



April 26, 2021

Stephen G. Heinz
Maine TU Council FERC Coordinator
Maine Council of Trout Unlimited

Via email: heinz@maine.rr.com

RE: LIHI Recertification Decision on the Medway, Orono, and Stillwater Projects

Dear Mr. Heinz,

I am writing in response to your April 12, 2021 letter objecting to the preliminary decision to recertify the Medway, Orono, and Stillwater projects. Since Trout Unlimited did not submit comments on the applications during the 60-day public comment period which ended on January 30, 2021, we cannot consider your letter a request for appeal of the decision (see Section 4.3 of the [LIHI Handbook](#)). However, your comments are important and thus I want to respond in detail.

I hope you had the opportunity to read the recertification review reports which go into great detail about the fishery and the status of fish passage at these projects¹. The reports summarize the complex nature of the Penobscot River basin fishery issues and the current agency fishery restoration priorities. While work is not yet complete to confirm safe and effective passage for all species, the projects are moving toward that end. Brookfield has remained actively engaged with agencies and the Penobscot Indian Nation (PIN) through ongoing consultation, completion of numerous passage studies, and facility modifications to continue to improve passage outcomes.

It is important to understand that “Low Impact” as defined within our program and as supported by the State of Massachusetts in its RPS program (which includes out-of-state projects), does not imply “no impact” and the review reports show that the projects continue to minimize or mitigate their impacts to the extent possible within the context of ongoing efforts, and that they continue to meet the LIHI program requirements and criteria.

The conditions imposed on each Certificate (see Section IX of each report) are all fish passage

¹ Medway report <https://lowimpacthydro.org/wp-content/uploads/2021/04/Medway-Recertification-Report-031621.pdf>

Orono report <https://lowimpacthydro.org/wp-content/uploads/2021/04/Orono-Recertification-Report-031621.pdf>

Stillwater report <https://lowimpacthydro.org/wp-content/uploads/2021/04/Stillwater-Recertification-Report-031621.pdf>

related and intended to encourage ongoing dialogue among the parties, with a goal of reaching agreement about specific timelines and scopes of additional fish passage studies and/or additional facility modifications.

Your comment letter makes several points for which I offer responses to each below.

1. TU noted the age of the current project FERC licenses and suggests that data collected during relicensing is too old to be of value, citing the 2018 Coosa River appeals court decision.

LIHI evaluates projects based on many factors and all available information including current license requirements, settlement agreement provisions, water quality certification conditions, agency recommendations made outside of licensing, subsequent FERC orders and license amendments, and compliance with regulatory requirements and with the current LIHI Certificate terms. In addition, we consider comments received on the LIHI applications, more current data if available, and the relationship of the project to other hydrologically connected projects. Relative to TU's comment, many fish passage studies since the last relicensings have been conducted by Brookfield (and by the University of Maine at Orono) including the recently filed 2020 studies referenced in your letter.

2. TU included the new fish passage study reports and stated that the results show significant downstream mortality.

The Medway 2020 downstream adult eel study report notes that background and tagging mortality were not accounted for, so the minimum survival estimate was calculated to be 92% during a low flow period which affected available passage routes and was therefore not entirely representative. In response to agency and PIN recommendations, a balloon tag and sensor fish study is planned for 2021 to better document turbine survival. The 2020 downstream juvenile alosine survival was 96.4% at Orono and 91.4% at Stillwater.

For all projects, the Maine Department of Marine Resources (MDMR) stated their intentions to develop numeric performance standards for non-salmon downstream passage within the next five years. In the absence of numerical standards, it is unclear whether mortality is significant or if the projects are not providing sufficiently safe and effective passage for species other than Atlantic salmon.

3. TU noted that critical habitat is designated for Atlantic salmon in the project areas and raised concerns about both upstream and downstream salmon passage.

