

Ms. Kimberly D. Bose, Secretary  
Federal Energy Regulatory Commission (FERC)  
888 First Street, NE  
Washington, DC 20426

January 15, 2009

**RE: Notice of Complaint for Failure of Eel Weir Project Licensee (FERC NO. 2984) to Comply with Mandatory License Conditions.**

**FILED ELECTRONICALLY.**

Dear Ms. Bose,

Pursuant to 18 CFR 385.206 of Commission Rules, Friends of Sebago Lake (FOSL) files this complaint against S.D. Warren Company, licensee for the Eel Weir Dam, for failing to comply with a mandatory requirement of the Sebago Lake Level Management Plan (LLMP) at Sebago Lake, Maine.

**I. Substance of Complaint**

The Sebago LLMP was created by a Commission license amendment issued April 22, 1997. The Sebago LLMP requires the licensee to lower the level of Sebago Lake to 261 feet msl by December 31st in two of every nine years. Because the LLMP was created by the Commission on April 22, 1997 the 2 in 9 clock began with the 1997 season. Under the LLMP, the licensee was required to lower the lake to 261 msl twice in the period 1997-2005. Gage records maintained by the licensee show that the level of Sebago Lake was lowered to 261 msl by Dec. 31st only once during the first nine-year cycle (1997-2005). Since 2006 (the first year of the second nine-year cycle), the licensee has lowered the lake to 261 msl only once, in 2007.

The Commission gives the licensee discretion as to which years it will select to meet the 261 msl requirement. During the first nine-year cycle (1997-2005), the licensee lowered the lake to 261 msl in 2001. The licensee chose not to lower the lake to 261 msl in 1997, 1998, 1999, 2000, 2002, 2003, 2004 or 2005. This decision caused the licensee to be out of compliance with the 2 in 9 rule for its first nine-year cycle. The second nine-year cycle began in 2006. However, the licensee already had a deficit from the first cycle. In the most recent four year period (2006-2009) the licensee has only lowered the lake to 261 msl once, in 2007. Since 2006, the licensee has had four opportunities to make up for the deficit from 1997-2005 but has not. As a result of this failure, the 2 in 9 rule has become a 1 in 9 rule, since the lake was only lowered to 261 msl once in the first nine-year period after the LLMP; and since 2006 the licensee has failed to take advantage of four separate opportunities to make up for its outstanding deficit from the 1997-2005 cycle.

**II. Issues Presented by the Violation**

Since S.D. Warren unilaterally altered the annual level and range of Sebago Lake at the Eel Weir Dam in 1987, the lake shoreline has suffered severe and continued erosion. The implementation of the LLMP in 1997 has not stabilized the shoreline and has not allowed for sufficient accretion to restore the lake's natural beaches to their pre-1987 condition.

In approving the LLMP, the Commission found that Sebago Lake needed to be brought down to 261 msl twice every nine years to mimic the natural frequency at which the lake reached the lower

percentiles of its range for the specific purpose of allowing for beach accretion during the fall months. In 2001, S.D. Warren elected to lower the lake to 261 msl by Dec. 31st as the first of the "2 in 9" years required by the LLMP. In 2002, FOSL members reported to the Commission that beach accretion had in fact occurred due to the drawdown to 261 msl the previous fall. Their observations were supported by Maine's State Geologist, Robert G. Marvinney Ph.D., who said in a memo dated Dec. 20, 2003:

"3. Beach accretion is a slow process. In the late winter and early spring of 2002, we saw significant accumulations of sand that moved at least part way up the beaches in response to rising water and waves. This was following the fall and winter low lake level that bottomed out at 260.8 feet. Accretion works but it needs to be given a chance. A one-time effort will not work. Eliminating the provision to drop the level to 261 feet periodically will drastically reduce the effectiveness of the accretion process. Personally, I think the catastrophic lows, well below 261 feet, have benefited the beaches the most, much in the way the catastrophic highs have caused the most damage. But I have no direct data to support this viewpoint ... What to do? A. Don't give up on the 261 level. It's the only thing that promotes accretion of sand."

The Nov. 29, 2005 Final EA at 41 concurs with Dr. Marvinney's opinion:

"c. Unavoidable Adverse Effects: Operation of the project, as proposed by S.D. Warren, would continue to contribute to localized erosion along the shorelines of Sebago Lake. Maintaining higher water levels, particularly during the fall and early winter, would exacerbate on-going erosion of the upper shore profile. Maintaining lower levels during the same period would reduce the effects of storm events on the shoreline, with a commensurate reduction in erosion and an increase in accretion."

The direct effect of this violation of the 2 in 9 license condition is that Sebago Lake's natural beaches have not benefitted from the beach re-building and accretion of a lowering to 261 msl twice every nine years. This failure has the effect of not allowing the beaches to regain sand in their middle and upper profiles, thus compounding the effect of the higher average annual water levels the LLMP has endorsed. This violation prevents the type of beach stabilization and rebuilding envisioned in the LLMP and creates conditions in which the already heavily eroded beaches at Sebago will erode further, as the 2005 Final EA admits.

### **III. Compliance of this complaint with Rule 206(b)(6):**

Commission Rule 206(b)(6) reads: "State whether the issues presented are pending in an existing Commission proceeding or a proceeding in any other forum in which the complainant is a party, and if so, provide an explanation why timely resolution cannot be achieved in that forum;"

While the Eel Weir Project is now in relicensing (Final EA approved Nov. 29, 2005), this is a violation of the existing, operating license issued to Warren in 1984 as amended in 1997 and 2000. Although Warren's existing license expired in 2004, the Commission has annually issued temporary licenses since 2004 while re-licensing is being completed. These annual licenses require Warren to comply with all terms of its original license and subsequent amendments, including the LLMP and the 2 in 9 rule at issue here. The Commission's 2005 Final EA for Eel Weir recommends retaining the 2 in 9 rule in the LLMP. Compliance with the 2 in 9 rule is mandatory under the existing license and is not under dispute in the new license being considered. For this reason, there are no conditions under which Warren is not required to fulfill this license obligation.

