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ANALYSIS OF LEGAL OBSTACLES AND INCENTIVES TO THE DEVELOPMENT OF LOW-HEAD HYDROELECTRIC POWER IN MAINE

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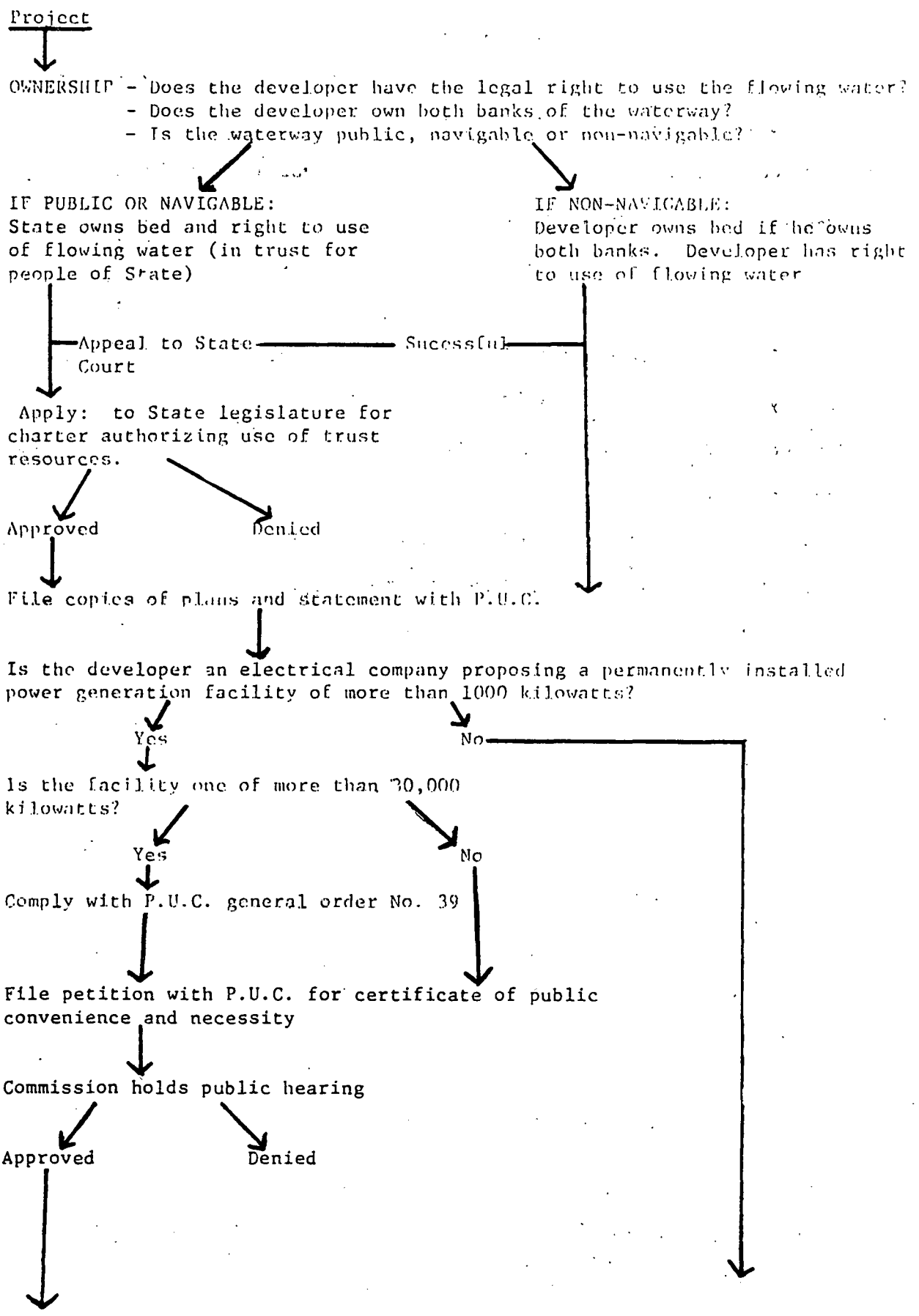
[z] See Florida Lime and Avocado Growers Inc. v. Paul, 373 U.S. 132 (1963).

