Chapter 579.5(A) provides that “a waterbody shall be determined to be in attainment of the designated aquatic life uses and characteristics of its assigned water classification, if the association value . . . is shown to be equal to or greater than 0.6 for that class or any higher class, or where the provisions for professional judgement determine that the water should be determined to be in attainment of its assigned water classification or any higher classification” As noted in the Certification, although the sampled macroinvertebrate community was indeterminate for attainment of Class A standards, “sensitive organisms were present in good numbers [so] the sampled macroinvertebrate community reflects natural conditions below a lake outlet.” Because of this, the Certification concludes on page 25, “based on professional judgment, that the sampled community meets Class A standards.”

As discussed above, it is appropriate to use best professional judgment in these circumstances, as expressly noted in the Certification itself (page 25, note 52); Chapter 579 provides for the use of best professional judgment where there is documented evidence of conditions that could result in uncharacteristic findings, including habitat conditions below lake outlets.⁹ DEP Reg. Ch. 579.3(G)(1).

In short, the evidence demonstrates that the Bypass at flows of 75 cfs meets Class A DO and aquatic life standards.

⁹ Chapter 579 is an approved part of Maine’s water quality standards that implements the water quality classification system. Thus, the use of rock baskets and best professional judgment to assess whether macroinvertebrates are, for example, “as naturally occurs” (the Class A standard) is an integral part of the water quality standard.

f. Claim 1(G)¹⁰: Fish habitat utilization studies show the Eel Weir bypass does not meet Class A or Class B standards for fish and other aquatic life.

Mr. Watts next argues that the Bypass reach does not meet Class B aquatic habitat standards, so it must also not meet Class A aquatic habitat standards. Class B aquatic habitat standards require that “the habitat must be characterized as unimpaired.” 38 M.R.S. § 465(3)(A). “Unimpaired” means “without a diminished capacity to support aquatic life.” 38 M.R.S. § 466(11). Mr. Watts says that because there is less aquatic habitat at flows of 75 cfs than there is at flows of 200 cfs or higher, the water in the Bypass must have a diminished capacity to support aquatic life. See Watts appeal, pp. 13-14.

Again, Mr. Watts’s fundamental misunderstanding is his view that flows must be natural. In fact, as discussed above, Class A standards do not require natural flows. So the question, again, is not whether there is less habitat compared to some other (greater) flow, but (1) whether the flow meets the flow requirements in the Policy, which has been adopted to ensure that the aquatic habitat criteria are met, and (2) whether the water meets the aquatic life and bacteria requirements of Chapter 579, which has been adopted to ensure that aquatic life criteria are met. As discussed above, flows of 75 cfs in the Bypass meet both of these criteria. Thus, the habitat that is present – even though there may not be as much of it as in a natural state – meets not only the Class B “unimpaired” standard (without diminished capacity to support aquatic life), but also the Class A “natural” standard (living in, or as if in, a state of nature not measurably affected by human activity).

¹⁰ There is no Claim 1(F).

2. *Claim Two: The Certification's authorized minimum flows into the Eel Weir Bypass Reach violate Class A and Class B water quality standards.*

Much of what Mr. Watts argues next is simply a repackaging of his arguments in his Claim One, and is wrong for the same reasons.

- a. *Claim 2(A): The DEP flow of 75 cfs violates Class A and Class B water quality standards because it puts this reach of the Presumpscot River in a perpetual condition of extreme drought.*

Mr. Watts again argues that habitat in the Bypass reach cannot be “natural” or “unimpaired” with flows of 75 cfs because natural flows are greater than 75 cfs.¹¹ Again, Class A aquatic habitat standards do not require natural flows.

- b. *Claim 2(B): The DEP's estimate of 7Q10 flow at Sebago Lake shows its use of 'professional judgment' and '3/4s wetted width' in lieu of the plain language of Class A standards is inapt.*

Mr. Watts argues that the Policy's 3/4ths wetted area standard, and the use of professional judgment authorized by Chapter 579, should not apply to the Bypass reach because the Bypass is different than most river reaches below dams. See Watts appeal, pp. 16-18. Specifically with respect to the Policy,¹² Mr. Watts says that it is inappropriate to make the 3/4ths wetted area calculation on the basis of bank full conditions in a braided river channel such as the Bypass. But in fact the braided river channel sections of the Bypass were not included in the determination of bank full conditions, for the very reasons Mr. Watts identifies.¹³ The Policy

¹¹ Mr. Watts asserts that flows of 75 cfs (which he erroneously refers to as maximum flows; 75 cfs is in fact the minimum flow imposed by the Certification) are “extreme drought” flows, asserting that the natural drought flow is 270 cfs. See Watts appeal, p. 14. In fact, as discussed below, the natural drought flow is 40 cfs, as stated on page 10 of the Certification. A flow of 270 cfs is the 7Q10 flow into the river (both the Bypass and the canal) in the *regulated* condition, with the dam in place. See Certification, p. 30 n.66.

¹² Mr. Watts refers to the Policy as a “back of the envelope” and “informal” standard. See Watts appeal, p. 16. In fact, as discussed below, see footnote 18, the Policy has been applied consistently, but on a case-by-case basis, for many years, and has been accepted by BEP, EPA, and the courts as a part of Maine's water quality standards.

¹³ The record shows that bank full conditions were determined by averaging measured bank full conditions (based on photographic evidence) across nine transects, none of which was in the braided channel. See Dec. 28, 2001 letter from DEP to Kleinschmidt Associates, pp. 4, 7 (referring only to the average of transects 1-9); Eel Weir Bypass Reach Instream Flow Study, Final Report, January 2002, pp. 2-4, 3-3 to 3-4 (referring to transects 10-11, located in the braided river channel).

is applied on a case-by-case basis, and it states that “bank full conditions will be determined based on the available cross sectional information or, where appropriate, average summer flow conditions.” That is exactly what DEP did in this case – it determined bank full conditions based on available cross sectional information, which in this case excluded braided river channel conditions.

Thus, DEP determined that the flow at bank full conditions in the Bypass is 133 cfs. Mr. Watts asserts that this flow is less than half of the natural drought flow. In fact, the natural drought flow is 40 cfs, as stated on page 10 of the Certification. A flow of 270 cfs (which Mr. Watts says is the natural drought flow) is the 7Q10 flow from Sebago Lake into the Presumpscot River (not just into the Bypass) in the *regulated* condition, with the dam in place. See Certification, p. 30 n.66. So although the 7Q10 flow into the Presumpscot River is 270 cfs (most of which passes through the Eel Weir canal), it is incorrect for Mr. Watts to assert that a bank full flow of 133 cfs into the Bypass is less than the natural drought flow into the Bypass.¹⁴ In fact, it is more than three times the natural drought flow, and a minimum flow of 75 cfs is almost twice the natural drought flow.

Thus, in short, it made perfect sense, and it was in fact required, for the DEP to apply the Policy to determine that a minimum flow of 75 cfs in the Bypass would meet the Class A aquatic habitat standard.

¹⁴ Mr. Watts says that “the reason the WQC concludes at p. 25 that the river reaches 'bankfull stage' at 133 cfs but also concludes at p. 30 that the *same* stretch of river is in drought stage at 270 cfs is because the DEP incorrectly applied the terms 'bankfull' and '3/4s wetted width' to the braided river channel below the outlet of Sebago Lake.” Watts Appeal, pp. 17-18. In fact, the Certification did not conclude that the Bypass is in drought stage at 270 cfs. That flow is the 7Q10 flow to the entire Presumpscot River, including the canal, and when flows have been at that level it is likely that flows into the Bypass have been the (current) minimum flow of 50 cfs.

3. *Claim Three: The WQC arbitrarily creates a less protective legal subcategory of Class A water quality standards for the Eel Weir bypass without Legislative and US EPA approval.*

Mr. Watts next argues that by imposing a minimum flow of 75 cfs in the Bypass and a minimum flow of 270 cfs in the Presumpscot River below the outlet of the Eel Weir canal, the Certification creates a less protective water quality standard for the Bypass that requires approval of the Maine Legislature and EPA.

In fact, the Class A standard is the same, and applied in the same way, for both the Bypass and the main stem below the canal. As discussed above, flows do not need to be natural to meet Class A standards, and application of the Policy demonstrates that a minimum flow of 75 cfs in the Bypass meets Class A habitat standards. Flows in the main stem, however, must be higher to ensure that the river meets Class A DO standards, as discussed on page 31 of the Certification. This is not a different standard, but a means to ensure that Class A standards are addressed in the entire river, not just in the Bypass.

