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August 31, 2018

[Kathy.Howatt@maine.gov](mailto:Kathy.Howatt@maine.gov)

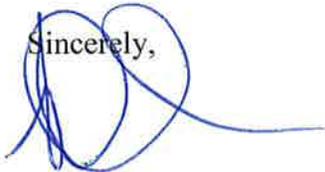
Ms. Kathy Howatt  
Maine Department of Environmental Protection  
17 State House Station  
28 Tyson Drive  
Augusta, ME 04333

RE: **Dyer Long Pond, Jefferson, Maine**

Dear Ms. Howatt:

Enclosed please find the Post Hearing Brief of Dam Owner in connection with the above captioned matter.

Thank you for your consideration in this matter.

Sincerely,  


Richard P. Olson

RPO/amt  
Enclosure

cc: Scott Boak, Esq.  
Email Service List

STATE OF MAINE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF

THOMAS PROUTY JEFFERSON, )	REGULATION OF WATER LEVELS AND
LINCOLN COUNTY )	MINIMUM FLOWS
DYER LONG POND )	
L-22951-36-A-N )	

**POST HEARING BRIEF OF DAM OWNER**

Now comes Richard Saltonstall, the dam owner (the “Dam Owner”) and provides the memorandum.

**INTRODUCTION**

While the Owner is appreciative of the effort that the petitioners, members of the public and employees of the State of Maine put into their various presentations relating to a water management plan for the Owner’s dam (the “Dam”) at Dyer Long Pond (the “Pond”), the evidence presented at the hearing was insufficient for a determination that there should be any material change in the current management practice. That practice has been to maintain a stop of approximately 7.5 inches (a 2 X 8)<sup>1</sup> in the dam and maintains a naturally stable level over the dam with a natural seasonal flow and variations. Existing practice also includes management of the flow through the fishway to facilitate alewife migration in the spring. Trans. pp. 64-67.

Despite the fact that the Petition has been pending since 2006, virtually none of the state employees who testified or offered documentary evidence met with or spoke with either the Dam Owner or Rodney Grady, who operates the dam. There was no modeling of the effects of higher water levels on wetlands or erosion around the Pond. There were no recommendations regarding

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<sup>1</sup> There was no stop log in 2017 because of damage.

seasonal flows. The only surveying was from October 2017 with no follow up surveys or inspections relating to seasonal variations. There was no accounting for recent dry summers or changes in weather patterns. There was no testimony, other than Mr. Grady's regarding any use of the downstream flow for any purpose other than alewife migration.

Based on that limited information, some have suggested just raising the water level 16-18 inches and hoping it works out.

### **FACTS**

Pursuant to 38 M.R.S.A. §840, the Commissioner's decision should be based on evidence addressing the followings facts:

#### **A. The water levels necessary to maintain the public rights of access to and use of the water for navigation, fishing, fowling, recreation and other lawful public uses;**

While the witnesses for the Petitioners expressed their opinions that the water level in the Pond should be higher in the summer to enhance their use of the Pond, they offered no evidence regarding the actual water level at the Pond over various periods of time. Each of the Petitioners' witnesses appears to have continued to use and enjoy the Pond for a variety of lawful purposes.

Both Mr. Grady and Mr. Madden expressed their opinions, based on their long experience at the Pond, that the water level and existing management regime is appropriate for all lawful purposes.

Diano Circo of the Maine Department of Inland Fisheries and Wildlife testified that the current public hand carry site which was designed in 1998 is "no longer functioning" as an ADA compliant hand carry cite. Trans. p. 83. Mr. Circo did not recommend any particular water level

or flow regime. He did, however, say that the important thing is that the water level be maintained in a consistent manner, not that it be raised or lowered. Id.

Mr. Circo did not have any specific information regarding annual water fluctuations or the conditions that existed at the Pond when the site was constructed. He said that the hand carry site needs to be reconstructed because of damage. Trans. p. 83. Mr. Circo said that the design water level in December 1998 was 128' above sea level. Trans. p. 84. Like most witnesses, Mr. Circo did not have any specific knowledge regarding water level variations between the time of the Petition (2006) and today.

