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STATE OF MAINE
BOARD OF ENVIRONMENTAL PROTECTION

JANET T. MILLS
GOVERNOR

Mark C. Draper, Chair

William F. Hinkel
Executive Analyst

Ruth Ann Burke
Board Clerk

**BOARD OF ENVIRONMENTAL PROTECTION
Meeting Minutes**

June 3, 2021

A meeting of the Board of Environmental Protection was held on Thursday, June 3, 2021, by Zoom webinar. Board Chair Mark Draper called the meeting to order at approximately 9:17 a.m. with the following individuals attending:

Board: Mark Draper, Robert Duchesne, Mark Dubois, Robert Sanford, Susan Lessard, James Parker, and Steven Pelletier

Staff: Pamela Parker, Water Enforcement Manager, Bureau of Water Quality
Nicholas Livesay, Director, Bureau of Land Resources
Kathy Howatt, Hydropower Coordinator, Bureau of Land Resources
Kevin Martin, Compliance and Procedures Specialist, Office of the Commissioner
Jeanne DiFranco, Biologist III, Bureau of Water Quality

Others: Melanie Loyzim, Commissioner
Scott Boak, Assistant Attorney General
William Hinkel, Board Executive Analyst
Ruth Ann Burke, Board Clerk and Administrative Assistant
Mary Breton, Assistant to the Commissioner, Office of the Commissioner

I. Departmental

A. Commissioner's Comments: No comments.

B. Chair's Comments: No comments.

C. Executive Analyst's Comments: Mr. Hinkel commented that he has consulted with appropriate Department staff to address Board member questions that were asked at the May 20, 2021, meeting in relation to: 1) the nature and number of minor revision permit actions completed for NECEC Transmission LLC between late April and early May; 2) the content of Board memoranda describing environmental restoration plans associated with administrative consent agreements; and 3) the availability of a redline markup document for rulemaking repeal and replace actions. Mr. Hinkel reported that the Board will receive as part of the packet information a description of environmental restoration plans, when applicable, associated with administrative consent agreements, and a clear presentation of proposed rule changes when the

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Department is recommending a rulemaking repeal and replace. Mr. Hinkel anticipates having additional information to share at the next meeting regarding the minor revision permits.

D. Board Calendar: No comments.

E. Departmental Orders / Applications Accepted for Processing: No comments.

F. Requests for Board Jurisdiction: No requests reported; no comments.

II. Regular Agenda Items (Note: All votes taken by roll call. Votes are recorded in the following order: number voting in favor of a motion – number voting against a motion – number abstaining – number absent)

1. BEP Meeting Minutes, May 20, 2021

The Board voted (7-0-0-0) on a motion by Mark Dubois and seconded by Steven Pelletier to approve the minutes of May 20, 2021, as presented.

The vote was taken pursuant to 38 M.R.S. § 341-D.

Chair Draper noted that the next item on the agenda is an administrative consent agreement for the Town of Machias. The consent agreement is a Clean Water Act related enforcement matter for which certain Board members may not participate, pursuant to Title 38 Section 341-C(8)(A). Chair Draper, Mark Dubois, and Susan Lessard recused themselves from participating in that agenda item and left the meeting. Chair Draper designated Robert Duchesne to preside over the Board's consideration of the administrative consent agreement for the Town of Machias.

2. Town of Machias, Administrative Consent Agreement (approval)

Staff: Pamela Parker, Bureau of Water Quality

This administrative consent agreement involves violations of its Waste Discharge License, W002674-5L-D-R; 38 M.R.S. § 413(1), *Waste discharge licenses*; and 38 M.R.S. § 414(5), *Applications for licenses*.

In June of 2013, the Town's wastewater treatment plant had a significant sanitary sewer overflow (SSO) of approximately 480,000 gallons during dry weather. After investigation, the Department found that serious operation and maintenance failures and lack of collection system maintenance had caused or contributed to the SSO and an increased number of combined sewer overflow events (CSO) from Outfall #2 (South side Siphon), closing the large, downstream clam flats in Machiasport.

The administrative consent agreement stipulates a monetary penalty of \$10,300.00 in the form of a supplemental environmental project; removal of the Outfall #2, and additional flow monitoring. No persons spoke on behalf of the Town of Machias.

Following a presentation by staff and response to questions of the Board, the Board voted (4-0-0-3) on a motion by James Parker and seconded by Steve Pelletier to approve the administrative consent agreement, as presented.

The vote was taken pursuant to 38 M.R.S. § 341-D(6). Mark Draper, Mark Dubois, and Susan Lessard were recused and were not present for the vote.