4. *Claim Four: The Certification's conclusions about fish habitat are erroneous.*

Mr. Watts next makes several arguments about fish habitat.

- a. *Claim 4(A): The DEP bases its required bypass flow on conclusions about fish habitat which are self-contradictory and not supported by credible evidence.*

Mr. Watts argues that higher flows are better for all fish species, and that it is wrong for the Certification to conclude that one benefit of flows of 75 cfs is that it reduces habitat for smallmouth bass, which compete with brook trout and salmon. See Watts Appeal, p. 19. But what Mr. Watts fails to recognize is that more habitat for smallmouth bass makes that species stronger and better able to compete with trout and salmon, including by preying on juvenile salmon. It is an oversimplification for Mr. Watts to say that more habitat is better for all; the

stronger species can use the additional habitat to better prey on the juveniles of the weaker species that inhabit their additional habitat, thus providing more food for the stronger species and more threat to the weaker species. More habitat is not better for all species, because young trout and salmon are more vulnerable when using the additional habitat than are young smallmouth bass. Certification, p. 23.

Additionally, weighted usable area (“WUA”) is only one consideration in determining whether Class A habitat standards are met. The primary consideration, as discussed above, is what the Policy provides, balanced with the case-by-case considerations discussed on page 26 of the Certification.

- b. *Claim 4(B): The DEP's use of coldwater refugia in the bypass to defend its 75 cfs flow has no scientific or legal support.*

Mr. Watts argues that the Certification “unlawfully and improperly uses data regarding coldwater refugia in the Eel Weir Bypass to defend its 75 cfs flow and to argue against natural or otherwise higher flows than 75 cfs.” Watts Appeal, p. 21. Again, Mr. Watts argues that the flows in the Bypass must be natural. As already discussed above, Mr. Watts is wrong about that. Mr. Watts also argues that the only reason coldwater refugia are necessary in the Bypass is that there is no fish passage to allow brook trout and salmon to swim into the lake, so coldwater refugia cannot be used to justify lower flows into the Bypass. But this argument assumes that fish passage facilities are necessary to meet Class A water quality standards which, as discussed below, is not correct. Because fish passage facilities are not necessary to meet water quality standards, it is appropriate to keep flows below 115 cfs, as discussed on pages 23 and 26 of the Certification.

5. *Claim Five: The DEP's use of an 'alternative' Class A standard is unlawful because it was performed and applied incorrectly, it is not suitable to the specific physical configuration of the bypass reach and it produces results which are demonstrably less protective than the plain language standard.*

Mr. Watts again argues that flows of 75 cfs are not natural, and thus cannot meet Class A habitat standards. See Watts Appeal, pp. 23-24. Again, contrary to Mr. Watts's argument, the "plain language" of the Class A standard does not require natural flows, but simply habitat that is comparable to natural habitat, which, as the Certification states on page 50, protects and maintains "the ecological functions and values of natural conditions for high quality waters."¹⁵ That is what the Policy was intended to, and does, provide for.¹⁶

6. *Claim Six: The DEP flow of 75 cfs in Eel Weir bypass reach violates Ch. 587 of DEP Rules.*

Mr. Watts argues that the 75 cfs minimum flow requirement for the Bypass violates Chapter 587 of the DEP's rules because it does not comply with the definition of "non-consumptive use":

Nonconsumptive use of water is defined in 38 M.R.S.A. Section 470-A. Notwithstanding this, an existing (as of the effective date of this chapter) point of return flow to contiguous water greater than ¼ mile from the point of withdrawal and that otherwise meets the definition of nonconsumptive use in 38 M.R.S.A. Section 470-A, is also deemed to be a nonconsumptive use. For the purposes of this chapter, non-consumptive use is determined to have no measurable effect on flows or water levels. *Flows in the segment between a point of withdrawal and a downstream point of return must be sufficient to maintain all other water quality standards, including all designated uses and characteristics of the assigned classification.* Activities that constitute a nonconsumptive use may occur during all flow and water level conditions.

DEP Reg. 587.1(C) (emphasis added). Mr. Watts alleges that flows of 75 cfs do not comply with this definition because they are not sufficient to maintain all other water quality standards. Watts

¹⁵ This is not an "alternate standard," as Mr. Watts asserts, but a description of the purpose of the Class A standard.

¹⁶ Mr. Watts again says that the 75 cfs is "worse" than what would "*naturally* occur only during the worst seven days on a one in ten year drought" (7Q10). Again, Mr. Watts is wrong, because the natural drought flow was 40 cfs, which is just over half of the 75 cfs minimum flow required by the Certification. Certification, p. 10.

Appeal, p. 25. As discussed above, however, flows of 75 cfs in fact meet Class A water quality standards, no matter how often or in what form Mr. Watts repeats his position that flows must be natural.¹⁷

7. *Claim Seven: The WQC admits the Eel Weir bypass reach does not support natural, self-sustaining populations of native, indigenous brook trout and Atlantic salmon. This failure is a violation of Class A, B and C water quality standards. Because the Eel Weir Dam contributes to this failure, the DEP cannot issue a water quality certification for the project.*

Once again, Mr. Watts argues that because the Bypass does not support self-sustaining populations of brook trout and salmon it does not meet the Class A aquatic life standard. As discussed above, however, there is nothing in the Class A aquatic life standard that requires that aquatic life must be “self-sustaining.” Although the Bypass does not support self-sustaining populations of brook trout and salmon, it does support those indigenous species – which is all that is required in determining whether the Class A aquatic life standard is met.

B. Fish Passage at the Eel Weir Dam

Mr. Watts next argues that the Certification must require immediate fish passage at the Eel Weir Dam for brook trout and salmon. Such a requirement would not only be at odds with DMR and DIFW recommendations, but it also is not required by the water quality standards.

1. *Claim Eight: The Certification must require immediate fish passage for brook trout and salmon.*

With respect to fish passage, the Certification states on page 38 that “there are currently no plans to restore anadromous fish to Sebago Lake and its tributaries. As a consequence, DMR has not recommended the installation of fish passage facilities at the Eel Weir Dam for

¹⁷ In any case, Chapter 587.8(B) provides as follows: “Flows and water levels for hydropower projects, as defined in 38 M.R.S.A. § 632(3) shall be established through the Water Quality Certification process pursuant to Section 401 of the Clean Water Act, 33 U.S.C. §1341, or a permit issued pursuant to the Maine Waterway Development and Conservation Act, 38 M.R.S.A. §630 et seq., and therefore shall not be subject to or established through this Chapter, notwithstanding any other provision in this Chapter.”

anadromous fish at this time.” Further, with respect to resident fish species, the Certification states that “DIFW has stated that it opposes the installation of a fishway for resident species, including landlocked salmon, at this time. However, DIFW supports the inclusion of a reopener condition that would allow the issue of passage for resident fish species to be reevaluated during the term of a new FERC license for the project, in the event that future circumstances or conditions warrant the installation of a fishway.”

The Certification concludes on page 39 that, “with respect to passage for anadromous and resident fish species, the evidence in the record indicates that passage for these species is not needed at this time. However, the need for passage for these species may have to be reevaluated if DIFW and/or DMR provide evidence in the future that circumstances or conditions warrant the installation of such fish passage.”

The Certification includes the following response to Mr. Watts’s fish passage arguments:

Maine's water quality standards do not require that fish passage be installed at all dams immediately. The Department notes that the water quality certification for Warren's Presumpscot River Hydro Projects establishes a schedule for the phased installation of fish passage facilities, based on trigger numbers of returning fish, at some, but not all, of Warren's dams on the Presumpscot River, and that this certification has been upheld by the Maine Supreme Judicial Court.

Certification, p. 50.

Undeterred, Mr. Watts continues to argue that immediate fish passage is required.

- a. *Claim 8(A): The WQC fails to require fish passage essential to the support of self-sustaining native and indigenous fish populations in the Eel Weir reach.*

Mr. Watts argues that “a mere reservation of discretionary authority by the DEP via a ‘reopener’ is not an appropriate legal substitute for a standing, active requirement for fish passage when the facts and existing conditions show such passage is required immediately.” Watts Appeal, p. 27. Although it is true that a reopener for fish passage would not be sufficient if the

water did not in fact meet water quality standards for fish, Mr. Watts is wrong that “the facts and existing conditions show such passage is required immediately.”