The National Marine Fisheries Service (NMFS) issued a final salmon recovery plan in 2019². It includes a phased approach to restoration throughout the areas of critical habitat. Current restoration priorities are focused on the mainstem and East Branch rather than the

² https://media.fisheries.noaa.gov/dam-migration/final_recovery_plan2.pdf

West and Stillwater Branches. NMFS had previously issued a Biological Opinion (BO) for numerous Penobscot River projects in 2012³ that includes Atlantic and shortnose sturgeon as well as Atlantic salmon. The BO (p. 59) lists several factors affecting salmon recovery in addition to dams, and states *“the potential interactions among these factors are not well understood, nor are the reasons for the seemingly poor response of salmon populations to the many ongoing conservation efforts”*. Page 126 of the BO states that given the sequential nature of implementation of protection measures *“it is possible that there will be a ten year period between when the licenses are amended and the final study year where performance standards are achieved”*. The Orono and Stillwater FERC licenses were amended in 2012 and Medway in 2013 so it is not unexpected that work continues toward achieving the applicable performance standards.

The Stillwater and Orono review reports note that upstream fish passage effectiveness for Atlantic salmon has not been tested at those projects and there are no upstream performance standards at these projects since the BO assumed that the majority of Atlantic salmon would use the mainstem of the Penobscot and would only be incidentally attracted to the Stillwater Branch under high flow/spill conditions. This is why any salmon caught in the Orono fish lift are transported to the Penobscot mainstem rather than being released upstream in the Stillwater Branch. However, there are numerical performance standards for salmon downstream passage at these projects. The review reports note that NMFS indicated that the current standards may not be statistically valid and may be adjusted. Brookfield is working with NMFS on the potential to reinstate consultation related to performance standards ahead of the 2023 deadline for take associated with performance standard achievement.

At Medway, there are no salmon performance standards under the BO. Included in the LIHI application is information from NMFS indicating that data is currently being collected to determine opportunities to restore connectivity with headwater streams having historical populations such as the West Branch of the Penobscot River. The goal is to have such data in advance of the upcoming re-licensing of the Medway Project with a current license expiration in 2029, and Brookfield is actively engaged with NMFS on this matter.

4. TU commented that Medway forms an upstream barrier for all anadromous species including American shad.

The Medway license includes reservation of authority to prescribe fishways under Section 18 of the Federal Power Act. To date, no agency request for fish passage has been made despite annual meetings, and this provision has not been triggered. Condition 2 of the LIHI Certificate addresses this issue if agency requests are made.

5. TU also mentioned that PIN was promised a subsistence fishery on the river that has not yet been achieved due to dam barriers.

³ <https://elibrary.ferc.gov/eLibrary/filedownload?fileid=13057286>

LIHI is unaware of this promise as relates to these hydro projects, but we strongly support restoration of Tribal sovereign authority over trust resources and traditional cultural heritage uses where they have been lost or usurped. However, in the case of the Penobscot River, the issue of sustenance fishing seems related more to water quality than to fish passage. In 2019 the Maine legislature passed an Act to Protect Sustenance Fishing⁴ which created sustenance fishing as a designated use in some state waters and strengthened water quality standards, particularly for mercury in fish tissue, in identified portions of several rivers including the Penobscot to protect that use. The designated area associated with Medway is apparently from the dam (e.g., the confluence of the East and West Branches) downstream. In the Stillwater Branch, only the segment upstream of the Gilman Falls dam is included in the new designated use area.

6. TU commented in support of MDMR's comment letter on the LIHI applications and attached that letter.

I would like to share LIHI's response letter to MDMR (attached) which provides our rationale for recertifying the projects with the facility-specific conditions that address MDMR's concerns.

7. TU stated that LIHI *"has become aware of the questionable status that it [sic] certification bestows, and reflected this in its proposal to modify the process"*.

I would like to correct this misunderstanding. The proposal was to change only the LIHI recertification process, not the criteria or standards, and was based on feedback we had received over several years from Certificate holders and other stakeholders on the 2nd Edition Handbook which was first issued in 2016. The proposal was not made in response to any perceived inadequacies of the program, but rather to try to simplify the recertification process while keeping it robust and consistent with the LIHI criteria and standards embodied in the 2nd Edition Handbook. We are currently reviewing the comments received and considering next steps in response to those comments, including TU's.

8. TU also mentioned Rumford Falls as having obvious impacts and an example of project that TU objects to having been certified and recertified.