The current water levels at the existing site have little evidentiary value since it needs to be reconstructed.

**B. The water levels necessary to protect the safety of the littoral or riparian proprietors and the public;**

Mr. Cercena's testimony described alleged injuries suffered on or about the Pond. Trans. p. 23. Both of the Owner's witnesses, who have spent decades at the Pond, testified that the current water levels and management pose no threat to safety. Mr. Madden expressed concerns about the risks of higher levels. No representative of any state agency expressed any concerns regarding safety or any recommended water level or flow requirement to maintain or improve safety.

**C. The water levels and minimum flow requirements necessary for the maintenance of fish and wildlife habitat and water quality;**

Rod Grady, who has operated the Dam since 2006, testified that the current system, combined with his management of the spillway and fish way, has been effective for the maintenance of fish and wildlife habitat and water quality.

**(i) Water Quality**

In her email to Ms. Howatt of May 9, 2018, Linda Bacon, Lake Assessment Biologist from the Division of Environmental Assessment Bureau of Water Quality in the Maine Department of Environmental Protection states as follows:

*The data we have does not indicate any decline in water quality in Dyer Long Pond, but rather suggests improvement.* [emphasis added] However, the dataset has many gaps (years when no data was collected) thus our confidence that these data reflects reality is on the low end of moderate. Nevertheless the data collected over the last two years fall within the long-term ranges in the long-term set. Data from many Maine lakes show natural fluctuations akin to a sine wave which spans a period of 10-25 years. Without having a solid long-term dataset, it is hard to tell if Dyer Long experiences a cyclical trend like this.

Ms. Bacon's assessment is consistent with the testimony of both Mr. Grady and Mr. Madden. With respect to water levels, Ms. Bacon went on to warn of the dangers of altering long term level water levels:

I've been a proponent of stable water levels in lakes when there is a control structure already in existence. When lake levels are higher than their long-term level, shoreline erosion can cause erosion and thus nutrient pulses to lakes. When lower, littoral habitat is lost; the resulting disturbance to that zone can promote colonization by 'weedy' species (when these species are already present in a lake, this is not a problem however many of the invasive species in Maine also take advantage of such disturbance). Lower water levels can also promote resuspension of sediments due to wind action and result in a physically based recycling of nutrients.

While witnesses for the Petitioner<sup>2</sup> suggested that there has been a decline in the water quality, there is no independent evidence of that decline and no evidence to link the alleged decline to the existing water management regime.

**(ii) Fish Habitat**

Michael Brown of the Maine Department of Marine Resources, testified about the alewife fishery on the Pond. He stated:

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<sup>2</sup> For example, Mr. Prouty noted green slime in recent years. Ms. Wronker noted worse secchi disc readings for 2017 versus 2016 but there is not causal connection between that information and the existing management of the dam.

***The current situation seems to work well with the parties that are involved.*** That hasn't always been the case at this particular site, but the harvester that we have and the way that things have been operated in the last few years it has worked well. We work through the town; the state manages the commercial fishery there with the town. The town leases that fishery with management oversight through the Department to a harvester and the harvester ***and the folks managing the dam have worked well together in this particular case.*** [emphasis added].

Trans. p. 87.

Mr. Brown's testimony is consistent with the testimony of Mr. Grady and Mr. Madden.

While witnesses for the Petitioner appear to complain of a decline in the fishery, there is no independent evidence of that decline and no evidence to link the alleged decline to the existing water management regime.

Mr. Brown had no recommendation regarding an appropriate downstream flow.

Mr. Brown's testimony was also notable for his suggestion that there may be ways to improve habitat. Under questioning by Mr. Boak; however, Mr. Brown had no specific recommendations for changing water level or flow:

Q. And when you say that there are other ways, do you have any thoughts on any other appropriate ways? I understand your recommendation is what's in the record in writing, but do you have any thoughts on any other appropriate ways at this site?