Class A and Class GPA waters must be of such quality that they are suitable for the designated use of habitat for fish and other aquatic life. The habitat must be characterized as natural. 38 M.R.S. §§ 465(2)(A), 465-A(1)(A). As discussed above, “natural” is defined as “living in, or as if in, a state of nature not measurably affected by human activity.” 38 M.R.S. § 466(9). The Class A aquatic life standard provides that the aquatic life and bacteria content of Class A waters shall be “as naturally occurs.” 38 M.R.S. § 465(2)(B). “As naturally occurs” means “conditions with essentially the same physical, chemical and biological characteristics as found in situations with similar habitats free of measurable effects of human activity.” 38 M.R.S. § 466(2).

The Certification notes on page 18 that “the habitat and aquatic life criteria of Class GPA waters are deemed to be met in an existing impoundment classified as GPA if the impounded waters, at a minimum, satisfy Class C aquatic life criteria (the receiving waters shall be of sufficient quality to support all species of fish indigenous to the receiving waters and maintain the structure and function of the resident biological community), provided that, where the actual quality of the impounded waters attains any more stringent characteristic or criteria, that existing water quality must be maintained and protected. 38 MRSA §464(9).”

Mr. Watts does not dispute that both the river and lake waters support fish, including trout and salmon. What Mr. Watts objects to is the fact that the trout and salmon in those waters are not “self-sustaining.” But, as noted above, there is nothing in the water quality standards that requires that fish populations must be self-sustaining – only that the water must support those fish.

With respect to the river, the Certification notes on page 20 that “the main stem Presumpscot River supports self-sustaining populations of several resident warmwater fish species (including smallmouth and largemouth bass, yellow perch, and chain pickerel) and migratory American eel. The main stem river does not currently support self-sustaining populations of coldwater fish. However, several species of coldwater fish (including brook trout, brown trout, and landlocked Atlantic salmon) are present in the river, and are supported primarily by annual stocking.” Further, “the Eel Weir Bypass currently provides a very popular year-round fishery for stocked coldwater fish (including brook trout, brown trout, and landlocked Atlantic salmon) and for indigenous landlocked Atlantic salmon that drop down from Sebago Lake.” In other words, although the Bypass does not support self-sustaining populations of brook trout and salmon, it does support those indigenous species.

With respect to the lake, the Certification states on pages 31-32 as follows:

Sebago Lake supports self-sustaining populations of a number of resident coldwater and warmwater game and non-game fish species, including a nationally recognized fishery for landlocked Atlantic salmon, one of only four indigenous populations of landlocked salmon in Maine. Migratory American eel, a catadromous fish, are also present in the lake.

The native landlocked salmon fishery is supplemented with stocked hatchery salmon when wild salmon production is insufficient to support angler demand. The stocking of hatchery fish also maintains an artificial salmon run on the Jordan River to support DIFW’s salmon hatchery operations.

In addition to landlocked salmon, other game fish present include brook trout, burbot (cusk), lake trout (togue), smallmouth and largemouth bass, lake whitefish, chain pickerel, white and yellow perch, black crappie, redbreast sunfish, pumpkinseed, and brown bullhead (hornpout). Non-game species present include rainbow smelt, white sucker, longnose sucker, fallfish, creek chub, lake chub, common shiner, golden shiner, blacknose dace, ninespine stickleback, banded killifish, and slimy sculpin.

In short, both the river and the lake support a diverse and abundant population of fish, and there can be no reasonable argument that fish are not supported. Thus, the water quality standards do not require fish passage.

b. Claim 8(B): The Ability Of A Water Body To Support its Indigenous Fish Goes To The Heart Of Water Quality Standards.

Mr. Watts argues that “The Clean Water Act, Maine water quality laws, and the Maine Department and Board of Environmental Protection are unequivocal that the presence of indigenous fish, and safe passage past dams to support indigenous fish, are an integral part of water quality standards.” Watts Appeal, p. 27. In fact, there is nothing in Maine’s water quality standards that requires “safe passage past dams.” As noted above, all that is required is that the water supports fish, and there is no dispute, as discussed above, that both the river and the lake currently support a diverse population of fish, including all indigenous species, without the need for fish passage.

Ironically, Mr. Watts cites to the BEP’s water quality certification order in the Presumpscot River dam case from 2003 as support for his argument that immediate fish passage is required. What Mr. Watts fails to acknowledge, though, but as noted in the Certification, is that the BEP’s Presumpscot River order did not require immediate fish passage at all the Presumpscot River dams, but instead upheld a schedule for the phased installation of fish passage facilities, based on trigger numbers of returning fish, at some, but not all, of Warren’s dams on the Presumpscot River, and that certification was upheld by the Maine Supreme Judicial Court. Certification, p. 50.

c. *Claim 8(C): Native Sebago Lake Atlantic Salmon Require Immediate Passage at Eel Weir.*

Mr. Watts again argues that fish passage is needed to allow salmon to move freely between the lake and the river, because salmon populations in the river are not self-sustaining. Watts Appeal, pp. 28-29. Again, though, there is nothing in the water quality standards that requires that fish populations must be self-sustaining. The water must support fish, but if it does then fish passage is not required unless and until DEP concludes that the water no longer adequately supports fish.

d. *Claim 8(D): Informal State Fisheries Management Plans Do Not Control Maine DEP Water Quality Certifications.*

Mr. Watts argues that the Certification gives excessive deference to DIFW's management plans and its concerns that fish passage would interfere with those plans. Watts Appeal, pp. 30-31. He asserts that "the Maine DEP appears to argue its options for WQC conditions requiring free passage for native salmonids and other fish at the Eel Weir Dam are strictly limited by the goals and objectives of an informal MDIFW recreational fisheries 'plan' for the river, one in which natural, self-sustaining populations of native brook trout and salmon is not desired. Such an informal 'plan' has no relevance in a WQC proceeding."

In fact, there is nothing in the Certification or the record to suggest that DEP considered DIFW's management goals to "limit" DEP's obligation to carefully apply the water quality standards. Rather, DIFW's management goals simply informed DEP's application of the law, which, as already discussed, does not require that fish populations must be self-sustaining. It is simply wrong for Mr. Watts to assert, as he does on page 31 of his appeal, that DIFW's management plans "would result in the *non-attainment* of water quality standards" (emphasis in original).

e. *Claim 8(E): Native Brook Trout Require Immediate Passage at Eel Weir.*

Mr. Watts argues that fish passage is needed to allow brook trout to move freely between the lake and the river, because brook trout populations in the river are not self-sustaining. Watts Appeal, p. 32. Again, though, there is nothing in the water quality standards that requires that fish populations must be self-sustaining; there is nothing in the definition of “natural” that says it means “self-sustaining.” The water must support fish, but if it does then fish passage is not required unless and until DEP concludes that the water no longer adequately supports fish.

f. *Claim 8(F): The WQC's lack of fish passage requirements at the Eel Weir Dam requires a Use Attainability Analysis (UAA).*

Mr. Watts argues that the failure of the Certification to require fish passage requires a Use Attainability Analysis (“UAA”) because it creates a “*de facto* ‘subcategory’” of the Class A standard; a UAA is required to lower water quality standards below that previously approved by EPA. Watts Appeal, p. 35. Mr. Watts says that the Certification’s standard for the Bypass is that it need not be “natural” and that it need not be capable of supporting natural, self-sustaining populations of native salmonids species. But again, Mr. Watts wrongly interprets the Class A standard.

Class A and Class GPA waters must be of such quality that they are suitable for the designated use of habitat for fish and other aquatic life. The habitat must be characterized as natural. 38 M.R.S. §§ 465(2)(A), 465-A(1)(A). As discussed above, “natural” is defined as “living in, or as if in, a state of nature not measurably affected by human activity.” 38 M.R.S. § 466(9). The Class A aquatic life standard provides that the aquatic life and bacteria content of Class A waters shall be “as naturally occurs.” 38 M.R.S. § 465(2)(B). “As naturally occurs” means “conditions with essentially the same physical, chemical and biological characteristics as

found in situations with similar habitats free of measurable effects of human activity.” 38

M.R.S. § 466(2).

The Policy implements these standards by providing a measuring stick to determine what water levels and flows will provide habitat that is comparable to natural habitat.¹⁸ The DEP applied the Policy in this case to make that determination, as discussed above.

Contrary to Mr. Watts’s assertion, these standards do not require that the habitat must be just like natural habitat, nor do they require that the habitat must be capable of supporting self-sustaining populations of fish. Rather, the habitat must be sufficiently comparable to natural habitat so that it supports fish with essentially the same physical, chemical, and biological characteristic as would be found in a similar natural habitat. This does not mean, and it does not say, that fish that are present must have the same ability to move freely between habitats as they would in the absence of the dam, only that each habitat must be able to support fish as would a similar natural habitat.

