

TODD J. GRISET
tgriset@preti.com
Direct Dial: 207/791-3234

March 21, 2005

Nancy Desjardin, Clerk
Kennebec County Superior Court
95 State Street
Augusta, ME 04330

RE: Save Our Sebasticook v. Board of Environmental Protection

Dear Ms. Desjardin:

Enclosed for filing in the above-referenced matter, please find:

1. Plaintiffs' Petition for Review of Final Agency Action Pursuant to M.R.Civ.P. Complaint and Request for 80C;
2. Plaintiffs' Case Summary Sheet; and
3. \$120 Filing Fee.

Should you have any questions, please do not hesitate to contact me. In advance, I thank you for your attention to this matter.

Very truly yours,



Todd J. Griset

cc: All Parties on Service List

1006473.1

SUMMARY SHEET

This summary sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by the Maine Rules of Court or by law. This form is required for the use of the Clerk of Court for the purpose of initiating the civil docket. (SEE INSTRUCTIONS ON REVERSE)

I.	County of Filing or District Court Jurisdiction: KENNEBEC	
II.	CAUSE OF ACTION (Cite the primary civil statutes under which you are filing, if any.) 5 M.R.S.A. § 11002, 38 M.R.S.A. § 346, and M.R.Civ.P. 80C	Pro se plaintiffs: If unsure, leave blank.
III.	NATURE OF FILING	
	<input checked="" type="checkbox"/> Initial Complaint <input type="checkbox"/> Third-Party Complaint <input type="checkbox"/> Cross-Claim or Counterclaim <input type="checkbox"/> If Reinstated or Reopened case, give original Docket Number _____ (If filing a second or subsequent Money Judgment Disclosure, give docket number of first disclosure)	
IV.	<input type="checkbox"/> TITLE TO REAL ESTATE IS INVOLVED	
V.	MOST DEFINITIVE NATURE OF ACTION. (Place an X in one box only)	Pro se plaintiffs: If unsure, leave blank.
	GENERAL CIVIL (CV)	
	Personal Injury Tort <input type="checkbox"/> Property Negligence <input type="checkbox"/> Auto Negligence <input type="checkbox"/> Medical Malpractice <input type="checkbox"/> Product Liability <input type="checkbox"/> Assault/Battery <input type="checkbox"/> Domestic Torts <input type="checkbox"/> Other Negligence <input type="checkbox"/> Other Personal Injury Tort Non-Personal Injury Tort <input type="checkbox"/> Libel/Defamation <input type="checkbox"/> Auto Negligence <input type="checkbox"/> Other Negligence <input type="checkbox"/> Other Non-Personal Injury Tort	Contract Contract <input type="checkbox"/> Declaratory/Equitable Relief <input type="checkbox"/> General Injunctive Relief <input type="checkbox"/> Declaratory Judgment <input type="checkbox"/> Other Equitable Relief Constitutional/Civil Rights <input type="checkbox"/> Constitutional/Civil Rights Statutory Actions <input type="checkbox"/> Unfair Trade Practices <input type="checkbox"/> Freedom of Access <input type="checkbox"/> Other Statutory Actions Miscellaneous Civil <input type="checkbox"/> Drug Forfeitures
		<input type="checkbox"/> Other Forfeitures/Property Libels <input type="checkbox"/> Land Use Enforcement (80K) <input type="checkbox"/> Administrative Warrant <input type="checkbox"/> HIV Testing <input type="checkbox"/> Arbitration Awards <input type="checkbox"/> Appointment of Receiver <input type="checkbox"/> Shareholders' Derivative Actions <input type="checkbox"/> Foreign Deposition <input type="checkbox"/> Pre-action Discovery <input type="checkbox"/> Common Law Habeas Corpus <input type="checkbox"/> Prisoner Transfers <input type="checkbox"/> Foreign Judgments <input type="checkbox"/> Minor Settlements <input type="checkbox"/> Other Civil
	CHILD PROTECTIVE CUSTODY (PC)	
	<input type="checkbox"/> Non-DHS Protective Custody	
	SPECIAL ACTIONS (SA)	
	<input type="checkbox"/> Money Judgments <input type="checkbox"/> Money Judgment Request for Disclosure	
	REAL ESTATE (RE)	
	Title Actions <input type="checkbox"/> Quite Title <input type="checkbox"/> Eminent Domain <input type="checkbox"/> Easements <input type="checkbox"/> Boundaries	Foreclosures <input type="checkbox"/> Foreclosure for Non-pmt (ADR exempt) <input type="checkbox"/> Foreclosure - Other Trespass <input type="checkbox"/> Trespass
		Misc. Real Estate <input type="checkbox"/> Equitable Remedies <input type="checkbox"/> Mechanics Liens <input type="checkbox"/> Partition <input type="checkbox"/> Adverse Possession <input type="checkbox"/> Nuisance <input type="checkbox"/> Abandoned ads <input type="checkbox"/> Other Real Estate
	APPEALS (AP) (To be filed in Superior Court) (ADR exempt)	
	<input checked="" type="checkbox"/> Administrative Agency (80C) <input type="checkbox"/> (80B) Governmental Body <input type="checkbox"/> Other Appeals	
VI.	M.R.Civ.P. 16B Alternative Dispute Resolution (ADR):	
	<input checked="" type="checkbox"/> I certify that pursuant to M.R.Civ.P. 16B(b), this case is exempt from a required ADR process because:	
	<input checked="" type="checkbox"/> It falls within an exemption listed above (i.e., an appeal or an action for non-payment of a note in a secured transaction).	
	<input type="checkbox"/> The plaintiff or defendant is incarcerated in a local, state or federal facility.	
	<input type="checkbox"/> The parties have participated in a statutory prelitigation screening process with _____ (name of neutral) on _____ (date).	
	<input type="checkbox"/> The parties have participated in a formal ADR process with _____ (name of neutral) on _____ (date).	
	<input type="checkbox"/> This is a Personal Injury action in which the plaintiff's likely damages will not exceed \$30,000, and the plaintiff requests an exemption from ADR.	

