

**STATE OF MAINE  
KENNEBEC, ss.**

**SUPERIOR COURT  
CIVIL ACTION**

**Douglas H. Watts,  
Petitioner**

**v.**

**Commissioner,  
Maine Department  
of Marine Resources**

1. Pursuant to M.R. Civ. P. 80B and 1 MRSA §409(2), Petitioner Douglas H. Watts asks this Court to declare null and void all official actions and contracts agreed to in secret executive sessions by the Commissioner of the Maine Department of Marine Resources regarding the amendment of federal licenses for five hydro-electric dams on the Presumpscot River owned by SAPPI, Inc.<sup>1</sup>

2. Pursuant to M.R. Civ. P. 80B and 1 MRSA §410, Petitioner Douglas H. Watts asks this Court to assess a penalty of \$500 against the Maine Department of Marine Resources for each and every occasion in which its Commissioner and/or designee has engaged in secret consultation meetings and conferences with SAPPI since March 2007 to negotiate contracts and agreements regarding the amendment of federal licenses for five hydro-electric dams on the Presumpscot River owned by SAPPI, Inc.<sup>2</sup>

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<sup>1</sup> 1 MRSA §409(2) states: "If any body or agency approves any ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official action in an executive session, this action shall be illegal and the officials responsible shall be subject to the penalties hereinafter provided. Upon learning of any such action, any person may appeal to any Superior Court in the State. If a court, after a trial de novo, determines this action was taken illegally in an executive session, it shall enter an order providing for the action to be null and void."

<sup>2</sup> 1 MRSA §410 states: "For every willful violation of this subchapter, the state government agency or local government entity whose officer or employee committed the violation shall be liable for a civil violation for which a forfeiture of not more than \$500 may be adjudged."

3. Pursuant to M.R. Civ. P. 80B and 38 MRSA §640(3), Petitioner Douglas H. Watts asks this Court to declare null and void the Maine DMR Commissioner's June 18, 2007 approval of a contract titled "Presumpscot River Settlement Framework Agreement" because this agreement requires Maine DMR to violate its legal duties under 38 MRSA §640(3) to provide "meaningful" public comment opportunities during state agency consultations in federal dam licensing proceedings.

### **The Parties**

3. Petitioner Douglas H. Watts lives at 131 Cony Street, Augusta, Maine 04330. Since 1999, Mr. Watts has been a member of Friends of Sebago Lake, a non-profit organization with a mission of restoring Sebago Lake and its watershed to health. Respondent George Lapointe is the Commissioner of the Maine Department of Marine Resources.

### **Background**

4. From March 2007 to the present, the Commissioner of the Maine Department of Marine Resources and his designees have conducted numerous secret meetings with SAPPI, Inc., the U.S. Fish & Wildlife Service and three non-profit organizations, American Rivers, Friends of the Presumpscot River and the Conservation Law Foundation. The purpose of these secret meetings is to secure the State of Maine's pre-approval for a package of amendments to federal licenses at five hydro-electric dams on the Presumpscot River owned by SAPPI, Inc.

From March 2007 to July 2007, the Commissioner of Maine DMR and his designees engaged in these secret consultation meetings with SAPPI, Inc. without any notice to the public that these meetings were occurring. Maine DMR signed a non-disclosure agreement with licensee SAPPI at the beginning of this secret consultation process. This non-disclosure agreement prohibits Maine DMR from informing the public that these secret consultation meetings are even occurring. In June 2007, these secret meetings resulted in a lengthy contract between SAPPI, Inc. and Maine DMR and others called the "Presumpscot Settlement Framework Agreement" (SFA). This SFA was secretly approved and signed by the Maine DMR Commissioner on June 18, 2007.<sup>3</sup> The

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<sup>3</sup> The June 18, 2007 "Settlement Framework Agreement" states at 4 that its existence must be kept secret until all Parties agree to make it public ("The Parties will jointly release to the public copies of this SFA on or before June 30, 2007, unless another date is agreed upon by all Parties.") The SFA was not revealed to the public until July 11, 2007. This contract is attached as Exhibit 1.

existence of the SFA (and the meetings which produced it) were deliberately kept secret from the public until July 11, 2007, when the signatories to the SFA jointly announced its existence at a press conference in Westbrook, Maine.

Since July 11, 2007, Maine DMR, SAPPI, Inc. and others have held extensive secret meetings to extend and refine the terms of the SFA to create a "final Settlement Agreement" (SA). These secret meetings continue today. Petitioner Douglas H. Watts and other members of the public have been repeatedly told by State of Maine officials they are not allowed to attend these secret meetings and are not allowed to know when or where these meetings are occurring. The Maine Dept. of Attorney General does not dispute the above facts.<sup>4</sup>

## **Argument**

### **A. The Maine DMR Commissioner has violated 38 MRSA §640.**

5. 38 MRSA §640 sets forth the public's right to be informed of, and to participate in State agency consultations with FERC dam licensees in FERC licensing matters. The ongoing secret consultation negotiations and the SFA signed by the Commissioner of Maine DMR on June 18, 2007 violate 38 MRSA §640 in at least three ways.

