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# LEGAL OBSTACLES AND INCENTIVES TO THE DEVELOPMENT OF SMALL SCALE HYDROELECTRIC POWER IN CONNECTICUT



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INTRODUCTION

This memorandum describes in detail the legal and institutional obstacles to the development of small scale hydroelectric energy at the state level. It is designed to aid the developer in the determination of which permits, licenses and laws of the state must be secured or complied with for the development of a project. However, the developer should be aware that the state regulatory system does not comprise the universe of hydroelectric regulation. The federal government also exercises extensive regulatory authority in the area.

This dual regulatory system is a function of the federalist nature of our government. Federalism permits both the federal government and the state government to regulate and license certain aspects of a developer's project. Principles of federalism often support a finding that the federal regulation in question will be superior to comparable state regulation. This superiority of federal law can divest the state of any regulatory authority in a given area. Typically, the developer, with this general principle in mind, is compelled to wonder why he must be concerned with the state system at all. The following discussion will examine the area of federal-state relationships with the aim of creating a more orderly understanding of the vagaries of the system.

Thus, the remainder of this introductory section will examine the dual regulatory system from the standpoint of the appropriate legal doctrine, the law of pre-emption, application of the law to the case of hydroelectric development and will conclude with an inquiry into the practical use of the doctrine by the Federal Energy Regulatory Commission. (Hereinafter the FERC).

A. The Law of Pre-emption[a]

As alluded to above, pre-emption is the term that describes, in a federalist system, the ability of the law of one sovereign to take precedence over the law of a lesser sovereign. Specifically, it is the supremacy of the federal law to the state law.

The doctrine of pre-emption is derived from the U.S. CONST. art. VI, cl. 2, which states: "...[t]his Constitution, and the Laws of the United States . . . and all Treaties . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." This clause is the basis of federal supremacy. On its face, the supremacy clause purports to divest the states of authority. However, the principles of federalism do not support such a reading. The federal government is a government of delegated authority. Its laws can be supreme only within the scope of its delegation.[b]

Thus, before the doctrine of pre-emption can be invoked, the federal measure in question must be within an area of the authority delegated to the federal government. In other words, the federal action must have the capability to pre-empt the state action. It is implicit in the above statement that there are certain areas of regulation in which the federal government does not have a pre-emptive capability. Where pre-emptive capability

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a See generally Gunther, Constitutional Law ch. 5 § 2 (9th Ed. 1975); Tribe, American Constitutional Law § 6-23 et seq. (1978); and Engdahl, Constitutional Power ch. 12 (1974).

b See McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 405 (1819), "...government of the Union though limited in its power is supreme within its sphere of action."

is lacking, the state law will control.[c]

Once pre-emptive capability is determined to exist, further inquiry must be made to ascertain whether pre-emption exists. Whether a particular state measure is actually pre-empted by a federal measure depends upon the judicially-determined Congressional intent.[d] At this point, the difficulty becomes one of how to determine the intent of Congress.

The U.S. Supreme Court has, on a case by case basis, articulated factors which it declares to be indicative of the Congressional intent to pre-empt. At times the Court has examined the federal statutes to see if they deal with the matter exhaustively. From exhaustive federal regulation the Court infers an intent of no state regulation.[e] Where the Court can infer a need for national uniform standards, pre-emption will be appropriate.[f] The Court has also found pre-emption proper where there are contradictory federal and state

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c
See, e.g., Regents v. Carroll, 338 U.S. 586 (1950); where the Court held that the F.C.C. could, pursuant to the federal power of regulating interstate commerce, grant or deny or condition the grant of a radio broadcasting license. Here, the license condition required the unilateral disaffirmance of a contract with a third party. Such a condition violated state law which prohibited unilateral disaffirmance. The Court held that while the federal government has pre-emptive capability in the area of interstate commerce, it had no such privilege in the area of state contract law. Hence, state contract law was supreme.

d
See, e.g., City of Burbank v. Lockheed Air Terminal Inc., 411 U.S. 624 (1973).

e
E.g., Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co., 394 U.S. 369 (1969).

f
E.g., Campbell v. Hussey, 368 U.S. 297, 301 (1961); stating "we do not have the question of whether [state] law conflicts with federal law. Rather we have the question of pre-emption . . . [Here] complementary state regulation is as fatal as state regulation which conflicts with the federal scheme." Cf. Florida Lime and Avocado Growers Inc. v. Paul, 373 U.S. 132 (1963) finding pre-emption inappropriate as federal law was concerned with minimum standard rather than uniform standard.

requirements making compliance with both impossible.[g]

Thus, given a finding of the pre-emptive capability of the federal law and a finding that an appropriate basis exists to infer that the Congressional intent was pre-emption, federal law will be superior to state law.

The following section will examine the application of these principles by the Court to the case of hydroelectric development.

B. Pre-emption and Hydroelectric Development

1. The Federal Power Act

In the area of hydroelectric development the Federal Power Act enjoys pre-emptive capability. This pre-emptive capability is based upon the Federal Commerce Clause.[h] That clause gives to the Congress the power "to regulate commerce . . . among the several states."[i] Federal jurisdiction to regulate commerce has been held to include the regulation of navigable waterways.[j] Thus, federal regulation of navigable waterways may preclude state regulation. However, the regulation of property rights is not a federal power and in that area the federal law does not have a pre-emptive capability. State property law will govern the rules pertaining to water rights.[k]

The U.S. Supreme Court has also addressed the issue of whether the Federal Power Act actually pre-empts state licensing authority. The Court held

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g See Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824).

h U.S. CONST. art. I, § 8, cl. 3.

i Id.

j Gibbons v. Odgen, 22 U.S. (9 Wheat) 1, 84 (1824), "...all America understands and has uniformly understood the word 'commerce' to comprehend navigation."

k First Iowa Hydroelectric Coop. v. F.P.C., 328 U.S. 152, 171-176 (1946). Compare Regents v. Carroll, 338 U.S. 586 (1950).

that an applicant need not comply with state permit requirements to secure a federal license.[1] Further, the Court found that the intent of Congress was to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation.[m] Given that finding of intent, the section of the Federal Power Act which requires each applicant to submit satisfactory evidence of compliance with state law[n] was interpreted to only require the Federal Energy Regulatory Commission to consider state laws when granting a federal license, but not to require an applicant to comply with state law.[o] Thus, pre-emption of state licensing by federal licensing is appropriate, given the Congressional call for a "complete scheme" evidencing exhaustive and uniform regulation.

However, the FERC may by regulation require evidence of the applicant's compliance with any of the requirements of a state permit that the Commission considers necessary. Hence, the Commission has the discretionary authority to require compliance with state permit requirements.[p]

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1 First Iowa Hydroelectric Coop. v. F.P.C., 328 U.S. 152 (1946).

m Id. at 180.

n 16 U.S.C. § 802(b) (1976).

o First Iowa Hydroelectric Coop. v. F.P.C., 328 U.S. 152, 177-178 (1946).

p Id. See F.P.C. v. Oregon, 349 U.S. 435, 445 (1955). The State challenged the adequacy of license provisions approved by the Commission for the conservation of anadromous fish. The Court held that the Commission acted within its power and discretion by granting the license and that the state could not impair the license by requiring the state's additional permission or more stringent requirements.

2. The Public Utility Regulatory Policies Act of 1978

Into the already complicated dual system of hydroelectric power regulation, Congress has injected a surprisingly progressive piece of legislation: The Public Utility Regulatory Policies Act of 1978 (hereinafter cited as PURPA), signed into law by President Carter on November 9, 1978, as part of the 5-bill National Energy Act.[q] The eventual impact of PURPA, whose implementing regulations are being drafted as of this writing, is far from certain.[r] However, a few broad conclusions regarding state and federal jurisdiction can be made based on the legislation, itself, and the Conference Managers Report which accompanied it.

The traditional regulatory scheme of things has been that a person selling electric energy for ultimate distribution to the public would be considered an electric utility and subject to federal jurisdiction if the electricity is sold for resale or in interstate commerce, and state jurisdiction if it is sold intrastate directly to the consumer.[s] As explained above, this system results from the Federal Power Act, the Commerce Clause[t] and the doctrine of pre-emption.

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[q]The other four pieces of legislation comprising the National Energy Act are: National Energy Conservation Policy Act; Energy Tax Act of 1978; Powerplant and Industrial Fuel Use Act of 1978; and Natural Gas Policy Act of 1978.

[r]Rules implementing the legislation herein under discussion are to be issued by FERC by November 8, 1979, to be implemented by state regulatory authorities and nonregulated utilities by November 8, 1980.

[s]16 U.S.C. § 824 (1975), Section 201 of the Federal Power Act.

[t]One of the bases for Commerce Clause invocation is the fact that a utility selling to another utility for eventual resale is interconnecting to an interstate transmission grid and will "affect" interstate commerce even if both the selling and purchasing utilities are located within the same state. See F.P.C. v. Union Electric Co., 381 U.S. 90, reh. denied, 381 U.S. 956 (1965).

PURPA seeks to turn this system upside down in order to further the Congressional intent to encourage the development of small power production facilities, such as small scale hydroelectric plants.[u]

One aspect of this reordering is that a hydroelectric plant which meets the qualifications set out in § 201 of PURPA, i.e., becomes a "qualifying facility" (hereinafter cited as QF), could have its rates determined by a state public utility commission, in spite of the fact that its sales enter the interstate grid and are intended for resale. Although FERC will retain some jurisdiction by setting out the rate-making standards which the state commissions will be required to follow, the day-to-day administration of the wholesale rate-making involved will fall to the states for the first time.

This contravention of traditional jurisdiction is further extended by a provision in PURPA which gives FERC the discretion to exempt QF's from substantial portions of now-existing state and federal law.[v] This exemption authority is premised on the Act's purpose of removing obstacles to the development of small power production facilities. The exemption from certain provisions of federal law, such as parts of the Federal Power Act and the Public Utility Holding Company Act, serves the Congressional goal of removing the extensive scrutiny of organizational and financial details which accompanies governmental regulation of power companies and acts as a substantial disincentive to alternative

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[u]The scope of PURPA encompasses much more than the principles discussed in this introduction. Even the Title II sections which provide the jurisdictional authorities discussed herein apply to facilities other than hydro; e.g., cogenerators. For a complete discussion of PURPA's effects on small scale hydroelectric development see FEDERAL LEGAL OBSTACLES AND INCENTIVES TO THE DEVELOPMENT OF THE SMALL SCALE HYDROELECTRIC POTENTIAL OF THE NINETEEN NORTHEASTERN UNITED STATES, Energy Law Institute (second draft) (1979).