- VII. (a) PLAINTIFFS (Name & Address including county)
or Third-Party, Counterclaim or Cross-Claim Plaintiffs
 The plaintiff is a prisoner in a local, state or federal facility

Save Our Seabasticook
c/o Kenneth Fletcher
383 Garland Road
Winslow ME 04901

- (b) Attorneys (Name, Bar number, Firm name, Address, Telephone Number)
(If Pro se plaintiff, leave blank)

If all counsel listed do NOT represent all plaintiffs
specify who the listed attorney(s) represent.

Anthony W. Buxton, Bar No. 1714
Linda S. Lockhart, Bar No. 8476
Todd J. Griset, Bar No. 9326
Preti Flaherty
45 Memorial Circle
P.O. Box 1058
Augusta, ME 04332-1058
(207)623-5300

- VIII. (a) DEFENDANTS (Name & Address including county)
 and/or Third-Party, Counterclaim or Cross-Claim Defendants
 The defendant is a prisoner in a local, state or federal facility

Board of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

- (b) Attorneys (Name, Bar number, Firm name, Address, Telephone Number)
(If known)

If all counsel listed do NOT represent all defendants
specify who the listed attorney(s) represent.

Dennis Harnish, Esq.
Assistant Attorney General
State of Maine
6 State House Station
Augusta, Maine 04333-0006

Date: March 21, 2005

Anthony W. Buxton, Esq.
Name of Lead Attorney of Record or Pro se Party

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
DOCKET NO. ___-04-___

SAVE OUR SEBASTICOOK, INC.,)	
KENNETH FLETCHER, MARY ELLEN)	
FLETCHER, KENNETH ESKELUND, PETER)	
LALIBERTE, DONNA LALIBERTE, JAMES)	
GORMAN, PATRICIA GORMAN, PETER)	
NEWKIRK, KATHLEEN NEWKIRK, RENE)	
DESROSIERS, KATHLEEN DESROSIERS,)	
JANE EDWARDS, WENDELL GOODRICH,)	
PARKER SMITH, DAVID BUTLER,)	PETITION FOR REVIEW OF
JEFFERY VANDENHEUVEL, JERRY)	FINAL AGENCY ACTION
QUIRION, JOSEPH DUMONT, and)	
ROBERTA DUMONT,)	(M.R.Civ. P. 80C)
)	
Petitioners,)	
)	
v.)	
)	
BOARD OF ENVIRONMENTAL)	
PROTECTION,)	
)	
Respondent.)	