The ongoing relicensing proceeding cannot give timely resolution to this matter because it is uncertain when a new license will (ever) be issued. The Commission issued its Final EA for Eel Weir more than four years ago, in 2005, and no new license has been issued. This is because the Maine Dept. of Environmental Protection has repeatedly failed to issue a water quality certification for the Eel Weir Dam and has stated in 2009 it does not know when it will issue a certification. Because the Maine DEP, and the State of Maine, have given their support for continuation of the 2 in 9 rule, there is no reason

to expect this rule will be altered by the Maine DEP water quality certification or any new license proffered by the Commission.

#### **IV. Remedy Requested.**

Commission Rule 206(b)(7) reads: "State the specific relief or remedy requested, including any request for stay or extension of time, and the basis for that relief."

Because S.D. Warren elected to not lower the level of Sebago Lake to 261 msl in two years during the period 1997-2005 and has not remedied this deficit since, we ask:

1. The Commission require Warren to lower the lake to 261 msl in 2010 to make up for the deficit from 1997-2005. This lowering shall not count towards Warren meeting its 2 in 9 requirement for the second nine-year cycle which began in 2006. The lowering to 261 msl in 2007 shall count as the first of the two required lowerings for the 2006-2014 cycle, thus requiring Warren to lower the lake to 261 msl again at some point between 2011 and 2014. This will mean that Warren must lower the lake to 261 msl three times in the 2006-2014 period, including the 2007 lowering, the mandatory lowering in 2010 that we request here, and one additional year of lowering thereafter prior to the next nine-year cycle which will begin in 2015.
2. To ensure that Warren can lower the lake to 261 msl in 2010, we request the Commission waive for 2010 the Oct. to Nov. cap on outflows in the LLMP, which can be a severe hindrance to achieving the 2 in 9 requirement during non-drought years. FOSL has repeatedly asked the Commission to eliminate this outflow cap in a new license, because with the fishway FOSL has recommended at the Eel Weir dam for spawning Sebago Atlantic salmon, the purported need for the Oct. to Nov. outflow cap would be eliminated. As we have stated numerous times in our EA comments, the lack of a fishway at the Eel Weir Dam for spawning Sebago Atlantic salmon is a violation of the legal Class A water quality standards for the upper Presumpscot River, which is one of the natural and historic spawning and nursery areas for Sebago Atlantic salmon. The only purpose for the Oct. to Nov. cap on outflows is that Sebago Atlantic salmon are naturally attracted to the lake's outlet during the fall spawning season, and upon reaching the outlet, have nowhere to spawn because they cannot get to their historic spawning grounds in the upper Presumpscot River due to the lack of a fishway at the Eel Weir Dam.
3. We ask the Commission approve our Sept, 11, 2009 Motion for a Supplemental EA to be prepared and issued for the Eel Weir Project because the existing EA is now more than four years old. To date, the Commission has not acknowledged or taken any response to this formal Motion filed four months ago. The failure of S.D. Warren here to comply with the basic requirements of the LLMP is further evidence that the Commission needs to re-open the EA and examine it in the light of new facts and evidence not available when the Final EA was issued, including this violation of the LLMP and the reasons for it happening. This violation shows that the existing 2 in 9 rule, wherein Warren is given sole discretion for deciding when to bring the lake down to 261 msl, is not working.

#### **V. Efficacy of Alternate Dispute Resolution Mechanisms.**

The alternative dispute resolution mechanisms described in Rule 206(9) are inapplicable to this violation. This is a basic violation of an explicit license condition. Since 1997, S.D. Warren has had the ability and legal authority to lower Sebago Lake to 261 msl to comply with the 2 in 9 rule but has chosen not to do so. Since 1997, we and the Commission, have been dependent on Warren's judgment as to which years, based on precipitation and other factors, would make reaching 261 msl most feasible. The only *post-hoc* remedy available is for the Commission to require Warren to lower the lake to 261 msl in 2010 and to undertake the other Commission actions described in section IV of this

complaint.

#### **VI. Request for Waiver from Public Notice Requirement.**

Rule 206(10) states: "Include a form of notice suitable for publication in the FEDERAL REGISTER and submit a copy of the notice on a separate 3½ inch diskette in ASCII format."

FOSL requests permission to submit a public notice of this complaint in ASCII text format as a (.doc) attachment to our electronic filing in this matter.

#### **VII. Service Requirements**

FOSL has provided the licensee and all interested parties with copies of this complaint pursuant to the service and notification requirements set forth in 18 CFR 385.206.

Sincerely,

Roger Wheeler, president  
Friends of Sebago Lake  
PO Box 561  
Fryeburg, ME 04037

Douglas Watts, executive officer  
Friends of Sebago Lake  
131 Cony Street  
Augusta, ME 04330

#### **APPENDIX -- Evidence Presented in Support of Complaint.**

Sebago Lake water gage data is from two sources:

a. Portland Water District gage data. This data is available on-line at:

<http://www.pwd.org/lake/level.php?mode=graph&year=2009>

b. USGS gage data. This data is available on-line at:

[http://waterdata.usgs.gov/me/nwis/dv?  
referred\\_module=sw&dd\\_cd=02\\_72020\\_00003&format=gif&period=60&site\\_no=01063995](http://waterdata.usgs.gov/me/nwis/dv?referred_module=sw&dd_cd=02_72020_00003&format=gif&period=60&site_no=01063995)