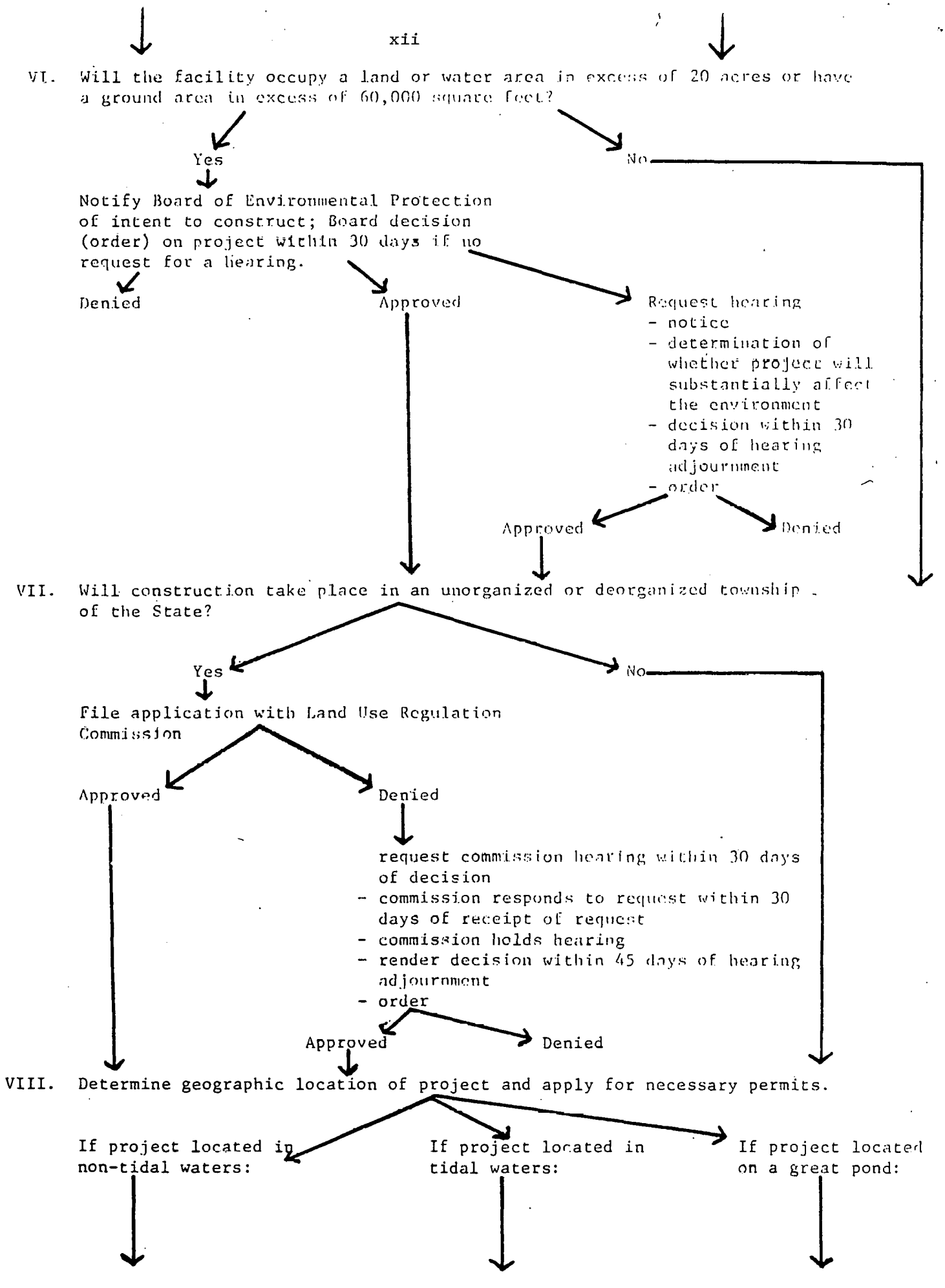
[aa] See F.P.C. v. Oregon, 349 U.S. 435 (1955).

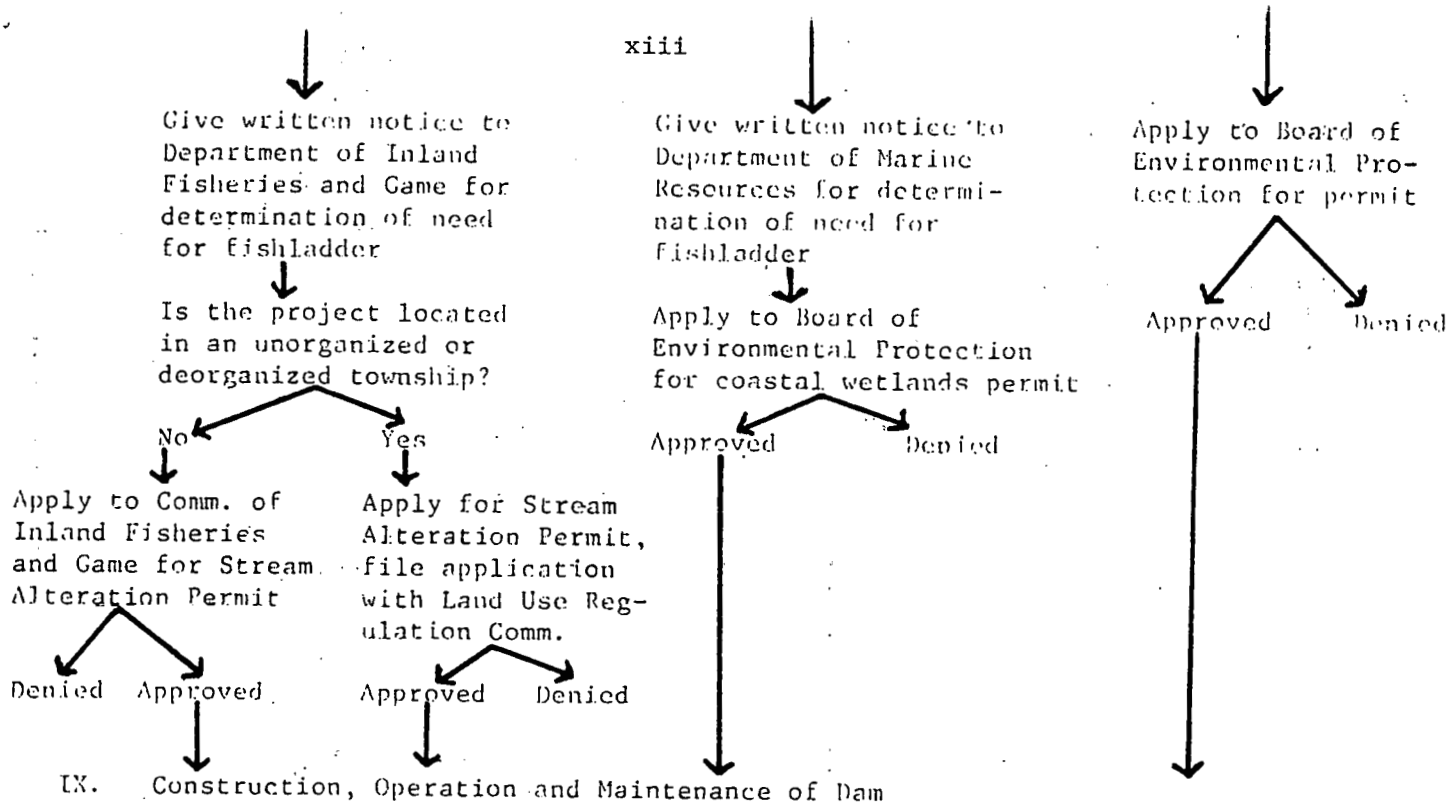
With respect to PURPA, the federal agency, FERC, will establish the guidelines for rates for sales and exchanges of power between electric utilities and qualifying small hydroelectric projects and will prescribe rules for exemptions from state and federal regulation. These standards and rules will be 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 MAINE




