



JANET T. MILLS
GOVERNOR

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION



MELANIE LOYZIM
COMMISSIONER

IN THE MATTER OF

TIMOTHY DOWNING,) REGULATION OF WATER LEVELS
SMITHFIELD, MERCER, ROME) AND MINIMUM FLOWS
KENNEBEC AND SOMERSET COUNTIES)
NORTH POND) SECOND PROCEDURAL ORDER
L-30629-36-A-N)

As set forth in the First Procedural Order, the Maine Department of Environmental Protection (Department), pursuant to the *Maine Dam Registration, Abandonment, and Water Level Act*, 38 M.R.S. § 840(1), will be conducting an adjudicatory hearing (or, public hearing) regarding the establishment of a water level regime for North Pond in the Towns of Smithfield, Mercer and Rome. This proceeding is being initiated as a result of a petition filed with the Department by 58 littoral/riparian owners (petitioners) along North Pond. The 58 petitioners represent more than 50 littoral or riparian proprietors of North Pond. The water levels of North Pond are controlled by a dam at the outlet of North Pond on Great Meadow Stream, which flows to Great Pond. The dam is owned and operated by the North Pond Association, Inc. (dam owner). On July 31, 2024, the Presiding Officer (or hearing officer) issued a Notice to interested persons that they could Petition for Leave to Intervene by August 30, 2024. The Department received 4 petitions to intervene. On September 25, 2024, the Presiding Officer issued the First Procedural Order, after which parties were given the opportunity to submit objections to the petitions to intervene and intervenors were given the opportunity to respond. No objections were received.

Given that no objections to the petitions to intervene were submitted, the Presiding Officer hereby accepts the 4 petitions to intervene and cancels the Pre-Hearing Conference that was scheduled for November 8, 2024.

This Order sets forth the Presiding Officer's decision with respect to certain procedures relating to the Petitions for Leave to Intervene and the procedures and expectations for the adjudicatory hearing and sets the date for an adjudicatory hearing regarding the establishment of a water level regime for North Pond.

PETITIONS FOR LEAVE TO INTERVENE

1. On July 31, 2024, the Presiding Officer issued a Notice notifying interested persons that they could submit Petitions for Leave to Intervene by Friday, August 30, 2024.
2. On September 25, 2024, the Presiding Officer issued the First Procedural Order, after which parties were given the opportunity to submit objections to the petitions to intervene and intervenors were given the opportunity to respond. No objections were received.

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

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3. The Petitions for Leave to Intervene of the following 4 persons are accepted and approved:
 - A. Christine Keller, Merrow Lane Road Association and Serpentine Stakeholders
 - i. 91 Merrow Lane, Smithfield ME 04978
 - ii. miltoncpk@gmail.com
 - B. Melvin Croft, resident of Smithfield
 - i. 90 Eastwood Lane, Smithfield ME 04978
 - ii. mcroftnlw@yahoo.com
 - C. Edith E. Cornwall, resident of Oakland, President of East Pond Association
 - i. 289 Brickett Point Ests., Oakland ME 04963
 - ii. ediened@roadrunner.com
 - D. 7 Lakes Alliance, Laura Rose Day, Chief Conservation and Special Initiatives Officer
 - i. P.O. Box 250, Belgrade Lakes ME 04918
 - ii. laura.roseday@7lakesalliance.org
4. In addition to the intervenors, other parties include:
 - A. North Pond Association, Inc., owner and operator of the dam, Katie Meikle, North Pond Association, Inc. President
 - i. P.O. Box 44, Smithfield ME 04978
 - ii. meiklekatie@gmail.com
 - B. 58 littoral/riparian owners, represented by Tim Downing

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- i. P.O. Box 24, Smithfield ME 04978
- ii. timothydowning@gmail.com

CLARIFICATION OF PARTIES

5. Each signer of the petition for the regulation of water levels and minimum flows is a “party” to the hearing under Department rules. Henceforth, all signers will be consolidated together as “the petitioners” or “petitioners.” For the purposes of this hearing and notice requirements of this hearing, the petitioners shall have one spokesperson, Timothy Downing. The term “all parties” shall refer to the petitioners through their spokesperson and North Pond Association, Inc., intervenors and the dam owner.