38 MRSA §640(3) states: "State agencies shall provide meaningful opportunities for public comment on the plans, studies, terms and conditions to be recommended by the agencies for inclusion in the license." The letter and intent of this subsection is defeated by the SFA's requirement at 6 that Maine DMR and its Commissioner fully support the FERC license terms and conditions described in the SFA before FERC and the Maine Board of Environmental Protection:

"The Parties agree to support the following ... (i) Approval of the SA by the FERC and the related amendments to the Licenses for the Saccarappa, Mallison Falls, Little Falls, Gambo Falls and Dundee Projects to reflect the terms of the SA, without material deletion, addition or modification. (ii) Amendment of the water quality

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<sup>4</sup> See May 29, 2008 letter from Maine Dept. of Attorney General to Friends of Sebago Lake, attached as Exhibit 2.

certifications for the Saccarappa, Mallison Falls, Little Falls, Gambo Falls and Dundee Projects by the Maine DEP to reflect the terms of the SA, without material deletion, addition or modification."

This section of the SFA requires the Commissioner of Maine DMR to reject *all* public comments, evidence and recommendations which diverge from the specific terms and conditions Maine DMR has already negotiated in secret with SAPPI, Inc. This section of the SFA renders meaningless the entire public participation process set forth in 38 MRSA §640(3).

6. 38 MRSA §640(1) states: "At the commencement of the consultation, review and comment process, the state agencies involved shall publish notification of this fact, informing the public of the issues anticipated to be involved in the licensing or relicensing process, the timetable for processing of the license and the opportunities the public has to comment on and participate in the process. The notice shall be designed to reach readership both statewide and in the vicinity of the hydropower project, including all persons that have contacted the agencies with an interest in this matter and all potentially interested persons."

The SFA signed by the Maine DMR Commissioner on June 18, 2007 shows the Commissioner of Maine DMR has been conducting a secret FERC consultation process with federal dam licensee SAPPI, Inc. since March 2007. The primary purpose of these secret meetings is for Maine DMR and SAPPI Inc. to formally agree upon "plans, studies, terms and conditions to be recommended by the agencies for inclusion in the license." 38 MRSA §640(3). For all intents and purposes, Maine DMR initiated a formal, secret licensing consultation process with SAPPI, Inc. in March 2007. In doing so, Maine DMR has violated 38 MRSA §640(1) which requires public notice at the *commencement* of the FERC consultation process. Today, 15 months after the consultation process began, Maine DMR has still not provided public notification of this fact in the manner required by §640(1).

7. 38 MRSA §640(2) states: "During the entire consultation process ... the state agencies shall inform in writing all members of the public that have indicated an interest in the particular licensing process of the status of that process, including all requirements that the agencies *may* be placing upon the license application. That information shall be provided no less than once every

four months." [emphasis added].

The Commissioner of Maine DMR has not done this. Petitioner Douglas Watts and other interested members of the public have received no written updates from the Maine DMR Commissioner that conform with §640(2) since Maine DMR began its secret FERC consultation meetings with SAPPI, Inc. in March 2007.

8. In sum, the Commissioner of Maine DMR has failed to follow any of the public participation and comment requirements set forth in 38 MRSA §640 for state agency consultations with federal dam licensees. The Commissioner of Maine DMR continues to be in violation of §640 by holding secret consultation meetings with SAPPI, Inc. The Commissioner of Maine DMR's signing of the SFA on June 18, 2007 violates §640 by making meaningless the entire public participation and comment process.

**B. The secret meetings described herein meet the definition of FERC consultation under 38 MRSA §640.**

9. The Maine Dept. of Attorney General has opined in a May 29, 2008 letter that 38 MRSA §640 does not apply to Maine DMR's participation in secret meetings with SAPPI, Inc. because SAPPI has yet to file an application before FERC to amend its federal dam licenses on the Presumpscot River. This is not true. Nothing in 38 MRSA §640 states that its public participation requirements are only triggered after a formal application has been filed with FERC.<sup>5</sup> The SFA document clearly shows that SAPPI, Inc. intends to file an application for license amendment so long as Maine DMR and other parties agree to support SAPPI's license amendment before FERC. If SAPPI did not have this intent, the SFA would not exist. The SFA text shows that SAPPI, Inc. will not file for license amendment *unless* Maine DMR agrees to give its full support to the amendment.