A. At this point, none without talking with people that manage the dam in other ways to approach water levels especially during the fall. Trans. p. 89.

Mr. Brown, like other state representatives, had not met or communicated with Mr. Grady or Mr. Saltonstall prior to the hearing.

In addition to alewives, the State takes an active interest in the management of other fisheries. In that regard, Wesley Ashe of Maine Inland Fisheries and Wildlife testified as follows:

So the major concern for us is similar to wildlife in that bass spawn in the spring and we're really looking for stable water levels during that --during that time frame, preferably the May, June time frame. And really for the most part that's our major

concern *is just stable water levels* during that period to enhance bass population. And that's all I have to say. Trans. p. 81. [emphasis added].

(iii) **Wildlife Habitat.**

Keel Kemper of Maine Inland Fisheries and Wildlife testified regarding desirable water levels for bird and other wildlife and also offered testimony regarding how his agency manages the dams that they control. He noted the extensive area of wetland present at the Pond:

It is interesting that Dyer Long Pond has four [significant wetland types], one at the north end that is 168 acres, one that is 13 acres on the west shore, one that's 11.7 acres sort of further down on the east shore and then at the bottom on the south end of the lake 168.5 acres. Trans. p. 80.

Mr. Kemper's subsequent testimony captured the delicate balance involved in dealing with water levels. While he stated that it is important for wetlands to have water on them; he also made it clear that stable water levels were important:

One thing while we can all sort of play around with where that exact water level is, but we all know that wildlife, particularly water fowl, wading birds, loons respond better to stable water level. So fluctuating water levels give wildlife a hard time and so we generally try to manage in ways that capture high water in the spring, hold it for a period of time with the understanding that stable water levels are probably more important than just exactly where they are. It's that up and down fluctuation that causes wildlife a problem. Trans. p 80-81.

Mr. Kemper described how his agency manages water levels:

We try to capture the water in the spring and we try to hold it there for the water fowl production season, which we generally identify as around April 15 to about July 1. At that time, we are less concerned with water levels. Trans p. 98-99.

Mr. Kemper discussed how his agency raises water approximately 16 inches in the spring and releases it as soon as waterfowl nesting season is over. Trans. p. 104. Mr. Kemper did not address downstream flows of water and had no information specific to the downstream flow of the Pond.

Mr. Kemper also offered testimony to demonstrate that the existing management has had or is likely to have any adverse impact on the existing wetlands or habitat at the Pond.

Mr. Kemper said that adding 16-18 inches of stop logs in the Dam “appeared reasonable” (Trans. p. 103-04), but he offered no specific recommendation for the height of water or flow on the Pond.<sup>3</sup> Perhaps more importantly, Mr. Kemper did not perform and was not aware of any modeling that would show the impact of raising water levels or altering flow rates at the Pond. Transcript, p. 106. Mr. Kemper warned of the dangers harming the dam that arise from raising the water level too high and leaving stop logs in too late in a season. Trans. p. 104-105.

One document that Mr. Kemper reviewed and that relates to water management was remarkable for its lack of foundation. Specifically, a letter from Gail Wippelhauser of the Maine Department of Marine Resources dated October 24, 2017. Ms. Wippelhauser, made the following recommendation:

MDMR requests that DEP establish the following operational schedule that should accommodate both the petitioners and maintain the existing run of alewife.

1. April 15: Stoplogs in the fishway exit (Figure 2) are removed to open the fishway.
2. April 15-June 15: Stoplogs (measuring a total of 16 inches in height) remain in place in the dam notch (Figure 1), and all flow is through the fishway to allow upstream passage of pre-spawning adults and downstream passage of post-spawn adults. If there is flow over the dam, adults may also exit the pond this way.
3. June 15-Labor Day: Stoplogs (measuring 16 inches) are placed in the fishway exit (Figure 2) to maintain the headpond level. Some spill is provided in dam notch to allow juvenile alewives to exit at will.
4. Labor Day: All stoplogs are removed to allow juvenile fish to exit the pond.