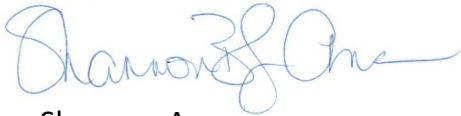
As mentioned above, LIHI Certification does not imply "no impact" and in reality, every hydro project is bound to have some level of impact. At Rumford Falls, during FERC relicensing, water quality and fishery habitat studies were conducted in the two bypassed reaches and they concluded that the combination of steep gradient, ledge bedrock substrate, and lack of safe access limit any fishery management opportunities in the reach, and that spill flows were not needed. Minimum flows are provided in both bypasses via

⁴ http://legislature.maine.gov/legis/bills/bills_129th/chapters/PUBLIC463.asp

leakage from both dams. The MDIF&W and USFWS agreed with those results. We evaluated this in the 2018 recertification report⁵ and Maine DEP commented in support of recertification⁶. Admittedly, a lack of higher consistent flows is not as aesthetically pleasing as in an undammed river, but we found no evidence to suggest that there are ecological impacts there.

On behalf of the LIHI Governing Board, I want to reiterate LIHI's appreciation for your organization's participation in the LIHI Certification Program. If you have any questions on this matter, please feel free to contact me.

Sincerely,



Shannon Ames
Executive Director

Attachment: LIHI Response to MDMR comment letter

⁵ https://lowimpacthydro.org/wp-content/uploads/2020/07/Rumford-Falls-2019-Recertification-Report_Final.pdf

⁶ <https://lowimpacthydro.org/wp-content/uploads/2020/11/Comment-letter-MDEP-2019-Rumford-Falls.pdf>



March 18, 2021

Casey Clark
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21 State House Station
Augusta, ME 04333

Via email: Casey.Clark@maine.gov

RE: LIHI Recertification Decision on the Medway, Orono and Stillwater Projects

Dear Casey,

I am writing to notify you that LIHI has made a preliminary determination that the Medway, Orono and Stillwater Projects located on the Penobscot River, West and Stillwater Branches qualify for LIHI Recertification. MDMR filed timely public comments on the applications, and I assure you that we gave your input serious consideration in our deliberations. Such comments are a very important part of the LIHI certification process and are addressed in the review reports in these weblinks for [Medway](#), [Orono](#), and [Stillwater](#). We also considered the applicant's response to your comments found [here](#).

Ultimately, the decision by LIHI was to recertify the Projects with several conditions relevant to your comments. You may know that LIHI has an appeals process that is available to stakeholders who provide timely comments on certification applications, but I am hopeful that the description of our rationale in the review reports and the related conditions found in Section IX of each report that are placed on these certifications adequately address your concerns.

For all three projects, the conditions imposed on the Certificates are intended to encourage ongoing dialogue among the parties, with a goal of reaching agreement about specific timelines and scopes of additional fish passage studies and/or needed facility modifications.

Medway: MDMR recommends that LIHI certification for Medway be delayed or be contingent on completion of improvements to downstream passage for eels.

- Condition 3 addresses downstream eel passage and the upcoming 2021 study, including any agency recommendations for modifications of passage facilities based on study results.
- Conditions 1 and 2 recognize potential future changes that may be needed for upstream and/or downstream passage for all species.

Orono: MDMR recommends that LIHI certification for Orono be delayed or be contingent on A) carrying out the agency's recommendations for upstream passage, in addition to B) committing to a prudent timeline to complete the additional studies as identified in your comment letter. In addition, MDMR noted that Orono project impacts should include an acknowledgement of the presence of

American eel and sea lamprey within Zone 1, 2, and 3 of the Project.

- The review report acknowledges the presence of American eel and sea lamprey.
- Condition 2 addresses upstream passage including any need for additional studies or fish lift modifications.
- Conditions 1, 3 and 4 recognize the potential need for additional studies and/or future changes to facilitate upstream and/or downstream passage for all species.

Stillwater: MDMR recommends that LIHI certification for Stillwater be delayed or be contingent on committing to a prudent timeline to complete the additional studies of downstream passage identified in your comment letter.

- Conditions 1, 3, and 4 are similar to Orono's conditions and recognize the potential need for additional studies and/or future changes to facilitate downstream passage for all species.
- Condition 2 addresses upstream passage including any need for additional studies.

On behalf of the LIHI Governing Board, I want to reiterate LIHI's appreciation for your organization's participation in the LIHI Certification Program. If you have any questions on this matter, please feel free to contact me.

Sincerely,



Shannon Ames
Executive Director

cc: Gail.Wippelhauser@maine.gov, Dan.McCaw@penobscotnation.org, Jeff.Murphy@noaa.gov,
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