VI. Will the facility occupy a land or water area in excess of 20 acres or have a ground area in excess of 60,000 square feet?
Yes
No
Notify Board of Environmental Protection of intent to construct; Board decision (order) on project within 30 days if no request for a hearing.
Denied
Approved
Request hearing
- notice
- determination of whether project will substantially affect the environment
- decision within 30 days of hearing adjournment
- order
Approved
Denied
VII. Will construction take place in an unorganized or deorganized township of the State?
Yes
No
File application with Land Use Regulation Commission
Approved
Denied
request commission hearing within 30 days of decision
- commission responds to request within 30 days of receipt of request
- commission holds hearing
- render decision within 45 days of hearing adjournment
- order
Approved
Denied
VIII. Determine geographic location of project and apply for necessary permits.
If project located in non-tidal waters:
If project located in tidal waters:
If project located on a great pond:



IX. Construction, Operation and Maintenance of Dam

- comply with conditions of all permits and licenses
- utilize Maine Mill Act for flowage
- damage assessment by superior court
- PUC regulation of rates if output capacity is over 1,000 kilowatts
- inspection of dam by inspector appointed by Commissioner of Agriculture
- emergency regulation by Bureau of Civil Defense
- annual registration of dam with Soil and Water Conservation Commission

I. OWNERSHIP OF THE REAL PROPERTY

A. Particular Methods of Acquisition.

The first step any developer of small scale hydropower must take is to acquire right, title or interest in the real property. In Maine, that step requires acquisition in some form of both river banks, the river bed and where necessary, the land needed for the upstream impoundment area. The developer must acquire the river banks to be considered a riparian owner. Classification as a riparian is important, for only a use of water by a riparian owner is deemed a reasonable use and hence a legal use. A non-riparian could not draw water from a stream to increase the water level of an impoundment area on another stream.

Apart from the usual methods of land acquisition involving sale, lease or perhaps gift, Maine has two somewhat unique methods a developer may use for property acquisition. These methods, authorized by statute, are use of the abandoned dams law[1] and use of the Mill Dam Act[2] for flowage of upstream impoundment areas.

1. Abandoned Dam Statute.

The abandoned dams statute cannot be read without encountering definitional ambiguity. The statute permits any person to petition the Soil and Water Conservation Commission to be awarded the ownership of any dam if the owner is unknown.[3] Ambiguity arises in the definition of dam.

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[1] Me. Rev. Stat. tit. 12 §251 et seq. (Supp. 1977).
[2] Id. tit. 38 §651 (1965).
[3] Supra, Note 1 at §253.

"Dam" means any artificial barrier, including appurtenant works, which impounds or diverts water, and which:

> (a) Is two (2) feet or more in height from the natural bed of the stream or watercourse measured at the downstream toe of the barrier, or from the lowest elevation of the outside limit of the barrier, if it is not across a stream, channel or a watercourse, to the maximum capable water storage elevation, or,
>
> (b) Has an impounding capacity at maximum water storage elevation of 15-acre feet or more.[4]

A narrow reading of this definition can leave the impression that the successful petitioner will receive the artificial barrier, not any land or flowage rights. A broader reading of the definition might include the land the artificial barrier rests upon. This may be inferred from the indecision in the definition of appurtenant works. Arguably, in transferring these works they are to include the land, for in most cases their removal will be impracticable. If removal is read in as a requirement it would weaken the effectiveness of the statute in terms of cost of removal and technical feasibility. As the statute is of recent origin no clarification of the matter exists.

Should the developer seek to utilize this statute, the following procedures apply:

(1) Upon receipt of a petition containing the information required by the commission's regulations, together with a fee in the amount of the cost of publication, the commission shall give notice of such petition, in writing, to the municipality in which the dam is located and also by publication at least five (5) times in a newspaper of general circulation within the county or counties in which the dam is located, which shall state that anyone claiming

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[4] Supra, note 1 at §252.

ownership of the dam must file notice of such ownership with the commission within sixty (60) days of the date of the last publication, in such form as the commission may by regulation require, and shall also invite any interested person to petition for award of ownership of the dam within sixty (60) days of the date of last publication.

(2) Upon receipt of a claim of ownership by any person within sixty (60) days of the date of last publication, the commission shall notify the petitioners and shall suspend all further proceedings until such time as a court of competent jurisdiction, in an action for declaratory judgment brought against such claimant by any person, determines that such claimant is not the owner of the dam, or the claimant withdraws his claim.[5]

(3) No sooner than sixty (60) days after the date of last publication, the commission may schedule and conduct a public hearing for the purpose of receiving such evidence and information as may aid it in making a determination.[6]

(4) After any hearing held, or if none is held, no sooner than sixty (60) days after the date of last publication, the commissioner may determine, by majority vote, to award the dam to a petitioner. In the case that there is more than one petitioner, the commission shall base its determination upon a consideration of the relative technical, financial and administrative ability of each petitioner, the purpose and intent of each petitioner with regard to maintenance, repair or removal of the dam, the effect of each petitioner's proposal upon private and public property, including the public resources of wildlife, fisheries, waters and water uses, the effect otherwise upon the public's health, safety and general welfare and the willingness of each petitioner to accept ownership of the dam upon such terms as are reasonable.[7]

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[5] Supra, note 1 at §253.
[6] Supra, note 1 at §253.
[7] Supra, note 1 at §253.