NOW COME the Petitioners, Save Our Seabasticook, Inc., and its members
Kenneth Fletcher, Mary Ellen Fletcher, Kenneth Eskelund, Peter and Donna Laliberte,
James and Patricia Gorman, Peter and Kathleen Newkirk, René and Kathleen Desrosiers,
Jane Edwards and Wendell Goodrich, Parker Smith, David Butler, Jeffery
VandenHeuvel, Jerry Quirion, Joseph Dumont, and Roberta Dumont, (collectively
“SOS”), by and through their undersigned counsel, and, pursuant to 5 M.R.S.A. § 11002,
38 M.R.S.A. § 346, and M.R.Civ.P. 80C, complain against the Respondent as follows:

PARTIES AND JURISDICTION

1. SOS is an incorporated, non-profit, Maine grass roots membership association of residents of the Town of Winslow, Maine. Save Our Sebasticook is incorporated under the laws of the State of Maine, Corporate ID No. 20020190, DCN No. 2030178049672.

SOS appeals on behalf of its individual members who are directly and substantially affected by the Order, including:

- a. Kenneth Fletcher and Mary Ellen Fletcher, SOS members, are landowners with property abutting the 5.2 mile long lake created in 1908 by the impoundment of the Sebasticook River by the hydroelectric dam at Fort Halifax.
- b. Dr. Kenneth Eskelund, an SOS member, is a landowner with property abutting the lake.
- c. James Gorman and Patricia Gorman, SOS members, are landowners with property abutting the lake.
- d. Peter Newkirk and Kathleen Newkirk, SOS members, own property along the lake.
- e. René and Kathleen Desrosiers, SOS members, are lakeside landowners.
- f. Jane Edwards, an SOS member, is an owner of lakeside property.
- g. Parker Smith, an SOS member, is a lakeside landowner.
- h. David Butler, an SOS member, is an owner of real estate on the lake.
- i. Jeffrey VandenHeuvel, an SOS member, lives near the lake and utilizes its resources.
- j. Gerry Quirion, is an SOS member and a Winslow resident.
- k. Peter and Donna Laliberte, SOS members, are landowners with property abutting the lake.

2. Respondent Board of Environmental Protection (“the Board”) is a state administrative agency having its principal office in Augusta, Maine.

3. Pursuant to 5 M.R.S.A. § 11002, 38 M.R.S.A. § 346, and M.R.Civ.P. 80C, jurisdiction is properly with this Court, insofar as Kennebec County is home to both Petitioners and Respondent, as well as the section of the Sebasticook River in question.

FINAL AGENCY ACTION APPEALED

4. SOS hereby seeks review of the Board's February 17, 2005 Findings of Fact and Order on Appeal upholding of the Department of Environmental Protection's July 16, 2004, Order #L-21060-34-B-N, granting a Maine Waterway Development and Conservation Act permit and §401 Water Quality Certification in connection with the proposed partial removal of the Fort Halifax Dam on the Sebasticook River.

MANNER AGGRIEVED

5. Petitioners are aggrieved by the Board's numerous statutory and regulatory violations in actions described herein. Petitioners own property on and utilize the affected section of the Sebasticook River. These interests are adversely affected by the Board's actions described herein.

NATURE OF ACTION TO BE REVIEWED

6. By Order #L-21060-34-B-N dated July 16, 2004, the Department of Environmental Protection ("the Department") approved the removal of the Fort Halifax Dam on the Sebasticook River in the Town of Winslow, Maine. On August 16, 2004, SOS filed a timely appeal of the Department's action.

7. By Findings of Fact and Order on Appeal dated February 17, 2005, the Board affirmed the Department's July 16, 2004, Order. Based on the Board's statutory and regulatory violations committed in reaching this conclusion, including reaching findings not supported by the record and taking action that is arbitrary and capricious, SOS hereby

seeks review of the Board's February 17, 2005 Findings of Fact and Order on Appeal.