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<sup>3</sup> In its November 16, 2017 comments the Department of Inland Fisheries and Wildlife stated that it “...recommends no greater than a one foot surface elevation change from the period known as ice-out to July 15 to protect nesting water birds. In addition, to protect furbearer populations, MDIFW recommends no greater than a one foot surface elevation change from October 15 through ice out in the spring.”

5. On or about November 15: Stoplogs (measuring 16-inches) are replaced in the dam notch and fishway exit to refill the pond to ensure the fishway is operational in spring. It is our experience that replacing stoplogs in the fall will be easier than doing so in the spring.

In her letter Ms. Wippelhauser states that the only documents she reviewed in making that recommendation were "...the Dyer Long Pond Petition material at the DEP web site..." prior to making her recommendation—October, 2017. Like most of the other state employees, Ms. Wippelhauser did not visit the dam, observe the seasonal conditions, meet with or communicate with the Dam owner or the Dam operator. In effect, she largely adopted the Petitioners' position. The timing she proposed was not consistent with the methodology that Mr. Kemper uses and described in his testimony. Mr. Kemper specifically did not agree with Ms. Wippelhauser's suggestion that stop logs be put into the Dam in November:

I have some concern about putting stop logs in in November because then -- then you get a big -- you get a big pile of rain like we've had, now all of a sudden you've got a lot more water against the face of the dam and -- and so we would never put -- the idea of putting in stop logs as we're going into winter so they'll kind of be there in the winter, that's not an activity that we would engage in nor recommend.

Trans. pp. 104-05

Ms. Wippelhauser did not address the impact of her proposal on downstream flow, except in with respect to alewife migration.

**D. The water levels necessary to prevent the excessive erosion of shorelines**

The only testimony offered regarding the water levels necessary to prevent excessive erosion of the shorelines was the testimony of Mr. Madden and Mr. Grady who testified that they believe that the current water levels protected the shoreline and prevented excessive erosion. None of the witnesses presented any opinion regarding what would happen to the shoreline or the existing wetlands from raising water levels or altering the natural flow regime that is

currently in effect and which has resulted in the thriving alewife population, stable water quality and existing valuable wetlands that witness from the State all noted.

**E. The water levels necessary to accommodate precipitation and run off of waters**

Mr. Grady, the only witness with long term knowledge of the Pond and the Dam testified as follows:

Attached as Exhibit A is a report of describing how, since 1995 there have been 53% more “extreme” rain events in the Northeast. It is extremely difficult to be able to remove stop logs once the water level is rising and it is similarly difficult to effectively predict the amount of rain that will fall in anticipation of a storm. I have personally observed the danger to the shoreline, particularly the roadway near my home and the causeway near the Dam that can be caused by increasing the water level on the Pond combined with an inability to be able to release water fast enough to prevent damage during surprise summer and fall rainstorms. The dam is a small dam with a very limited release capacity. I understand that to a lakefront property owner, it may seem simple to just throw in an extra stop log or two in the spring; however, I do not believe that those people understand how difficult or potentially dangerous to the shoreline, wildlife and even people when there is a sudden torrential period of rain as we have experienced, particularly in recent years.

Grady Pre-filed Testimony, p. 4.

Robert Mohler of the Maine Department of Environmental Protection described some of his observations and efforts to model various water levels and flow at the dam. Transcript, p. 74-76. Mr. Mohler stated at the outset of his testimony that “had nothing prepared” and went on to state as follows:

Nothing – nothing surprises me. It all sounds reasonable. What – the area where things can change is intervention, so we can put more stop logs in -- in the dam potentially under certain conditions or release a little more water through that fishway and I've kind of tried to study those scenarios **but there is only so much that can be managed there.**

Trans. p. 75.