[v]§ 210 (e)(1) of PURPA.

energy development.[w] The exemption from state law, however, meets an additional concern. Without it, the states might have an argument to the effect that the field of wholesale rate regulation has no longer been pre-empted and they are therefore free to step into the void created by the removal of exhaustive federal involvement. Because this would have the effect of subjecting QF's to precisely the kind of utility-type regulation Congress sought to avoid, this idea of pre-emption by exemption was utilized.

Although provisions exempting QF's from certain state and federal regulations will only be implemented if FERC "determines such exemption is necessary to encourage . . . small power production,"[x] a recent FERC Staff paper on this section states: "It is clear from the Conference Report that Congress intended the Commission to make liberal use of its exemption authority."[y]

3. Federal Clean Water Act

A current example of this type of coordination between federal pre-emptive authority and day-to-day administration by the states is found in the area of water quality. Under the Federal Clean Water Act, authority has been conferred upon appropriate state agencies to monitor and enforce various aspects of water quality. Certain state agencies have also been designated to issue § 401

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[w] "...the examinations of the level of rates which should apply to the purchase by the utility of the . . . small power producer's power should not be burdened by the same examination as are utility rate applications, but rather in a less burdensome manner. The establishment of utility type regulations over them would act as a significant disincentive to firms interested in . . . small power production." Conference Manager's Report, accompanying § 210 of PURPA.

[x] § 210 (d)(1) of PURPA.

[y] STAFF PAPER DISCUSSING COMMISSION RESPONSIBILITIES TO ESTABLISH RULES REGARDING RATES AND EXCHANGES FOR QUALIFYING COGENERATION AND SMALL POWER PRODUCTION FACILITIES PURSUANT TO SECTION 210 of THE PUBLIC UTILITY REGULATORY POLICIES ACT OF 1978, page 7; Docket No. RM79-55, Federal Energy Regulatory Commission, June 26, 1979.

water quality certificates and § 402 "point source" permits. As in what is expected to be the case with electric utility regulation under PURPA, in the area of water quality, there is no dispute as to which sovereign's law applies; the federal law applies and is administered by a state agency. The federal law establishes a minimum standard for the states to implement. Consistent with the law of pre-emption, a state may require a higher standard,[z] i.e., a standard which goes even further in carrying out the intent of Congress.

C. The Practical Use of Pre-emption

The above discussion has detailed the legal use of the pre-emption doctrine. The purpose of this section is to describe the doctrine in practice.

The FERC prefers that a developer comply with appropriate state permits before applying to it for a license. The preference is grounded in two rationales. First, the FERC is aware of the federal-state relationship and the possible political ramifications of totally ignoring state input. Second, the FERC must, in granting the license, make a determination that it is a project best suited to the comprehensive development of the waterway. The state has an interest in the use and development of its watercourses and its opinion of their development is important to the FERC. Hence, the FERC values state input where it is reasonable.[aa] Thus, the practical application of pre-emption dictates that the hydroelectric developer adhere to the state's legal and regulatory system.

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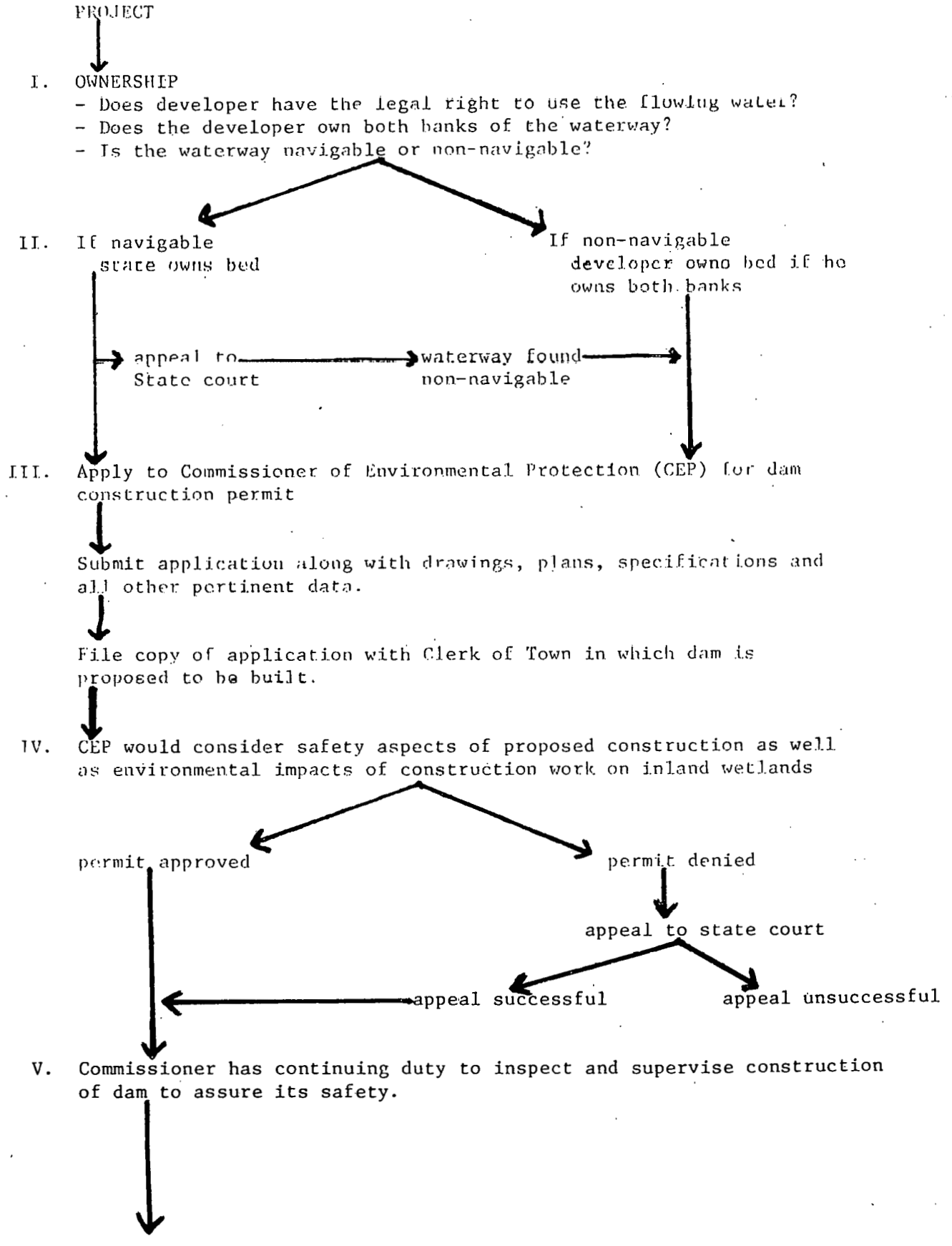
[z] See Florida Lime and Avocado Growers Inc. v. Paul, 373 U.S. 132 (1963).

[aa] See F.P.C. v. Oregon, 349 U.S. 435 (1955).

With respect to PURPA, the federal agency, FERC, will establish the guidelines for rates for sales and exchanges of power between electric utilities and qualifying small hydroelectric projects and will prescribe rules for exemptions from state and federal regulation. These standards and rules will be administered by state agencies, i.e., state public utility commissions. Accordingly, the developer of a SSH project should be aware of the FERC standards on rates and rules on exemptions and should know that he/she will be dealing directly with state agencies.

The regulatory system which is presently in place with regard to clean water will confront the developer at the state level. In most states, this federally-conferred authority will be administered by an agency such as the Department of Natural Resources. These agencies will require the developer to meet certain water quality standards, set by the state and federal government and will mandate that the SSH developer obtain the requisite certificate and permit, as required by the Federal Clean Water Act.

FLOW DIAGRAM OF REGULATION OF
SMALL DAMS IN CONNECTICUT



VI. Upon completion of construction, developer must file plans and descriptions of the work as actually completed.

CEP issues certificate of approval to be filed by developer with town land records.

VII. Does the developer anticipate flowage upon adjacent property?

Yes

Developer must institute action in Superior court against adjacent landowners for a flowage easement

Committee decides whether flowage would be of public use

If within public use, easement would be granted specifying dam height and dimensions and period of time which dam may be maintained

Committee would compute damages which developer must pay adjacent landowner to flow land

No

VIII. Does developer anticipate connection to an electric power grid by means of a transmission line of a design capacity of sixty-nine (69) kilovolts or more?

