



## **Testimony of the Maine Council of Trout Unlimited on**

### **LD 1049: An Act to Protect Maine's Inland Fisheries from Invasive Fish**

**May 5, 2023**

Senator La Fountain, Representative Landry, and Honorable Members of the Joint Standing Committee on Inland Fisheries and Wildlife:

My name is Stephen Heinz, and I am the volunteer coordinator for Maine Council of Trout Unlimited (TU) actions regarding hydropower licenses issued by the Federal Energy Regulatory Commission (FERC) here in Maine. Trout Unlimited is a national organization whose mission is to bring together diverse interests to care for and recover rivers and streams so our children can experience the joy of wild and native trout and salmon. I represent Maine's six chapters with over 2,000 members state-wide.

TU is providing testimony in opposition to LD 1049 on two bases: 1) as a matter of law and 2) as a matter of biology.

The Federal Power Act gives authority to prescribe fish passage to the Department of Commerce and the Department of the Interior. I have attached the applicable portion of the law - see the highlighted portion of page 3.

The dam at Medway is licensed by FERC and that same authority will be exercised when the Medway Project is relicensed after the current license expires on March 31, 2029. That relicensing process will start next year. Both Federal and State resource protection agencies will be part of that process. Fish passage provisions are a likely outcome, one that cannot be prevented by adoption of LD-1049.

Regarding the biology, while functional fish passage is necessary for restoring and sustaining vibrant native species communities within their native habitat, we would also point out that fish passage facilities are not primarily responsible for the spread of non-native fish within the state. The deliberate introduction of non-native fish, is by far the leading cause. As an example, you need only need to look upstream from the Medway Project to the Penobscot Mills Project that includes all the dams and their impoundments from the first one upstream to the last one before Ripogenus Dam. That project is currently undergoing relicensing and the Initial Study

Report was posted on April 24, 2024 [Ripogenus - Penobscot Mills Initial Study Report, pages D-111 and D-112]. It illustrates just how widespread non-native fish are throughout the system already in the absence of fish passage at Medway or any of the dams above it on the West Branch. These non-native fish were introduced. Note: upstream fish passage is provided between Millinocket Lake and Pemadumcook/North Twin.

Summary of All Species by Water Body - Penobscot Mills Project								
Species	Origin	Pemadumcook/ North Twin	North Twin Tailwater	Millinocket Lake	Quakish Lake	Shad Pond	Dolby	East Millinocket Tailwater
American Eel	indigenous	X		X		X	X	X
Banded Killifish	indigenous		X					
Blacknose Dace	indigenous	X	X	X				
Brook Trout	indigenous	X		X				
Brown Bullhead	indigenous	X	X	X	X	X	X	
Burbot	indigenous	X		X				
Chain Pickerel	introduced	X	X	X	X	X	X	
Common Shiner	indigenous		X	X		X	X	
Creek Chub	indigenous	X		X				
Fallfish	indigenous	X	X	X		X	X	X
Golden Shiner	introduced	X	X	X		X	X	
Lake Chub	indigenous	X	X	X				
Lake Trout	indigenous	X		X				
Lake Whitefish	indigenous	X		X				
Landlocked Salmon	introduced	X	X	X	X			X
Longnose Sucker	indigenous	X		X				X
Pearl Dace	indigenous			X				X
Pumpkinseed	indigenous	X	X	X	X			X
Rainbow Smelt	introduced	X		X				
Redbreast Sunfish	indigenous	X	X	X	X		X	X
Slimy Sculpin	indigenous	X	X	X				
Smallmouth Bass	introduced	X			X	X	X	X
White Perch	introduced	X	X	X	X	X	X	X
White Sucker	indigenous	X	X	X	X	X	X	
Yellow Perch	indigenous	X	X	X		X		X
x = present, blank = absent.								
Source: Ripogenus - Penobscot Mills Initial Study Report pages D-111 and D-112 Note: Origin information provided from this and other sources								

During the hearing for this bill, Representative Wood indicated that he had recently caught smallmouth bass in Kingsbury Pond. Kingsbury Pond has an impassable dam at its outlet—*those bass did not swim into it!* Kingsbury Pond is yet another case of illegal introduction of a non-native fish species.

Passage of LD-1049 would imply that the principal threat of movement of non-native species comes from fish passage, not human intervention and illegal introduction.