38 MRSA §640(3) describes FERC consultation as a process used by the State of Maine to determine the "... plans, studies, terms and conditions to be recommended by the agencies for

<sup>5</sup> State agency consultation with FERC licensees normally begins several years prior to the expiration of an existing FERC license and the actual submission of an application for a new license. This allows state and federal agencies to request the applicant perform various scientific studies well in advance of the application submission. For example, state agency consultation for SAPPI's Eel Weir Dam at the outlet of Sebago Lake began in 1999 even though SAPPI did not file its formal application for re-license until 2003. As such, the Attorney General is wrong.

inclusion in the license." The entire purpose of the SFA and the secret negotiations leading up to it has been for Maine DMR and SAPPI to decide in secret on a final package of "plans, studies, terms and conditions" to be *jointly* recommended by SAPPI and Maine DMR for inclusion in amended FERC licenses for five of SAPPI's dams on the Presumpscot River. The SFA at 6 further binds Maine DMR to support this secretly negotiated package of license amendments without "material deletion, addition, or modification." There can be no question that the secret meetings held between Maine DMR and SAPPI, Inc. since March 2007 meet the definition of a FERC consultation between a state agency and a FERC licensee as set forth in 38 MRSA §640.

**C. State agency consultations with FERC licensees meet the definition of public proceedings under Maine's Freedom of Access Act. 1 MRSA §401-410.**

10. Maine's Freedom of Access Act describes a broad swath of state agency activities which are public proceedings. The Act states that it shall be liberally construed:

**§401. Declaration of public policy; rules of construction**

The Legislature finds and declares that public proceedings exist to aid in the conduct of the people's business. It is the intent of the Legislature that their actions be taken openly and that the records of their actions be open to public inspection and their deliberations be conducted openly. It is further the intent of the Legislature that clandestine meetings, conferences or meetings held on private property without proper notice and ample opportunity for attendance by the public not be used to defeat the purposes of this subchapter. This subchapter shall be liberally construed and applied to promote its underlying purposes and policies as contained in the declaration of legislative intent.

State agency consultations with FERC licensees are public proceedings by statute.<sup>6</sup> 38 MRSA

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<sup>6</sup> 1 MRSA §402 (2)(F) states: "The term "public proceedings" as used in this subchapter means the transactions of any functions affecting any or all citizens of the State by any of the following ... (F) Any advisory organization, including any authority, board, commission, committee, council, task force or similar organization of an advisory nature, established, authorized or organized by law or resolve or by Executive Order issued by the Governor and not otherwise covered by this subsection, unless the law, resolve or Executive Order establishing, authorizing or organizing the advisory organization specifically exempts the organization from the application of this subchapter." The plain language of 38 MRSA §640 shows the Legislature's intent that state agencies consulting with FERC licensees meet the definition of an 'advisory organization or task force authorized by law' as described in §402 (2)(F).

§640. Section 640 sets out in detail the public's right of participation in state agency consultations with FERC licensees and the specific legal duties of state agencies to provide meaningful opportunities for public participation and comment during the consultation process. Nothing in 38 MRSA §640 suggests that state agencies may conduct consultations with FERC licensees in secret. Nothing in 38 MRSA §640 suggests that state agencies may sign non-disclosure agreements with FERC licensees to prevent the public from attending or even knowing about secret consultation meetings between state agencies and FERC licensees. 38 MRSA §640(4) states that "All information submitted to the agencies by the applicants for a license under the Federal Power Act shall constitute a public record pursuant to Title 1, section 402, unless such information is otherwise exempted from public disclosure by state law. Release of this information to members of the public shall be governed by Title 1, section 408." On its face, 38 MRSA §640(4) prohibits state agencies from signing non-disclosure agreements with FERC licensees to discuss "plans, studies, terms and conditions to be recommended by the agencies for inclusion in the license."

**D. The secret meetings between Maine DMR, SAPPI, U.S. Fish & Wildlife Service and others conducted since March 2007 meet the definition of "clandestine meetings, conferences or meetings held on private property without proper notice and ample opportunity for attendance by the public" under 1 MRSA §401.**

11. 1 MRSA §401 states: "It is further the intent of the Legislature that clandestine meetings, conferences or meetings held on private property without proper notice and ample opportunity for attendance by the public not be used to defeat the purposes of this subchapter."

FERC consultation meetings held with Maine DMR and SAPPI, Inc. and others since March 2007 have been conducted in secret in order to defeat the purposes of 1 MRSA §401. Petitioner Douglas Watts has been repeatedly told that he and other members of the public are not allowed to attend these meetings, to know when and where these meetings are being held, or to know what transpires at them.

Participants at these secret meetings include representatives from Maine state agencies, SAPPI, Inc., the U.S. Fish & Wildlife Service, three non-profit organizations, and consultants paid for by

one or several of these parties. These are not meetings with members of one state agency. They are not meetings between one state agency and another. These are secret FERC consultation meetings held by invitation only with state agencies, federal agencies, the FERC licensee, and *selected* members of the public. The general public is specifically and forcefully prohibited from attending these meetings.

