

PLEASE NOTE: Legislative Information **cannot** perform research, provide legal advice, or interpret Maine law. For legal assistance, please contact a qualified attorney.

## **An Act To Protect and Enhance Maine Marine Fisheries**

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

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

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

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

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

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

**3-A. Petition for modification, revocation or suspension.** A person may petition the board to modify, revoke or suspend a license. Within 60 days of receipt of such a petition, the board shall determine if there is substantial evidence that one or more of the criteria set forth in subsection 3, paragraphs A to H have been met. If the board determines that such substantial evidence exists, the board shall hold a hearing on the petition and issue a final decision within 180 days of receipt of the petition.

The board may dismiss the petition if it finds that none of the criteria set forth in subsection 3, paragraphs A to H have been met. A decision by the board to dismiss a petition filed under this subsection constitutes final agency action and may be appealed in accordance with Title 5, chapter 375, subchapter 7.

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

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

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

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

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

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

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

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

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

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

2. Within 60 days of the issuance of the modified order pursuant to this section, the owner of the dam will submit a license amendment application to the Federal Energy Regulatory Commission to incorporate the condition set forth in subsection 1 into the federal operating license for the dam.

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

## **SUMMARY**

This bill:

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

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

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

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

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

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