Thus, it is not true, contrary to Mr. Watts’s assertion, that the Certification approves a subcategory of the Class A aquatic life and habitat standards, so a UAA is not necessary.¹⁹

¹⁸ Because the Policy has been used to apply Maine’s water quality standards, EPA, BEP, and the courts have determined that it is part of Maine’s enforceable water quality standards, and that to deviate from the Policy would require a UAA. See letter from EPA to Dana Murch, dated November 10, 2003, re Flagstaff Storage Project, at p. 2 (UAA is needed to change policy); letter from EPA to BEP, dated February 27, 2004, re Flagstaff Storage Project, at p. 3 (“by adopting the new interpretation of Class C criteria for hydropower impoundments, the Commissioner did in fact apply criteria to this project that are less stringent than what were applied before the Order was issued, what EPA has understood the water quality standards to require, and what is necessary to protect the goal use. . . . Indeed, pursuant to 40 C.F.R. § 131.10(j), a state must conduct a UAA not only when a state designates uses that do not support the goal uses, but also when it adopts subcategories of the goal uses which require less stringent criteria.”); BEP Order, dated July 15, 2004, at pp. 8, 10-12; *FPL Energy Maine Hydro LLC v. DEP*, 2007 ME 97, ¶¶ 25, 35-36.

¹⁹ This case is different than the Flagstaff case cited by Mr. Watts because in that case the DEP had applied an impoundment-to-impoundment comparison test for whether the Class GPA aquatic life and habitat standard was met, and the BEP concluded that the comparison must be to a natural lake, as required by the Policy. Here the DEP compared aquatic life and habitat to natural conditions, as required by the Class A standard.

- g. *Claim 8(G): Reservation of Authority to Require Future Fish Passage is an Inadequate and Unlawful Substitute for Immediate Fish Passage.*

Mr. Watts argues that the reservation of authority providing for future fish passage, if determined to be necessary, is insufficient to meet water quality standards. Watts Appeal, p. 37-38. This would be true if, in fact, the water did not currently meet the Class A aquatic life and habitat standard. But, as discussed above, it does meet that standard. Therefore, the reservation simply provides a mechanism for the DEP to reopen the Certification if it determines in the future that fish passage is necessary to meet the water quality standard (because the water no longer adequately supports fish).

- h. *Claim 8(H): Salmon and Trout in Maine will use fishways -- when they are provided for them.*

Warren agrees with Mr. Watts that salmon and trout will use fishways. But Warren does not agree that a fishway is necessary at the Eel Weir Dam to meet the Class A water quality standard.

- i. *Claim 8(I): The provision of downstream passage for American eels will require upstream passage for salmon and trout anyways.*

Mr. Watts argues that downstream eel passage at the Eel Weir Dam will allow salmon to enter the Bypass, but they will not be able to move back into the lake. Even assuming that Mr. Watts is correct that some salmon will use the downstream eel passage to enter the Bypass, however, that does not mean that fish passage facilities are required by the Class A standard, as discussed above. The "loss" of some salmon from the lake to the Bypass (see Watts Appeal, p. 39) does not violate the Class A standard.

- j. *Claim 8(J): The reason MDIFW opposes an upstream fishway at Eel Weir is because it would be a financial burden on the applicant.*

Mr. Watts says that the reason DIFW opposes an upstream fishway at the Eel Weir Dam is because it would be a financial burden on Warren. In fact, the evidence is that DIFW opposes fish passage at the Eel Weir Dam because its management goals for the Bypass do not include a self-sustaining salmonid population in the Bypass and because it does not want additional invasive species to enter the lake.²⁰

A fishway at Eel Weir Dam would then allow additional new fish assemblages (including invasive organisms) to enter Sebago Lake. These additional introductions would alter the ecology of Sebago Lake and could severely compromise efforts by the Department to manage the lake for southern Maine's only indigenous population of landlocked salmon. Interactions with anadromous species being restored to the bypass would also result. A fishway requested by FOSL would compromise management goals for both the Presumpscot River and Sebago Lake.

See November 2, 2005 letter from DIFW to DEP, p. 2.

In any case, the question is whether fish passage is required to meet water quality standards, not why DIFW does not believe fish passage is necessary or appropriate.

- k. *Claim 8(J)²¹: The WQC's requirement of eel passage but not for any other native fish species has no factual or legal basis.*

Mr. Watts says the Certification must require salmon and trout passage to be consistent with its requirement for immediate passage for eels. See Watts Appeal, pp. 43-44. But the question, again, is not one of consistency – it's whether the Class A water quality standard is met with respect to salmon and trout. The evidence in the record, as discussed above, is that the Class A standard is met for those fish species, and DIFW's recommendation informed that

²⁰ Mr. Watts acknowledges this evidence on page 41 and page 43 n.11 of his appeal, but he provides no evidence that DIFW based its recommendation on the "financial burden" on Warren. Mr. Watts says DIFW no longer has a management plan for the Bypass, but he ignores DIFW's goal to encourage use of various tributaries to Sebago Lake, from mid-October to mid-November, for annual spawning runs. Certification, p. 33.

²¹ There are two Claims 8(J).

analysis. With respect to eels, on the other hand, DMR's recommendation that eel passage is appropriate informed DEP's conclusion that "the evidence in the record indicates that, while eels are currently present in Sebago Lake, overall eel populations would benefit from the increased access to habitat, reduced migratory delays, and reduced injury and mortality that would result from the installation of upstream and downstream passage facilities at the Eel Weir Dam."

Certification, p. 35. The fact that DEP concluded that Class A water quality standards require eel passage at the Eel Weir Dam does not mean passage is required for other fish species, notwithstanding Mr. Watts's assertions to the contrary.

C. Lake Levels

Mr. Watts next argues that the water levels in Sebago Lake must be natural, just like he argued that flows into the Bypass must be natural. But again, Mr. Watts is wrong. The Class GPA water quality standard does not require natural water levels, just like the Class A standard does not require natural flows.

Like the Class A standard, the Class GPA standard requires that waters must be of such quality that they are suitable for the designated use of habitat for fish and other aquatic life. The habitat must be characterized as natural. 38 M.R.S. § 465-A(1)(A). As discussed above, "natural" is defined as "living in, or as if in, a state of nature not measurably affected by human activity." 38 M.R.S. § 466(9).

In February 2002, as discussed above, DEP adopted the Policy, which addresses flows and water levels at hydropower projects. Under the Policy, "in determining . . . water levels at hydropower projects, the Bureau of Land and Water Quality will operate under the rebuttable presumption that . . . a water level that provides wetted conditions for 3/4ths of the littoral zone of a lake or pond, as measured from full pond conditions, will be needed to meet aquatic life and

habitat standards.” The Policy also provides that “full pond conditions for lakes and ponds will be determined based on the maximum impounding capacity of a dam or, where appropriate, historic dam operations.”

So the first question, with respect to habitat, is whether it is “characterized as natural.” Clearly the impoundment is not a natural lake, because it is an impoundment. But that does not resolve the question of whether the habitat in the impoundment can be characterized “as if in” a “state of nature not measurably affected by human activity.” 38 M.R.S. § 466(9).

Sebago’s impoundment habitat can be characterized as if it were in a state of nature not measurably affected by human activity, because it complies with the Policy’s 3/4ths wetted width requirement, which is intended to approximate “natural” littoral lake habitat. See Certification, p. 39 (“Based on an average secchi disk transparency of 9-10 meters (29.5-32.8 feet), the littoral zone of Sebago Lake extends to a depth of approximately 60 feet. The maximum historic drawdown of the lake (9.4 feet below spillway crest) will maintain significantly more than 75% of the littoral zone habitat of the lake.”). Thus, Sebago’s impoundment habitat meets Class GPA water quality standards for aquatic habitat.

1. *Claim Nine: The Certification must reduce the target lake levels from 262’-266’ msl to 259’-265’ msl.*

Mr. Watts chooses to ignore the law discussed above and to focus instead on what he says are “natural” water levels, again taking the position that only “natural” water levels are allowed. This argument, of course, makes no sense, because it would mean that dams that control lake levels are not allowed. As the Certification states:

Mr. Watts’ basic argument is that there can be no unnatural fluctuations of the water levels of Class GPA lakes or of the flows of Class A rivers. Taken to its logical conclusion, this argument would require the removal of all dams at the outlet of Maine lakes, which Mr. Watts admits at one point in his comments, when he states that “[t]he only way in which Sebago [Lake] can be legally ‘managed’ under Class GPA standards is

to remove the Eel Weir Dam and allow Sebago Lake to function as it has for the past 10,000 years as a natural glacial lake with a natural, free-flowing outlet.” There is nothing in Maine’s water quality standards that compels such a radical outcome.

