



JANET T. MILLS  
GOVERNOR

005  
STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION



GERALD D. REID  
COMMISSIONER

## MEMORANDUM

To: The Board of Environmental Protection

From: Kathy Howatt, Hydropower Coordinator

Re: Transfer Order #L-22585-36-F-T / Appeal by AquaFortis Associates, LLC by its manager and sole member Richard Smith

Date: Board Meeting of May 2, 2019

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Before the Board is an appeal by AquaFortis Associates, LLC by its manager and sole member Richard Smith (AQF) of Department Order #L-22585-36-F-T (Order), which transferred a final Department Water Level Order (WLO) establishing a water level and minimum flow regime for Clary Lake to the Clary Lake Association (CLA).

**Statutory and Regulatory References.** Procedural rules governing appeals of Commissioner licensing decisions, including transfers of Department orders, are found in the Department's Chapter 2 *Rule Concerning the Processing of Applications and Other Administrative Matters* (Chapter 2), § 24. WLOs are established pursuant to 38 M.R.S. § 840, and set water level regimes and, if applicable, minimum flow requirements, for waterbodies impounded by certain dams. Pursuant to Section 840(5), WLOs are issued to the "owner, lessee or person in control" of the dam impounding the waterbody subject to the WLO. After issuance of a WLO, and pursuant to 38 M.R.S. § 841, "no owner, lessee or person in control of any dam impounding the body of water, nor any subsequent transferee," may operate or maintain the dam in violation of the WLO for the waterbody. In addition, Special Condition 11 and Standard Condition 5 of the Clary Lake WLO each require Department approval of a transfer of the WLO and set forth requirements for such a transfer, including those in Chapter 2, §§ 11(D) (title, right and interest) and 21(C) (transfers).

**Location.** Clary Lake is located in the towns of Jefferson and Whitefield, Lincoln County. The Clary Lake dam is located on the outlet of Clary Lake in Whitefield, and provides flow to an unnamed tributary to the Sheepscot River.

**Procedural History.** On January 3, 2012, the Department received a petition for a WLO for Clary Lake, and on August 27, 2012, held a water level hearing pursuant to 38 M.R.S. § 840. By Order dated January 27, 2014, the Department issued the WLO for Clary Lake to Pleasant Pond Mill, LLC (PPM), which then owned the Clary Lake dam. On February 26, 2014, PPM and AQF filed an appeal of the WLO in Maine Superior Court. By Order dated January 25, 2016, the Maine Superior Court dismissed PPM as a party to that appeal after finding that PPM waived or abandoned its rights and lost standing. By Order dated February 26, 2018, the Maine Superior

Court substantively affirmed the WLO for Clary Lake and dismissed AQF's appeal of the WLO. No further appeal of the WLO was taken, and the WLO itself is final.

In March 2017, PPM filed for bankruptcy in U.S. Federal Court in Portland, Maine, and in November 2017, PPM's manager and sole member also filed for bankruptcy. On September 28, 2018, the U.S. Bankruptcy Court issued a Sale Order approving the sale of the dam to CLA. Also on September 28, 2018, the bankruptcy trustee, on behalf of PPM and the bankruptcy estate of PPM's sole member, issued a trustee/quitclaim deed conveying the dam to CLA, which was recorded in the Lincoln County Registry of Deeds at Bk 5314/Page 281 on October 15, 2018.

On October 22, 2018, CLA submitted an application for the transfer of the WLO to CLA, which included, among other things, the deed from the bankruptcy trustee to CLA, and a notice of CLA's intent to file its transfer application and evidence of mailing of that notice to the littoral abutters. Department Order #L-22585-36-F-T, dated December 6, 2018, transferred the Clary Lake WLO to CLA, and is the subject of this Board appeal. By email dated December 11, 2018, AQF filed a timely Board appeal of this transfer order. On January 4, 2019, CLA filed a response to the appeal. By letter dated January 17, 2019, PPM and its sole member filed a separate appeal of the Department's transfer order. By letter dated January 21, 2019, AQF filed a response and comment on CLA's January 4, 2019 response to AQF's appeal, which addressed issues and attached exhibits not contained in AQF's appeal, and requested a stay to allow for mediation. By letter dated January 30, 2019, the Board Chair excluded these AQF materials from the Board's record, and declined to stay the appeal for mediation. By another letter dated January 30, 2019, the Board Chair dismissed the January 17, 2019 appeal filed by PPM and its sole member as untimely and excluded all of those materials from the Board's record.

#### **Issues Raised by AQF's Appeal and Remedy Requested.**

AQF asserts that the Department's transfer application form does not apply to transfers of WLOs. Otherwise, AQF questions or disputes various aspects of the underlying final WLO for Clary Lake, as well as the validity of Department enforcement efforts with respect to that WLO. AQF's December 11, 2018 email requests that the Department reconsider its transfer of the WLO to CLA, or in the alternative, appeals that transfer to the Board.

**Department Recommendation.** Department staff recommends that the Board deny the appeal and affirm the Commissioner's decision.

**Estimated time of Agenda Item:** 45 minutes

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