Under questioning, Mr. Mohler stated that the normal high water level at the Pond was “in the general range of” approximately 128 feet above sea level. Trans. p. 121. Mr. Mohler went on to describe the water level at the Dam on October 26, 2017 at being “...approximately 2

feet below the normal high water line...” Trans. p. 125. He further testified that in October 26, 2017, when the survey work was performed, *there were no stop logs in the Dam.* Trans. p. 127. Mr. Grady had earlier testified that there were no stop logs during 2017 because of damage. Trans. p. 61.

Mr. Mohler further testified that that standards for water level as set forth in Chapter 587 of the DEP regulations call for no more than a two foot drop from normal high water during the period after July 31. His testimony appears to demonstrate the current management of the Pond was and is within those parameters.

There was no competent testimony to establish the average water level relative to the Pond’s normal high water level during any time other than the time of the October 26, 2017 survey.

**F. The water levels necessary to maintain public and private water supplies**

While some witnesses asserted that they were aware of some property owners moving their water inlet points, there was no testimony offered to establish any particular water level as necessary to maintain public or private water supplies.

**G. The water levels and flows necessary for any ongoing use of the dam to generate or to enhance the downstream generation of hydroelectric or hydromechanical power;**

The Dam is not used for hydroelectric power and no testimony was offered regarding the water levels and flows necessary for hydroelectric power generation.

**H. The water levels necessary to provide flows from any dam on the body of water to maintain public access and use, fish propagation and fish passage facilities, fish and wildlife habitat and water quality downstream of the body of water.**

The only testimony relevant to the question of downstream flow was offered by Mr. Grady:

A downstream farmer who uses the water for irrigation and the fisherman with the alewife license has told me that they are satisfied with our current management practices.

Grady Pre-filed Testimony, p. 5.

As noted above, Mr. Brown also testified that “The current situation [regarding the Alewife fishery] seems to work well with the parties that are involved.” Trans. p. 87.

Mr. Mohler provided some information on flows from the Pond; however, he specifically did not make any recommendation regarding downstream flows:

4 Q. Are there recommended -- recommendations on  
5 this document that you are making?  
6 A. No. I am just -- I am -- for my modeling --  
7 for my hydraulic modeling of the dam structure, I use  
8 these mean flows that are in...

Trans. p. 117.

### **Historical Water Levels**

Mr. Madden offered extensive Prefiled Testimony regarding the historic water levels at the Pond. There has always been significant fluctuation. See Madden Pre-filed testimony.

## ARGUMENT

THE COMMISSION SHOULD REOPEN THE HEARING FOR TESTIMONY FOR THE LIMITED PURPOSE OF ELICITING TESTIMONY AND RECOMMENDATIONS FROM THE STATE REGARDING HIGHER WATER LEVELS AND DOWNSTREAM FLOWS

While there was general testimony regarding downstream flow from Mr. Mohler, The only specific testimony at the hearing regarding the actual downstream flows came from Mr. Grady. There was no testimony regarding the impact of higher water levels or additional stop logs on downstream flows for either the river or the fish way.

There was also no testimony regarding the impact of higher water levels on existing wetland, habitat or erosion at this particular body of water.

In the absence of such testimony it may become difficult or impossible for the Commissioner to be able to weigh adding stop logs or altering the existing management regime over any other. Similarly, it will be difficult or impossible for the Dam Owner or operator to balance any requirements for a particular water level with an appropriate downstream flow.

The state witnesses demonstrated a valuable grasp of the technical and practical issues that the Commissioner faces in ordering a water level regime as well as the issues that the Dam Owner and the operator will face implementing any order. Despite the knowledge of the witnesses, they did not provide the Commissioner with sufficient specific information necessary to implement a sound water management regime.

Accordingly, the Dam Owner respectfully suggests that the Commission reopen testimony for the limited purpose of eliciting such evidence and recommendations.