Certification, pp. 50-51.

- a. *Claim 9(A): The WQC requirement for S.D. Warren to achieve a ‘target’ at Sebago Lake of 266.65 feet msl is unlawful because this level is well above the natural high water level of Sebago Lake.*

Mr. Watts says the target level of 266.65 feet msl is “well above” the natural high water level of Sebago Lake,²² and thus it violates the Class GPA water quality standard. As noted above, “natural” water levels are not the relevant test. Rather, the test is whether aquatic habitat meets the requirements of the Policy designed to determine whether that habitat is comparable to what would exist in a natural lake. Mr. Watts does not even attempt to argue that the lake does not meet the requirements of the Policy.

- b. *Claim 9(B): Boating Interests and Expectations*

Mr. Watts says that water levels must be natural, and that DEP may not consider boating interests in deciding whether the Class GPA standard has been satisfied. Watts Appeal, p. 48-49. In fact, as previously discussed, water levels do not need to be natural. Rather, the Policy is intended to ensure that water levels meet habitat and aquatic life water quality standards. In addition, of course, the water must meet the Class GPA requirement that “waters must be of such quality that they are suitable for the designated uses of . . . recreation in and on the water.” 38 M.R.S. § 465-A(1)(A). For this reason, DEP also must consider in issuing water quality certifications whether the proposed water levels will allow the water to support recreation, including boating, on the water. Notwithstanding Mr. Frechette’s arguments to the contrary (see

²² The evidence in the record does not support Mr. Watts’s assertions about natural lake levels. Mr. Watts says natural lake levels were between 259 feet msl and 265 feet msl. In fact, the evidence in the record is that natural lake levels were much lower, between 256 feet msl and 258 feet msl. See memo from Dana Murch to Eel Weir Project file, dated June 29, 2011, p. 4.

below), the evidence in the record is that Sebago Lake waters are suitable for recreation in and on the water, including boating.²³

- c. Claim 9(C): The DEP upper target level for Sebago Lake of 266.65 feet msl has no basis in fact or law.*

Mr. Watts again asserts that the Class GPA standard requires that the lake must maintain natural lake levels. Again, as discussed above, Mr. Watts is wrong. The applicable aquatic life and habitat water quality standard is contained in the Policy, as discussed above.

- d. Claim 9(C)²⁴: The DEP allowable legal upper level for Sebago Lake of 266.65 feet msl makes the 'target' level of 266.0 msl unenforceable and meaningless.*

Mr. Watts argues that the Certification's target lake level of 266.0 feet msl between May 1 and June 15 is meaningless because the Certification also includes a maximum lake level of 266.65 feet msl, which is the height of the Eel Weir spillway crest. Mr. Watts argues that 266.0 feet msl should be the maximum lake level. But Mr. Watts misunderstands the purpose of the 266.0 feet msl target level. It is not an "upper target level," contrary to what Mr. Watts says. That is, its purpose is not to impose a maximum lake level, but is instead to set a high spring time target to help to keep lake levels higher in late summer, to protect recreational boating. Certification, p. 49. There is nothing in the water quality standards that requires a maximum lake level of 266.0 feet msl, and Mr. Watts offers nothing (other than his mantra, "natural" water levels, which Mr. Watts does not argue is 266.0 feet msl).

²³ On the other hand, if lake levels were the same as they were before a dam was present, there would be much less boating on the lake because it would be much smaller and shallower.

²⁴ There are two Claims 9(C).

- e. *Claim 9(D): The only lawful regulatory nexus for the DEP's upper allowable and target levels of Sebago Lake is the lake's natural high water mark.*

Mr. Watts argues that the Certification allows higher lake levels than those that were the practice until the late 1980s, and that the increased lake levels have caused erosion, for the benefit of private marina and boating interests. Watts Appeal, pp. 51-52.

The LLMP that is currently in place, and that has been since the 1990s, was developed in response to complaints, including about erosion due to high water levels, and was devised as a compromise that would, among other things, help to reduce erosion. Certification, p. 11 n.21. The Certification acknowledges that some erosion has continued to occur, and will continue to occur, but notes that that erosion has stabilized since the 1990s:

Virtually all of the 105 miles of shoreline around Sebago Lake is currently stable and is not experiencing significant erosion. Those areas currently subject to erosion are predominantly steep bluffs composed of loose sands and gravels that are inherently unstable. Most erosion-prone shoreline areas have already been protected by retaining walls or riprap and have been stable for many years, despite changing lake levels. However, the shoreline of the lake is still in the process of coming into equilibrium with the higher water levels created by the construction of the outlet dam to its current elevation. As a result, both shoreline erosion and beach recession will continue in the future.

Certification, p. 36.

The revised LLMP approved by the Certification also is, as noted above, a compromise intended to address the environmental needs of both the Presumpscot River and Sebago Lake, including addressing the recreational desires of both beach users and boaters. As noted in the Certification:

High lake levels during the open-water recreation season, especially during the summer months, can adversely affect recreational use of the lake by putting beaches under water. Conversely, low lake levels during the open-water recreation season can adversely affect recreational use of the lake by inhibiting boat access and by increasing navigational hazards around the lake.

Certification, p. 44. Contrary to Mr. Watts's apparent contention, the question is not whether lake levels are higher than they were historically, but whether the water meets the Class GPA water quality standard. As previously discussed, it does. The fact that there may be some continuing erosion that is affected by water levels does not mean that water quality standard is not met.

2. *Claim Ten: The Certification must reduce the target lake levels from 262'-266' msl to 259'-265' msl.*

This claim is largely a repeat of Claim 9, except that in this claim Mr. Watts objects to the lower limit of the target lake levels (262 feet msl), rather than the upper limit (266 feet msl).

- a. *Claim 10(A): The WQC requirement of the lower bounds of the lake level target range of 262.0 msl has no basis in fact or law and is harmful to natural beach accretion and natural beach re-building.*

Again, Mr. Watts misses the point. The question is whether the water meets the Class GPA water quality standard, not whether historical water levels were lower.

- b. *Claim 10(B): The 262.0 feet msl lower target bounds in the WQC is inconsistent with the expert opinion and testimony of the Maine Geological Survey.*

Mr. Watts objects to removal of the so-called "2 in 9" requirement to allow lake levels in the fall to drop to 261 feet msl twice every nine years.²⁵ He acknowledges that the Maine Geological Survey ("MGS") no longer supports that requirement. The record demonstrates that the 2 in 9 requirement is burdensome and would not achieve its stated goals. See Supplement to Application for New License, dated June 6, 2011, pp. 11-12. But again, the issue is not what might (or might not) add sand to beaches on the lake, but whether the lake levels authorized by the Certification meet the Class GPA water quality standard.

²⁵ Mr. Watts alleges that Warren has not lowered the lake level to 261 feet msl since 2001. Watts Appeal, pp. 58-59. In fact, Warren successfully lowered the lake level to 261 feet msl in 2007, and FERC concluded that Warren complied with the 2 in 9 requirement. See March 4, 2010 letter from FERC to FOSL, p. 4.

- c. *Claim 10(C): The natural beaches of Sebago Lake have suffered unprecedented, unnatural and severe damage since S.D. Warren's unilateral raising of lake levels beginning in 1987.*

Mr. Watts argues that the higher lake levels have damaged the lake's beaches. The evidence is to the contrary; as discussed above, erosion has stabilized. But again, the question is whether the Class GPA water quality standard is met. The applicable standard for purposes of the beaches is whether the waters are of "such quality that they are suitable for the designated uses of . . . recreation in and on the water." 38 M.R.S. § 465-A(1)(A). The fact that there may be some beach erosion is not a water quality issue, but a balancing issue to be addressed by FERC. And again, the revised LLMP is a compromise intended to protect numerous interests, including the divergent recreational uses of the lake – one of which is boating uses whose proponents prefer higher water levels, as Mr. Watts acknowledges. Watts Appeal, p. 60.

3. *Claim Eleven: The Certification must reduce the target lake levels from 262'-266' msl to 259'-265' msl.*

This claim is largely a repeat of Claims 9 and 10.