CLARIFICATION OF RESPONSIBILITIES AND PROCEDURES

I. Role/Responsibilities of the Parties, the Presiding Officer, and Department Staff

A. Petitioners/Intervenors

1. The petitioners/intervenors have the right to present evidence at the public hearing regarding the regulatory review criteria that are relevant to establishing a water level regime for North Pond and to cross-examine any other witnesses, including those called by the owner of the dam. The petitioners/intervenors will be required to file their testimony in advance of the public hearing and to copy the owner of the dam (and all parties on the service list) on all documents and correspondence they file with the Department, in accordance with Section II, Filing Requirements, paragraph 9 of this Order. Witnesses for the petitioners and intervenors will be subject to cross-examination at the public hearing.

B. Owner of the Dam

2. The owner of the dam has the right to present evidence at the public hearing regarding the regulatory review criteria that are relevant to establishing a water level regime for North Pond and to cross-examine any other witnesses, including those called by the petitioners

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or intervenors. The owner of the dam will be required to file its testimony in advance of the public hearing and to copy the petitioners and intervenors (and all parties on the service list) on all documents and correspondence it files with the Department, in accordance with Section II, Filing Requirements, paragraph 9 of this Order. Witnesses for the owner of the dam will be subject to cross-examination at the public hearing.

C. Public/Interested Persons

3. The entire public hearing is open to the public. The Department will receive testimony from the general public during an evening session of the public hearing. This evening session is expected to be held on Monday, February 24, 2025, from 5:30 P.M. to 7:30 P.M. at 90 Blossom Lane Deering Building Augusta, ME, Conference Room 101. As with all testimony, public testimony at the evening session is under oath. Members of the public do not have to file their testimony in advance of the evening portion of the public hearing.
4. In addition to the public hearing, members of the public may submit written comments to the Department by mail to Laura Paye, Maine Department of Environmental Protection, 17 State House Station, Augusta, Maine 04333; by email to Laura.Paye@maine.gov; or by hand delivery to 28 Tyson Drive, Augusta, Maine. The Department will receive such written comments until the date for closure of the record, to be provided by the Presiding Officer at the close of the public hearing.
5. Interested persons are members of the public who have asked to be placed on a list to receive certain information regarding the public hearing, including Procedural Orders and Notices. These documents will also be placed on the Department website under <https://www.maine.gov/dep/ftp/HYDRO/WaterLevelProjects/north-pond/>.

D. Department Staff

6. The Presiding Officer will rule upon issues of evidence, regulate the course of the hearing, rule upon issues of procedure (including establishing deadlines), administer oaths, and take such other action as is necessary for the efficient and orderly conduct of the public hearing, consistent with applicable statutes and regulations. Although the Commissioner of the Department and not the Presiding Officer is the ultimate decision-

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maker in this matter, the parties are directed not to communicate with either the Commissioner or the Presiding Officer on any issue of substance or procedure regarding the public hearing, except during open sessions of the public hearing or during any future pre-hearing conferences. Further notices, not including procedural or final orders, shall be sent via electronic mail to the parties' contact information as found in the Updated Public Hearing Service List. Any inquiries should be made to Laura Paye, by email to Laura.Paye@maine.gov.

7. The role of Department staff is to gather facts on behalf of the Commissioner and to ask questions of witnesses at the public hearing, including witnesses called or requested to testify by the Department. After the public hearing is concluded, Department staff will analyze the record. The role of Department staff is essentially the same as it is with respect to any licensing application. Ultimately, the Commissioner will establish a water level regime for North Pond that is based upon the complete record, including the public hearing record.

E. Responsibilities of all Parties

8. All parties are expected to comply with deadlines and filing requirements established by the Presiding Officer. Failure to comply may result in appropriate sanctions, including the rejection of argument, evidence or testimony the party seeks to offer. All participants in this proceeding, including the public hearing and any pre-hearing conferences, are expected to conduct themselves professionally and civilly, both in their dealings with the Department and with each other. If a party is unable to conduct his or herself professionally and civilly, the Presiding Officer reserves the right to take any appropriate action, including excluding the individual from further participation in these proceedings.

