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**From:** Sroka, Eric

**Sent:** Tuesday, December 11, 2018 4:33 PM

**To:** Bertocci, Cynthia S <[Cynthia.S.Bertocci@maine.gov](mailto:Cynthia.S.Bertocci@maine.gov)>

**Cc:** Boak, Scott <[Scott.Boak@maine.gov](mailto:Scott.Boak@maine.gov)>; Bergeron, Mark <[Mark.Bergeron@maine.gov](mailto:Mark.Bergeron@maine.gov)>; Loyzim, Melanie <[Melanie.Loyzim@maine.gov](mailto:Melanie.Loyzim@maine.gov)>; Madore, David <[David.Madore@maine.gov](mailto:David.Madore@maine.gov)>

**Subject:** FW: [EXTERNAL SENDER] Re: Public Hearing request - Clary Lake WLO

FYI, this came in today.

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**From:** AquaFortis Associates LLC [<mailto:aquafortisllc@hotmail.com>]

**Sent:** Tuesday, December 11, 2018 4:08 PM

**To:** Sroka, Eric <[Eric.Sroka@maine.gov](mailto:Eric.Sroka@maine.gov)>

**Cc:** Howatt, Kathy <[Kathy.Howatt@maine.gov](mailto:Kathy.Howatt@maine.gov)>; AquaFortis Associates LLC <[aquafortisllc@hotmail.com](mailto:aquafortisllc@hotmail.com)>

**Subject:** [EXTERNAL SENDER] Re: Public Hearing request - Clary Lake WLO

Dear Mr. Sroka,

Thank you for your email of last week attaching a letter regarding the decision in the license transfer request from the Clary Lake Association. Aquafortis has still not received a hard copy of the letter, which your email indicated would follow in the mail.

Therefore, Aquafortis takes your notification date to be the date of the email, and hereby request that the Acting Commissioner reconsider the decision not to hold a public hearing. Aquafortis is the largest landholder associated with Clary Lake, and has become aware that the other largest landowner, Mr. Frederick Duncan, also requested a public hearing, by writing to Ms. Howatt. Aquafortis also exchanged emails with Ms. Howatt, and was not apprised of the apparent detail necessary in any request for a hearing, only of the request deadline. Upon belief, Mr. Duncan was not apprised either, nor did Ms. Howatt indicate any deficiency when the requests were submitted.

Your email notes, and suggests is missing, an assertion of conflicting technical information by those requesting a hearing:

*'the Department will hold public hearings in those instances where*

*the Department determines there is credible conflicting technical information regarding a licensing*

*criterion and it is likely that a public hearing will assist the Department in understanding the evidence.'*

There is indeed a host of conflicting or absent technical information and/or any of the apparent "criterion" regarding the request for transfer. The current Water Level Order (WLO) is issued against Pleasant

Pond Mill LLC (PPM) which is a bankrupt and administratively dissolved LLC. As Ms. Howatt has previously stated (in a pre-application permitting meeting with Dawn Hallowell and Paul Kelley of PPPM), the DEP WLO is neither a permit nor a license, but rather a "strange beast" which is the result of DEP's first-ever adjudicatory hearing under the Water Level statute. This fact is borne out by the application form itself used for the request, which does not apparently apply to WLO transfers (if transfers are even contemplated or allowed under the statute). If this is a criterion of license transfer (and the lack of a form, or apparent use of a non-applicable form) is neither addressed (nor are WLO's mentioned) in the Rule Chapter the letter mentions.

In addition, the WLO is the subject of a contested September, 2015 Notice of Violation, issued earlier in draft form against PPM only, then mysteriously altered to include Aquafortis Associates and certain private individuals. There is a technical question as to the validity of the NOV, the failure of DEP to withdraw it upon PPM's bankruptcy, and the question of whether a purportedly violated WLO may be transferred while an NOV apparently remains pending. What criterion are applicable in this situation are unknown or unshared, and the criterion for any transfer in this setting is apparently absent, or indeed raises an apparent conflict regarding any current or future enforcement of any WLO.