While opposing LD-1049 for the reasons above, TU remains sensitive to the issue of non-native fish and their impacts on Maine’s native fish species and aquatic ecosystems. Non-native fish are one of the greatest threats to Maine native trout and salmon and we take this threat to them seriously. We hope that the State will redouble its efforts to prevent their spread through a vigorous program of public education complemented by a concerted enforcement effort by the Maine Wardens Service. MDIFW has input to the FERC process and diligently argues for fish

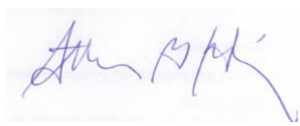
passage provisions that do not afford the spread of non-native species, and testimony provided by them on April 24, 2023 indicates that this will continue to be the case both for FERC-licensed and other dams.

We agree with the Maine Department of Inland of Fisheries and Wildlife and the Maine Department of Marine Resources that what's needed here is not enshrining two barriers in the Penobscot watershed into statute, falsely believing that such will preclude the spread of non-native species. Instead, as supported *by the Departments*, we believe the best outcome is for the two Departments to work together to "manage aquatic invasive species threats" while also supporting native species fish passage needs throughout the state.

We urge you to vote LD-1049 'ought NOT to pass.'

Maine TU Council appreciates the opportunity to provide testimony on the bill.

Respectfully,

A handwritten signature in blue ink, appearing to read "Stephen Heinz", is written over a light blue rectangular background.

Stephen G. Heinz  
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This content is from the eCFR and is authoritative but unofficial.

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## Title 43 – Public Lands: Interior

### Subtitle A – Office of the Secretary of the Interior

#### Part 45 Conditions and Prescriptions in FERC Hydropower Licenses

##### Subpart A General Provisions

- § 45.1 What is the purpose of this part, and to what license proceedings does it apply?
- § 45.2 What terms are used in this part?
- § 45.3 How are time periods computed?
- § 45.4 What deadlines apply to the trial-type hearing and alternatives processes?

##### Subpart B Hearing Process

###### Representatives

- § 45.10 Who may represent a party, and what requirements apply to a representative?

###### Document Filing and Service

- § 45.11 What are the form and content requirements for documents under this subpart?
- § 45.12 Where and how must documents be filed?
- § 45.13 What are the requirements for service of documents?

###### Initiation of Hearing Process

- § 45.20 What supporting information must DOI provide with its preliminary conditions or prescriptions?
- § 45.21 How do I request a hearing?
- § 45.22 How do I file a notice of intervention and response?
- § 45.23 Will hearing requests be consolidated?
- § 45.24 Can a hearing process be stayed to allow for settlement discussions?
- § 45.25 How will the bureau respond to any hearing requests?
- § 45.26 What will DOI do with any hearing requests?
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###### General Provisions Related to Hearings

- § 45.30 What will the Hearings Division do with a case referral?
- § 45.31 What are the powers of the ALJ?
- § 45.32 What happens if the ALJ becomes unavailable?
- § 45.33 Under what circumstances may the ALJ be disqualified?
- § 45.34 What is the law governing ex parte communications?
- § 45.35 What are the requirements for motions?

###### Prehearing Conferences and Discovery

- § 45.40 What are the requirements for prehearing conferences?
- § 45.41 How may parties obtain discovery of information needed for the case?
- § 45.42 When must a party supplement or amend information it has previously provided?

§ 45.43 What are the requirements for written interrogatories?

§ 45.44 What are the requirements for depositions?

§ 45.45 What are the requirements for requests for documents or tangible things or entry on land?

§ 45.46 What sanctions may the ALJ impose for failure to comply with discovery?

§ 45.47 What are the requirements for subpoenas and witness fees?

#### Hearing, Briefing, and Decision

§ 45.50 When and where will the hearing be held?

§ 45.51 What are the parties' rights during the hearing?

§ 45.52 What are the requirements for presenting testimony?

§ 45.53 How may a party use a deposition in the hearing?

§ 45.54 What are the requirements for exhibits, official notice, and stipulations?

§ 45.55 What evidence is admissible at the hearing?

§ 45.56 What are the requirements for transcription of the hearing?

§ 45.57 Who has the burden of persuasion, and what standard of proof applies?

§ 45.58 When will the hearing record close?