GROUND UPON WHICH RELIEF IS REQUESTED

8. By a letter dated February 22, 2005, the Board of Environmental Protection notified the Petitioners of its decision to approve the partial removal of the Fort Halifax dam in Winslow, Maine.

9. Applications for partial dam removal are decided based upon the provisions of the Maine Waterway Development and Conservation Act "MWDCA". 38 M.R.S.A. §630 et seq. The MWDCA contains eight criteria that must be satisfied before an approval can be granted. These criteria include categories such as: safety, public benefits, environmental mitigation, and water quality. 38 M.R.S.A. §636. Section 7 of the statutory approval criteria (38 M.R.S.A. §636(7)) requires the Board to make a finding that:

The advantages of the project are greater than the direct and cumulative adverse impacts over the life of the project based upon the following considerations:

A. Whether the project will result in significant benefit or harm to soil stability, coastal and inland wetlands or the natural environment of any surface waters and their shorelands;

B. Whether the project will result in significant benefit or harm to fish and wildlife resources. In making its determination, the department shall consider other existing uses of the watershed and fisheries management plans adopted by the Department of Inland Fisheries and Wildlife, the Department of Marine Resources and the Atlantic Salmon Commission;

C. Whether the project will result in significant benefit or harm to historic and archeological resources;

D. Whether the project will result in significant benefit or harm to the public rights of access to and use of the surface waters of the State for navigation, fishing, fowling, recreation and other lawful public uses;

E. Whether the project will result in significant flood control benefits or flood hazards; and

F. Whether the project will result in significant hydroelectric energy benefits, including the increase in generating capacity and annual energy output resulting from the project, and the amount of nonrenewable fuels it would replace.

The department shall make a written finding of fact with respect to the nature and magnitude of the impact of the project on each of the considerations under this subsection, and a written explanation of their use of these findings in reaching their decision.

10. The statute specifically requires that the Board make a written finding and an explanation of how those findings were used to obtain a positive finding under this criterion. Since no such explanation is part of the Board Order, the Order does not comply with the requirements of the statute, and thus the Order violates state law, is unsupported by the record, and is arbitrary and capricious.

Procedural violations

11. The appellants filed timely requests for public hearing and for the Board to assume jurisdiction of the application to remove the Fort Halifax dam. The Department's regulations require the Commissioner to make a preliminary recommendation and to bring that request to the Board within 45 days after the application was accepted as complete. 06-096 CMR Ch. 2 §17. The request for the Board to assume jurisdiction was never brought to the Board. The Department's failure to follow its procedure prejudiced

and injured the appellants by limiting the participation of the Board in the process and restricting access to a hearing (see 06-096 CMR Ch. 2 §7(B)).

12. Furthermore, the Department abused its discretion by not informing the appellants until mere days before its Draft Order was issued – approximately two years after SOS’s timely request was filed – that SOS’s requests for a public hearing were denied.

Public benefits analysis

13. The statute requires that the Board must find that the “project will result in significant economic benefits to the public, including, but not limited to, creation of employment opportunities for workers of the State.” 38 M.R.S.A. §636(2) (emphasis added). The Department’s regulations provide guidance on how this criterion should be applied. 06-096 Ch. 450 §5(A)(3). The regulations specifically require the applicant to demonstrate that the claimed benefits are real and would not occur but for the project. Further, the applicant is required to provide a comparison of the public economic conditions likely to exist if the project is undertaken versus those likely to occur under existing conditions. The regulation further establishes that this comparison must be undertaken “using generally accepted methods and procedures,” and must look at factors such as employment and the value of hydroelectric power and benefits from reducing dependence on fossil fuels. 06-096 CMR Ch. 450 §5(A)(3).

14. This project involves the decommissioning of the hydroelectric generating station and the partial removal of the dam. The only “costs” that the evaluation considers are direct loss of property taxes to the City of Winslow, including loss of valuation for properties abutting the headpond which will no longer be waterfront property.