Yes

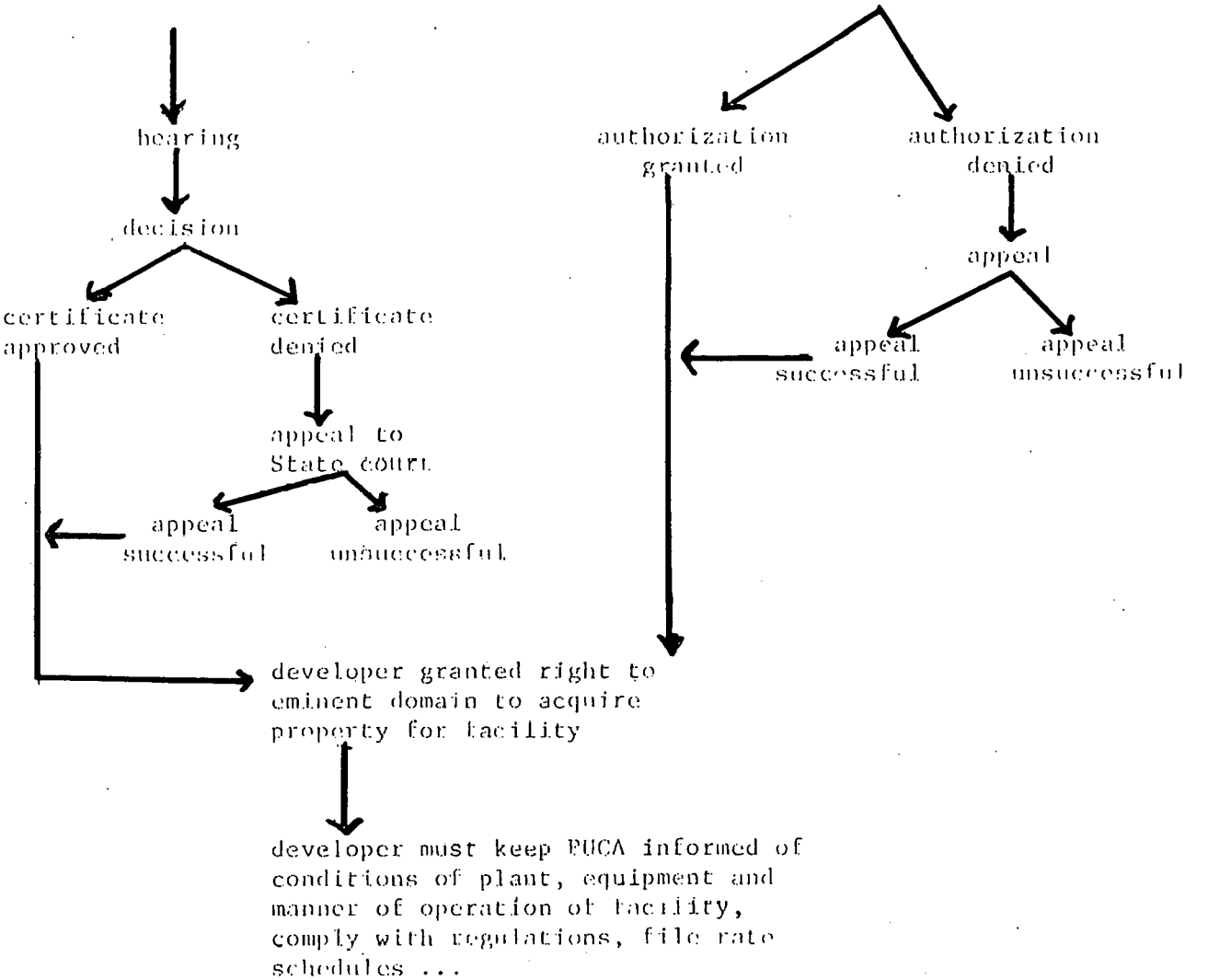
developer must file a statement of intent to acquire property with Power Facility Evaluation Council (PFEC)

Developer must file application for certificate of environmental compatibility and public need

notice

No

Developer would file application with Public Utility Control Authority seeking authorization to generate, transmit, distribute and sell electricity; and designation as a public service company (includes electric company owning, leasing, maintaining, operating plant and equipment; does not include municipality or municipal corporation)


hearing
decision
certificate approved
certificate denied
appeal to State court
appeal successful
appeal unsuccessful
authorization granted
authorization denied
appeal
appeal successful
appeal unsuccessful
developer granted right to eminent domain to acquire property for facility
developer must keep PUCA informed of conditions of plant, equipment and manner of operation of facility, comply with regulations, file rate schedules ...

## I. CONNECTICUT WATER LAW

### A. The Right to Use the Bed, Banks and Flowing Water at a Given Stream Site

#### 1. Requisite Property Interests

The preliminary obstacle that any developer must confront is obtaining authority to utilize the bed, banks and flowing water at his proposed site. This necessarily involves a determination of: 1) ownership of the stream banks and bed and the manner for obtaining either title or use; 2) existing constraints with regard to the use of the water.

Connecticut follows the riparian theory of water law.[1] Under this thoery, private rights in the flowing water of a river or stream are vested in those landowners whose lands border the river or stream. Riparianism contrasts with another theory of water law which has been adopted by a number of Western states, i.e., the prior apporpriation doctrine. Under prior appropriation, the private right to utilize flowing water vests in the earlier user regardless of the location of any land he might own.[2]

Riparianism constitutes a cost to the developer inasmuch as his right to utilize the flowing water at his proposed site is dependent upon the acquisition of property interests in the

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[1] See Wargo v. Connecticut Power and Light Co., 127 Conn. 629, 18 A.2d 924 (1941).

[2] See generally Richard R. Powell, The Law of Real Property, ¶ 733 et seq. (1977).

abutting land on both sides of the waterway. The normal procedure would be for the developer to purchase or lease the requisite interests from the appropriate landowners. In certain circumstances, he may obtain the authority to acquire abutting land by eminent domain.[3]

In addition to obtaining the necessary interests in the banks of a stream, the developer must be able to utilize the streambed. Ownership of the streambed turns upon a determination of whether the watercourse in issue is navigable or non-navigable. Title to the underlying land of a navigable waterway is held by the State in trust for the public.[4] This "trust" essentially incorporates the public rights of navigation and fishing.[5]

The legal definition of navigability varies from state to state. It appears that Connecticut has followed the English Common Law definition which provides that navigable streams are those which are subject to the ebb and flow of the tide.[6]

This definition has been rejected by the great majority of states and replaced by the "navigable in fact" doctrine. This is the same doctrine utilized by the Federal government

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[3]See, e.g., 16 U.S.C. § 814 (1976) which permits a federal licensee to condemn land upon a showing of a good faith but unsuccessful effort to purchase.

[4]See State v. Brennan, 3 Conn. Cir. Ct. 413, 216 A.2d 294 (1965).

[5]See Richards v. New York, New Haven and Hartford R.R. Co., 77 Conn. 501, 60 A. 295 (1905).

[6]See Delinks v. McGowan, 148 Conn. 614, 173 A.2d 488 (1961); State v. Brennan, supra note 4.

for purposes of the interstate commerce clause. While state adaptations may vary somewhat, the doctrine essentially provides that rivers are navigable when they are used, or susceptible to being used a highways of commerce.[7] While no Connecticut case was found in point, states following the "ebb and flow" theory of navigability frequently incorporate the "navigable in fact" doctrine into their common law. For example, in neighboring Massachusetts, if a stream is navigable in fact -- even though non-navigable in law -- the title which is held by the respective riparian owners will be subject to a superior public easement of passage.[8]

The significance of a determination that a stream is navigable -- distinctions of "in law" and "in fact" notwithstanding -- is that any right a developer may have with respect to such stream is subordinate to a superior right of the public. The developer's proposed use must not seriously interfere with the "public easement." Consequently, the State will subject the developer's request to utilize the bed of a navigable stream to a "public interest" scrutiny prior to granting approval. If it is found that the public rights in a navigable stream will be unreasonably infringed upon, the State is essentially without authority to grant approval. To do otherwise in such circumstance would constitute a violation of its "trust."

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[7] See, e.g., Arizona v. California, 283 U.S. 423 (1931).

[8] See, e.g., Ingraham v. Wilkinson, 21 Mass. (4 Pick.) 268 (1927).

Since any right the developer may have in a navigable stream is inferior to the public easement of passage, the right is subject to any improvement the State or Federal government may make for purposes of navigation. The consequences of such action may indeed be harsh. For example, although an improvement might well result in substantial injury to the developer's ability to generate power, he may be left without a remedy.[9]

As previously noted, the developer is confronted with the initial task of obtaining either title or interest to the banks and streambed at his proposed site. In the event that his site is located on a navigable stream, he must look to the State for permission.[10] In the event that the developer's proposed site is located on a non-navigable stream, he must obtain title or interest from the appropriate riparian landowners. If the stream is navigable -- either in law or in fact -- any interest he acquires will be subject to a superior public right of navigation and his proposed use will be subjected to a "public interest" scrutiny.[11]

The obvious advantage of locating a L.H.H. site on a non-navigable stream is that the stream is not subject to the public easement of navigation. A disadvantage is that it may occasionally be difficult to locate the holder of title to the streambed.

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[9] See Powell, supra note 2, ¶ 723.1 et seq.

[10] Id. ¶ 160.

[11] Id. ¶ 723.1.

In some instances, the owner of the streambed may be an individual other than the abutting landowner. On balance it would appear that locating a site on a non-navigable stream is the more attractive alternative in view of the increased regulation that obtains with respect to navigable waterways. However, the number of streams categorized as non-navigable under both State and Federal law is likely to be quite limited particularly in light of the Federal government's broad definition of navigability.

2. The Reasonable Use Doctrine

Under the riparian theory of water law, private rights in rivers and streams are confined to the use of flowing water. A riparian proprietor does not "own" the water that flows by his estate.[12]

It appears that Connecticut limits the use of a watercourse by the "reasonable use" theory of riparian law.[13] Under this thoery, a court will weigh and balance the various rights of riparian proprietors and determine the use to which each is entitled.[14] The Connecticut Court appears to have consistently applied this rationale notwithstanding the fact that some decisions have utilized the language of another

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[12] Dewitt v. Bissell, 77 Conn. 530, 60 A. 113 (1905).

[13] See Wargo v. Connecticut Light and Power Co., 127 Conn. 629, 18 A.2d 924 (1941).

[14] Id.

theory of stream use under riparianism, i.e., "natural flow."[15]

The theory of reasonable use constrains the extent to which a developer may utilize the flowing water at his proposed site inasmuch as his use must not exceed a "reasonable" one. The exercise of his right will be measured against the like rights and interests of other riparian proprietors.[16] If it is determined that a given riparian owner's use is unreasonable, he may be liable for any damages caused another riparian proprietor as a result of such use. In addition, in certain circumstances his activity may be enjoined. While it is necessary for a complaining riparian to demonstrate some type of actual damage, it is sufficient for him to show an injury to his rights as a riparian.[17] For example, in a situation involving diversion of a watercourse, damages are implied.[18]

Any use that materially diminishes the flow of a watercourse is an unreasonable one. In addition, an upper riparian proprietor has no right to gather and impound waters and then suddenly let them loose on the land of the lower proprietors.[19]

The elusiveness of the concept of "reasonable use" and the uncertainty it engenders may well be a cause for concern to the

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[15] See, e.g., Dimmock v. City of New London, 157 Conn. 9, 245 A.2d 569 (1968). Under the natural flow theory of riparian law, a riparian proprietor is entitled to have the water of a stream remain undiminished in quantity and unpolluted in quality. He may enforce this right against other riparians whether he sustains any injury or not. The Court will not weigh and balance the competing uses of riparian proprietors as it does under the reasonable use doctrine.

[16] Id.

[17] Id.

[18] Id.

[19] Id.

developer. It must be noted, however, that the theory clearly incorporates the use of water for power purposes as a reasonable one.[20] The developer, however, must determine that this use on a particular stream will be viewed as reasonable in relation to the other riparian owners.