Addressing the WLO itself, there is a recent technical question related to the WLO discussion of purported "flowage rights" ownership around Clary Lake, which a federal court recently addressed to Aquafortis' benefit in an Order upholding certain Corrective Deeds, one applying to Aquafortis' properties, and the other applying to the Clary Lake Dam (the subject of the WLO). In addition to this apparently conflicting federal court adjustment of the WLO (where both DEP and the Attorney General's Office appeared in court), there is the technical failure of the WLO to establish a so-called "normal high water line" during the hearing and WLO itself, which is a statutory criterion, and which now requires further analysis by the department and opportunity to question and comment. Please indicate where the list of criterion (and related technical information) exists for transferring a WLO where such determination is now in question or conflict, leaving a situation of insufficient information for public awareness or apparent examination of potential conflict with important property rights. This open technical question, and the now apparent conflict over the WLO "flowage rights" issue, requires a hearing to address lake abutters questions and concerns, including those not limited to Aquafortis and Mr. Duncan.

Additional technical conflicts arise when considering any transfer criterion that affects Aquafortis' property, which not only abuts, but actually sits atop the dam subject of the WLO. Prior dam owners had agreed to a boundary expansion of the National Register of Historic Places listing of the Clary Mill site, which lists the dam, and Aquafortis' house atop it, as historically "contributing structures". The Clary Lake Association has already trespassed on Aquafortis' land and done damage to the listed-property, and the technical issue of whether DEP adequately considered the historic nature of the dam and anticipated repairs under the WLO and a Permit by Rule warrant public examination. The issue would have been addressed, along with comment from the Maine Historic Preservation Commission, in any proper permit application.

Additionally, the WLO is silent on the technical question of what is an adequate repair and future configuration of the breached dam to allow it to follow any WLO conditions, without increasing upstream and downstream risk. Upon belief, the Clary Lake Association did not submit any engineered drawings of its anticipated repair and change of dam configuration which would allow the technically necessary consideration of outward flow (particularly during precipitation events). This seems a necessary predicate to any "license transfer", if such applies, and the future dam configuration (i.e. change) from that which existed at the time the WLO was issued may create a conflict which bears examination in a public forum.

In addition, the WLO requires a water level management plan, and Aquafortis has seen no draft or discussions of this important technical requirement, and believes that any plan should be submitted and reviewed (and commented upon in a public setting) before any purported license transfer. Again, Aquafortis was not apprised of whether there is an applicable criterion for such an issue. Without this important of any potential change to the dam, any potential licensing conflict cannot even be adequately determined.

In short, there are a host of technical questions and conflicts, all related to WLO related topics, all of which seem to be criterion for a transfer, and which should require the DEP to hold a hearing in this first-ever-DEP-issued WLO. Aquafortis requests a full list of the criterion DEP will use to consider this application, and whether they have ever been utilized for transfer of a WLO. At the very least, the DEP should have produced a proper form for purported WLO transfers, and likely undertaken examination of its Rules to address the actually criterion related to this "strange beast".

Aquafortis therefore respectfully requests that the Acting Commissioner re-visit the decision, and grant Aquafortis and other's request for a public hearing, to address these issues in an open an transparent fashion. If this request for reconsideration is not the appropriate mechanism to seek a change in decision, then alternatively, Aquafortis hereby requests and initiates an appeal to the Board of Environmental Protection to review the Acting Commissioner's licensing decision (including the above conflicts and questions, and perhaps the apparent failure to apprise members of the public seeking a hearing of the technical elements of such a request, which you cite as reason for denial).

Thank you for your consideration of this matter, and Aquafortis will continue to look for hard copies of future communications (which we also welcome by email attachment, but with the date of communication and response bearing on hard copy receipts).

Sincerely,

*s/Richard Smith*, Member  
Aquafortis Associates LLC

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**From:** Sroka, Eric <[Eric.Sroka@maine.gov](mailto:Eric.Sroka@maine.gov)>  
**Sent:** Tuesday, December 4, 2018 3:39 PM  
**To:** [aquafortisllc@hotmail.com](mailto:aquafortisllc@hotmail.com)  
**Cc:** Howatt, Kathy  
**Subject:** Public Hearing request

Mr. Smith,

The response to your request is attached. You should be receiving a hard copy of the letter in the mail shortly.

Eric

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