



STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
17 STATE HOUSE STATION AUGUSTA, MAINE 04333-0017

PROPOSED  
BOARD ORDER

IN THE MATTER OF

CLARY LAKE ASSOCIATION	)	REGULATION OF WATER LEVELS
Jefferson and Whitefield, Lincoln County	)	AND MINIMUM FLOWS
CLARY LAKE DAM	)	TRANSFER
WATER LEVEL ORDER	)	
	)	
APPEAL filed by	)	
AquaFortis Associates LLC	)	
	)	APPEAL
L-22585-36-G-Z (denial)	)	FINDINGS OF FACT AND ORDER

Pursuant to applicable provisions of 38 M.R.S. §§ 815-843 and Department of Environmental Protection (Department) Rules Concerning the Processing of Applications, Chapter 2 (Rule Ch. 2), the Board of Environmental Protection (Board) has considered the appeal of AquaFortis Associates LLC (Appellant) of the Water Level Order (WLO) transfer (L-22585-36-F-T) issued to Clary Lake Association (CLA or Licensee), with underlying record, and all responses properly filed, and FINDS THE FOLLOWING FACTS:

1) PROCEDURAL HISTORY AND BACKGROUND

The Clary Lake WLO subject to this transfer appeal has a lengthy procedural history including previous appeals prior to the transfer. 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, and pursuant to the requirements of 38 M.R.S. § 840,<sup>1</sup> the Department issued the WLO applicable to Clary Lake and provided that WLO to Pleasant Pond Mill, LLC (PPM) as the then-owner of the Clary Lake dam (Clary Lake Dam).

On February 26, 2014, PPM and the Appellant 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 WLO appeal after finding that PPM had waived or abandoned its rights and lost standing. On February 26, 2018, the Maine Superior Court substantively affirmed the WLO for Clary Lake and dismissed Appellant's appeal. No further appeal of the WLO was taken, and all aspects of the Clary Lake WLO itself are now final.

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<sup>1</sup> 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.

Since then, CLA has become the owner of the Clary Lake Dam.<sup>2</sup> Pursuant to 38 M.R.S. § 841, “no owner, lessee or person in control” of Clary Lake Dam, nor any subsequent transferee, may operate or maintain the Clary Lake Dam in violation of the WLO for Clary Lake. *See* n.1 above. On October 22, 2018, George Fergusson submitted a transfer application on behalf of CLA to transfer the WLO, L-22585-36-B-N, for Clary Lake to CLA as the new owner of the dam. The Department approved that transfer on December 7, 2018.

By email dated December 11, 2018, Richard Smith, on behalf of the Appellant, filed a timely appeal to the Board requesting review of the Department’s decision to transfer the Clary Lake WLO to CLA. On January 4, 2019, the Licensee (CLA) filed a response to that appeal.

On January 17, 2019, PPM (the former owner of the Clary Lake Dam) and its sole member and manager attempted to file a separate Board appeal of the Department’s transfer of the Clary Lake WLO and submit new materials to the Board. By letter dated January 30, 2019, the Board Chair dismissed that attempted appeal as untimely and excluded all of the new materials from the Board’s record.

On January 21, 2019, the Appellant filed a response to CLA’s January 4, 2019 response to the Appellant’s Board appeal, which addressed matters and materials not contained in AQF’s original appeal and requested a stay by the Board to allow for mediation. By letter dated January 30, 2019, the Board Chair excluded Appellant’s new materials from the Board’s record and declined to stay the Board appeal.

2) PROJECT DESCRIPTION

The Licensee proposes to transfer the Clary Lake WLO to CLA and assume responsibility for the water level regime set forth in the now-final Clary Lake WLO. Water levels at and flows from Clary Lake are controlled by the Clary Lake Dam, which is currently owned by the Licensee. *See* n. 2 below. Downstream flows from the Clary Lake Dam then drain into a separate mill dam impoundment and then into an unnamed tributary of the Sheepscot River.

3) STANDING

As set forth in Department Rule Ch. 2 §(1)(B), in order to have standing to file an appeal to the Board, an appellant must be an aggrieved person who may suffer a particularized

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<sup>2</sup> On information and belief, PPM and its manager and sole member (Paul Kelley) each filed for bankruptcy in 2017, and the U.S. Bankruptcy Court issued a sale order approving the sale of the Clary Lake Dam to CLA in September 2018. Also in September 2018, the bankruptcy trustee, on behalf of PPM and the estate of Mr. Kelley, conveyed the Clary Lake Dam to CLA by deed, which on information and belief was recorded in the Lincoln County Registry of Deeds at Bk 5314/Page 281 in October 2018.

injury as a result of the licensing decision. The Clary Lake Dam abuts a downstream mill complex and other property owned by the Appellant. As an abutter, the Board finds that the Appellant may suffer a particularized injury and has standing to bring this appeal before the Board.