- a. *Claim 11(A): The DEP lake level targets violate state water quality standards for waterbodies in state and national parks.*

Mr. Watts argues that the beaches at Sebago Lake State Park must be protected from erosion, pursuant to 38 M.R.S. § 464(4)(F)(2), which provides that "where high quality waters of the State constitute an outstanding national resource, that water quality must be maintained and protected. For purposes of this paragraph, the following waters are considered outstanding national resources: those water bodies in national and state parks and wildlife refuges" Mr. Watts argues that a lower target level of 262 feet msl is less protective than the "natural" water quality standard "because it inhibits and prevents natural beach accretion and rebuilding during the fall" Watts Appeal, p. 66.

In fact, the lake levels authorized by the Certification meet Class GPA water quality standards, as discussed above. The mere fact that there may be some beach erosion does not mean that water quality is not “maintained and protected” at the State park.

- b. *Claim 11(B): The DEP low level of 262.0 feet msl target prevents beach accretion by ice-bulldozing and by fair-weather, longshore wave action.*

Mr. Watts says that natural beach rebuilding “can only work if late fall and winter lake levels periodically reach their historic minima, which at Sebago is in the range of 258-260.0 msl.” Watts Appeal, p. 68. Again, Mr. Watts misses the point. As much as Mr. Watts would like to see larger beaches, the water quality standard simply does not require it.

4. *Claim Twelve: The level targets in the WQC violates the anti-degradation provision of the U.S. Clean Water Act and Maine water quality standards.*

Mr. Watts argues that the target lake levels violate the anti-degradation provisions of the Water Quality Law. Mr. Watts says that the antidegradation policy “does not apply to uses which arise from, and are dependent upon, an artificial increase in the natural height of a waterbody,” citing to *Save Our Sebasticook, Inc. v. BEP*, 2007 ME 102, ¶¶ 34-35. Watts Appeal, p. 69.

In fact, the *Save Our Sebasticook* case did not say that. All the *Save Our Sebasticook* case said was that the antidegradation policy does not require that all current uses must always be maintained, no matter what. 2007 ME 102, ¶ 35. Instead, that case stated that it was appropriate for DEP to balance the changes to existing uses with countervailing water quality considerations and benefits, and the request of the applicant (in that case, to cease hydroelectric power generation).

Mr. Watts’s assertion that the antidegradation policy “solely applies to designated uses which arise from the waterbody in its natural condition,” Watts Appeal, p. 69, would mean that

dams could not exist in Maine, because they change natural conditions. This makes no sense. In fact, the antidegradation policy simply requires that existing in-stream water uses – not just “natural” uses – must be maintained and protected. With respect to recreation uses of the water, the applicant must demonstrate that “the proposed activity would not result in significant degradation of the existing use.” 38 M.R.S. § 464(4)(F)(1-A)(b). Even if we assume, for purposes of discussion, that beach uses are uses of the water, the water levels in the Certification will not “result in a significant degradation of the existing use” of those beaches, because, as discussed above, erosion has stabilized. Further, the antidegradation policy must also consider other existing uses, such as boating uses and hydropower generation (which would be degraded by putting more water into the Bypass). And, in any case, the use protected by the antidegradation policy is “recreation” (such as swimming and boating) not beach uses.

Thus, the water levels authorized by the Certification do not violate the antidegradation policy.

5. *Claim Thirteen: The Certification's lake levels cause erosion.*

Mr. Watts next claim is more of the same.

a. *Claim 13(A): The WQC target levels violate Maine water quality standards by causing soil and other materials to fall and wash into Sebago Lake.*

Mr. Watts argues that erosion violates the following provision of the Class GPA standard:

“Materials may not be placed on or removed from the shores or banks of a Class GPA water body in such a manner that materials may fall or be washed into the water” 38 M.R.S. § 465-A(1)(C). Even assuming lowering the water levels as requested by Mr. Watts would prevent erosion, this language does not address erosion. Rather, it prohibits actually placing materials on or removing materials from the shores of a lake in a manner that such materials may

be washed into the lake. It does not address wave action and erosion of materials that are already present on the shore.

- b. Claim 13(B): Maine Geological Survey mapping data shows the southwest side of Frye Island is underlain by glaciomarine clay which is extremely vulnerable to unnatural accelerations of shoreline erosion.*

Mr. Watts argues that the southwest side of Frye Island is extremely vulnerable to erosion. Whether or not that is true, it does not mean that the target lake levels in the Certification violate the Class GPA water quality standard.

D. Fall Outflow Flow Cap

Finally, Mr. Watts argues that the Certification's 1,000 cfs fall outflow cap, which is intended to discourage salmon from moving from the lake into the river, violates the Class GPA standard.

- 1. Claim Fifteen²⁶: The Certification may not include the October 16-November 16 1,000 cfs flow cap.*

Mr. Watts says that the fall outflow cap would not be needed if fish passage were required at the Eel Weir Dam. But, as discussed above, the water quality standards do not require fish passage at all dams in all cases.

- a. Claim 15(A): The WQC unlawfully requires an outflow cap of 1,000 cfs at the Eel Weir Dam from Oct. 16 - Nov. 16 annually to 'protect' landlocked salmon on their spawning runs.*

Mr. Watts says the outflow cap is "unlawful." His argument, again, is that salmon reproduction and habitat must be "natural," so the flow cap, which is intended to encourage salmon to use the DIFW Jordan River broodstock collection site, promotes an "unnatural" use. But again, the question is not whether the flow cap is "natural" or encourages "natural" fish movement, but whether the habitat is characterized as "natural" (38 M.R.S. § 465-A(1)(A)),

²⁶ There is no Claim Fourteen.

which is not defined to mean a literally natural state. 38 M.R.S. § 466(9) (“living in, or as if in, a state of nature not measurably affected by human activity”) (emphasis added). In addition, the water quality must be suitable for the designated use of fish habitat. 38 M.R.S. § 465-A(1)(A). Given that DIFW believes that a flow cap is needed to prevent salmon from leaving the lake, it is appropriate to include such a condition in the Certification, to ensure that the lake waters are suitable for the designated use of fish habitat.

- b. *Claim 15(B): The 'fall outflow' cap will severely diminish the effectiveness of downstream adult American eel passage at the Eel Weir Dam.*

Mr. Watts says that the flow cap will discourage eels from moving upstream into the lake via the required eel passage. Watts Appeal, pp. 83-84. In fact, there is no evidence, and Mr. Watts does not cite any, to show that eels will be discouraged from moving into the lake to spawn at flows of 1,000 cfs or less.²⁷

- c. *Claim 15(C): The 'fall outflow' cap will prevent Sebago Lake from behaving naturally in the fall and reaching its natural fall levels, thus preventing and inhibiting beach rebuilding and accretion.*

Moving back to his erosion arguments, Mr. Watts argues that the flow cap will prevent lake levels from lowering sufficiently and “naturally” in the fall, inhibiting beach rebuilding. This argument is addressed fully above. Stated simply, there is nothing in the water quality standards that requires water levels and flows to rebuild beaches. Warren included the flow cap proposal in the revised LLMP at the request of DIFW, and it does not violate water quality standards.

²⁷ In any case, the eel passage is intended to assist eels in moving into the lake, but it is not necessary to meet Class A or Class GPA water quality standards, because water levels and flows meet the habitat and aquatic life requirements of the Policy.

V. Response to Frechette Appeal

As noted above, Mr. Frechette essentially argues the opposite of what Mr. Watts argues. While Mr. Watts wants lower lake levels and higher flows, Mr. Frechette wants higher lake levels and lower flows. Specifically, Mr. Frechette requests that the Board modify the Certification to (A) require that the lake level trigger to reduce flows to the Presumpscot River to the minimum flow be increased from 262' msl to 264' msl from April 1 to October 15, and 263' msl from November 1 to April 1, and (B) reduce the required minimum flow to the Presumpscot River from 270 cfs to 250 cfs.

As stated in FERC's FEA (page 20), Sebago Lake is used for "many" purposes with the "main uses" including "recreation (*e.g.*, fishing, boating and swimming) and drinking water." DOC's July 8, 2011 letter discusses interests on the lake that would be favorably impacted by the revised LLMP (except for extended periods of high water), including use of the State's most popular state park, Sebago Lake State Park, for swimming, camping and other outdoor recreational activities. Landowners on the shore of the lake also anticipate benefits from the operation of the revised LLMP. See comments of Stephen M. Kasprzak (dated June 28, 2011) arguing that the revised LLMP will help reduce the accelerated rate of upland and beach erosion, stop flooding of beaches, help mitigate the spread of variable milfoil, and improve lake water quality. See also comments filed by Harvey L. Dutil (dated June 23, 2011) arguing that the revised LLMP will benefit homeowners on the lake through improved health and water quality of the lake.

