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Patricia Aho, Commissioner
Maine Department of Environmental Protection
17 State House Station
Augusta, ME 04333-0017

January 3, 2012

Re: Flagstaff Storage Project #L-19313-32-G-N

Dear Commissioner Aho:

We have finished a review of records provided by your Department pursuant to a December 9, 2011, Freedom of Access Act request from our organization, the Conservation Law Foundation. That review leads us to conclude that the Department, under your direction, intentionally waived the State's rights under section 401 of the Clean Water Act, 33 U.S.C. § 1341(a), to certify that the relicensing of Florida Power & Light's Flagstaff Storage Project meets Maine's water quality standards. That conclusion is contrary to the assertions of the Department's spokeswoman, Ms. DePoy-Warren, who publicly stated that the failure to act in a timely manner on the FPL application was neither intentional nor insidious. While we will never definitively know about the latter, as set forth below, we believe the failure to act was certainly intentional.

As you know, for the past several years, a new license for the Flagstaff Storage Project, #L-19313-32-G-N, had been stayed by FERC based on the denial of the Section 401 water quality certification by the Board of Environmental Protection in 2004, a decision appealed and upheld by the Maine Law Court in 2007. Since then, FPL had filed an application for a water quality certification for the Flagstaff Storage Project as a placeholder while it worked with the Department staff to identify a means to meet the water quality standards identified by the Board in its original order. The Clean Water Act provides that if an application for water quality certification is not acted upon within a year of its submittal, the State is deemed to waive its right to make or to withhold such a certification. To avoid such a waiver, the Department's practice had been to request FPL to withdraw and refile the application. Failing that, the Department would deny the application. FPL, as it had with its other hydroelectric projects, would withdraw its application for this project and then re-file, thereby "re-starting the clock." (This is a practice followed not just by FPL but by most other owners of hydropower projects seeking water quality certification from Maine.) Thus, FPL filed its water quality certification application for the Flagstaff Storage Project with the Department on November 15, 2009, then withdrew and re-filed its application on November 16, 2010.

As you also know, action by the Department on water quality certifications applications had for many years been coordinated by a longtime Department employee, Dana Murch. Mr. Murch announced that he would retire at the end of the summer in 2011 and documents produced in response to our FOAA request establish that he began preparing for the transfer of his responsibilities to other employees at the Department in early summer. Specifically, in June, Mr.

Murch and senior managers at the Department, including Michael Mullen, current head of the Department's Land and Water Bureau, scheduled a series of meetings to discuss the transition of his work load. These meetings specifically included discussion of the Flagstaff Storage Project water quality certification application. Indeed, Mr Murch prepared a memorandum to the file dated July 13, 2011, concerning the history and status of the Flagstaff Storage Project and specifically noting that "Unless DEP acts to approve or deny the pending application for water quality certification on or before November 15, 2011, certification will be deemed waived by operation of law."

On June 17, 2011, you were named acting Commissioner of the Department, subsequently nominated to take that position permanently on September 9, 2011 and confirmed on September 28, 2011 by the Senate. The documents produced by the Department in response to our FOAA request establish that shortly after you were named acting Commissioner, Pierce Atwood's Matt Manahan, a partner at your former law firm and FPL's attorney, contacted you to discuss FPL's Flagstaff and Brassua Storage Projects and requested a meeting with you, Mr. Murch and representatives of FPL. A meeting that you organized was set for August 5, 2011 at your office. On the following Monday, August 8, 2011, you sent an email to Mr. Mullen (delivered at 8:11 a.m. and read at 8:40 a.m.) stating the following – "Hi Mike – We need to talk about Flagstaff and Brassawa [sic] when you get a chance. Thanks! Pattie."

A subsequent memorandum from Mr. Murch dated August 12, 2011 to DEP staff, including Mr. Mullen (who was by then overseeing all staffing of hydropower projects for the Department) attached a spreadsheet that listed the staff that would be overseeing the various hydropower projects in the state. Ms. Dawn Hallowell was listed as being responsible for the Flagstaff Storage Project but it is our understanding that, at the direction of the Commissioner's office, Ms. Hallowell never received that file.

Thus, by the time that Mr. Murch retired on August 31, 2011, the documents strongly support the following: you had been briefed on the status of the water quality certification application for the Flagstaff Storage Project by the applicant and its attorney and had met with Mr. Mullen, the head of the lead bureau on that application; and that you and your staff were aware of the options available to the State with respect to the application. This makes Ms. DuPoy-Warren's statements of December 9, 2011 that the failure to act on the application in a timely manner was due to reorganization efforts and changed assignments at best completely uninformed and at worst deliberately false.

Even more troubling is the conclusion one can logically draw that after you met with the FPL and its attorney, you made the decision to not act on the application and thereby waive the State's rights to certify whether the Flagstaff Storage Project's new license meets our water quality standards. While the Department is legally authorized to make such a decision under the Clean Water Act, the manner in which this decision was made, particularly after the State had invested significant resources over the last 7 years in defending the right to determine when a project does or does not meet our water quality standards, and the subsequent response by the Department when the waiver came to light, is unacceptable.

We feel strongly that the documents we have seen to date support our conclusion. If, however, we have not reviewed all of the relevant documents or there are other facts we are not aware of, we would be most interested in meeting with you to discuss them. If we are wrong and this was indeed a case of a blown deadline, then the Department should be aggressively acting to ensure that FERC condition the license for the Flagstaff Storage Project to ensure that Maine's water quality standards are met and instituting procedures to prevent such failures in the future. If our current understanding of the situation does not change, we believe that at a minimum you should clarify that the Department decision to waive its rights to determine if the Flagstaff Storage Project met Maine's water quality standards was in fact intentional and should include an apology to the stakeholders who were counting on the State to exercise its rights under the Clean Water Act.

Respectfully,



Sean Mahoney
Vice President and Director
CLF Maine

cc: Peter J. Carney