4) FINDINGS & CONCLUSIONS OBJECTED TO

The Appellant's primary contention raised in the appeal concerns the Department's determination, by letters dated November 26 and December 10, 2018, not to hold a hearing regarding the transfer application. This determination is discretionary pursuant to Rule Ch. 2 §7(B) and is thus not properly subject to Board appeal. Similarly, contentions in the Appellant's December 11, 2018 email appeal that involve the underlying terms and conditions of the now-final Clary Lake WLO itself and any related enforcement efforts are also not properly the subject of any Board appeal of the Department's decision to transfer that WLO to CLA, which is also now separately and independently subject to the WLO by operation of 38 M.R.S. § 841. As outlined in the procedural history above, the contentions regarding the underlying terms and conditions of the Clary Lake WLO were previously subject to the administrative process and a Maine Superior Court appeal and are no longer timely or relevant to this Board appeal, which is limited to the transfer of the now-final Clary Lake WLO only. The Appellant's remaining contentions in its December 11, 2018 email appeal concern whether transfers of WLOs are contemplated by statute, whether the form on which the Licensee applied for a transfer was proper, and generally whether the transfer application met the criteria for transfer of a WLO.

5) REMEDY REQUESTED

In its December 11, 2018 email appeal, the Appellant requests review of the Department's decision to transfer the Clary Lake WLO to CLA. The Board interprets this as a request to reverse the Department's transfer determination and deny the Licensee's transfer application with respect to the Clary Lake WLO.

6) DISCUSSION AND RESPONSE TO APPEAL

A. ABILITY TO TRANSFER:

The Appellant raises questions regarding whether WLOs are transferable generally. The Appellant does not cite any authority for this position and contends that an alleged verbal reference to the WLO by the Department as a "strange beast" and the lack of explicit reference to water levels in the transfer application infer that transfers of WLOs are not contemplated by statute. The Board finds this argument to be without merit. As noted above, 38 M.R.S. § 841 prohibits any owner, lessee, or person in control of a dam, including "any subsequent transferee," from operating a dam contrary to a WLO issued for that dam. Similarly, 38 M.R.S. §§ 901-909 governing the release from dam ownership and water level maintenance contain express provisions for transfers of dams. Collectively these provisions also demonstrate that WLO transfers are indeed contemplated by statute, and do not in any event bar such a transfer by the Department.

To the extent that the Appellant contends that a WLO is a “strange beast” rather than a permit or license and therefore allegedly not subject to transfer, the Board also finds this argument to be without merit. Rule Ch. 2 §21(C), states that “[e]xcept as provided in this subsection, every license issued by the Department is non-transferable unless the Department approves the license transfer.” Even assuming the Board could find that this provision outright prohibits transfers of decisions not meeting the definition of the term “license,” this contention fails because a WLO meets both the statutory and regulatory definitions of “license”. License is defined broadly by the Maine Administrative Procedures Act (MAPA), 5 M.R.S. § 8002(5), to include any “permit, certificate, approval, registration, charter or similar form of permission required by law which represents an exercise of the state's regulatory or police powers.” In the context of Department administered statutes governing powers of the Commissioner, 38 M.R.S. § 342, and duties and responsibilities of the Board, 38 M.R.S. §341-D, the term “licensee” also broadly includes “any license, permit, order, approval or certification issued by the department.” Rule Ch. 2 §1(L). Given the broad scope of these definitions, the Board finds that the term “license” as used in the MAPA and in Department Rule Ch. 2 encompasses Department-issued WLOs. Accordingly, the Board finds that the term “license” as used in the context of transfers encompasses WLOs, making WLOs transferable and subject to transfer provisions including those in Rule Ch.2 §21(C). The Board further finds that this is consistent with and confirmed by two conditions of the now-final Clary Lake WLO itself (Special Condition 11 and Standard Condition 5), each of which indicates that the WLO is subject to Department transfer and Rule Ch.2 §21(C).

#### B. FORM OF TRANSFER APPLICATION:

The Appellant also raises issues concerning “the lack of a form, or apparent use of a non-applicable form” regarding the Licensee’s transfer application. The Appellant asserts that this form “requirement” is derived from Ch. 2 §21(C) which states that a “[t]he proposed transferee must submit a license transfer application in a form approved by the Department.” This rule provision, however, is silent as to whether “form” refers to an “established method of expression or proceeding, procedure according to rule” or to “a printed or typed document with blank spaces for insertion of required or requested information,” which are both common interpretations of the word “form.” *See* “form.” *Merriam-Webster.com*. 2019. <https://www.merriam-webster.com> (March 19, 2019). Under either interpretation, however, the Board finds that the Licensee’s application meets all “form” requirements in Ch. 2.

