

# MAINE STATE LEGISLATURE

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# 124th MAINE LEGISLATURE

## FIRST REGULAR SESSION-2009

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Legislative Document

No. 1237

S.P. 456

In Senate, March 31, 2009

### An Act To Modify Maine's Fishway Laws

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Reference to the Committee on Inland Fisheries and Wildlife suggested and ordered printed.

A handwritten signature in cursive script that reads "Joy J. O'Brien".

JOY J. O'BRIEN  
Secretary of the Senate

Presented by Senator DAMON of Hancock.  
Cosponsored by Representative WHEELER of Kittery and  
Representatives: EATON of Sullivan, EBERLE of South Portland, MacDONALD of  
Boothbay, McKANE of Newcastle, PERCY of Phippsburg.

1 **Be it enacted by the People of the State of Maine as follows:**

2 **Sec. 1. 12 MRSA §12760**, as amended by PL 2003, c. 655, Pt. B, §304 and  
3 affected by §422, is further amended to read:

4 **§12760. Fishways in dams and other artificial obstructions**

5 **1. Commissioners' authority.** In order to conserve, develop or restore anadromous  
6 or migratory fish resources, the Commissioner of Marine Resources or the commissioner  
7 may require a fishway to be erected, maintained, repaired or altered by the owners,  
8 lessors or other persons in control of any dam or other artificial obstruction within inland  
9 waters frequented by alewives, shad, salmon, sturgeon or other anadromous or migratory  
10 fish species.

11 **2. Examination of dams.** The commissioner in consultation with the Commissioner  
12 of Marine Resources shall periodically examine all dams and other artificial obstructions  
13 to fish passage within the inland waters in order to determine whether fishways are  
14 necessary, sufficient or suitable for the passage of anadromous or migratory fish.

15 **3. Monitoring program.** The commissioner shall, in cooperation with the  
16 Department of Marine Resources and the Atlantic Salmon Commission, establish a  
17 program to ensure fishways are functioning properly and remain sufficient or suitable for  
18 the passage of anadromous or migratory fish. The Commissioner of Marine Resources or  
19 the commissioner has sole authority to may take corrective action at fishways as  
20 prescribed under this section.

21 **4. Initiation of fishway proceedings.** The Commissioner of Marine Resources in  
22 consultation with the commissioner shall initiate proceedings a fishway proceeding to  
23 consider the construction, repair or alteration of fishways in existing dams or other  
24 artificial obstructions whenever petitioned by 10 or more citizens of this State. The  
25 Commissioner of Marine Resources and the commissioner may also independently  
26 initiate a fishway proceeding. The Commissioner of Marine Resources and the  
27 commissioner determines that shall order the construction, repair or alteration of fishways  
28 in existing dams or other artificial obstructions whenever one or more of the following  
29 conditions may exist:

30 A. Fish passage at the dam or obstruction in issue, whether alone or in conjunction  
31 with fish passage at other upriver barriers, will improve access to sufficient and  
32 suitable habitat anywhere in the watershed to support a substantial commercial or  
33 recreational fishery for one or more species of anadromous or migratory fish; or

34 B. Fish passage at the dam or obstruction in issue ~~is necessary to~~ will protect or  
35 enhance any rare, threatened or endangered fish species, including any fish species  
36 listed under the federal Endangered Species Act of 1973, Public Law 93-205, as  
37 amended; or

38 C. Fish passage at the dam or obstruction in issue is necessary to allow the water  
39 body to be in attainment of its water classification and water quality standards as set  
40 forth in Title 38, chapter 3, subchapter 1, article 4-A.

1 Any decision by the Commissioner of Marine Resources and the commissioner to require  
2 or not to require construction, repair or alteration of fishways must be accompanied by  
3 written findings of fact. This decision must be considered a final agency action and may  
4 be appealed by an aggrieved person to the Superior Court.

5 **5. Adjudicatory proceedings.** A fishway proceeding must conform to the following  
6 requirements.

7 A. A fishway proceeding must be an adjudicatory proceeding under Title 5, chapter  
8 375, subchapter 4, but a hearing is not required unless requested in accordance with  
9 paragraph B. Notice of the proceeding must be given in accordance with Title 5,  
10 section 9052 and the following requirements:

11 (1) Personal notice must be given to the dam owner, lessee or other person in  
12 control of the dam or artificial obstruction, informing that person that a  
13 proceeding has been undertaken and informing that person of that person's right  
14 to request a hearing; and

15 (2) Notice to the public, in newspapers of general circulation in the areas  
16 affected, must be given notifying the public of the initiation of the proceedings  
17 and of the public's opportunity to request a hearing.