(5) No sooner than forty-five (45) days after notice to all petitioners of its proposed decision, the commission shall cause a copy of its decree or decision, signed by the petitioner to whom the dam is awarded and acknowledging acceptance of the dam subject to such terms as are reasonable, to be filed in the Registry of Deeds for the county in which the dam is located. Upon the filing of such decree or determination, the interests of all other persons in the dam shall be deemed to have been abandoned and the petitioners to whom the dam is awarded shall be deemed the owner thereof, in fee simple absolute, for all purposes.[8]

2. Mill Dam Act.

a. Flowage. For the developer contemplating a dam other than a run of the river dam, an impoundment area will be needed to raise the necessary head of water. As an impoundment area will involve the flooding of upstream lands, the developer must either acquire the land or have some right to flow it. The developer under common law principles would have to own any lands he wished to flow. Flowage absent ownership of the land could result in a suit for nuisance. The Maine Mill Dam Act[9] presents the developer with an alternative to ownership of the flowed land.

The Act permits the dam developer to flow the upstream lands free from any common law liability. This flowage does not change any ownership rights. Maine does not recognize in theory or fact that the owner of land flowed by a pond for a dam is a part owner of the developed lower privilege.[10] The upstream riparian still owns his flowed land and may still use it on which to sink a pier or in which to drive piling or submit it to any reasonable use

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8 Supra, note 1 at §253.
9 Me. Rev. Stat. tit. 38 §651 et seq. (1965).
10 Bean v. Central Maine Power Co., 133 Me. 9, 173 A. 498 (1934).

not detrimental to the maintenance of the pond.[11] The Act permits any person to erect and maintain on his own land a water mill and dams to raise water for working it, upon and across any stream not navigable.[12] The water power may be used for the purpose of propelling mills or machinery.[13]

All rivers where the tide ebbs and flows are by common law denominated navigable rivers.[14] A river which in its natural condition unaided by artificial means is susceptible to public use to float vessels, rafts or logs is a navigable stream.[15]

Dams under this Act are those for the purpose of raising water for a water mill.[16] Dams for the holding back of water that would otherwise run to waste in times of flood, or for the storage and release in times of low water to increase the effective water power of the stream are reservoir dams.[17] Reservoir dams are within the meaning of dams under the Mill Act.[18]

In an action for flowage, the following procedures apply. A complaint shall be issued containing such a description of the land flowed or injured and such a statement of the damage that the record of the case shall show the matter heard and determined in the action.[19] To maintain a complaint for flowage under this section the petitioner must aver that the dam which caused the flowage was erected or maintained on the land of the defendant.[20]

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11 Id.
12 Supra, note 9.
13 Supra, note 9.
14 Smart v. Aroostook Lumber Co., 103 Me. 37, 68 A. 527 (1907).
15 Wilson v. Harrisburg, 107 Me. 207, 77 A. 787 (1910).
16 Wilson v. Campell, 76 Me. 94 (1884).
17 Brown v. DeNormandie, 123 Me. 535, 124 A. 697 (1924).
18 Id.
19 Supra, note 9 at §701.
20 Stevens v. King, 76 Me. 197 (1884).

The owner or occupant of such mill may answer that the plaintiff has no right, title, or estate in the lands alleged to be injured or that he has a right to maintain the dam and flow the lands or divert the water for an agreed price or without any compensation or any other matter which may show that the plaintiff cannot maintain the action, but he shall not answer that the land described is not injured by such dam.[21] When any such answer is filed and an issue in fact or in law is joined, it shall be decided as similar issues are decided at common law.[22] If judgment is for the defendant he shall recover his costs.[23]

If the issue is decided in favor of the plaintiff or if the defendant is defaulted or does not answer or show any legal objection to the proceedings, the court shall appoint three (3) or more commissioners who shall go upon and examine the premises and make an appraisement of the yearly damages done to the plaintiff by the flowing of his lands.[24] The commissioners shall determine how far the flowing is necessary and ascertain and report for what portion of the year such lands ought not to be flowed.[25] The commissioners shall determine and report what sum in gross would be a reasonable compensation for all the damages, estimated according to the height of the dam and flashboards as then existing.[26]

If within ten (10) days after the damage report is presented to the court, the owners of the dam elect to pay the damages in gross, the court shall fix the time in which said damages shall be paid.[27] If the damages are not paid

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[21] Supra, note 9 at §703.
[22] Supra, note 9 at §704.
[23] Supra, note 9 at §704.
[24] Supra, note 9 at §705.
[25] Supra, note 9 at §705.
[26] Supra, note 9 at §705.
[27] Supra, note 9 at §705.

in that time, the owners of the dam shall lose all benefit of their election and the annual damages shall stand as the judgment of the court.[28]

If the damages in gross are paid within the fixed time, the judgment is a bar to any further complaint so long as the dam and flashboards remain at the same height.[29] If either is raised, a new complaint may be made by the owner of the lands flowed.[30]

If either party requests that a jury be impaneled to try the case, the report of the commissioners shall be given in evidence to the jury.[31] Evidence shall not be admitted to contradict it unless misconduct, partiality or unfaithfulness on the part of some commissioner is shown.[32]

If neither party requests a trial by jury, the report of the commissioners may be accepted by the court and judgment rendered thereon.[33] The verdict of the jury or the report of the commissioners so accepted is a bar to any action brought for damages.[34]

The party entitled to annual compensation shall have a lien for such compensation on the mill, and milldam with the appurtenances and the land.[35]

If after judgment, the restrictions imposed by the report or the finding of the jury are violated, the party injured may recover of the wrongdoers double damages for the injury in a civil action.