II. Filing Requirements

9. Unless otherwise required, all filings submitted by the petitioners, intervenors or the owner of the dam with the Department relating to this proceeding must be transmitted electronically in Adobe PDF format by email to Laura Paye at Laura.Paye@maine.gov and must be electronically served on all parties on the public hearing service list at the same time they are filed with the Department. There are several important exceptions to

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note here. First, on the same day an electronic copy is served by email on the Department, the serving party must also mail, by first class postage, a paper copy to Laura Paye at the Department and a paper copy at the request of any party on the public hearing service list. Second, with respect to pre-filed testimony and exhibits, in addition to the standard electronic filing, parties must provide a paper copy of all testimony to the Department, and a paper copy at the request of any party on the public hearing service list. The currently effective public hearing service list will be maintained on the Department website, and it is the responsibility of each party to be sure its filings are copied to all parties on that list. The public hearing service list will contain contacts for the petitioners, intervenors, owner of the dam, Department staff, consultants and counsel, as well as for other governmental review agencies.

10. The petitioners, intervenors and the owner of the dam must pre-file the testimony they wish to submit on behalf of any witness in writing by the established deadline. This pre-filed testimony must be sworn, meaning the witness declares by oath or affirmation that the testimony is true and correct to the best of the witness' knowledge and belief. The requirement for pre-filed testimony includes any individual party who intends to present his or her own testimony at the hearing. If the witness wishes to be considered an expert, his or her credentials must be set forth in the pre-filed testimony. No person will be allowed to testify at the hearing for a party unless they have submitted pre-filed direct or rebuttal testimony, and no testimony will be allowed into the record if the witness is not present at the public hearing at the designated time for questioning and cross-examination by Department staff and the parties.
11. Pre-filed rebuttal testimony will be allowed only in response to the pre-filed direct testimony of other witnesses, and parties are cautioned against attempting to introduce new evidence through rebuttal testimony that is not responsive to the direct testimony of another witness. All rebuttal testimony must identify the specific direct testimony to which it is submitted in response. If a party wishes to refer to documents already contained in the hearing record within pre-filed testimony, the party may specifically refer to those documents in the testimony.
12. Filing with the Department is complete when the Department receives the email submission by the close of business on the date due (5:00 P.M., as determined by the received time stamp on the document, telefax, or electronic mail), unless otherwise

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specified by the Presiding Officer. Chapter 3, § 3(D). In accordance with Chapter 3, § 3 (D)(4), the email submission must be followed by the receipt of the identical original document within five (5) working days.

13. The requirement of pre-filed testimony is an important part of the public hearing process, as it allows Department staff and other parties to review testimony in advance and come to the public hearing prepared to conduct efficient and focused cross-examination. The Presiding Officer expects compliance with the pre-filing testimony requirements.

III. Exhibits

14. Generally, any exhibit that a party wishes to introduce into the hearing record must be attached to pre-filed testimony. The Presiding Officer retains the discretion to allow the introduction of an exhibit at the public hearing that was not pre-filed based on a showing of good cause; however, such requests will be looked upon with extreme disfavor, and the requesting party will bear the heavy burden of demonstrating that it was not feasible to pre-file the exhibit and that the need to introduce the exhibit outweighs any prejudice to other parties. The use of exhibits that were not pre-filed and are not in the public hearing record to impeach witnesses at the public hearing may be approved by the Presiding Officer on a case-by-case basis if the Presiding Officer is satisfied that the use of the exhibit as proposed will assist the Department in its decision-making. Legible reduced versions of oversized exhibits may be pre-filed, with the full-size exhibit presented at the public hearing. It is the responsibility of each party to label their exhibits in a manner that allows them to be easily identified and referenced. For purposes of this Second Procedural Order, the term “exhibits” and responsibilities and deadlines pertaining to exhibits also applies to proposed demonstrative aids.

15. The public hearing record includes, but is not limited to, the water level petition filed with the Department in November 2023 and all documents filed with the Department or issued by the Department with regard to this water level petition.

IV. Statutory and Regulatory Framework and Relevant Review Criteria

16. The Department will conduct the proceeding in accordance with the provisions of the *Maine Administrative Procedure Act* (MAPA) governing adjudicatory proceedings, 5

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M.R.S. §§ 9051-9064, and Rules of the Maine Department of Environmental Protection, Chapters 2 and 3. The Presiding Officer may permit deviation from Chapter 3 when compliance is found to be impractical or unnecessary and no prejudice to any party will result. 5 M.R.S. § 9053(4); 06-096 C.M.R. Ch. 3, § 4(C)(11).