18 B. If any interested person requests a public hearing, the commissioner in  
19 consultation with the Commissioner of Marine Resources shall, within 30 days, either  
20 notify the petitioners in writing of the commissioner's denial, stating the reasons for  
21 the denial, or schedule a public hearing. The Commissioner of Marine Resources and  
22 the commissioner shall hold a public hearing whenever:

23 (1) The Commissioner of Marine Resources or the commissioner is petitioned by  
24 50 or more residents of the State; or

25 (2) The owner, lessee or other person in control of the dam or artificial  
26 obstruction requests a hearing.

27 C. The Commissioner of Marine Resources and the commissioner shall accept  
28 testimony from the owner, lessee or other person in control of the dam or artificial  
29 obstruction on alternate fishway designs to those proposed by the commissioner for  
30 that dam or artificial obstruction.

31 **6. Decision.** In the event that the Commissioner of Marine Resources or the  
32 commissioner decides that a fishway should be constructed, repaired, altered or  
33 maintained pursuant to this section, the Commissioner of Marine Resources or the  
34 commissioner shall issue final orders with specific plans and descriptions of the fishway  
35 construction, alteration, repair or maintenance requirements, the conditions of the use of  
36 the fishway and the time and manner required for fishway operation. The Commissioner  
37 of Marine Resources or the commissioner may issue a decision requiring the owners,  
38 lessees or other persons in control of the dam or obstruction to construct, repair, alter or  
39 maintain a fishway. Such a decision must be supported by a finding based on evidence  
40 submitted to the Commissioner of Marine Resources or the commissioner that either of  
41 the following conditions exist:

1 A. One or more species of anadromous or migratory fish can be restored in  
2 substantial numbers to the watershed by construction, alteration, repair or  
3 maintenance of a fishway and habitat anywhere in the watershed above the dam or  
4 obstruction is sufficient and suitable to support a substantial commercial or  
5 recreational fishery for one or more species of anadromous or migratory fish; or

6 B. The construction, alteration, repair or maintenance of a fishway is necessary to  
7 protect or enhance rare, threatened or endangered fish species.

8 In the event that the Commissioner of Marine Resources or the commissioner decides that  
9 no fishway should be constructed, the Commissioner of Marine Resources or the  
10 commissioner shall specify in that decision a period not to exceed 5 years subsequent to  
11 that decision during which no fishway may be required to be constructed.

12 **7. Compliance.** The owner, lessee or other person in control of a dam or other  
13 artificial obstruction is jointly and severally liable for the costs of fishway design,  
14 construction, repair, alteration or maintenance, and for full compliance with a decision  
15 issued pursuant to subsection 6.

16 A. If the owner, lessee or other person in control of a dam or other artificial  
17 obstruction refuses to comply or does not fully comply with the Commissioner of  
18 Marine Resources' or the commissioner's decision issued pursuant to subsection 6, the  
19 Commissioner of Marine Resources or the commissioner shall initiate a civil action  
20 to enjoin the owner, lessee or person in control of the dam to comply fully with the  
21 Commissioner of Marine Resources' or the commissioner's order or to restrain the  
22 violation of an order. In the proceeding, the court may not review the legality of the  
23 Commissioner of Marine Resources' or the commissioner's order, except when the  
24 owner, lessee or person in control of the dam or artificial obstruction has brought a  
25 timely petition for judicial review pursuant to Title 5, chapter 375, subchapter 7.

26 B. The court may render judgment against and order the sale of the dam or other  
27 artificial obstruction, the land on which it stands and a right-of-way to the dam or  
28 artificial obstruction, in order to secure the costs of fishway construction, repair,  
29 alteration or maintenance, the costs of the court-ordered sale and the costs incurred  
30 by the department for fishway design. The purchaser of the dam or other obstruction  
31 is subject to the Commissioner of Marine Resources' or the commissioner's decision  
32 issued pursuant to subsection 6.

33 **8. Privileged entry.** The Commissioner of Marine Resources or the commissioner,  
34 or either of the ~~commissioner's~~ commissioners' agents or subcontractors may enter upon  
35 any private land in order to examine, at least annually, fishways in dams or other artificial  
36 obstructions and dams as provided in subsection 2. The Commissioner of Marine  
37 Resources or the commissioner shall notify the landowner, lessee or other person in  
38 control of the dam when the examination will take place and the time required to  
39 complete the examination. The Commissioner of Marine Resources or the commissioner  
40 shall make every effort to preserve private land and shall restore surrounding lands to the  
41 grade and condition existing prior to entry, if economically feasible.

## SUMMARY

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This bill includes the Commissioner of Marine Resources with the Commissioner of Inland Fisheries and Wildlife in the laws governing fishways in dams, including a decision whether to initiate a fishway proceeding to consider the construction, repair or alteration of fishways in existing dams or other artificial obstructions and in a decision as to what action, if any, to order as a result of such a proceeding. The bill also allows 10 or more citizens of this State to petition the commissioners to initiate a fishway proceeding and sets forth conditions whereby the commissioners must order action as the result of a fishway proceeding.