3. Connecticut's Flowage Act - Modification of the Common Law

Under the common law, once an individual had gained the necessary property interests he could build a dam. If he overflowed only his own land, he encountered no difficulty. However, if he flowed the lands of another, his action could have been adjudged a nuisance and a court could have ordered his dam removed. The consequences of this aspect of the common law could well have proved devastating to the early industrial development of the States. The operation of a gristmill or sawmill, both so essential to early colonial life, could have been halted by the mere whim of an upper riparian whose lands had been flowed.

Another problem confronted the states with regard to the use of waterways for power purposes. A given stream could support the efficient operation of only a limited number of mills. Some method had to be devised in order to protect a miller from the impairment of his operations due to the construction of a dam below him. The solution to these inherent difficulties under the common law came in the form of the Mill Acts. The Connecticut version, entitled the "Flowage Act,"

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[20] Cf. DeWitt v. Bissell, supra note 12 in which the Court notes the favored status of the use of water for power purposes.

is still in effect today.[21] The Act provides the developer with significant assistance in his efforts to raise a head of water for the generation of hydroelectric power.

If a developer anticipates flowing water onto another's land and agreement cannot be reached regarding the appropriate amount of damage, he may proceed under the Flowage Act.[22] In essence, the petitioner (developer) must bring an action against the owner of the land to be flowed in the Superior Court for the county in which the land lies. This petition must contain descriptions of the land to be overflowed and the dam or other proposed improvement (including location and proposed height and dimensions). Generally speaking, this action is treated like any other civil action. Service of process on the owner of land to be flowed would be mes ne process (a writ of summons describing the parties, the court to which it is returnable, the return day and the date for the filing of an appearance). The summons must be accompanied by the petitioner's complaint.[23]

Any petition is to be heard and decided by a committee of three disinterested property owners appointed by the court. Initially, the committee must make a finding as to whether the flowing or taking of the respondent's land would be of "public use."[24]

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[21]Conn. Gen. Stat. Ann. §§ 52-446 et seq. (West 1972).

[22]Id.

[23]Id. § 52-446.

[24]Id. § 52-447.

In interpreting the term public use, the courts have taken it to be synonymous with public benefit or advantage:

> It would be difficult to conceive a greater public benefit than the garnering up of the waste waters of innumerable streams and rivers and ponds and lakes, and compelling them with gigantic energy to turn machinery and drive mills and thereby build up cities and villages, and extend business, the wealth, the population and the prosperity of the state.[25]

This concept of public use will be further addressed in the discussion below.

Assuming for the moment that the developer can successfully establish a public use, the committee is to authorize the flowage easement and specify the dam height and dimensions and the period of time in which the dam may be maintained.[26] Additionally, the committee must assess the damages to be paid by the developer.[27] The Superior Court is to then intervene and add fifty per cent (50%) to the amount specified by the committee and order the developer to pay the full amount to the individual whose land is to be overflowed.[28]

Either party may move for a reassessment of the damages by a jury. If the developer petitions for a jury determination, the following applies to him:

a) he must pay the costs of the application and hearing;

b) if the jury does not lessen the amount of damages to be paid, the developer will be required to pay the additional

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[25] Olmstead v. Camp, 33 Conn. 532, 551, 89 Am. Dec. 221 (1866).

[26] Conn Gen Stat. Ann. §§ 52-447.

[27] Id.

[28] Id.

costs of the other party;

c) if the amount of damages is decreased, payment of the other party's costs will not be required;

d) in the event that the jury raises the damages, all costs must be borne by the developer.[29]

If the Superior Court accepts the finding on damages, either from the committee or jury, the determination is final.[30] Consequently, the right to maintain the dam as established would be conclusive and binding upon the parties, their heirs and assignees.[31] Before the developer may flow the land in issue, and within sixty (60) days after the proceedings have ended, he is required to pay to the individual whose land will be affected the damages and costs assessed.[32]

It must be noted that the "Flowage Act" also provides that a dam may not be erected which will injure another lawfully existing mill dam.[33] This protection also extends to any mill site on which a dam or mill dam has been lawfully erected and used.[34] The protection may be lost or defeated by abandonment.[35] The question of whether the right to maintain a mill which has

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[29] Id. § 52-452.

[30] Id. § 52-451.

[31] Id. § 52-453.

[32] Id. § 52-453.

[33] Id. § 52-448.

[34] Id.

[35] Id.

been abandoned is one of fact to be determined by the committee.[36] The fact that an individual neglected to use his right coupled with a showing that he had no intention of improving the site for milling purposes, has been held to sufficiently support a finding of abandonment.[37]

A number of states have upheld their mill (flowage) acts on the theory that they constitute a proper exercise of the state's police power.[38] The rationale is that such acts merely seek to regulate conflicting property rights; there is no "taking" of private land.[39] The Connecticut Flowage Act, on the other hand, envisages an exercise of eminent domain power. This is evidenced by the statutory provision requiring a finding of "public use" before a petitioner may be authorized to flow the land of another.[40]

The Flowage Act has been justified as a proper delegation of the power to exercise the right of eminent domain on the grounds that the development of water power in the State is a public benefit which could not otherwise be realized.[41] Although historically this power has frequently been utilized by a number of small, private industrial enterprises, justification has been provided on the rationale that the development of water

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[36] McArthur v. Morgan, 49 Conn. 347, (1881).

[37] Curtiss v. Smith, 35 Conn. 156 (1868).

[38] See, e.g., Otis v. Ludlow Manufacturing Co., 95 Mass. (13 Allen) 10 (1866).

[39] Id.

[40] Conn. Gen. Stat. Ann. § 52-446 (West 1972).

[41] Olmstead v. Camp, supra note 25.

power for public use was primary while any private benefit was merely incidental.[42] It must be noted that this rationale, as it originally evolved, applied to gristmills and sawmills.[43] These enterprises were readily found to be sufficiently vested with a public purpose. During the Colonial period, the grinding of corn was a public necessity; millers were required by law to grind for all who brought corn to their mills. In addition, the rates a miller was permitted to charge were regulated by law. Sawmills were also essential to the prosperity of the community.[44]

It is quite plausible that a number of developers will encounter substantial difficulty in meeting the public use (benefit) threshhold under the Flowage Act. Few private enterprises will be able to stand on equal footing with the gristmills and sawmills of the Colonial period. It would seem that a L.H.H. project which has as its primary purpose the sale and distribution of electricity to the public should have little difficulty in demonstrating a sufficient "public use." On the other hand, the developer who utilizes the energy he produces solely for his own manufacturing purposes would not be able to proceed under the Flowage Act. Somewhat less clear is the situation in which the developer utilizes the power he produces for

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[42] Id.

[43] See generally Sackman, Nichols', The Law of Eminent Domain, §7.623 (3rd Ed. 1976).

[44] Id.

his manufacturing purposes and yet occasionally supplies power to a grid for distribution purposes. The committee of three disinterested property owners would have to initially determine whether the developer's activity confers the requisite degree of "public benefit." Even if the developer succeeds at this level, the determination may be subject to constitutional attack in the courts. Private land may not be taken for private use even though damages may have been paid. As one Connecticut Superior Court has noted in a different, but related, context: "in many situations, the right (of eminent domain) may be sought primarily for private enhancement or gain, with only such incidental general benefit or community advantage as might accrue from any successful private endeavor."[45] In such circumstance, the exercise of the power of eminent domain would be unconstitutional.

Since the Flowage Act requires a showing of public use, the developer in Connecticut is confronted with a burden not imposed upon developers in those states which uphold their mill acts on the theory that they regulate conflicting property rights.

a. Maintenance of Water Level

Once a dam has been constructed and the land has been overflowed, the question arises regarding the obligation of a developer to maintain a specific water level for the benefit

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[45] H.A. Bosworth and Son, Inc. v. Tamiola, 24 Conn. Supp. 328, 190 A.2d 506 (1963). While the focus of the Court in this decision is the State's Drainage Act, it also discusses and compares the rationale underlying the Flowage Act.

of those individuals whose lands have been overflowed. If the level of a pond is permitted to drop, offensive odors and mosquito infestation may result with the consequence that the value of flowed land will be adversely affected. On the other hand, if the developer is required to maintain a specific water level, the value of his property is likely to be imparied since there will be times when he cannot both maintain a specific level and generate power. This would be particularly true during the dry summer months.

In addressing this problem, the Connecticut Supreme Court of Errors has determined that the "favored position of the development of water power" requires striking the balance in favor of the dam owner.[46] The developer has thus been relieved of a potentially substantial burden.

B. Public Trust, Environmental Protection and Citizen Complaints

The concept of Public Trust has been previously noted during the discussion of navigable waterways. As the importance of preserving the quality of the nation's land, air and water has become increasingly realized, there has been a general tendency to increase the notion of the "Public Trust." The Connecticut legislature has declared:

> ...there is a public trust in the air, water and other natural resources of the State...and that each person is entitled to the protection, preservation and enhancement of the same. It is further found and declared that it is in the public interest to provide all persons with an adequate remedy to protect (these natural resources)

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[46] DeWitt v. Biswell, 77 Conn. 530, 60 A. 113 (1905).

from unreasonable pollution, impairment or destruction.[47]

The Department of Environmental Protection (hereinafter D.E.P.) has jurisdiction over all matters relating to the preservation and protection of the water resources of the state.[48] The D.E.P. is under the direction of a commissioner who is required to carry out the environmental policies of the state. Consistent with the environmental policy of the state, the Commissioner is empowered to promote and coordinate management of water, land and air resources to assure their protection, enhancement and proper allocation and utilization; provide for the protection, enhancement and management of inland, marine and coastal water resources, including, but not limited to, wetlands, rivers, estuaries and shorelines; regulate the storage, handling and transportation of solids, liquids and gases which may cause or contribute to pollution; and provide for minimum state-wide standards for the mining, extraction, excavation or removal of earth materials of all types.[49] The Commissioner of Environmental Protection also has the power to adopt, amend or repeal such environmental standards and regulations as are necessary and proper to carry out his functions.[50]

If there are any citizen complaints alleging a violation of any environmental statute or regulation, they are directed to the Council on Environmental Quality. The Council is directed by statute to investigate these allegations, and if proper, to direct the matter to the Commissioner of Environmental Protection

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[47] Conn. Gen. Stat. Ann. § 22(a)-15 (West 1975).