Damage for the overflowing of land by a milldam is exclusively the statutory remedy.[36] No action shall be sustained at common law for the recovery of damages occasioned by the overflowing of lands.[37]

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28 Supra, note 9 at §705.
29 Supra, note 9 at §707.
30 Supra, note 9 at §707.
31 Supra, note 9 at §708.
32 Supra, note 9 at §708.
33 Supra, note 9 at §709.
34 Supra, note 9 at §710.
35 Supra, note 9 at §713.
36 Foster v. Sebago Import Co., 100 Me. 196, 60 A.894 (1905).
37 Supra, note 9 at §721.

b. Constitutionality of the Mill Dam Act. The Maine Mill Dam Act by giving the right to control flowage of a dam-created lake to the person erecting the dam represents a significant policy position favoring dam development. However, the Act has a history of challenges concerning its constitutionality. The constitutional underpinnings of the Act have fluctuated from a basis in eminent domain to a basis as a state regulatory measure. As an eminent domain proceeding the Act is questionable, for in essence it represents a right of private taking for a private use. An eminent domain proceeding requires that a taking be for a public purpose. As a state regulatory measure of the reasonable use of the watercourse, the Act may be susceptible to a different interpretation by a modern court. It is important for the developer to understand the history of the Act in order to effectively marshall his arguments for the continued existence of the Act should the need arise.

The Maine Supreme Judicial Court in an interpretation of the state constitution has held the Act valid under the power of eminent domain.[38] The Maine Constitution states that private property may not be taken for public uses without just compensation, nor unless the public exigencies require it.[39] This article places two restrictions on a taking: it must be for a public use and the public exigencies must require that use. Implicit in the article is that private property of one citizen cannot be taken and given to another citizen for private uses.[40] The latter statement in connection with a declaration by the Court that "while the erection of mills in the early history of the country was a matter of great public convenience and necessity; the reasons in which the policy originated have ceased to exist,"[41] would appear to infer that the Act violated the Maine Constitution.

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[38] Jordan v. Woodward, 40 Me. 317 (1855).

[39] ME. CONST. art I § 21.

[40] Jordan v. Woodward, supra note 38.

[41] Jordan v. Woodward, supra note 38.

The Court leaned to that reasoning and stated that "the mill act as it has existed in this state, pushes the power of eminent domain to the very verge of constitutional inhibition." If it were a new question it might well be doubted whether it would not be in conflict with Article 1, §21.[42] Yet in its final analysis the Court, perhaps foreseeing property rights disputes, stated: "[w]e do not intend to question the authority of the existing mill act...from its great antiquity and the long acquiescence of our citizens in its provisions, it must be deemed to be the settled law of the state."[43]

In a later case the fact of the validity of the Mill Act was considered settled.[44] It was too late in time to challenge the Act. Whether its validity rests upon its great antiquity and long acquiescence[45] or upon the principle of eminent domain[46] or upon the adjustment and regulation of riparian rights on the same stream so as to best serve the public welfare having due regard to the interest of all and to the public good,[47] it is settled law.

Maine has since moved to a more definite expression of the theory of the Mill Act's constitutionality. It considers the flowing of land of another for the purpose of working mills, a right recognzied in the jurisdiction not as an exercise of eminent domain, for the mills are not of public use, but rather as an adjustment and regulation to assure development of reasonable use of such lands among riparian owners.[48]

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[42] Jordan v. Woodward, supra, note 38.

[43] Jordan v. Woodward, supra, note 38.

[44] Brown v. DeNormandie, supra, note 17.

[45] Jordan v. Woodward, supra, note 38.

[46] Ingram v. Maine Water Co., 98 Me. 566, 57 A. 893 (1904).

[47] Otis Co. v. Ludlow Mfg. Co., 201 U.S. 140 (1906).

[48] Bean v. Central Maine Power Co., supra, note 10. Compare: Shaw C.J. in Chase v. Sutton Mfg. Co., 4 Cush (Mass.)152, 169 (1849), "these acts justifying the flowing of another's land without his consent can rest only on the right of eminent domain to take private property for public use." With Shaw C.J. in Murdock v. Stickney, 8 Cush (Mass.) 113, 116, 118 (1851), "the principle on which this law is founded is not as has sometimes been supposed, the right of eminent domain; it is not in any proper sense a taking of the property of an owner of the land flowed...the mill acts were intended to regulate the right enjoyed by every owner of land through which a running stream of water passes."

The move by Maine to adoption of the regulatory rationale may be a result of the U.S. Supreme Court's decision concerning New Hampshire's Mill Act.[49] In that case the court stated that "whether the erection of mills under the Mill Act can be upheld as a taking, by delegation of the right of eminent domain, of private property for public use in the constitutional sense is so important and far reaching, that it does not become this court to express an opinion upon it...we prefer to rest the decision of this case upon the ground that such a statute, considered as regulating the manner in which the proprietors of lands adjacent to a stream may be asserted and enjoyed, with a due regard to the interests of all and to the public good is within the constitutional power of the legislature."[50]

While the courts have not clearly stated it to be the case, it may be inferred that in seeking to regulate in a manner best calculated on the whole to promote and serve the common rights in the stream and land the courts have engaged in a balancing test. The scales may balance public good or the regulation of the reasonable use. Arguably the regulation of the reasonable use is a regulation to determine the best use consistent with another's use. The public good may be seen as that process whereby property in which several persons have a common interest which cannot be fully and beneficially enjoyed may submit to measures necessary to secure its beneficial enjoyment. Each process seeks to regulate the rights of the various parties to arrive at a use of the property which is beneficial (i.e., efficient). Thus whether the label of the balance is public good or regulation of the reasonable use the outcome sought is the same.