38 MRSA §640(3) prohibits secret consultation proceedings between state agencies and FERC licensees by declaring that state agencies must provide “meaningful opportunities” for public comment and participation during the FERC consultation process; and by requiring that all information submitted by the FERC applicant is a public record. §640(4).

The public participation and comment process mandated by 38 MRSA §640 is rendered meaningless if the consulting state agency (Maine DMR) has already signed a contract with the FERC licensee which *requires* the agency to support the licensee’s application “without material deletion, addition, or modification.” SFA at 6.

**E. Ongoing secret license consultation meetings between state agencies and S.D. Warren are unlawful executive sessions.**

12. The character of the secret FERC consultation sessions held between state agencies and S.D. Warren since March 2007 demonstrate these meetings are executive sessions intended to defeat the purpose of 1 MRSA §401:

**§401. Declaration of public policy; rules of construction**

The Legislature finds and declares that public proceedings exist to aid in the conduct of the people's business. It is the intent of the Legislature that their actions be taken openly and that the records of their actions be open to public inspection and their deliberations be conducted openly. It is further the intent of the Legislature that clandestine meetings, conferences or meetings held on private property without proper notice and ample opportunity for attendance by the public not be used to defeat the purposes of this subchapter. This

subchapter shall be liberally construed and applied to promote its underlying purposes and policies as contained in the declaration of legislative intent.

FERC licensing, relicensing and license amendment activities are the ‘people’s business.’ 38 MRSA §640 gives the public the right to be notified of, and to fully participate in, state agency consultations with FERC licensees in FERC licensing proceedings. The secret meetings held between Maine DMR and SAPPI, Inc. since March 2007 fit the definition of “clandestine meetings, conferences or meetings held on private property without proper notice and ample opportunity for attendance by the public ...” These secret meetings are ‘executive sessions’ of a public proceeding (state agency consultation with a FERC licensee). These ‘executive sessions’ are being conducted in secret in order to defeat the Legislative purpose of 1 MRSA §401. There is no other reason for the clandestine nature of these meetings except to prevent the public from knowing about them, participating in them, and knowing what happened in them.

**F. Maine DMR’s approval of the SFA is null and void because the Commissioner of Maine DMR approved it in an illegal executive session.**

13. The secret state agency consultation meetings with SAPPI that began in March 2007 resulted in a lengthy contract between Maine DMR and SAPPI, Inc. called the “Presumpscot Settlement Framework Agreement” (SFA). This contract was not revealed to the public until after the Maine DMR Commissioner had signed and approved it on June 18, 2007. By signing and approving this contract in secret, the Maine DMR Commissioner violated the letter and intent of 1 MRSA §405(2), which states that no ordinances, orders, rules, resolutions, regulations, contracts, appointments or other official actions shall be finally approved at executive sessions. There is no question that the SFA is a contract. As a signatory, Maine DMR is bound to follow its terms. There is no question that the Maine DMR Commissioner signed this contract on June 18, 2007. There is no question that the SFA was written and negotiated in secret by Maine DMR and others between March and June 2007. There is no question that Maine DMR made no effort to invite the public to participate or comment on the SFA or even notify the public of the SFA’s existence prior to the Maine DMR Commissioner signed it on June 18, 2007.

**G. Maine DMR's approval of the SFA is null and void because the SFA violates the public's comment and participation rights in 38 MRSA §640.**

14. 38 MRSA §640(3) guarantees the public's right to "meaningful" opportunities to comment on plans, studies and terms and conditions to be recommended by state agencies for inclusion in a FERC license. The Commissioner of Maine DMR signed the SFA on June 18, 2007. The SFA remains in effect at this time. The SFA states at 6:

"The Parties agree to support the following ... (i) Approval of the SA by the FERC and the related amendments to the Licenses for the Saccarappa, Mallison Falls, Little Falls, Gambo Falls and Dundee Projects to reflect the terms of the SA, without material deletion, addition or modification. (ii) Amendment of the water quality certifications for the Saccarappa, Mallison Falls, Little Falls, Gambo Falls and Dundee Projects by the Maine DEP to reflect the terms of the SA, without material deletion, addition or modification."

There is no way the above language can be reconciled with Maine DMR's legal duties as set forth in 38 MRSA §640. This language *prohibits* Maine DMR from considering any public comments that recommend deletions, additions, or modifications from the license terms and conditions described in the SFA. This language defeats the entire Legislative purpose of 38 MRSA §640.

**Relief Requested**

15. Petitioner Douglas H. Watts requests this Court declare null and void the Maine DMR Commissioner's June 18, 2007 approval of a contract titled "Presumpscot River Settlement Framework Agreement" and this Court order Maine DMR to cease and desist from conducting any further secret consultation meetings with FERC licensee SAPPI, Inc.