[48] Id. § 22(a)-5.

[49] Id. § 22(a)-6.

[50] Id. § 22(a)-6.

who is required to conduct a public hearing on the issue.[51]

The developer is likely to be acutely aware of the affects of his L.H.H. project on the environment. This will, no doubt, be due in part to his obligation to comply with Federal and state regulations which are permeated with environmental concerns. Compliance with these should generally provide protection against citizen complaints. Nevertheless, the developer should be aware that in certain situations a successful allegation under the citizen complaint statute may impose additional delay, and consequently additional costs with respect to his project.

C. Liability for Dam Breach

The developer will naturally be concerned with the extent of his liability for injuries resulting from dam breach. The present status of the law in Connecticut is favorable to him; a developer will be held liable only if he was negligent. The Connecticut courts have determined that a dam owner is not to be viewed as an insurer. Thus the measure of his duty in the construction and maintenance of his dam is to use reasonable care and conduct operations of the dam in a non-negligent manner.[52] This theory of liability contrasts with another theory recently adopted by the state courts in Massachusetts: "strict liability."[53] Under strict liability, a developer would be held liable for those damages foreseeably caused by dam breach regardless of any fault on his part.[54]

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[51] Id. § 22(a)-13.

[52] Beauton v. Connecticut Light and Power Co., 125 Conn. 76, 3 A.2d 315 (1938).

[53] See Clark-Aihan v. Cromwell-Wright, 367 Mass. 70, 323 N.E. 2d 876 (1975).

[54] Id.

An obvious consequence of this theory of liability is that the risk of development is significantly increased. A further consequence is that insurers may be willing to extend coverage only to very low risk, e.g., run of the river, operations in strict liability jurisdictions.

While Connecticut still adheres to the negligence approach, the developer should be aware that state courts are frequently influenced by the judicial decisions of neighboring states. If the Massachusetts rationale proves to be persuasive, Connecticut may well adopt a "strict liability" approach at some point in the future.

## II. LICENSING, PERMITTING AND REVIEW PROCEDURES

### A. Dam Construction and Wetland Permits

Pursuant to the procedures outlined in § 25-110 to §25-119 of the Connecticut statutes, a developer must submit an application to the Commissioner of Environmental Protection for a permit to construct and operate a dam. The Commissioner has the power to formulate all rules, definitions, and regulations that are necessary in carrying out these statutory provisions relating to dams. The powers of the Commissioner include investigations and gathering data by entering upon private property so as to check dams, watersheds, sites, structures and general conditions.[55]

The developer must file, together with the application, the necessary drawings, plans, specifications and any other data which the Commissioner may be regulation require. A copy of this application must also be filed with the Clerk of the town in which the dam is proposed to be built.[56]

The issuance of a permit approving the construction of the dam is contingent upon a determination of the environmental impacts of the construction work on the inland wetlands, an inspection of the proposed site and an examination of the pertinent documents submitted with the application. These assessments are carried out by the Commissioner himself or by an appointed representative or by an independent consultant. The fee which may be exacted for

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[55] Conn. Gen. Stat. Ann. § 25-110 (West 1975).

[56] Conn. Gen. Stat. Ann. § 25-112 (West 1975).

the construction permit ranges between one and ten dollars ($1 and $10)[57] and is charged to the developer.

Once the construction permit has been granted, the developer is authorized to initiate construction of the dam. Throughout the construction process, the Commissioner has the continuing duty to maintain supervision over the dam to assure its safety. The Commissioner may exercise this supervisory function himself or may place a competent inspector on the work. The compensation for such an inspector is shared equally by the state and by the owner.[58]

Upon the completion of the construction of the dam, the developer must file plans and descriptions of the work as actually constructed. Should the Commissioner find that the structure has been constructed to his satisfaction and is safe, he would then issue a certificate approving the structure. The certificate of approval is subsequently filed by the developer with the town land records.[59]

As mentioned previously, the Commissioner is directed to determine the environmental impact of the construction work on the inland wetlands of the state. Specifically, section 25-112 obliges the Commissioner to base his determination whether to grant or deny the initial permit in accordance with the previsions prescribed in the Inland Wetlands and Watercourses Act.[60] A cursory reading of these provisions seems to imply that this statutory interplay triggers local inland wetland agency involvement and thus requires

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[57] Id.

[58] Conn. Gen. Stat. Ann. § 25-113 (West 1975).

[59] Conn. Gen. Stat. Ann. § 25-114 (West 1975).

[60] Conn. Gen. Stat. Ann. § 22a-30 to §22a-45, inclusive (West Cum. Supp. 1978).

a developer to seek and obtain a separate inland wetlands permit in addition to a dam construction permit. This notion is foreclosed, however, by a comprehensive reading of the regulations promulgated under the Inland Wetlands and Watercourses Act which provide in relevant part: the Commissioner of Environmental Protection is empowered to "license and maintain exclusive jurisdiction over activities in the inland wetlands and watercourses" including the construction or modification of any dam;[61] and "any permit granted or denied by the Commissioner is binding upon any local inland wetland agency as matters within his jurisdiction."[62]

The concept of exclusive jurisdiction in the Commissioner is further supported by two informal advisory opinions drafted by the Attorney General. In response to inquiries from the Department of Environmental Protection concerning dam construction and modifications in the inland wetlands, the Attorney General has expressed that while the legislation pertaining to dams and reservoirs is acknowledged to be concerned with the safety aspects of constructing, maintaining, altering and repairing dams, that is not the limit of its scope.[63] The provisions repose in the Commissioner the responsibilities of considering not only the immediate concerns of the effect of life and property, but also the more comprehensive considerations including the impact on inland wetlands of the state, to the exclusion of any local inland wetlands commission.[64]

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[61] Regs. 22a-39-4.3(a).

[62] Regs. 22a-39-4.3(f).

[63] Opinion of Attorney General expressed in letter dated June 9, 1977, to Hon. Stanley J. Pac, Commissioner of Environmental Protection from James J. Grady, Assistant Attorney General.

[64] Opinion of Attorney General expressed in letter dated April 12, 1976, to Hon. Joseph N. Gill, Commissioner of Environmental Protection from James J. Grady, Assistant Attorney General.

It is therefore permissible for a developer, once having obtained a proper dam construction permit, to proceed with excavating and dredging material from an impounded area without additional recourse to a local inland wetland agency for a second permit. Also, the creation of a pond or a lake which is incidental to or the result of the construction of the dam would be included in the statutory scheme governing dams and reservoirs and thus, would be authorized under a dam construction permit.[65]

Prior to issuing the dam construction permit, the Commissioner, as a matter of discretion, may submit a copy of the application to the local conservation commission for review.[66] The regulations are adamant, however, in maintaining that failure to receive comment from either of these agencies would not delay or prejudice the final decision on an application.[67] A hearing on the application is also discretionary; necessary only when the Commissioner finds that the proposed activity would present a significant impact or major effect upon a wetland or watercourse.[68] If after a full review of the environmental impact of the proposed action the Commission initially finds no such significant or major effect on the inland wetlands or watercourses, the Commissioner may allow the activity with or without conditions or limitations and no hearing would be required.[69]

As a matter of practice, a preponderance of dam construction

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[65] Supra, note 59.

[66] Regs. 22a-39-5.7(a).

[67] Regs. 22a-39-5.7(b).

[68] Regs. 22a-39-5.5.

[69] Regs. 22a-39-5.3.

and modification permits are granted by the Commissioner without recourse to a hearing.[70] Additionally, it has been intimated by the Superintendent of Dam Maintenance, within the Department of Environmental Protection, that to date a successful dam permit applicant need not obtain a water quality certificate or a separate channel encroachment permit in order to proceed with a project.[71] The rationalization for this one-stop approach is that it streamlines the administrative process, avoiding duplicity and unnecessary expense for both the applicant and the Commissioner. (The Commissioner is empowered with exclusive jurisdiction over the regulation of construction or placement of any obstruction within channel encroachment lines as well as discharges into the waters of the state and issuance of a permit for these activities would require an environmental assessment substantially the same as that required for a dam permit.)[72]

Additional justification for the Commissioner's position that separate permits need not be obtained, at least with respect to water quality certificates, can be found in the water pollution abatement statute itself which provides: "the commissioner may waive public hearings and approve applications of certain categories, types or sizes of discharges if they are not likely to cause substantial pollution."[73]

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[70]Telephone conversation with Superintendent of Dam Maintenance, Victor Galgowski, October 1978.

[71]Id.

[72]Regs. 29a-39-4.3(a).

[73]Conn. Gen. Stat. Ann. § 25-54b (West 1975).

"Pollution" as defined by statute means rendering unclean or impure of any waters of the state by reason of material discharged or deposited therein, so as to come in contact with any waters directly or indirectly.[74] "Rendering unclean or impure" means any alteration of the physical, chemical or biological properties of any of the waters of the state, including but not limited to change in odor, color, turbidity or taste.[75] To date a dam has not been considered a point source of pollution in Connecticut, however, faced with the pervasiveness of the statutory definitions for pollution and the present controversy in the federal courts concerning this matter, the Commissioner may be inclined to change his position.

Recently, a dispute has arisen as to the propriety of a dam owner who is attempting to remove his dam.[76] Relying upon the Attorney General's opinion, the Commissioner has maintained his position that the owner, having previously acquired a dam permit for the modification, does not have to obtain a separate local inlands wetlands permit. On the other hand, environmentalists have intervened and have claimed that the local permit is required. The Commissioner is aware that the Attorney General's opinion is advisory only and would have no force and effect in a court of law. In any event, a hearing has been scheduled which is hoped to resolve the dispute; however, the likelihood of future adjudication on this

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[74] Id.

[75] Id.

[76] Supra, note 16.

matter has not been discounted.

To a developer, it should be of primary concern to learn how such intervention, attacking the propriety of his project, may be effectuated and thereby cause him delay. Any citizen complaints alleging a violation of an environmental statute or regulation are directed to the Council on Environmental Quality. The Council is mandated by statute to investigate these allegations, and, if proper to direct the matter to the Commissioner of Environmental Protection who is required to conduct a public hearing on the issue.[77] A determination of the matter must be made and published by the Commissioner within forty-five (45) days after the hearing. Those aggrieved by the Commissioner's findings are afforded the opportunity to take an appeal to the superior court for the county or judicial district where the property subject to the dispute is located. Under Connecticut law, which is consistent with the law elsewhere pertaining to judicial review of administrative action, the scope of review by the court would be limited and concerned only with where the Commissioner acted illegally, arbitrarily or in abuse of his discretion.[78]

B. Environmental Protection: Review Procedures for State Sponsored and Funded Projects

As previously noted, the concept of "public trust" has gradually been expanded throughout the years.[79] One reflection of this has

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[77] Conn. Gen. Stat. Ann. § 22a-13.