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49 Head v. Amoskeag Mfg. Co., 113 U.S. 9 (1884).
50 Id., at 21.

In the past this outcome of efficient use has tipped the scales in favor of the dam developer. This was understandable given the need for power in the early history of New England. However, it is not clear that that would be the case today. The argument may be raised that with the passing of time, the increasing scarcity of land, its rise in value as developed real estate, the tourist industry and the availability of alternative sources of power, the balance may shift toward the private land owner.[51]

B. Rights in the Property.

1. Riparian Law.

The developer in Maine, having acquired his riparian land parcel, has also acquired certain rights and uses in the water. For the developer on a private body of water, these rights are circumscribed by the common law riparian doctrine of reasonable use. This doctrine is in contrast to that of prior appropriation which is used in many western states. The riparian doctrine views water use as an incident of ownership of riparian land. Prior appropriation doctrine separates the water rights from the ownership of land. Under that doctrine the right to use flowing water accrues in the first user rather than the riparian owner. In Maine, it is the set of common law rules of riparianism that will determine the developer's rights in the water.

Where the developer's land borders on a non-tidal stream and he owns the fee in the land, that will include the bed of the stream to its center.[52]

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[51] The Mill Act as an action by the legislature is open to repeal by that body. Such a bill "An Act to Repeal the Mill Act", L.D. No. 521, was filed on February 17, 1977. It was later withdrawn. It is also questionable how much of the Mill Act is left given the expanded federal definitions of navigability. Navigability under federal law would include waterways the state definition may consider non-navigable.

[52] Opinion of the Justices, 118 Me. 503, 106 A.865 (1919).

If he should own both banks he will also own the entire bed.[53]

This statement of ownership should not be construed to include ownership of the water itself. A developer will not own the water that passes through his land or that may be impounded therein. His right is to the natural flow of the stream and to the use and benefit of it as it passes through his land for all domestic and agricultural purposes to which it can be reasonably applied.[54]

The "reasonably applied" language stated above delineates the extent of the riparian use permitted of the water. Every proprietor upon a stream is entitled to the reasonable use and enjoyment of the water, taking into consideration a like reasonable use by all above and below.[55] A reasonable use is a reasonable riparian use; a non-riparian use is unreasonable as a matter of law.[56] Riparian uses are those uses of water which benefit the riparian land.[57] A lower riparian will be entitled to injunctive relief of an unreasonable use regardless of any showing of actual damage.[58]

The reasonable use doctrine permits the damming of a waterway. A developer may avail himself of the momentum of the stream as power for manufacturing, provided the water is not unreasonably detained.[59] The reasonableness of the detention of running water by dams, by the riparian above to the injury of the riparian below, depends upon the nature and size of the stream.[60] In that regard, the detention must not be longer than necessary for profitable enjoyment.[61]

Other factors the courts have looked to in determining reasonableness of use include the subject matter of the use, the occasion and manner of its

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53 Id.
54 Auburn v. Water Power Co., 90 Me. 584, 38 A. 561 (1897).
55 Kennebunk Water District v. Maine Turnpike Authority, 145 Me. 35, 71 A.2d 520 (1950).
56 Id.
57 Stanton v. Trustees of St. Joseph College, 254 A.2d 597 (Me. 1969).
58 Id.
59 Blanchard v. Baker, 8 Me. 253 (1832).
60 Davis v. Getchell, 50 Me. 602 (1862).
61 Id.

application, the object, extent, necessity and duration of use, the nature and size of the stream, the kind of business to which it is subservient, the importance and necessity of the use claimed by one party, the state of improvement of the county in regard to mills and machinery and the use of water as a propelling power, the general and established usages of the county in similar cases and all other and ever varying circumstances of each particular case bearing upon the question of the fitness and propriety of the use of the water under consideration.[62]

A use of water followed by a detention which would be reasonable in a pond that would fill in a nighttime, would not be reasonable in a case where it would take weeks or months to fill the pond.[63] The owner of the dam controlling the water must not only see existing conditions but must foresee probable consequences.[64] He must not lower the water in the dam so that in order to perform his duty to those below and give them the natural flow at all times, he must deprive his own dam of the water to which it is entitled. The proprietors below must take the water as it comes to them after such use even if the flow is less constant and less valuable than it would otherwise be.[65]

2. Public Trust.

The developer should not assume that riparian law constitutes the universe of the regulations of his water rights. In the event the project is located on a public body of water, the developer's rights will be regulated by the public trust doctrine. This doctrine is important as it declares the duty the state owes to the public in its administration of the public's resources. The developer must seek permission of the people through the state legislature

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[62] Lockwood v. Lawrence, 77 Me. 297 (1885), citing Red River Roller Mills v. Wright, 30 Minn. 249, 44 Am. R. 194 (1883).

[63] Oakland Woolen Co. v. Union Gas and Electric Co., 101 Me. 198, 63 A. 915 (1907).

[64] Id.

[65] Id.

for use of these public resources.