Following the vote, the Board took a brief recess to allow recused Board members Draper, Dubois, and Lessard to rejoin the meeting for the next agenda item. Ms. Parker noted that the signatory block for the Board on the administrative consent agreement specified "Mark C. Draper, Chair."

To correct the signatory block of the administrative consent agreement, the Board voted (4-0-3-0) on a motion by Robert Sanford and seconded by Steve Pelletier, to reconsider the vote on the Town of Machias' administrative consent agreement. The vote was taken pursuant to 38 M.R.S. § 341-D. Mark Draper, Mark Dubois, and Susan Lessard were recused and did not participate in the vote.

The Board voted (4-0-3-0) on a motion by Steve Pelletier and seconded by Robert Sanford, to amend by hand the signatory block on the last page of the Town of Machias' administrative consent agreement from "Mark C. Draper, Chair" to "Robert Duchesne, Presiding Officer." The vote was taken pursuant to 38 M.R.S. § 341-D. Mark Draper, Mark Dubois, and Susan Lessard were recused and did not participate in the vote.

Mark Draper resumed his role as Chair for the duration of the meeting.

3. Black Bear Hydro Partners, LLC Appeal of Ellsworth Hydroelectric Project Water Quality Certification, Commissioner's Decision, #L-13256-33-M-Z (decision)

Staff: Nick Livesay, Bureau of Land Resources
Kathy Howatt, Bureau of Land Resources
Jeanne DiFranco, Bureau of Water Quality
Kevin Martin, Office of the Commissioner

Mr. Hinkel stated that before the Board proceeds with consideration of the appeal of Black Bear Hydro Partners, LLC of the Commissioner's March 19, 2020, Order denying water quality certification for Black Bear's Ellsworth Hydroelectric Project, Assistant Attorney General Scott Boak has remarks regarding this matter.

Mr. Boak addressed the Board regarding its discretion to consider convening an executive session pursuant to Title 1 of the Maine Revised Statutes, Section 405(6), which outlines permitted deliberations that may be conducted in executive session. In particular, Mr. Boak stated that he would like to speak to the Board pursuant to Title 1, Section 405(6)(E), which allows for executive session deliberation for the following:

“Consultations between a body or agency and its attorney concerning the legal rights and duties of the body or agency, pending or contemplated litigation, settlement offers and matters where the duties of the public body's or agency's counsel to the attorney's client pursuant to the code of professional responsibility clearly conflict with this subchapter or where premature general public knowledge would clearly place the State, municipality or other public agency or person at a substantial disadvantage.”

Pursuant to this Subsection 405(6)(E), Mr. Boak stated that he would like to discuss the legal rights and duties of the Department and the Board with respect to water quality certification actions and restrictions on such actions pursuant to the federal Clean Water Act, Section 401, 33 U.S.C. 1341, and related caselaw.

Mr. Boak explained that, if the Board voted to hold such an executive session, no Board vote would be taken in executive session, and no other matters would be discussed in the executive session.

An executive session may be called only by a public, recorded vote of 3/5 of the Board members, present and voting. Since all seven Board members were present and participating, a vote to enter executive session would require five affirmative votes.

The Board voted (7-0-0-0) on a motion pursuant to Title 1 M.R.S. Section 405(6)(E) by James Parker and seconded by Steve Pelletier, to hold an executive session for the purpose of discussing with legal counsel the Board's legal rights and duties with respect to water quality certification actions and restrictions on such actions pursuant to Section 401 of the federal Clean Water Act. The vote was taken pursuant to 1 M.R.S. § 405(6)(E) and 38 M.R.S. § 341-D.

Following the executive session and resumption of the regular business meeting, Mr. Boak noted the Board voted to and did hold an executive session pursuant to Title 1, M.R.S. Section 405(6)(E), and that during that executive session, Mr. Boak discussed the legal rights and duties of the Department and the Board with respect to water quality certification actions and restrictions on such actions pursuant to the federal Clean Water Act, Section 401, 33 U.S.C. 1341, and related caselaw. Mr. Boak also noted that no other topics were discussed and that no vote by the Board was taken in the executive session.

Mr. Hinkel introduced the appeal by summarizing Black Bear's objections to the Commissioner's decision and the procedure for deciding an appeal, including the Board's consideration of and vote on whether or not to hold a hearing in response to Black Bear's request for a hearing.

Mr. Hinkel noted that both Black Bear and respondent Downeast Salmon Federation offered proposed supplemental evidence; that some, but not all, of the proposed supplemental evidence offered by these parties was admitted by the Chair; that proposed supplemental evidence offered by both parties but not admitted was stricken and in places redacted from the materials in the Board packet; and that the Chair also accepted into the record two staff memoranda.