**IN THE ALTERNATIVE, THE COMMISSIONER SHOULD ISSUE AN ORDER ESTABLISHING A WATER LEVEL REGIME CONSISTENT WITH THE CURRENT WATER LEVELS AND NATURAL FLOW THROUGH THE DAM.**

The Dam Owner submits that Commissioner should issue an order establishing a water level Regime for the Dam and the Pond that requires accomplishes the following:

1. Maintain the water level at the Pond to within approximately 1.4 feet of the normal high water level during the period April 1 to July 31; and within 2.4 feet of the normal high water from August 1 until March 31-- to the extent practical --while maintaining sufficient downstream flow for irrigation and fish migration.
2. Deem the normal high water level to be the level of the dark staining existing at the Dam as described by Mr. Mohler.

3. Continue to make adjustments as necessary or appropriate to the water flowing through the fish way to ensure its functionality as the Dam Operator has done in the past and subject to ongoing consultation with State Wildlife officials.

4. For the purposes of the order, “to the extent practical” should be deemed to mean that the Dam Owner would generally leave one 7.5<sup>4</sup> inch stop log in the Dam year round and would, typically in the spring, add up to an additional 7.5 inches of stop logs (e.g. two “four inch” wide stop logs) for a total of 15 inches of stop logs. The Dam owner would reduce the height of the stop logs from 15 inches to 7.5 inches over the course of the summer with the reduction at the Dam Owner’s discretion. The lower stop may be removed after September 1, if, in Dam Owner’s discretion, such removal is appropriate to assist with fish migration.

5. The Dam operator will use all practical efforts<sup>4</sup> to ensure that there shall be adequate water flow over the dam to ensure the requirements of the Dyer River as well as the operation of the fish way.

6. In the event of any conflict between maintaining flow through the fish way and downstream flow or maintaining the water level, maintaining minimal flow will take priority.

The water level regime proposed by the Dam Owner (“Owner’s Proposal”) should be approved for the following reasons:

(a) Stable Water Level.

Virtually every State employee who testified emphasized the importance of stable water levels, particularly during the period from ice out until July. That testimony is consistent, if not totally compliant, with the applicable statutes, regulations and standard practices. Mr. Kemper

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<sup>4</sup> Stop logs are dimensional lumber commonly referred to as 2 X 8 and may be 2 X 4s.

testified that his department begins removing logs after July. DEP Regulations required a stable water level through July 31. Chapter 587, Paragraph 6. The existing water management regime with natural flow has generally provided a result that is close to the standards during much of the year. Adding an additional 3.7 to 7.5 inches is likely to ensure better compliance without endangering the Dam, causing erosion or generating other harmful effects.

The Dam Owner submits that having additional flexibility from the usual water level standards is appropriate in this case because of the acknowledged small capacity of the dam, the shallowness of the Pond and the unexplored risks of higher water levels. In essence, the Dam Owner suggests that flexibility to have the water level be lower is better than the uncharted risks of a higher level.

(b) The Owner's proposal is feasible.

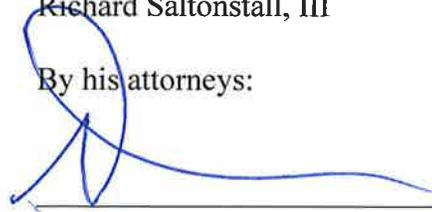
The Dam is not a large or complex dam. The testimony of Mr. Mohler and Mr. Grady demonstrate that "there is there is only so much that can be managed there." The spillway is small. The Owner's Proposal provides the dam operator with sufficient flexibility and discretion to make adjustments to water levels to ensure the downstream flow, the viability of the fish way and to accommodate rains and run off.

Mr. Grady's testimony demonstrates the complexity of balancing flow and water level to ensure the viability of both the Pond and the river along with the alewives. Any order should provide the Dam Owner with sufficient discretion to make the adjustments necessary to keep the fishery thriving and downstream uses viable.

Respectfully submitted this 31<sup>st</sup> day of August, 2018.

Richard Saltonstall, III

By his attorneys:

A handwritten signature in blue ink, consisting of a large, stylized loop followed by a horizontal line extending to the right.

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