[78] State v. Hillman, 110 Conn. 92, 147 A. 294 (1929).

[79] See discussion part I B this paper.

been the enactment of environmental protection (or policy) acts both on the national level and in a number of states. The Connecticut version is incorporated within the general statutory section on Environmental Protection.[80]

The General Assembly of Connecticut has directed that, to the fullest extent possible, each state department, institution or agency shall review its policies and practices to insure that they are consistent with the state's environmental policy.[81] Specific procedures for evaluation and review are mandated with regard to agency recommendation or initiation of actions which may significantly affect the environment.[82] Actions which may significantly affect the environment are defined as "individual acitivities or a sequence of planned activities proposed to be undertaken by state departments, institutions or agencies or funded in whole or in part by the state, which could have a major impact on the state's land, water air or other environmental resources, or could serve short term to the disadvantage of long-term environmental goals."[83] Such actions include new projects supported by state contracts and grants.[84] The statutory definition of "significant action" does not, hwoever, extend to those activities in which the State functions only in a permitting or licensing

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[80] For the specific provisions relating to review, see Conn. Gen. Stat. Ann. §§22a-1a through 22a-1f (West Cum. Supp. 1978).

[81] Id. § 22a-1b.

[82] Id.

[83] Id. § 22a-1c.

[84] Id.

capacity.[85] This contrasts with the policy of other states under similar laws.[86]

If the developer's project qualifies as one which may significantly affect the environment, an environmental impact evaluation (hereinafter EIE) must be proposed. All EIEs must be detailed statements which include the following:

1) a description of the proposed action;

2) the environmental consequences of the proposed action, including direct and indirect effects which might result during and subsequent to the proposed action;

3) any adverse environmental effects which cannot be avoided;

4) alternatives to the proposed action, including the alternative of not proceeding with the proposed action;

5) mitigation measures proposed to minimize environmental impacts;

6) an analysis of the short-term and long-term economic, social and environmental costs and benefits of the proposed action;

7) the effect of the proposed action on the use and conservation of energy resources.[87]

The EIE is to be prepared by the state agency primarily responsible for initiation or recommendation.[88] An affected developer,

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[85] Telephone conversation with Ms. Marianne Dickenson, Executive Director, Connecticut Council on Environmental Quality, January 3, 1979.

[86] See, e.g., Mass Gen. Laws Ann. ch. 30, § 61 et seq. (West Cum. Supp. 1978 - 1979).

[87] Conn Gen. Stat. Ann. § 22a-1b(b) (West Cum. Supp. 1978).

[88] Id.

however, will in all probability be required to submit a substantial amount of data in order to facilitate the preparation of an adequate EIE.

After an EIE is completed, it is submitted for comment and review to the Council on Environmental Quality, the Department of Environmental Protection and other appropriate agencies, and to the town clerk of each affected municipality.[89] In addition, copies must be made available for public inspection and comment.[90] The agency responsible for preparing an EIE is required to publish notice of its availability. If twenty-five (25) persons or an association having not less than twenty-five (25) persons request a hearing within ten (10) days of publication, the agency must provide one.[91] All comments received by the agency must be forwarded to the State Planning Council. The State Office of Policy and Management is required to review an EIE, together with the comments thereon, and make a written determination as to whether the EIE satisfies the state's policy on environmental protection. The determination is to be made public and forwarded to the agency which prepared the EIE.

The review requirements under the Connecticut version of the Environmental Protection Act poses a dilemma to the developer. It is likely that he will seek as much financial assistance as possible for his project. Such assistance may very well derive from state funding programs. However, if the developer receives state monies

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[89] Id. § 22a-1d(a).

[90] Id.

[91] Id.

he will be required to comply with the EIE preparation and review procedures. This will constitute additional delay and cost. If the developer must file an Environmental Impact Statement (hereinafter EIS) under the National Environmental Protection Act (hereinafter EPA), this additional burden may not be significant. A Federal EIS may be filed as a substitute for the State EIE.[92] In addition, it is not likely that the developer would be subjected to a more stringent comment and review under the state law than he would be under N.E.P.A. If for some reason, however, the developer is not required to file an EIS under N.E.P.A., the delay and cost of the State procedure may outweigh any benefit he may receive in the form of state financing. Each situation must be evaluated individually. In some circumstances, the developer may derive greater benefit by seeking funding from private sources.

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[92] Id. § 22a-1f.

## III. PUBLIC UTILITIES REGULATION

Before the discussion begins, it is necessary to ascertain the use to which the proposed small scale hydroelectric facility will be put. Sections A and B deal only with facilities which anticipate connection to an electric power grid by means of an electric transmission line of design capacity of sixty-nine kilovolts or more.[93] The statutory scheme described in Sections A and B represents the requirements mandated by the Public Utility Standards Act. This Act purports to: (1) provide for the balancing need for adequate public utility services at the lowest reasonable cost to consumers; (2) provide environmental quality standards and criteria for location, design, construction and operation of facilities at least as stringent as the federal standards; (3) encourage research to develop new and improved methods of generating and transmitting electricity with minimal damage to the environment; and (4) require annual forecasts of demand for electrical power in order to facilitate energy planning.

Section C deals with the regulation of electrical generating plants which do not come within the purview of the Public Utility Environmental Standards Act. Those facilities not utilizing an electrical transmission line of sixty-nine (69) kilovolts or more are governed by the Public Utilities Control Authority (PUCA). Municipalities or municipal corporations, however, are expressly exempt from PUCA jurisdiction.

### A. Statement of Intent to Acquire Land

Prior to entering an agreement for the acquisition of land, any

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[93] It is conceivable that a developer, desiring to connect his facility to an an existing transmission grid, would augment his voltage output generated by his 25 mw dam by means of step-up transformers.

person engaged in the transmission of electric power is required to file a statement describing the property and the reason for its acquisition. The acquisition may proceed unless the Council gives notice within thirty (30) days after the filing of the statement, that a hearing will be held to review the conformity of acquisition with the Council's regulations. Should a hearing be required, acquisition of the property cannot proceed until such time as the Council renders its approval.[94]

B. Certificate of Public Need and Environmental Compatability

The operation of the statute which governs the certification of major electrical generating plants is triggered by the proposed construction or modification of any "facility." The criteria which may reasonably pertain to a small scale hydroelectric project and thereby qualify the project as a "facility" within the statutory definitions are included as follows: an electric transmission line of design capacity of sixty-nine (69) kilovolts or more; such substations, switch yards and other facilities which may have an adverse environmental effect; any electric generating or storage facility using any fuel, including associated equipment for furnishing electricity by electric utilities.[95]

The Application Process:

The first step in obtaining a certificate of environmental compatibility and public need is to file an application with the Council.[96] Accompanying the application should be a fee of not more than $25,000, and such pertinent information as the following: (1) a description including estimated costs of the proposed transmission

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[94] Conn. Gen. Stat. Ann. § 16-50z.

[95] Id. § 16-50i.

[96] Id. § 16-50k.

line covering underground cable sizes and specifications, overhead tower design and appearance and heights conductor sizes and initial and ultimate voltages; (2) a statement and full explanation of why the facility is necessary and how it conforms to a long range plan for expansion of the electric power grid serving the state and interconnected utility systems; (3) safety and reliability information including planned provisions for emergency operations and shutdowns; (4) estimated cost information, including plant costs, plant service life, capacity factor and total generating cost per kilowatt hour; (5) a schedule showing the program for design material acquisition, construction and testing and operating dates; (6) available site information, including maps and description of present and proposed development and geological, scenic, population and load center data; (7) justification for adoption of the site selected including comparison with alternative sites; (8) design information including description of facilities, plant efficiencies, electrical connections to systems and control systems. Also included in the application would be information concerning forecasted loans resources and margins for each year.[97]

Notice:

Copies of each application are required to be sent to (1) the municipality which the facility is to be located, zoning commissions, planning commissions and inland wetlands agencies of each municipality; (2) the attorney general; (3) each member of the legislature in whose district the facility is to be located; (4) any agency, department or

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[97] Id. § 16-50m.

instrumentality of the federal government that has jurisdiction whether concurrent with the state or otherwise, over any matter that would be affected by such a facility; (5) the state of Connecticut Department of Environmental Protection, Department of Health, the Council of Environmental Quality, the Public Utilities Control Authority, the Department of Commerce and the Department of Transportation, as well as any other state or municipal agency as the Council may by regulation designate. Also, so as to substantially inform the public and afford interested persons sufficient time to prepare for the prescribed hearing a copy of the application should be published in the newspaper of general circulation in the area affected.[98]

The parties to the certification proceedings would include (1) the applicant; (2) each person entitled to receive a copy of the application so long as he has filed a notice of intent to become a party; (3) any public interest group formed to promote conservation and natural beauty, to protect the environment, personal health or biological values, to preserve historical sites, to promote consumer interests or to represent commercial and industrial interests so long as each group has filed a notice of intent to be a part; (4) an appointed representative of the attorney general to act as counsel for the Power Facility Evaluation Council.

Independent consultants may be employed to study and measure the consequences of the proposed facility upon the environment.

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[98] Id. § 16-50m.

Any reports issued by these consultants would become part of the record of the proceedings. It should also be noted that all parties to the proceedings would have the right to present oral testimony, cross examine witnesses or parties and would also be subject to cross examination.[99]

The Hearing:

Upon receipt of an application for certification the Council would set a commencement date and location for a public hearing sometime between 30 and 150 days of the receipt of the application. Notice of the date and location (the hearings would be located in the county in which the proposed facility is to be constructed) would be sent to the applicant and those persons who as described above, have received a copy of the application. A general notice to the public would also be published in the newspaper of general circulation in the area affected.[100]

The Decision:

Within ten months of the filing of an application, the Council is obligated by statute to render a decision upon the record either granting or denying the application as filed or granting it upon such conditions, limitations or modifications of the construction or operation of the facility as the Council deems appropriate. An opinion stating in full its reasons for the decisions would be filed along with the Council's order. The criteria used to base its decision to either grant or deny the application would include:

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[99] Id. §16-50h.