§ 45.59 What are the requirements for post-hearing briefs?

§ 45.60 What are the requirements for the ALJ's decision?

#### **Subpart C** Alternatives Process

§ 45.70 How must documents be filed and served under this subpart?

§ 45.71 How do I propose an alternative?

§ 45.72 May I file a revised proposed alternative?

§ 45.73 When will DOI file its modified condition or prescription?

§ 45.74 How will DOI analyze a proposed alternative and formulate its modified condition or prescription?

§ 45.75 Has OMB approved the information collection provisions of this subpart?

## **PART 45—CONDITIONS AND PRESCRIPTIONS IN FERC HYDROPOWER LICENSES**

**Authority:** 16 U.S.C. 797(e), 811, 823d.

**Source:** 80 FR 17194, Mar. 31, 2015, unless otherwise noted.

### **Subpart A—General Provisions**

**§ 45.1 What is the purpose of this part, and to what license proceedings does it apply?**

(a) *Hearing process.*

- (1) The regulations in subparts A and B of this part contain rules of practice and procedure applicable to hearings on disputed issues of material fact with respect to mandatory conditions and prescriptions that the Department of the Interior (DOI) may develop for inclusion in a hydropower license issued under subchapter I of the Federal Power Act (FPA), 16 U.S.C. 791 *et seq.* The authority to develop these conditions and prescriptions is granted by FPA sections 4(e) and 18, 16 U.S.C. 797(e) and 811, which authorize the Secretary of the Interior to condition hydropower licenses issued by the Federal Energy Regulatory Commission (FERC) and to prescribe fishways.
- (2) The hearing process under this part does not apply to provisions that DOI may submit to FERC under any authority other than FPA section 4(e) and 18, including recommendations under FPA section 10(a) or (j), 16 U.S.C. 803(a), (j), or terms and conditions under FPA section 30(c), 16 U.S.C. 823a(c).
- (3) The FPA also grants the Department of Agriculture and the Department of Commerce the authority to develop mandatory conditions, and the Department of Commerce the authority to develop mandatory prescriptions, for inclusion in a hydropower license. Where DOI and either or both of these other Departments develop conditions or prescriptions to be included in the same hydropower license and where the Departments agree to consolidate the hearings under § 45.23:
  - (i) A hearing conducted under this part will also address disputed issues of material fact with respect to any condition or prescription developed by one of the other Departments; or
  - (ii) A hearing requested under this part will be conducted by one of the other Departments, pursuant to 7 CFR 1.601 *et seq.* or 50 CFR 221.1 *et seq.*, as applicable.
- (4) The regulations in subparts A and B of this part will be construed and applied to each hearing process to achieve a just and speedy determination, consistent with adequate consideration of the issues involved and the provisions of § 45.60(a).
  - (b) **Alternatives process.** The regulations in subparts A and C of this part contain rules of procedure applicable to the submission and consideration of alternative conditions and prescriptions under FPA section 33, 16 U.S.C. 823d. That section allows any party to the license proceeding to propose an alternative to a condition deemed necessary by DOI under section 4(e) or a fishway prescribed by DOI under section 18.
  - (c) **Reserved authority.** Where DOI has notified or notifies FERC that it is reserving its authority to develop one or more conditions or prescriptions at a later time, the hearing and alternatives processes under this part for such conditions or prescriptions will be available if and when DOI exercises its reserved authority.
  - (d) **Applicability.**
    - (1) This part applies to any hydropower license proceeding for which the license had not been issued as of November 17, 2005, and for which one or more preliminary conditions or prescriptions have been or are filed with FERC before FERC issues the license.
    - (2) This part also applies to any exercise of DOI's reserved authority under paragraph (c) of this section with respect to a hydropower license issued before or after November 17, 2005.

## § 45.2 What terms are used in this part?

As used in this part:

**ALJ** means an administrative law judge appointed under 5 U.S.C. 3105 and assigned to preside over the hearing process under subpart B of this part.

**Alternative** means a condition or prescription that a license party other than a bureau or Department develops as an alternative to a preliminary condition or prescription from a bureau or Department, under FPA sec. 33, 16 U.S.C. 823d.

**Bureau** means any of the following organizations within DOI that develops a preliminary condition or prescription: The Bureau of Indian Affairs, Bureau of Land Management, Bureau of Reclamation, Fish and Wildlife Service, or National Park Service.