The public resources include rivers navigable in law and navigable in fact. Rivers navigable in law are those rivers where the tide ebbs and flows.[66] Waterways which are sufficiently large to bear boats or to be of public use in the transportation of property are navigable in fact.[67] The ability for transportation must be present as the waterway exists in its natural state without the aid of dams or other artificial improvements.[68] Public resources also include bodies of water denominated great ponds. The substantive law of great ponds is discussed below. Title to the bed of a water body subject to the public trust doctrine is in the state.[69]

In all such bodies of water the trust insures certain rights to the public. These public rights in the waters of Maine stem from one of two sources, the common law or the Colonial Ordinance of 1641-1647. The common law is the source of rights to use tidal waters[70] and nontidal waters that are navigable.[71] The Colonial Ordinance is the source of public rights to use ponds with a surface area of at least ten acres which are not navigable.[72]

The public rights in these waterways include the right of floating logs,[73] operating vessels for commercial purposes,[74] to fish and fowl,[75] and boating.[76]

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66 Smart v. Aroostook Lumber Co., supra, note 14.
67 Wadsworth v. Smith, 11 Me. 278 (1834).
68 Brown v. Chadbourne, 31 Me. 9 (1849).
69 Opinion of the Justices, supra, note 52.
70 State v. Leavitt, 105 Me. 76, 72 A. 875 (1909).
71 Smart v. Aroostook Lumber Co., supra, note 14.
72 Flood v. Earle, 145 Me. 24, 71 A.2d 55 (1950).
73 Clark v. Gilman, 114 Me. 251, 95 A. 1032 (1915).
74 Dudley v. Kennedy, 63 Me. 465 (1884).
75 Conant v. Jordan, 107 Me. 227, 77 A. 938 (1910).
76 Gratto v. Palangi, 154 Me. 308, 147 A.2d 455 (1958).

These public rights are property rights and are paramount to private riparian rights.[77] Public rights may not be lost by continuous adverse use. In one instance damages were recovered for obstructing navigation by a dam in place for seventy-two years prior to the action.[78]

The public trust doctrine does not forbid a private use of these waters nor the encroachment of any public rights. As beneficiaries, the people possess these rights subject to the legislature as representatives of the people to abridge these rights and grant them or any portion of them to private individuals or corporations.[79]

A great pond presents the Maine developer with an interesting proposition. The pond is a natural impoundment for raising a head of water. If the developer can acquire a legislative grant he will have the use of the pond and bed. In terms of land acquisition he would need only to own the littoral lands upon which to place the structure. However, location upon a great pond subjects the developer to regulation under the public trust doctrine and the need to comply with the terms of the legislative grant. These regulatory requirements are derived from the Colonial Ordinance of 1641-1647.

The common law has judicially adopted the Colonial Ordinance of 1641-1647, which states that ponds of more than ten acres are great ponds.[80] The state holds such ponds in trust for the use of the people.[81] The title to the bed of great ponds is in the state.[82] The Maine court has affirmed these principles

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77 State v. Leavitt, supra, note 70.
78 Knox v. Chaloner, 42 Me. 150 (1856).
79 Opinion of the Justices, supra, note 52 and Auburn v. Water Power Co., supra, note 54, where the legislature granted the right to take water from a great pond for a public water supply.
80 Barrows v. McDermott, 73 Me. 441 (1882).
81 Auburn v. Water Power Co., supra, note 54.
82 Opinion of the Justices, supra, note 52.

stating that all great ponds without exception are public and subject to the trust even in the face of a claim of a private grant of a pond pre-dating the Colonial Ordinance.[83] A developer may not draw down the water of a natural great pond or lake below the natural low water line, absent legislative authority.[84] The rationale for this principle is that lands bounded by a great pond exist only to the natural low water line. To allow a dam operator to lower the water below that mark would expose a strip of the bed between the riparian's land and the water. This strip of the bed, held by the state, could not be used by the riparian landowner and thus would deprive him of his right to the natural water frontage.[85]

While great ponds are public property the state may undoubtedly control and regulate their use. In one case, the state legislature had authorized the plaintiff to take water from a great pond sufficient for its domestic use.[86] Defendant corporation claimed it was entitled to compensation, as it had a superior right to the waters of the pond to run its mill. The court found the defendant's claim to be without merit as the state has title to the pond and may confer the right to the water without liability for any loss to the owners of a mill privilege.

In addition to the public ownership argument the same court stated that domestic uses of water are primary and mechanical uses are secondary. In the event of a conflict of uses the latter must yield.[87]

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83 Conant v. Jordan, supra, note 75.
84 Fernald v. Knox, 82 Me. 48, 19 A. 93 (1889).
85 Id.
86 Auburn v. Water Power Co., supra, note 54.
87 Id, Accord: American Woolen Co. v. Kennebec Water District, 102 Me. 153, 66 A. 316 (1906) where defendant corporation with a legislative grant to take water to supply domestic and municipal uses was not liable for injury to plaintiff's mill privilege.

A legislative grant of authority does not shield against all attacks. The argument may be raised that the dam owner is operating outside the authority granted in the legislative charter. In the one case concerning a dam where this argument was raised the court did not reach the merits, as the plaintiff was a non-riparian and could not claim any damage to water frontage.[88]

Bodies of water comparable in size to a great pond may be artifically created by the erection of a dam. In determining ownership rights in such a water body it has been stated that where a lot of land is bounded by a pond artificially created by the flowing of a stream by a dam, the same rule applies to the pond as to the stream before the dam was built.[89] The rule is that a grant of land bounded by a pond artificially created is presumed to go to the center of the stream.[90]

The Maine developer of great ponds and certain artifical ponds will be required to secure a permit from the Board of Environmental Protection. This permit is examined in Part IV.