[100] Supra, note 97.

(1) the public need for the facility and the basis of that need and (2) the nature of the probable environmental impact, including a specification of every significant adverse effect, any conflict with the policies of the state concerning the natural environment, ecological balance, public health and safety, scenic, historic and recreational values, forests and parks, air and water quality and fish and wildlife. A decision granting an application would explain why the adverse effects or conflicts referred to are not sufficient reason to deny the application.

A copy of the order and opinion would be served upon each party and notice of the issuance would be published in the newspaper.[101]

The Effect of Certification:

Whenever the Council certifies a facility pursuant to the application process, this certification would preempt and be "in lieu of" all certifications, approvals and other requirements of state and municipal agencies with respect to any questions of public need, conveniences and necessity for the facility. Additionally, the successful applicant is granted the right to exercise the power of eminent domain to acquire property for the facility. Should the applicant initiate condemnation proceedings to acquire property for the proposed facility and it appears that any delay would prejudice the public interest, the court before whom the proceedings are pending may direct that the applicant be permitted to enter upon the property immediately and devote it to the public

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[101] Conn. Gen. Stat. Ann. § 16-50p.

use specified in the application.[102]

C. Public Utility Control Authority

Regardless of whether the developer contemplates connecting his facility to the electric power grid servicing the state, he must file an application with the Public Utilities Control Authority seeking authorization to generate, transmit, distribute and sell electricity. Any person or any corporation desiring to generate, transmit, distribute and sell electricity is required to file an application with the Public Utilities Control Authority.[103] Specific reference in the statute is made to "corporations authorized to construct and maintain sites on any stream and to utilize the power generated by (that stream)." The Public Utility Control Authority would have jurisdiction upon the application and subsequently having evaluated such would make an order with respect to the rates and terms upon which the electricity would be furnished.[104]

Supplementing the application would be a statement describing the area that would be affected, and a map or plan describing the scope and nature of the area which would be serviced by the applicant. In addition to this information, the applicant must include a statement relating to his financial condition. The statement would entail furnishing the names and addresses of all persons owning ten percent (10%) or more of the applicant's outstanding debt or equity, a pro forma statement of the applicant's income and a statement of the rules, tariffs and rate schedule the

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[102] Id. § 16-50x.

[103] Id. § 16-246 (West 1960).

[104] Id.

applicant intends to apply to the area he proposes to supply electrical energy. Also included would be a description of the anticipated purchasers of such electrical energy and the nature of the services the applicant proposes to supply as well as evidence of any proposed or existing contracts between the applicant and any other person concerning the furnishing of electrical energy. Finally the applicant would annex to the application a statement of any benefits that will accrue to the area where such electrical energy will be furnished, including facts and arguments leading to the conclusion that public convenience will be better served by granting the application than by rejecting the proposal.[105]

Assuming that the application is granted, the Public Utility Control Authority would be kept informed of the conditions of the plant, equipment and manner of operation of all public service companies. It may order such reasonable improvements, repairs or alterations in such plants as may be reasonably necessary in the public interest.[106] A public service company is defined to mean electric or other company owning, leasing, maintaining, operating, managing or controlling plants or parts of plants and equipment, but does not include municipalities or municipal corporations. The plants operated by a public service company include all real estate, buildings, poles, wires and other fixed construction and equipment, wherever located, used in the conduct of the business of the company. The statute also defines "electric company" as

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[105]Regs. §16-1-77.

[106]Conn. Gen. Stat. Ann. § 16-11 (West 1960).

every corporation, association, partnership or lessee thereof, owning, leasing, maintaining, operating, managing or controlling poles, wires, conduits or other fixtures for the purpose of transmitting or distributing electric current for sale.[107]

With respect to jurisdiction over the regulation of public utilities, although there are statutes empowering local authorities as well as the Public Utility Control Authority to restrict the public service, regulation is a matter of more than local concern, and one which should be under the supervision of a state wide agency.[108] Thus local authorities would plan a secondary role where a clash of authority exists. In delegating exclusive jurisdiction over the construction and reconstruction of facilities for the transmission of electricity to the Public Utilities Control Authority, the General Assembly obviously acknowledged the desirability that an agency with statewide jurisdiction and expertise in the field have exclusive power and responsibility in such area.

## IV. INDIRECT CONSIDERATIONS

### A. Stream Flow Standards and Fishways

Minimum stream flow standards are set forth in regulations

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[107] Id. § 16-1.

[108] Jennings v. Connecticut Light and Power Company, 140 Conn. 650, 103 A. 2d 535 (1954).

[109] Connecticut Light and Power Company v. Costello, 161 Conn. 430, 288 A. 2d 415 (1971).

promulgated by the Commissioner pursuant to Conn. Gen. State. Ann. §26-141(a) and (b).[110] These standards are designed to insure the maintenance of stream conditions suitable for stocking fish, protecting natural acquatic life, promoting public recreation and protecting public health. The regulations apply to any dam or other structure which impounds or diverts waters located on stocked watercourses and their tributaries. Impoundments expressly exempted from these regulations are listed as follows:

(1) those at locations with drainage areas of less than three (3) square miles in area:

(2) government operated flood control dams;

(3) those which discharge directly or through a stream less than one mile in length into a reservoir, lake, pond or tidal waters unless the Commissioner has found that such stream has a unique value to the natural or stocked wildlife;

(4) those which return substantially all the daily inflow to the same watercourse in the immediate vicinity or in the case of existing impoundments, in the locations where releases normally occur;

(5) those which have no capability of controlling the discharge; and

(6) those granted an exemption or a variance by the Commissioner.[111]

Operators of existing impoundments not exempted by the regulations are required to file the following information by June 19, 1979, and operators of new impoundments would file such information three (3) months prior to commencement of operation:

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[110] Regs. 26-141a-1 through 26-141a-8.

[111] Regs. 26-141a-3.

(1) name of structure, name, address and telephone number of owner and operator; location of structure on U.S. Geological Survey topographic map; purpose and use of structure; location of discharge;

(2) drainage area above structure; reservoir capacity at various elevations; stream flow records; the safe yield of the facility; demand requirements;

(3) frequency of recurrence of water surface elevations on the first day of each calendar month; and

(4) type, capacity and control capability of all gates, valves, pipes, spillways, flashboards or similar means of conducting water from above an impoundment to the watercourse below.[112]

Upon approval of the information filed by the operator, the operator would be thereafter required to release a minimum daily flow computed by multiplying the drainage area by the appropriate flow. A table is listed in the regulations which correlates the appropriate flow with respect to the percent of safe yield utilized.[113]

As previously mentioned an operator may petition the Commissioner for an exemption or variance for his impoundment from the minimum flow and freshet release standards of these regulations. Notice of the granting of an exemption or variance would be published in a newspaper of general circulation in the municipality where the affected structure, river or stream system is located. In deciding whether to grant an exemption or variance the Commissioner would consider whether the operation of the structure would:

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[112] Regs. 26-141a-3.

[113] Regs. 26-141a-5.

(1) prevent the maintenance of viable pools, channels or other water basins or allow their undue depletion by normal evaporation and aquifer absorption;

(2) reduce oxygen content below minimal levels, cause stagnation or inhibit repoductive cycles;

(3) prevent the preservation, protection and safe maintenance of the river and stream stocking program, the natural or stocked wildlife dependent upon the flow of such water; or

(4) meet the needs and requirements for public health, flood control, industry, public utilities, water supply, water quality, electric power production, public safety, agriculture, and other lawful uses of the waters.[114]

Any person aggrieved by the denial of a petition is entitled to request a hearing consistent with the regulations of the Department of Environmental Protection.

Somewhat related to the matter of minimum flow standards is the express statutory authority granted to the Commissioner allowing him to direct the dam operator to construct a fishway.[115] Upon the petition of ten (10) or more persons owning property above any dam built on a stream where salmon or shad cannot pass over or around the dam, the Commissioner would issue an order to the operator requiring him to provide a suitable fishway.

The order would specify the design, location and the materials to be used for the construction as well as the time frame in which the

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[114] Regs. 26-141a-4.

[115] Conn. Gen. Stat. Ann. § 26-136 (West 1975).

fishway is expected to be built. Unless otherwise stated in the order, the statute dictates that the fishway would be kept open and free from April 1 to November 1 of each year.

B. Land and Soil Conservation

Connecticut has several statutes that deal with land conservation so as to preserve not only the ecological values, but also scenic, scientific and historic values that are in the public interest. Such a statute deals with the formation of the lower Connecticut River conservation zone. In order to deal with the problems of conservation in this geographic area, the Connecticut River Gateways Commission was established, and is an autonomous body within the Department of Environmental Protection for fiscal and budgetary purposes only.[116] There is also a Connecticut River Gateway Committee which is empowered by statute to hold hearings for the purpose of developing minimum standards to preserve the area within the conservation zone and prepare minimum standards for the regulation of the usage of property within the conservation zone.[117]

The towns within the conservation zone may revise their zoning and planning commissions so that local ordinances will not be effective in terms of zoning or planning regulation unless the town has received the approval of the Connecticut River Gateway Commission.[118]

Whenever any zoning board of appeals of a town which was voted to be governed by the provisions discussed above, receives an application with respect to land within the conservation zone, it must

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[116] Id. § 25-102(e).

[117] Id. § 25-102(d).

[118] Id. § 25-102(g).

submit the application to the Connecticut River Gateway Commission for approval.[119] Thus, the State and local authorities are able to cooperate so that a large area involving land and water resources is better protected against environmental deterioration.

The conservation of soil in the State has been seen by the Connecticut legislature to be so important that programs are authorized for its regulation. The Commissioner of Environmental Protection is given the power to make surveys and conduct research concerning the problems of soil and water erosion and its control. The Commissioner may also obtain property and improve it so as to contribute to the overall program of soil conservation.[120] In order to assist the Commissioner of Environmental Protection in remedying the problems of soil and water erosion, the Commissioner may promulgate a regulation that establishes soil and water conservation districts and boards. These boards are empowered by statute to advise the Commissioner on matters of soil conservation, sedimentation and erosion control, and assist him in the implementation of programs concerning these matters. The Commissioner is also empowered by statute to create, by regulation, a council to coordinate the activities of such boards with the activities of the Department of Environmental Protection and other State, regional and local agencies, as well as propose regulations to the Department in matters of soil and water erosion control.[121]

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[119] Id. § 25-102(h).