In addition to interests on Sebago Lake, there are numerous recreation and fishing opportunities on the river and many environmental benefits downstream on the river that are related to the operation of the Eel Weir Project. Furthermore, flows from the lake are about "70

percent of the flow in the Presumpscot River" (FEA, page 90) and the river is used for "hydroelectric power generation, process water for S.D. Warren's paper mill in Westbrook, Maine, municipal and industrial wastewater treatment, and recreation" (FEA page 20). Therefore, in addition to power generation at the Eel Weir Project, outflows from the lake also affect power generation at the five Warren-owned downstream hydro projects and at the North Gorham Project (owned and operated by FPL Energy Maine).

In short, numerous uses and benefits must be balanced together, and no single use can trump the other uses.

What Mr. Frechette requests would upset the delicate balance that is accomplished by the revised LLMP. By lowering flows into the river to 250 cfs when the lake level falls below 264 feet msl in the summer and 263 feet msl in the winter, boating uses would be favored over other uses, which would be impaired and degraded, potentially in violation of water quality standards. As noted on page 49 of the Certification, "Sebago Lake Marina is now requesting a substantial reduction in the historic drawdown of the lake (in effect, Sebago Lake Marina is asking that the minimum level of the lake be raised substantially above historic median minimum levels). Such a change in minimum lake levels would, by reducing flow releases, adversely affect downstream water quality, fishing, and power generation, all for marginal benefits to the lake." In other words, the revised LLMP that was approved by the Certification is a compromise that is intended to protect boating on the lake (Mr. Frechette's interests) while also protecting beaches (Mr. Watts's interests), downstream water quality, fishing, and power generation. See Certification, pp. 11 n.21 (erosion/beaches), 44-45 (beaches versus boating), 47 (hydropower generation), 49 (water quality, fishing, and power generation).

Mr. Frechette does not even acknowledge that the Certification includes a condition specifically intended to address Mr. Frechette's concerns, even though that condition is not required to meet water quality standards:

However, the Department agrees that low lake levels in the early summer can adversely affect recreational boating, especially in view of the fact that, under normal precipitation conditions, lake levels will drop throughout the course of the summer. Accordingly, Conclusion 1 and Condition 1 of the draft Order have been modified to require that lake levels are managed with the goal of achieving a level of 266.0 feet msl (0.65 feet below spillway crest elevation) between May 1 and June 15 annually, as proposed by Warren. Achieving this goal should ensure that lake levels remain suitable for recreational boating during the balance of the boating season.

Certification, p. 49.

Again, the question in these appeals is whether the project as proposed meets water quality standards. That neither Mr. Watts nor Mr. Frechette is entirely happy with the revised LLMP's compromise does not mean that it does not meet water quality standards. Mr. Frechette essentially admits this when he writes, on page 2 of his appeal, that he wants "sensible management of the lake." In other words, the issue is not whether the Certification violates water quality standards, but whether the revised LLMP is, in his view, "sensible."²⁸

Unfortunately for Mr. Frechette, that is not the applicable test.

Given that he cannot prevail on the law, Mr. Frechette stoops to name calling and a personal attack on the former DEP Dams and Hydro Supervisor, Dana Murch:

As you may have noticed I have directly and purposely used the name of the dams hydropower supervisor. Dana Murch. As the author of this 401 and after having dealt with him on this issue for 20 years, I cannot believe the statements he has made, especially with respect that 262 msl does not impact the boating community, which can only be made by someone who has an agenda. . . . Arrogance is knowing the facts, but making a decision and ignoring them, because it does not support your agenda. Ignorance

²⁸ This is further demonstrated by the relief Mr. Frechette requests, which is to require reduced flows when the lake level goes below 264 feet msl in the summer and 263 feet msl in the winter. Unless the reduced flows prevent the lake from going below those levels (which even 250 cfs would be unable to achieve in times of drought, given a natural drought flow of 40 cfs), then, under Mr. Frechette's own reasoning, even Mr. Frechette's proposal does not satisfy his version of what the water quality standards require.

is not knowing all the facts and making a decision. Incompetence is not doing the job you are hired to, at the level or standards that are required. Most people have not been involved with the lake level for a quarter century. I will tell you that as someone who has, this 401 is a result of Dana Murch being all three. The State needs to find someone who is not arrogant, ignorant or incompetent to write the 401 for Eel Weir and Sebago Lake. "Even a dog knows the difference between being stumbled over or being kicked." Mr. Murch kicked the boating community, our aquatic life, Sebago Lake and the people of Maine and New England, for five more feet of beach on July 1 and more water for South African Pulp and Paper.

SLM Comments, August 14, 2011, pp. 17-19. Those who know Mr. Murch, and are familiar with his many years of dedicated service to the DEP and the State of Maine, know that he was a dedicated, objective public servant until he retired last year, and the Board should reject Mr. Frechette's attempt to bolster his appeal by making personal attacks on Mr. Murch.

A. Specific Arguments

1. *Claim: Impact studies are using already degraded [wetland] habitat as a baseline for comparison to justify "no significant impacts" to these already impacted areas.*

Mr. Frechette first claims, apparently, that environmental studies improperly use already degraded wetland habitat as the baseline for comparison to determine that the approved water levels will not have a significant impact on wetlands. Frechette Appeal, p. 4. This claim appears to be referring to SLM's August 14, 2011 comment on the draft Certification: "Mr. Murch justifies [sic] continued environmental harm to our fish, wildlife, wetlands, and economy, by comparing degraded wetlands and management results we have, to degraded wetlands and management that will continue, and because there is not "significant" change to these areas or project operations (even though the paper mill is gone), it is OK for Sebago Lake." See SLM Comments, p. 11.

As previously discussed, the question is whether the water quality standard is met. Class GPA waters must be of such quality that they are suitable for the designated use of habitat for

fish and other aquatic life. The habitat must be characterized as natural. 38 M.R.S.

§§ 465(2)(A), 465-A(1)(A). As discussed above, “natural” is defined as “living in, or as if in, a state of nature not measurably affected by human activity.” 38 M.R.S. § 466(9).

Sebago’s impoundment habitat can be characterized as if it were in a state of nature not measurably affected by human activity, because the lake complies with the Policy’s 3/4ths wetted width requirement, which is intended to approximate “natural” littoral lake habitat. See Certification, p. 39. Thus, as discussed above, Sebago’s impoundment habitat, including associated wetlands, meets Class GPA water quality standards for aquatic habitat; the wetlands are comparable to natural wetlands.

As discussed in more detail in Warren's May 20, 2009, letter to FERC, available data do not support a claim that operating under the existing LLMP has resulted in negative impacts on wetlands. Furthermore, the revised LLMP is even less likely to affect wetlands.

The impacts of Warren's operations under the existing LLMP on the surrounding areas have been extensively studied and discussed. In its 1997 Order approving the LLMP, FERC directed Warren to conduct studies to monitor and evaluate the effects of the LLMP on the environmental resources of the lake, including: evaluation of impacts on shoreline archaeological resources, wetlands inventory and monitoring, beach profile monitoring, recreation monitoring, and near shore water quality study. Pursuant to the 1997 Order Warren conducted the following studies:

- 1997 Sebago Lake Wetlands Inventory Maps
- 1998, 1999 and 2000 Sebago Lake Wetlands Monitoring Study
- 1998, 1999, and 2000 Sebago Lake Nearshore Water Quality Study
- 1998, 1999 and 2000 Sebago Lake Level Management Recreation Study
- 1997, 1998, 1999 and 2000 Sebago Lake Beach Profile Study

In addition to the studies expressly required under the 1997 Order, Warren also performed the following studies relating to the lake level in connection with preparing and submitting its FERC application: Seasonal Lake Level Study (2000-01), Tributary Smelt Spawning Survey (2000-2001), Seasonal Lake Level Survey (2001), Rare, Threatened and Endangered Species Survey (2000), and Recreation Resource Study (2002). Warren filed the results of these studies with its application.

These extensive studies on the potential impacts of the LLMP on various resources in the area (including wetlands) have confirmed that there are no adverse impacts as a result of LLMP implementation. The proposed modifications to the LLMP will provide for more natural lake levels than the current LLMP. Consequently, the revised LLMP is even less likely to affect wetlands.

It is also important to note that operation of the Project is only one of many factors that may influence wetlands along Sebago Lake's shoreline. The shoreline is proximate to many major roads and large residential and commercial developments. Changes in localized hydrology and nonpoint source runoff from such developments undoubtedly impact those wetlands. In addition, significant armoring of the shoreline continues to occur to protect the drinking water supply. As such, changes in the wetlands over time would be the result of many anthropogenic contributing factors over which Warren has no control.