The Licensee’s transfer application was submitted on a form titled, “Transfer Application for Maine Waterways Development and Conservation Act Permit and/or Water Quality Certification for Hydropower Projects,” which is a Department-approved form with a revision date of October 2013. This Department-approved form includes “required information” capturing the criteria expressed in Ch. 2 §21(C) and thus satisfies any “procedural” definition of “form” that might derive from Ch. 2. Regarding the “printed or typed” definition of “form” (with space for requested information), the Licensee’s transfer application form is also sufficient as it has been approved by the Department and contemplates the insertion of such requested information. While the form used by CLA here is titled with reference to 38 M.R.S. §§ 630-638, rather than §§815-843, it includes

the same requirements that meet the transfer criteria for a WLO. Thus, the Board finds that under either interpretation of “form,” all Ch. 2 requirements are met here.

In any event, the Department also approved the use of CLA’s transfer application form here when it accepted that transfer application form for processing. Thus, for all of these reasons, the Board finds that the Licensee submitted its transfer application in a form approved by the Department.

C. TRANSFER CRITERIA:

The Appellant contends that the Department failed to articulate the applicable criteria for a WLO transfer and that the Department should have undertaken an examination of its rules to address actual criterion related to this transfer order. WLOs must generally meet the transfer provisions in Rule Ch. 2 §21(C), as well as any conditions applicable to transfers contained in the WLO itself (*i.e.*, Special Condition 11 and Standard Condition 5 of the Clary Lake WLO). Accordingly, an applicant such as CLA must demonstrate to the Department’s satisfaction technical and financial capacity, an intent to comply with all terms and conditions of the applicable license (the WLO), and an intent to satisfy all applicable statutory and regulatory criteria. The Appellant does not identify any standard that the Licensee allegedly failed to meet here. In any event, the Board has considered the applicable transfer criteria and finds that all such criteria have been met here.

For instance, the Licensee addressed its technical capacity in a letter submitted as part of its transfer application. CLA retained an experienced construction firm to perform repairs and maintenance of the Clary Lake Dam and a surveyor to monument property boundaries and calibrate elevation benchmarks necessary to operate the lake level gauge. Operation of the Clary Lake Dam itself requires removing stoplogs from the weir to manage the water level. CLA submitted a letter demonstrating an understanding of routine dam operation. The Board finds that the Licensee has demonstrated sufficient technical capacity to operate the Clary Lake Dam in accordance with the water level regime in the WLO.

The Licensee also submitted several documents supporting its financial capacity. Statements submitted in the application state that CLA collects approximate four thousand (\$4000.00) dollars in association dues annually. The Licensee’s annual operating costs including operation of the Clary Lake Dam is approximately two-thousand and five hundred (\$2500.00) dollars. The Licensee provided evidence of account balances sufficient to support operating costs and current fundraising to support future dam repairs and maintenance. Accordingly, the Board finds that the Licensee has sufficient financial capacity to operate the Clary Lake Dam in accordance with the WLO.

The Licensee must demonstrate intent to satisfy the terms and conditions of the WLO being transferred and the statutory and regulatory criteria applicable to WLOs generally. As noted above, the Clary Lake WLO includes conditions subject to this requirement. Special Condition 11 and Standard Condition 5 prohibit transfers without submitting written notification to the Department for review and approval. Additionally, applicants for transfer under these conditions must provide a signed letter agreeing to comply with

the terms of the WLO, evidence of title, right, or interest in the property, and evidence of public notice of the transfer of ownership sent to owners of littoral and riparian property around Clary Lake. Applicable statutory and regulatory criteria such as water levels and flow requirements necessary to support existing uses are integrated into the existing WLO and captured through the required intent to comply with the order.

The Board finds that the Licensee provided a deed demonstrating evidence of title, right, and interest in the Clary Lake Dam, as well as sufficient notice (through the application itself) to the public and appropriate littoral and riparian property owners. The Licensee also submitted a letter agreeing to comply with the terms of the WLO. Accordingly, the Board finds that the Licensee has demonstrated its intent to comply with the WLO and its conditions, as well as applicable statutory and regulatory criteria.

BASED on the above findings, and subject to the conditions incorporated into transfer Order #L-22585-36-F-T, the Board finds that the Licensee has provided adequate evidence of financial capacity, technical ability and intent to comply with all conditions of Department Order L#22585-36-B-N and to satisfy all applicable statutory and regulatory criteria. The Board further finds that all applicable transfer criteria contained in Rule Ch. 2 and the Clary Lake WLO have been satisfied by CLA here. The Board further finds that CLA is also a current owner, lessee, or person in control of the Clary Lake Dam, and is thus also separately and independently subject to the Clary Lake WLO by operation of 38 M.R.S. § 841.

THEREFORE, the Board AFFIRMS Department Order L-22585-36-F-T approving the transfer application of CLARY LAKE ASSOCIATION for water level order L-22585-36-B-N, and DENIES the appeal of AQUAFORTIS ASSOCIATES, LLC.

DONE AND DATED IN AUGUSTA, MAINE, THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 2019.  
BOARD OF ENVIRONMENTAL PROTECTION

BY: \_\_\_\_\_  
Mark C. Draper, Chair

PLEASE NOTE THE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES.