

MAINE STATE LEGISLATURE

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124th MAINE LEGISLATURE

FIRST REGULAR SESSION-2009

Legislative Document

No. 1282

S.P. 463

In Senate, March 31, 2009

An Act To Protect and Enhance Maine Marine Fisheries

Reference to the Committee on Natural Resources 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 EATON of Sullivan and
Senator: SULLIVAN of York, Representatives: BOLDUC of Auburn, DUCHESNE of
Hudson, EBERLE of South Portland, MacDONALD of Boothbay, PENDLETON of
Scarborough, PERCY of Phippsburg.

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

2 **Sec. 1. 38 MRSA §341-D, sub-§3**, as amended by PL 1995, c. 642, §§1 and 2, is
3 further amended to read:

4 **3. Modification, revocation or suspension.** After written notice and opportunity for
5 a hearing pursuant to the Maine Administrative Procedure Act, Title 5, chapter 375,
6 subchapter IV 4, the board ~~may~~ shall modify in whole or in part any license, or ~~may~~ issue
7 an order prescribing necessary corrective action, or ~~may~~ act in accordance with the Maine
8 Administrative Procedure Act to revoke or suspend a license, whenever the board finds
9 that:

- 10 A. The licensee has violated any condition of the license;
- 11 B. The licensee has obtained a license by misrepresenting or failing to disclose fully
12 all relevant facts;
- 13 C. The licensed discharge or activity poses a threat to human health or the
14 environment;
- 15 D. The license fails to include any standard, condition or limitation legally required
16 on the date of issuance;
- 17 E. There has been a change in any condition or circumstance that requires
18 revocation, suspension or a temporary or permanent modification of the terms of the
19 license;
- 20 F. The licensee has violated any law administered by the department; ~~or~~
- 21 G. The license fails to include any standard, condition or limitation required
22 pursuant to the federal Clean Air Act Amendments of 1990; or
- 23 H. The licensed discharge or activity is causing a violation of the water quality
24 classification system established in chapter 3, subchapter 1, article 4-A.

25 For the purposes of this subsection and subsection 3-A, the term "license" includes any
26 license, permit, order, approval or certification issued by the department and the term
27 "licensee" means the holder of the license.

28 **Sec. 2. 38 MRSA §341-D, sub-§3-A** is enacted to read:

29 **3-A. Petition for modification, revocation or suspension.** A person may petition
30 the board to modify, revoke or suspend a license. Within 60 days of receipt of such a
31 petition, the board shall determine if there is substantial evidence that one or more of the
32 criteria set forth in subsection 3, paragraphs A to H have been met. If the board
33 determines that such substantial evidence exists, the board shall hold a hearing on the
34 petition and issue a final decision within 180 days of receipt of the petition. The board
35 may dismiss the petition if it finds that none of the criteria set forth in subsection 3,
36 paragraphs A to H have been met. A decision by the board to dismiss a petition filed
37 under this subsection constitutes final agency action and may be appealed in accordance
38 with Title 5, chapter 375, subchapter 7.

39 **Sec. 3. 38 MRSA §464, sub-§14** is enacted to read:

1 14. Dams used to generate hydroelectric power; requirement. The department
2 may approve water quality certification pursuant to the Federal Water Pollution Control
3 Act, Public Law 92-500, Section 401, 33 Stat. 1341 for a dam used to generate
4 hydroelectric power only if the dam provides safe and effective passage for all
5 diadromous fish indigenous to the body of water on which the dam is located.

6 A. The department may not waive its authority to approve water quality certification
7 pursuant to the Federal Water Pollution Control Act, Public Law 92-500, Section
8 401, 33 Stat. 1341 for a dam used to generate hydroelectric power that does not
9 provide safe and effective passage for all diadromous fish indigenous to the body of
10 water on which the dam is located.

11 B. For every day a safe and effective passage is not in effect, the owner of the dam
12 may be fined not less than \$1,000 by the department.

13 C. For purposes of this subsection, "safe and effective passage" means that the
14 passage provided does not kill or severely injure the fish when the fish are migrating
15 upstream or downstream past the dam and that the passage provided allows fish to
16 migrate past the dam in a manner that does not impair the reproductive viability of
17 the fish. "Safe and effective passage" does not include any method of passage that
18 entails the removal of diadromous fish from the vicinity of the dam for any period of
19 time. This paragraph may not be construed to require safe and effective passage for
20 diadromous fish through operating turbines of the dam.

21 D. A person may commence a civil action on that person's own behalf against any
22 person, including any governmental instrumentality or agency, who is alleged to be in
23 violation of this section. The Superior Court has jurisdiction to enforce this section
24 and impose fines of up to \$10,000 per day per violation. The Superior Court, in
25 issuing any final order in any action brought pursuant to this section, may award costs
26 of litigation, including reasonable attorney's fees and expert witness fees, to any
27 prevailing or substantially prevailing party seeking to enforce this section against a
28 violation whenever the court determines the award is appropriate.

29 **Sec. 4. 38 MRSA §466, sub-§4-A** is enacted to read:

30 4-A. Diadromous fish. "Diadromous fish" means species of fish that use both
31 marine and freshwater habitats during their life cycle.

32 **Sec. 5. Modification of water quality certification approvals.** Within 60
33 days of the effective date of this Act, the Board of Environmental Protection, referred to
34 in this section as "the board," shall schedule one or more public proceedings to modify
35 the water quality certification of dams used to generate hydroelectric power in the State to
36 condition water quality certification on the agreement by the owner of the dam that:

37 1. Within 2 years of issuance of the modified order pursuant to this section, the dam
38 will provide safe and effective fish passage for all diadromous fish species indigenous to
39 the body of water on which the dam is located and within the historic ranges of those fish
40 species; and

41 2. Within 60 days of the issuance of the modified order pursuant to this section, the
42 owner of the dam will submit a license amendment application to the Federal Energy

1 Regulatory Commission to incorporate the condition set forth in subsection 1 into the
2 federal operating license for the dam.

3 The board shall issue modification orders for the affected dams no later than
4 December 31, 2009.

5 SUMMARY

6 This bill:

7 1. Specifies that the Department of Environmental Protection may issue water quality
8 certification for a dam used to generate hydroelectric power only if the dam provides safe
9 and effective passage for all diadromous fish indigenous to the body of water on which
10 the dam is located;

11 2. Provides that, for every day a safe and effective passage is not in effect, the owner
12 of the dam may be fined not less than \$1,000;

13 3. Authorizes the commencement of a civil action against any person, including any
14 governmental instrumentality or agency, who is alleged to be in violation of the
15 requirement for dams to provide safe and effective passage for all diadromous fish and
16 authorizes a fine of up to \$10,000 per day per violation;

17 4. Expands the grounds for which the Board of Environmental Protection may
18 modify, revoke or suspend a license to include that the licensed discharge or activity is
19 causing a violation of the water quality classification system;

20 5. Authorizes a person to petition the Board of Environmental Protection to modify,
21 revoke or suspend a license; and

22 6. Directs the Board of Environmental Protection to modify the water quality
23 certification of dams used to generate hydroelectric power in the State to condition water
24 quality certification on the agreement by the dam to provide safe and effective passage
25 for all diadromous fish species indigenous to the body of water on which the dam is
26 located, and within the historic ranges of those fish species, and to submit a license
27 amendment application to the Federal Energy Regulatory Commission to incorporate that
28 condition into the federal operating license for the dam.