Mr. Frechette has not provided any evidence that revised LLMP water levels will result in any significant impacts on Sebago Lake vegetative communities or associated wetland functions and values, as stated in the Certification. See Certification, p. 41. And the Certification observes that the revised LLMP is intended to more closely mimic natural

fluctuations in water levels during the growing season, so there should be no significant impact on wetlands. Certification, p. 42.

2. *Claim: The 401 requires more release of water from lake to mitigate river low Dissolved Oxygen instead of release of more water through the Presumpscot River dams that are causing the problem (SAPPI makes more money with lake option).*

Mr. Frechette next argues that it is inappropriate for the Certification to require additional releases of water from the Eel Weir Dam to address low DO in the Gambo and Dundee impoundments downstream,²⁹ and that the DO issue should be addressed instead by releasing more water from the downstream dams. Frechette Appeal, p. 4. Mr. Frechette explains this argument more fully on page 1 of his appeal:

The applicant has not shown that they would be severely impacted from mitigation of their Presumpscott [sic] River dam Dissolved Oxygen problems, by releasing/spilling more water and thus less retention of water in those dams. The reduction of DO from 7.0 to 6.5 ppm in a 165 acre impoundment with little or no wetlands could never come close to the impacts of dewatering 2000 acres of Sebago Lake. Sebago Lake is one of only ten lakes over 10,000 acres in Maine.

In other words, Mr. Frechette says that the “problem” is the dams on the Presumpscot River, not Sebago Lake, so the Certification should not use water from Sebago Lake to address a water quality issue on the river: “Increasing the minimum flow and increasing the negative impacts to our beavers, muskrats, loons, fish, and wildlife by wild fluctuations and excessive (below one foot summer draw downs) is not a legal 401. A legal 401 would force Warren to run more over the site specific dams to mitigate those site specific problems.” SLM Comments, p. 7. Mr. Frechette also argues that DO levels in Turtle Cove suffer when the lake levels go below 262 feet msl. SLM Comments, p. 11.

²⁹ See August 31, 2011 letter from DEP to FERC, p. 2: “A total minimum flow of 270 cfs (16,200 cfm) shall be released from the project at all times, except that a total minimum flow of 408 cfs (24,500 cfm) shall be released from the project between June 1 and September 30 annually whenever spillage is required at the downstream Dundee and Gambo Dams to maintain dissolved oxygen levels in the Presumpscot River.”

What Mr. Frechette wants is higher lake levels in Sebago Lake and lower flows into the river. According to Mr. Frechette, summer minimum normal outflows should be reduced to 15,000 cfm (250 cfs). Not only DEP, but also DIFW and DOC, disagree with Mr. Frechette's position on the need for maintaining reduced outflows from the lake during this period.

Under the water quality certifications for the Gambo and Dundee projects downstream of the Eel Weir Project, Warren has been required to monitor DO during the summer months. Pursuant to those requirements, Warren submitted its 2010 DO Monitoring Report to DEP on December 16, 2010. As stated in the 2010 DO report (page 12), Warren's three years of monitoring confirmed that releases from Sebago Lake have a significant effect on attainment of DO standards in the river downstream of the Eel Weir Project.

Based on the 2010 DO report, in a letter dated April 14, 2011 (pages 3 and 5) DEP confirmed its analysis that increasing minimum flow releases from the lake will improve DO levels in the river during the summer months. Furthermore, DOC (July 8, 2011, comments to FERC, p. 2) raised concerns about periods of extended high water in the lake (and, therefore, implementation of low outflows) during the fall and early winter periods before winter freeze-up because of concern for beach erosion around the lake.

Again, the question here is whether water quality standards are satisfied. Warren believes that the minimum outflow for mid-June to mid-October of 24,500 cfm (408 cfs) in the revised LLMP appropriately addresses potential DO concerns on the river and strikes the proper balance of the competing interests on the lake and the river during this period. And because the revised LLMP meets the Policy's requirements for water levels and flows – and because the Policy is part of the State's water quality standards – there is no reasonable argument that the revised LLMP does not meet water quality standards.

3. *Claim: Inadequate water storage in the lake to compensate for water shortages during drought conditions.*

Again, the revised LLMP is a balancing of interests. During drought conditions there is less water available for all uses. Mr. Frechette would like more water reserved for boating uses, but in that event there would be less water that could be used to address water quality and recreational uses of the river.

4. *Claim: Minimum flow rate is too high and applied too late to prevent extreme low water situations during water shortage situations.*

This claim is a repeat of Mr. Frechette's prior claim.

5. *Claim: Statements by DEP and IF&W that lake will be maintained above the current LLMP is contradictory regarding actual water levels that Warren/SAPPI is allowed to achieve before minimum flow is required.*

In this claim Mr. Frechette is apparently referring to the following statement in SLM's August 14, 2011 comments: "Warren plans to manage to the median flow which for most times of the year is one foot lower than the current plan and compared to Moosehead 401 a Sebago Lake Disaster." SLM Comments, p. 7. In fact, Warren will be required to follow the revised LLMP, as modified by the Certification, and the revised LLMP meets water quality standards, as discussed above. It's as simple as that.

6. *Claim: The plan ignores documented benefits of alternate flow plans already considered by the State and DEP.*

Again, the revised LLMP approved by the Certification is a refinement to the original LLMP based on more than 14 years of experience – addressing the multiple interests on the lake and the river, and at the same time better enabling Warren to seek to manage power generation, in recognition of this valuable renewable resource. The revised LLMP does not in any way "ignore" other alternatives that have been considered since 1997. On the contrary, the revised LLMP incorporates the best parts of those plans to best balance all competing interests.

Contrary to Mr. Frechette's assertion, the revised LLMP is not a "huge change from the current LLMP." SLM Comments, p. 2. The major difference is the elimination of periodic target lake levels, but the elimination of those targets does not mean that the lake levels will fall to the bottom of the target range (262 feet msl) "in the middle of the open water season," as Mr. Frechette asserts. See SLM Comments, p. 3. The Certification's goal of 266 feet msl between May 1 and June 15, in fact, will help to ensure that will not happen. Certification, p. 49 ("Achieving this goal should ensure that lake levels remain suitable for recreational boating during the balance of the boating season.").

B. Process Arguments

1. *Claim: This plan has been virtually "rubber stamped" by the DEP without the benefit of input from the public as required by chapter 2: Rules concerning the Processing of Applications and Other Administrative Matters.*

This assertion makes no sense, and is completely contrary to the record. The DEP has accepted and considered public comment on this application for many years, starting when the Certification application was filed in 2002. With respect to the Certification order itself, DEP issued a draft Certification on July 26, 2011 and requested public comment from all stakeholders, including SLM. Certification, p. 47. DEP considered all comments on the draft Certification, and in fact the Certification was amended to reflect comments filed by SLM, as discussed above. That can hardly be called a "rubber stamp."

2. *Claim: A public informational meeting was required.*

Citing Chapter 2.10(B)(7) of the DEP's regulations, Mr. Frechette apparently argues that a public informational meeting ("PIM") was required before the DEP could issue the Certification. Frechette Appeal, p. 4. He writes that "the 401 water quality assessment for

Sebago Lake has involved the Dept. of Conservation, IF&W, the Federal Energy Regulatory Commission, the USF&W Service, and the FERC.” Frechette Appeal, p. 4.

Chapter 2.10(B)(7) requires a PIM for “projects requiring new or amended licenses involving more than two bureaus.” See Chapter 2.13. “Bureaus” do not include agencies outside the DEP. Because the Eel Weir Project requires a license (which includes a certification) only from the Bureau of Land and Water Quality, a PIM was not required.

3. *Claim: The Board should have assumed jurisdiction over this application.*

Mr. Frechette apparently argues that this application is of substantial public interest, and therefore the Board should have assumed jurisdiction over it, pursuant to Chapter 2.17. Frechette Appeal, p. 5. There is no indication that Mr. Frechette requested that the Board assume jurisdiction within the 20-day deadline contained in Section 2.17(A).³⁰

VI. Conclusion

For all of the foregoing reasons, Warren requests that the Board deny the appeals and affirm the Certification.

Respectfully submitted,

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³⁰ Note that the criteria for the Board to assume jurisdiction have changed, and in determining whether a project is of statewide significance the Board now must find that the project meets at least three of the four criteria listed in 38 M.R.S. § 341-D(2).