Mr. Hinkel further noted that the Chair had not admitted Black Bear's proposed supplemental evidence Exhibits 3, 4, 5, 12, and 14; that these materials were not circulated to the Board; and that references to these stricken materials remaining in Black Bear's appeal text and footnotes (i.e., Black Bear's appeal and footnotes 6, 7, 8, 21, and 30 on pages 1332, 1333, and 1336, and 1340 of the Board packet) had not been redacted but should be disregarded by the Board given that they had not been admitted.

Mr. Hinkel also noted that the original Board packet for this matter contained three errors that were subsequently corrected.

1. The original packet index labeled item # 6 as: "Downeast Salmon Federation (DSF) Appeal and Proposed Supplemental Evidence," but instead should have been: "Downeast Salmon Federation's Proposed Supplemental Evidence." Mr. Hinkel noted that DSF did not appeal the Commissioner's decision; that DSF was a respondent in this matter; and that a corrected Index was included in the links provided when the Board agenda was posted online;
2. The original packet included a version of Index item 6, "Downeast Salmon Federation's Proposed Supplemental Evidence," which inadvertently and erroneously included pages that were not part of DSF's June 26, 2020, filing. Mr. Hinkel noted that pages 3940-4197 of the Board packet that was previously mailed to Board members had been removed, and that a corrected version of the document was included in the links provided when the Board agenda was posted online; and
3. The original packet included a version of Index item 7, "DSF Response to Appeal - Redacted," which inadvertently and erroneously (a) included DSF's proposed supplemental evidence exhibits 4 and 21, which had not been admitted by the Chair; and (b) excluded DSF's supplemental evidence exhibit 6, which had been admitted by the Chair. Mr. Hinkel

noted that a corrected version of the document was included in the links provided when the Board agenda was posted online.

Mr. Hinkel prepared and presented an errata sheet with respect to the proposed recommended decision for the Board's possible consideration after deliberation. The errata sheet identified and served to correct clerical or typographical errors in the proposed Board Order prepared by Department staff. Specifically, the errata were:

- In the last paragraph on p. 19 of the proposed Board Order (Board packet page 0069): the date of the BMI Study should have been January 31, 2020, rather than January 31, 2019;
- In the last paragraph before the block quotation on p. 23 of the proposed Board Order (Board packet page 0073): the reference to BBHP's proposed 7.5-foot drawdown is a typographical error and should instead have been 5.7-foot;
- In the first full paragraph after the block quotation on p. 23 of the proposed Board Order (Board packet page 0073): the abbreviation referring to Black Bear Hydro Partners, LLC should have been BBHP rather than BBH; and
- In the first paragraph on p. 29 of the proposed Board Order (Board packet page 0079): the term "APPELLANTS" should have been singular, "APPELLANT."

Black Bear's attorney Sharon Newman and Brookfield Licensing Manager Randy Dorman discussed Black Bear's objections and challenges to the Commissioner's decision.

Ron Kreisman representing Downeast Salmon Federation; Ed Bassett representing Passamaquoddy Tribe at Indian Point Reservation; Chuck Verrill representing Schoodic Riverkeepers; and Ed Damm representing Friends of Graham Lake addressed the issues raised on appeal by Black Bear.

No members of the public commented on the appeal.

Department staff Nick Livesay, Kathy Howatt, Jeanne DiFranco, and Kevin Martin presented the proposed Board Order and answered Board questions. Department staff's recommendation was that the Board deny the appeal and affirm the Commissioner's decision.

Black Bear's attorney Sharon Newman delivered a brief rebuttal in support of Black Bear's appeal.

Following oral arguments and comments from the staff and participants in the appeal, the Board voted (6-1-0-0) on a motion by Susan Lessard and seconded by Robert Duchesne to, pursuant to Chapter 2, section 24(G), deny Black Bear's request to hold a hearing on the issues raised on appeal. James Parker voted against the motion.

The vote was taken pursuant to 38 M.R.S. § 341-D and 06-096 C.M.R. 2, § 24.

Following deliberations, the Board voted (6-1-0-0) on a motion by Susan Lessard and seconded by Robert Duchesne to accept the staff recommendation to affirm the Commissioner's Order denying Water Quality Certification and deny the appeal of Black Bear Hydro Partners, LLC, as drafted but also incorporating the corrections identified by Board staff in the errata sheet.

The vote was taken pursuant to 38 M.R.S. § 341-D and 06-096 C.M.R. 2, § 24(G). James Parker voted against the motion.

(The meeting adjourned at approximately 1:49 p.m.)

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