17. The public hearing is not a public forum on anything and everything related to North Pond but is limited to the regulatory criteria that are relevant to establishing a water level regime for North Pond. The relevant regulatory review criteria, including the statutes and rules, that are part of the legal framework for the Department's decision are set forth in the attached document entitled "Relevant Regulatory Review Criteria." Proposed testimony that is not related to the regulatory review criteria for establishing a water level regime for North Pond will not be permitted.
18. The Presiding Officer will not allow testimony or cross-examination on irrelevant subjects. Pre-filed testimony on irrelevant subjects may be stricken. The Presiding Officer may rule that a witness is not required to respond to a cross-examination question on a subject that is not relevant.
19. Pursuant to the *Maine Dam Registration, Abandonment, and Water Level Act*, 38 M.R.S. § 840(4), all testimony is limited to the following:
 - 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;
 - B. The water levels necessary to protect the safety of the littoral or riparian proprietors and the public;
 - C. The water levels and minimum flow requirements necessary for the maintenance of fish and wildlife habitat and water quality;
 - D. The water levels necessary to prevent the excessive erosion of shorelines;
 - E. The water levels necessary to accommodate precipitation and run off of waters;

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- F. The water levels necessary to maintain public and private water supplies;
- G. The water levels necessary for any ongoing use of the dam to generate or to enhance the downstream generation of hydroelectric or hydromechanical power; and
- 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.

V. Order of Presentation of Evidence

- 20. At the hearing, presentation of evidence, witnesses, and cross-examination shall be conducted in the following order:
 - 1. Petitioners
 - 2. Intervenors
 - 3. Owner of the dam
 - 4. State, Municipal, and other governmental agencies and representatives
 - 5. Department staff and/or counsel
- 21. With respect to cross-examination, Department staff, counsel, and the Presiding Officer may ask clarifying questions after the parties have had the opportunity to cross-examine the witnesses.
- 22. Parties are requested to consolidate presentations of evidence where possible to avoid duplicative testimony, evidence, argument, and cross-examination.

VI. Deadlines and Schedule

- 23. The public hearing will be held on Monday, **February 24, 2025**, at 10:30 A.M., at 90 Blossom Lane, Deering Building Augusta, ME, Conference Room 101. The public comment session of the public hearing will take place the evening of Tuesday, **February 25, 2025**, from 5:30 P.M. to 7:30 P.M., at the same location as the public hearing.

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24. All pre-filed testimony and exhibits must be filed by **Friday, December 13, 2024, at 5:00 P.M.** See paragraphs 9 and 10 for specific information about filing and serving pre-filed testimony and exhibits. See paragraphs 14 and 15 for specific information about exhibits.
25. At the time of submitting pre-filed testimony, each party must state in writing the amount of time in total requested for witnesses to briefly summarize their direct testimony. In doing so, the parties are reminded that all other parties and the Department will have received and reviewed the pre-filed testimony before the public hearing. Therefore, any direct testimony summary must be brief and tightly focused.
26. Any objections to pre-filed testimony or the overall validity of the petition must be filed by **Friday January 3, 2025, at 5:00 P.M.**
27. The Presiding Officer will rule on objections to pre-filed testimony and exhibits by issuing a subsequent Procedural Order. The Presiding Officer will attempt to issue such Procedural Order before the deadline for submission of rebuttal testimony.
28. Rebuttal testimony must be filed by **Friday, January 24, 2025, at 5:00 P.M.** See paragraph 11 for specific information about rebuttal testimony.
29. **By Friday, February 7, 2025,** all parties must state in writing:
- 1) the names of witnesses they intend to cross-examine;
 - 2) the amount of time requested for cross-examination of each such witness; and
 - 3) the reason and general topic for cross-examination.

VII. Governmental Review Agencies

30. The Department anticipates receiving government agency comments on this matter. The Presiding Officer reserves the right to request that any of the reviewing governmental agencies present testimony at the public hearing or be present to answer questions at the public hearing. Should any government agency testify in this matter, all parties shall be given an opportunity to comment on such testimony and cross-examine any reviewing agency witnesses.

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31. The Department reserves the right to request additional evidence for the record from any party or government agency, including Department staff. Should the Department elect to introduce evidence at the hearing, parties shall be given an opportunity to comment on such testimony and cross-examine any witness called by the Department.

Dated: November 4, 2024

/s/ Ronald Mongeon

Ronald Mongeon, Presiding Officer

Attachment:

- “Relevant Regulatory Review Criteria”
- Updated Public Hearing Service List