**Condition** means a condition under FPA sec. 4(e), 16 U.S.C. 797(e), for the adequate protection and utilization of a reservation.

**Day** means a calendar day.

**Department** means the Department of Agriculture, Department of Commerce, or Department of the Interior.

**Discovery** means a prehearing process for obtaining facts or information to assist a party in preparing or presenting its case.

**DOI** means the Department of the Interior, including any bureau, unit, or office of the Department, whether in Washington, DC, or in the field.

**Ex parte communication** means an oral or written communication to the ALJ that is made without providing all parties reasonable notice and an opportunity to participate.

**FERC** means the Federal Energy Regulatory Commission.

**FPA** means the Federal Power Act, 16 U.S.C. 791 *et seq.*

**Hearings Division** means the Departmental Cases Hearings Division, Office of Hearings and Appeals, Department of the Interior, 301 South West Temple Street, Suite 6.300, Salt Lake City, UT 84101, telephone 801-524-5344, facsimile number 801-524-5539.

**Intervention** means a process by which a person who did not request a hearing under § 45.21 can participate as a party to the hearing under § 45.22.

**License party** means a party to the license proceeding, as that term is defined at 18 CFR 385.102(c).

**License proceeding** means a proceeding before FERC for issuance of a license for a hydroelectric facility under 18 CFR part 4 or 5.

**Material fact** means a fact that, if proved, may affect a Department's decision whether to affirm, modify, or withdraw any condition or prescription.

**Modified condition or prescription** means any modified condition or prescription filed by a Department with FERC for inclusion in a hydropower license.

**NEPA document** means an environmental assessment or environmental impact statement issued to comply with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*

**OEPC** means the Office of Environmental Policy and Compliance, Department of the Interior, 1849 C Street NW., Mail Stop 2462, Washington, DC 20240, telephone 202-208-3891, facsimile number 202-208-6970.

**Party** means, with respect to DOI's hearing process under subpart B of this part:

(1) A license party that has filed a timely request for a hearing under:

(i) Section 45.21; or

- (ii) Either 7 CFR 1.621 or 50 CFR 221.21, with respect to a hearing process consolidated under § 45.23;
- (2) A license party that has filed a timely notice of intervention and response under:
  - (i) Section 45.22; or
  - (ii) Either 7 CFR 1.622 or 50 CFR 221.22, with respect to a hearing process consolidated under § 45.23;
- (3) Any bureau whose preliminary condition or prescription has been filed with FERC; and
- (4) Any other Department that has filed a preliminary condition or prescription, with respect to a hearing process consolidated under § 45.23.

**Person** means an individual; a partnership, corporation, association, or other legal entity; an unincorporated organization; and any Federal, State, Tribal, county, district, territorial, or local government or agency.

**Preliminary condition or prescription** means any preliminary condition or prescription filed by a Department with FERC for potential inclusion in a hydropower license.

**Prescription** means a fishway prescribed under FPA sec. 18, 16 U.S.C. 811, to provide for the safe, timely, and effective passage of fish.

**Representative** means a person who:

- (1) Is authorized by a party to represent the party in a hearing process under this subpart; and
- (2) Has filed an appearance under § 45.10.

**Reservation** has the same meaning as the term "reservations" in FPA sec. 3(2), 16 U.S.C. 796(2).

**Secretary** means the Secretary of the Interior or his or her designee.

**Senior Department employee** has the same meaning as the term "senior employee" in 5 CFR 2637.211(a).

**You** refers to a party other than a Department.

### § 45.3 How are time periods computed?

- (a) **General.** Time periods are computed as follows:
  - (1) The day of the act or event from which the period begins to run is not included.
  - (2) The last day of the period is included.
    - (i) If that day is a Saturday, Sunday, or Federal holiday, the period is extended to the next business day.
    - (ii) The last day of the period ends at 5 p.m. at the place where the filing or other action is due.
  - (3) If the period is less than 7 days, any Saturday, Sunday, or Federal holiday that falls within the period is not included.
- (b) **Extensions of time.**
  - (1) No extension of time can be granted to file a request for a hearing under § 45.21, a notice of intervention and response under § 45.22, an answer under § 45.25, or any document under subpart C of this part.