The analysis fails to consider loss of employment and the purchase of goods and services (even though the application does show that a significant amount of money is spent to service and maintain the project). The analysis also fails to consider the lost hydroelectric energy benefits to the public. It also apparently assumes that there is no cost to the public to protect the sewer lines or roads and bridges because the applicant may pay to replace or repair those public facilities. This assumption, however, is unfounded since the condition attached to the license merely requires the applicant to submit a report on the monitoring and any measures taken to protect the sewer. It does not require the applicant to actually pay the costs to relocate or otherwise protect the sewer line. Perhaps more importantly, neither the Board nor the applicant undertook any quantification using accepted methods of the costs and benefits, so any conclusion that the benefits are significant are based on speculative subjective values, and was not reached in accordance with the Department's regulation. As such, the finding is unsupported in the record, arbitrary and capricious and a violation of State law, and the Order must be vacated.

Water quality

15. The MWDCA requires the applicant to provide "reasonable assurance that the project will not violate applicable state water quality standards, including the provisions of section 464, subsection 4, paragraph F, as required for water quality certification under the United States Water Pollution Control Act, Section 401." 38 M.R.S.A. §636(8). Section 464(4)(F) contains the State's antidegradation policy. This policy specifically requires that:

Existing in-stream water uses and the level of water quality necessary to protect those existing uses must be maintained and protected. Existing in-

stream water uses are those uses which have actually occurred on or after November 28, 1975, in or on a water body whether or not the uses are included in the standard of classification of the particular water body.

38 M.R.S.A. §464(4)(F)(1) (emphasis added)

16. The antidegradation policy further provides:

(1-A) The department may only issue a waste discharge license pursuant to section 414-A, or approve a water quality certification pursuant to the United States Clean Water Act, Section 401, Public Law 92-500, as amended, when the department finds that:

(a) The existing in-stream use involves use of the water body by a population of plant life, wildlife, or aquatic, estuarine or marine life, or as aquatic, estuarine, marine, wildlife, or plant habitat, and the applicant has demonstrated that the proposed activity would not have a significant impact on the existing use. For purpose of this division, significant impact means:

(i) Impairing the viability of the existing population, including significant impairment to growth and reproduction or an alteration of the habitat which impairs viability of the existing population; or

...

The department shall determine what constitutes a population of a particular species based upon the degree of geographic and reproductive isolation from other individuals of the same species.

If the department fails to find that the conditions of this subparagraph are met, water quality certification, pursuant to the United States Clean Water Act, Section 401, Public Law 92-500, as amended, is denied.

17. Both the Department and the applicant concede that the use of the Fort Halifax impoundment as habitat for two species of State threatened freshwater mussels and as habitat for white perch and bass (smallmouth and largemouth) are existing uses. The applicant further concedes that these species are geographically and reproductively isolated due to the presence of the only partially removed Fort Halifax dam downstream (the partial removal will allow upstream migration of anadromous species, but there is

nothing the record that even suggests the mussels, perch or bass can use the partial breach) and the Benton Falls dam upstream. The statute requires that the species continue to exist as a viable population between the Fort Halifax dam and the Benton Falls dam. The Order fails to make this required finding and the record could not support such a finding. Therefore, the Board's finding that there is a 'reasonable assurance that water quality standards will be met is unsupported in the record, arbitrary and capricious and a violation of specific statutory requirements.

18. The record also indicates that the following additional uses will not be maintained and protected: (1) provide habitat for existing species; (2) commercial use by guides for bass fishing; and (3) existing recreational use by snowmobiles and power boats.

19. Finally, the Board Order approves the elimination of a hydroelectric generating facility. Hydroelectric power generation is both an existing use and a designated use. 38 M.R.S.A. § 465(4). Pursuant to the provisions of Maine law, and the federal Clean Water Act, the Board does not have the statutory authority to approve the removal of an existing and designated use in this application process.

***The advantages of the project are greater
than the direct and cumulative adverse impacts***

20. The MWDCR contains a balancing criterion that requires the Board to find that "the advantages of the project are greater than the direct and cumulative adverse impacts over the life of the project...." 38 M.R.S.A. §636(7). The balancing involves six categories, one of which is whether the project "will result in significant hydroelectric benefits including the increase in generating capacity and annual energy output resulting from the project and the amount of nonrenewable fuels it would replace." 38 M.R.S.A.

§636(7)(F). Since the project involves the decommissioning of a hydropower facility, this category has an adverse impact, as any other conclusion is inconsistent with the law, unsupported by the record, and is arbitrary and capricious.