[120] Id. § 25-104.

[121] Id. § 25-104(a).

Participation in this area by local authorities is further enhanced by the statute enabling the legislative body of any municipality to vote to request the Commissioner of Environmental Protection for advice and assistance in initiating a soil conservation and flood prevention project for the watershed or sub-watershed area in which the municipality is located.[122] The Commissioner is empowered to make an investigation of the area in cooperation with the Secretary of Agriculture, after which the Commissioner shall advise the legislative body of the municipality as to the general type and extent of works of improvement desirable for such a project. Lands, easements or rights-of-way required for such projects may be acquired by the Commissioner through purchase, lease or gift, or by eminent domain, but the power of eminent domain shall not extend to property owned or used by public service companies.[123] The Commissioner of Environmental Protection also has the power to enter into agreements with municipalities within the watershed area for the construction, operation and maintenance of works of improvement for recreational or fish and wildlife developments, and may convey title to any structure erected for these purposes.

C. Land Conservation

The Commissioner of Environmental Protection is involved in another aspect of land conservation in that he is required to establish a system of natural area preserves that are not to exceed ten thousand (10,000) acres in the aggregate. The Commissioner is also required to maintain such preserves in as natural and wild a

[122] Id. §25-107.

[123] Id. § 25-108.

state as is consistent with educational and scientific purposes. Regulations concerning these preserves are promulgated by the Commissioner so as to maintain order, safety and sanitation upon the lands in his control.[124]

D. Historical Preservation

Somewhat related to the establishment of natural preserves is the preservation of historic structures and landmarks. The Connecticut Historical Commission is appointed by the Governor to study and investigate structures and landmarks and encourage and recommend the development, preservation and marking of such historic structures and landmarks found to have educational, recreational and historical significance.[125] An historic structure and landmark is defined as "any building, structure, object or site that is significant in American history, architecture, archeology and culture or property used in connection therewith".[126] The Historical Commission is also empowered to make recommendation to the General Assembly regarding the development and preservation of historical structures, to formulate standards and criteria to guide the several municipalities in the evaluation, delineation and establishment of historic districts, and to review planned State and Federal actions to determine their impact on historic structures and landmarks.

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[124] Id. § 23-5(c), § 23-4 (West Cum. Supp. 1978).

[125] Id. § 10-321 (West 1977).

[126] Id. § 10-321(a).

E. Interstate Compacts

To aid in the regulation of water pollution, Connecticut became a signatory to both the Interstate Sanitation Commission Tri-State Compact,[127] and the New England Interstate Water Pollution Control Compact.[128] The Tri-State Compact deals with the territory surrounding and adjacent to the harbor of New York, and measures to control pollution in this area. The New England compact deals with interstate waters in the New England area and the cooperation of the signatory States to abate or prevent pollution in these waters.

Interstate compacts have also been approved by the Connecticut legislature to aid in the protection of life and property from floods, help prevent soil erosion and maintain ecological values. The Connecticut River Flood Control Compact has as its principal purposes, "to assure adequate storage capacity for impounding the waters of the Connecticut River and its tributaries for the protection of life and property from floods; (and) to provide a joint and common agency through which the signatory states . . . may more effectively cooperate in accomplishing the object of flood control and water resources utilization in the basin of the Connecticut River and its tributaries".[129] The Thames River Valley Flood Control Compact is an agreement between Connecticut and Massachusetts to provide for a joint agency so as to accomplish the objective of flood control and water resources utilization for the Thomas River and its tributaries.[130]

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[127] Id. § 25-56 (West 1975).

[128] Id. § 25-68.

[129] Id. §25-99.

[130] Id. §25-101.

A combining of many of the statutory requirements discussed above may be seen in the Northeastern Water and Related Land Resources Compact, of which Connecticut is a signatory State.[131] The purpose of the compact is to provide the northeastern region with improved facilities and procedures for the coordination of policies, programs and activities of the Federal and State governments as well as private persons or entities in the field of water and related land resources. The commission that is formed under this compact has the responsibility to collect and interpret basic data, investigate and plan water and related land resources projects, schedule water and land resources construction and development, and encourage the referral of plans or proposals for resource projects to the commission.

F. Taxation

1. Taxing Authority

The state derives its taxing authority from the Connecticut Constitution.[132] The Connecticut courts have interpreted the taxing authority of the legislature as almost unlimited as to property within the state. In a 1948 case,[133] the Connecticut Supreme Court interpreted the word "property" as used in the statutes relating to assessment and taxation as "every species of valuable right or interest which is subject to ownership, or that which goes to make up one's wealth or estate, and all things which have a pecuniary

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[131] Id. § 25-120.

[132] Conn Const. art. 3, § 1.

[133] Eric v. Walsh, 135 Conn. 85, 61 A.2d 1 (1948).

value".[134] While the Connecticut statutes provide for various exemptions to the property tax, it does not appear that dams would fall into one of the exemptions.

2. Taxation of Water Power

Connecticut law provides for the taxation of water power as property.[135] The statute provides the "(W)hen water power, created or reserved in any manner by works wholly located in the same town in which it is appropriated and used, is used by its owner, the whole shall be assessed and set in the list as incident to the machinery which is operated by it, and not separately as distinct property..."[136] This section means that a LHH owner or developer may not be allowed to have his dam and land, upon which water is located to be used in power production, to be assessed as separate property.[137]

The statute allowing for the taxation of water power has been given a broad reading by the courts. In a 1908 case,[138] the Connecticut court held that "...an owner of water power, having it applied to his own mill, so that it is available for immediate use in connection therewith, is using it within the meaning of the statute, so that it should be assessed as incident to the machinery, though the mill and machinery stand idle,...".

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134 Id.

135 Conn. Gen. Stat. Ann. (West 1972).

136 Id.

137 Id.

138 Hazard Power Co. v. Town of Enfield, 80 Conn, 486, 69 A.16 (1908).

3. Property Assessment

Connecticut law requires assessments to be based on the fair market value of the property to be taxed.[139] In a fairly recent case, the Connecticut Light and Power Company appealed an assessment made on a hydroelectric dam owned by the company.[140] The assessor had refused to abate the tax when experts had given a much lower valuation of the property. The experts had been hired by the power company to value the hydro facility. The Court, on the appeal for abatement, held that "(h)ydroelectric dams are not readily marketable as such, and, in ascertaining fair market value of such property for tax purposes, it is proper to resort to other means of ascertaining true and natural valuation."[141] The Court reasoned that since each dam is unique in structure and capacity, the traditional methods of valuation of property are generally inadequate in assessing the value of hydroelectric dams.[142]

4. Situs of Property for Assessment

The assessment of water power property is to take place in the town in which such property is located.[143] "...(T)he valuation of the land occupied by such dam,...., and the increased flowage occasioned thereby, shall be made and set in the list in the town in which such dam,....is located, to the owner of such power at what would be its fair market value were it improvised farmland."[144]

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[139]Conn. Gen. Stat. Ann. §12-78 (West 1972).

[140]Connecticut Light & Power Co. v. Town of Monroe, 149 Conn. 450, 181 A2d 118 (1962).

[141]Id.

[142]Id.

[143]Conn. Gen. Stat. Ann. § 12-75 (West 1972).

[144]Id. § 12-78.

When water power is used outside the state "...for taxation, water power developed in the state and used outside the state shall be assessed and set in the list of the town in which the dam...from which it is derived is located."[145]

It appears that developers and owners of LHH dams will be required to pay property taxes on their site and equipment, as there are currently no exemptions available for such facility. Assessments in Connecticut will be made based on the fair market value of the entire facility, and will be assessed in the town in which the dam is located. LHH developers selling power outside of Connecticut will be taxed by the town in Connecticut where the dam is located.

G. State Financing

State financing for development is administered by the Department of Commerce which as of January 1, 1979, will become the Department of Economic Development (hereinafter DED). Several divisions of the DED deal with financing. The most significant is the Connecticut Development Authority (hereinafter the CDA).[146]

CDA was created to assist industrial and commercial development which provides employment and tax revenues. An industrial project within the scope of CDA legislation includes any building whether or not in existence, real estate improvement and real property necessary to its use which is to be used for the manufacturing, processing or assembling of raw materials or manufactured products, or rebuilding of such products, or research, etc. CDA may purchase, receive, lease or otherwise acquire, and construct, improve, equip and maintain

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[145] Id. §12-79.

[146] Id. § 32-1 et seq. (West Cum. Supp. 1978).

projects. Contracts may also be entered into covering planning, financing, construction, operation, etc. Assistance includes insuring any or all payments to be made by the borrower through the insurance of capital reserve fund bonds or mortgage payments of any first mortgage. Such insurance is funded by an industrial building mortgage fund. Loans and bonds are also financial possibilities.[147]

Although this chapter is to be liberally construed, there still exists a number of obstacles to LHH development. For example, in the event that LHH is not considered "manufacturing," CDA could not provide financial assistance.[148]

DED also assists projects and businesses that qualify under the Public Works and Economic Development Act.[149] DED may enter into a contract with any public or private organization which meets the federal definition of "industrial or business project." Such a contract may provide for financial assistance from the State in the form of a loan not to exceed one-half of the non-federal share of the cost of the project. Issuance of the loan is contingent upon the provision of at least an equal and matching sum by the political subdivision or organization which has requested assistance. State loans are further limited in that they may not exceed five percent (5%) of the total cost of a project which qualifies under the Public Works and Economic Development Act or ten percent (10%) of the total cost of a project which qualifies under the Small Business

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[147] Id. § 32-1 et seq. (West Cum. Supp. 1978).

[148] Opinion within the CDA itself is unclear with regard to the status of LHH. Telephone conversation with Mr. John Carson, Deputy Director, CDA, December 22, 1978; telephone conversation with Mr. James Mahoney, Planner, CDA, December 28, 1978.

[149] See 42 U.S.C. § 692 et seq.

Investment Act. The aggregate amount of state loans for "industrial or business projects" in accordance with provisions of this section shall not exceed two million dollars.[150]

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[150]Conn. Gen. Stat. Ann. § 8-168 (West Cum. Supp. 1978).