



JANET T. MILLS  
GOVERNOR

STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION



MELANIE LOYZIM  
COMMISSIONER

**TESTIMONY OF**  
**NICHOLAS D. LIVESAY**  
**DIRECTOR, BUREAU OF LAND RESOURCES**  
**MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION**

**SPEAKING IN OPPOSITION TO L.D. 1979**  
**AN ACT TO SUSTAIN GOOD-PAYING JOBS IN THE FOREST PRODUCTS**  
**INDUSTRY BY ENSURING CONSISTENCY BETWEEN COMPREHENSIVE RIVER**  
**RESOURCE MANAGEMENT PLANS AND STATE WATER QUALITY STANDARDS**

**SPONSORED BY PRESIDENT JACKSON**

**BEFORE THE JOINT STANDING COMMITTEE**  
**ON**  
**ENVIRONMENT AND NATURAL RESOURCES**

**DATE OF HEARING:**  
**FEBRUARY 28, 2022**

Senator Brenner, Representative Tucker, and members of the Committee, I am Nick Livesay, Director of the Bureau of Land Resources within the Department of Environmental Protection. I am here today to speak in opposition to LD 1979.

The bill consists of two sections and I will address them in turn.

Section 1, which is modeled after existing State law, directs the Department of Agriculture, Conservation and Forestry (DACF) to develop comprehensive river resource management plans for every watershed in the State that has a hydropower project licensed by the Federal Regulatory Commission (FERC). More than 10 such plans would be needed.

AUGUSTA  
17 STATE HOUSE STATION  
AUGUSTA, MAINE 04333-0017  
(207) 287-7688 FAX: (207) 287-7826

BANGOR  
106 HOGAN ROAD, SUITE 6  
BANGOR, MAINE 04401  
(207) 941-4570 FAX: (207) 941-4584

PORTLAND  
312 CANCO ROAD  
PORTLAND, MAINE 04103  
(207) 822-6300 FAX: (207) 822-6303

PRESQUE ISLE  
1235 CENTRAL DRIVE, SKYWAY PARK  
PRESQUE ISLE, MAINE 04769  
(207) 764-0477 FAX: (207) 760-3143

Development of comprehensive river resources management plans initially was tasked to the State Planning Office (SPO). For a number of years the SPO had a dedicated staff-person who helped coordinate State agencies' participation in FERC's hydropower licensing proceedings. (This was separate from DEP's preparation of water quality certifications.) While this SPO staff-person likely had some capacity to help with resource management plans, only one river-specific plan was ever developed and that was back in 1993.

In 2012, the State Planning Office was abolished and its duties were distributed among other agencies. The complex river resource management planning task was assigned to DACF without a deadline for its initiation or completion, without dedicated resources, and, to our knowledge, without a detailed assessment of DACF's capacity to address this mandate. Not surprisingly, no new comprehensive river resources management plans have been developed by DACF over the last decade, continuing a trend that has reached nearly 30 years.

Section 1 of the bill reincarnates this resource planning requirement, with the same fatal flaw that has long persisted – a lack of funding to do the work.

Section 2 of the bill targets the state water certification of hydropower projects.

As background, Section 401 of the federal Clean Water Act (33 U.S.C. § 1341) provides that an applicant for a federal license to conduct an activity that may result in a discharge into the waters of the United States must obtain certification from the state that the activity will comply with state water quality standards. These state water quality standards must be developed pursuant to the Clean Water Act and approved by the U.S. Environmental Protection Agency (EPA). (33 U.S.C. § 1313.)

Pursuant to the Federal Power Act, FERC licenses the operation of hydropower projects. Dam owners seeking a FERC license must obtain Section 401 state water

quality certification. FERC licenses typically run for a term of 30 to 50 years and it is through the water quality certification process that Maine has regulatory authority relative to the operation of the hydropower projects that impact some of our most important public and natural resources – Maine’s lakes and rivers.

Section 2 of the bill is hard to decipher, but at its core appears designed to effectively delegate Maine’s water quality certification authority – to the federal government – in certain instances when a species listed as threatened or endangered under the federal Endangered Species Act may be impacted. When delegation is triggered, so long as a hydropower project meets a single condition “relating to any effect or potential effect” on a federally listed species “that is imposed or proposed to be imposed” by FERC, a dam owner seeking a FERC license “is considered to have met the State’s water quality standards.” Putting aside the particulars of the bill and questions about whether this type of delegation is legal, under any scenario, giving up the State’s ability to evaluate the impact of a dam on Maine waters, – an impact that may last for up to a half century – is bad policy.

The bill is sweeping as drafted and has the potential to limit the State’s authority to require conditions that benefit non-listed, native species such as American eels, striped bass, alewives, and brook trout. These species support the two largest commercial fisheries in Maine (elver and lobster fishery regarding alewife bait) and hundreds of millions of dollars of recreational fishing value annually. The bill also could limit the ability for the State to require conditions intended to prevent the spread of invasive species; support water levels that improve recreational use and wildlife habitat for loon, and waterfowl; and provide suitable water quality to sustain native fish and wildlife.

Additionally, at least three serious legal questions are raised by Section 2.

First, Section 303 of the Clean Water Act (33 U.S. C. § 1313) requires states to develop water quality standards and EPA approval of the statutory change proposed in Section

2 of the bill. Whether EPA could do so is in doubt. The proposed amendment to the State's antidegradation law does not itself set a standard, but rather creates a framework for a federal agency to set a presently unknown standard in the future and effectively limits the States' ability to set its own water quality standards to those that are "equivalent" to the federal conditions. This framework and limitation may not be legally approvable. And even if this framework were acceptable, each future federal condition proposed for inclusion by FERC may then have to be independently reviewed and approved or denied by EPA as a change to Maine's water quality standards.

Second, Section 401 of the Clean Water Act grants water quality certification authority to states. A state may waive its authority by failing to act on a request for water quality certification, but delegating to, deferring to, or relying on a federal agency to fulfill this state responsibility is not provided for in Section 401. Whether the bill complies with this section of the Clean Water Act is questionable.

Third, Section 2 may violate the non-delegation doctrine that is grounded in the Maine Constitution. This doctrine places limits on the delegation of legislative authority. Whether the Maine legislature may delegate establishment of state water quality standards to federal agencies warrants consideration.

In sum, the Department is concerned with both the policy advanced in and the legal soundness of Section 2 of the bill. We believe that Maine citizens and visitors benefit greatly from the State's role in protecting water quality and water levels at lakes and ponds, and in maintaining and enhancing recreation, fish, and wildlife through the Section 401 process. We urge you to vote ought not to pass on LD 1979.

Thank you for the opportunity to provide testimony.