21. Another of the categories is whether “the project will result in significant flood control benefits or flood hazards.” 38 M.R.S.A. §636(7)(E). The application and the Order make it clear that flood hazards will be increased during the 25-year and greater storm events and all storms when there is backwater effect from the Kennebec River. It also suggests that flood levels will be reduced in the 10-year storm event (except when there is a backwater effect); however, it does not indicate that under existing conditions if there is a flood hazard during the 10-year storm event. Thus, there is no basis to conclude that the benefits outweigh the adverse impacts. Such a conclusion is inconsistent with the law, unsupported by the record, and is arbitrary and capricious.

22. Another criterion is whether the project “will result in significant benefit or harm to the public rights of access to and use of the surface waters of the State for navigation, fishing, fowling, recreation and other lawful public uses.” 38 M.R.S.A. §636(D). Again, the record is clear; public access will be reduced. The applicant has stated that it has “no plans to change access.” This statement, however, provides no legal basis for access as the applicant’s permission may be revoked at any time. Further, there is no question that recreation uses will be substantially reduced. Again there is no basis for a positive finding for this criterion. Such a conclusion is inconsistent with the law, unsupported by the record, and is arbitrary and capricious.

23. Finally, a criterion requires the Board to evaluate whether or not the project will result in significant benefit or harm to wetlands. 38 M.R.S.A. §636(7)(A). While

the record and the Order suggest that the number of acres of wetlands is not anticipated to change, the types of wetlands will change significantly. In order to determine benefit or harm to wetlands, the functions and values of those wetlands must be identified. Indeed, the Department has identified a method and procedure to identify wetland function and values. The applicant did not provide such an analysis. Without it, there is no rational basis to determine whether or not the impacts to wetlands is adverse or positive. Further, there is no basis to determine whether mitigation is required for wetland impacts. 38 M.R.S.A. §636(6). Thus, there is no basis in the record to support a positive finding on this criterion. The Order is arbitrary and capricious and unsupported by law.

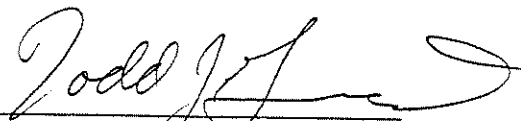
DEMAND FOR RELIEF

WHEREFORE, Save Our Sebasticook, Inc., and its members, respectfully request that this Court enter a judgment:

- a. Vacating the Board's Findings of Fact and Order on Appeal of February 17, 2005 and/or remanding this matter to the Department of Environmental Protection with instructions to comply with all applicable statutory requirements; and
- b. Awarding it such other relief as the Court deems just and proper.

Dated: March 21, 2005

Respectfully submitted,



Anthony W. Buxton, Esq., Bar No. 1714
Todd J. Grisct, Esq., Bar No. 9326
Linda S. Lockhart, Esq., Bar No. 8476
Counsel for Petitioners Save Our
Sebasticook, Inc., et al.

PRETI, FLAHERTY, BELIVEAU, PACHIOS & HALEY, LLP
45 Memorial Circle, P.O. Box 1058
Augusta, Maine 04332-1058
207.623.5300

CERTIFICATE OF SERVICE

I, Todd J. Griset, hereby certify that, pursuant to 5 M.R.S.A. § 11003, I have caused the foregoing Petition of SOS to be served upon Dawn R. Gallagher, Commissioner of the Maine Department of Environmental Protection; Attorney General G. Stephen Rowe, Dennis Harnish, Esq., Assistant Attorney General, Attorney for Respondent Board of Environmental Protection, and upon all parties to the agency proceeding, by certified mail, return receipt requested, on March 21, 2005:

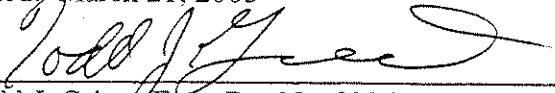
Dawn R. Gallagher
Commissioner
Maine Department of Environmental Protection
17 State House Station
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Assistant Attorney General
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F. Allen Wiley, Esq.
FPL Energy Maine Hydro LLC
150 Main Street
Lewiston, ME 04240

Dated: March 21, 2005



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