II. ENTERING THE REGULATORY SYSTEM

While efficiency may lead the developer to carry on his land acquisition and permit applications concurrently, a legal roadblock will prevent permit approvals from proceeding at a rate faster than land acquisition. Before any state agency can issue a permit the developer must have right, title, or interest in the proposed site.[91] For the developer who has met this jurisdictional

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[88] Smedley v. Moxie Dam Co., 148 Me. 302, 92 A.2d 606 (1952).
[89] Mansur v. Blake, 62 Me. 38 (1873).
[90] Id.
[91] See the discussion in Part II-B(2) of this paper for the requirements of right, title or interest.

requirement the next step is to enter the regulatory system. This system, as a composite of other regulatory systems, does not dictate any particular starting point. The following sequence is arranged in what appears to be an efficient use of the system. Phase one of the system will authorize the location of the dam, its impact on the environment, and its characterization as an energy producer.

A. A Suggested Approach.

Three major agencies, in their administration of certain statutes, present themselves as viable entry points. These agencies are the Public Utilities Commission, the Board of Environmental Protection and the Land Use Regulation Commission. In particular cases the statutory preference that an agency may give to the decision-making process of another agency may suggest a time efficient use of the system. In the event the developer is an electric company proposing a generating facility of more than 1,000 kilowatts the following regulatory sequence is suggested.[92]

The Public Utilities Commission requires any electrical company which proposes to erect a permanently installed power generating facility of more than 1,000 kilowatts to follow a procedure, which favorably results in the issuance of a certificate of public convenience and necessity for the facility.[93] The Board of Environmental Protection, in the administration of the Site Location Act must approve or disapprove the location of the development.[94] This

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[92] See the discussion in Part II-B(1) of this paper for the definition of an "electric company."

[93] Me. Rev. Stat. tit 35 §13-A (1965).

[94] Id., tit 38 §483 (Supp. 1973).

approval is conditioned on factors of financial capacity, traffic conditions, soil conditions and effect on the natural environment. When the proposed development is an electrical generating facility of 1,000 kilowatts or more, approval by the Board is conditioned upon the above four factors and the approval of the Public Utilities Commission. This approval, as stated above, is in the form of a certification of public convenience and necessity. The desireability of obtaining the Public Utility Commission's approval first is demonstrated by the bond requirement. A bond or satisfactory evidence of financial capacity must be filed by an electric company with the Board in the event that the electric company files with the Board before a certificate of public convenience and necessity has been issued by the Public Utilities Commission.[95] This bond is not to exceed $50,000 and may be used to reimburse the Board for its cost incurred in processing any application in the event the applicant does not receive a certificate of public convenience and necessity. Thus a maximum use of a developer's resources would suggest that strong efforts be made toward obtaining the certificate of convenience and necessity.

Should the electric company's development take place in an unorganized or deorganized township of the state a permit and certificate of compliance would be required by the Land Use Regulation Commission. The Commission may waive the requirement of a hearing for any person who has secured approval pursuant to the Site Location Act.[96] The Commission shall approve no application unless adequate technical and financial provision has been made for complying with the requirements of the state's environmental laws and those standards and regulations adopted thereunder, including, inter alia, the Site Location Act.[97]

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[95] Id. §484 (Supp. 1978).
[96] Id., tit. 12 §685-B (Supp. 1978).
[97] Id.

Additionally, the commission may also exempt wholly or partially from regulation any land to be used by a public service corporation.[98] Thus the developer who has complied with the Site Location Act has also met a major burden under the Land Use Regulation Commission. The Land Use Regulation Commission also looks favorably upon status as a public utility.

While realistically the developer may have all of the above permit procedures progressing at various rates, concentration on expediting the certificate from the Public Utilities Commission may result in less time spent in the regulatory processes of the other two agencies.

In the event the developer is not an electric company proposing a plant or the dam has less than a 1,000 kilowatt capacity, the certificate will not be required. Such developer should first apply to the Board of Environmental Protection for approval under the Site Location Act. In this manner, where applicable, the developer may still capitalize on the statutory interface between the Land Use permit and the Site Location approval.

B. Regulatory Requirements.

The following discussion will map the procedures and requirements for each of the above permitting processes. Each agency regulates certain classes of projects as defined by that agency's definitions. The developer in determining which agencies to apply to must ascertain the inclusion or exclusion of his project from the scope of each agency's definition.

1. Public Utilities Commission.

The Public Utilities Commission oversees and regulates public

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98 Id. §685-A(11)(1965).

utilities in the State of Maine. A public utility includes an electrical company.[99] An electrical company includes anyone owning, controlling, operating or managing any electrical plant, except where electricity is generated on or distributed by the producer through private property solely for his own use or use of his tenants and not for sale to others.[100] The requirements of the Commission depend on the type of development undertaken.

All developers of a dam for the purpose of developing water power or the creation or improvement of a water basin or reservoir must file with the commission copies of construction plans and a statement giving the location, height, nature, and estimated power to be developed by the proposed dam.[101] In the event the dam is to be constructed solely for water storage and not for development of a water power at its site, plans and statements must be filed showing the extent of the land to be flowed, the estimated number of cubic feet of water that may be stored and the estimated effect upon the stream flow.[102]

The developer who is an electrical company proposing to erect a permanently installed power generation facility of more than 1,000 kilowatts must file a petition with the Commission.[103] The petition is to be on a form prepared by the Commission and shall contain such information as the Commission shall reasonably require.[104]

General Order No. 39 of the Maine Public Utilities Commission sets out the information that is to be filed in the petition. The Commission has administratively promulgated this order to require compliance with its contents only for facilities of 30,000 kilowatts or more. The order contains a list of forty-one

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99 Me. Rev. Stat. tit 35 §15(13)(1965).
100 Id., §15(5).
101 Id., §11.
102 Id., §11.
103 Id., §13-A.
104 Id.

facts and details which generally relate to:

1. annual peak demand
2. actual energy generated and sold in the past and estimates for the future
3. total peak energy generation in the past and estimates for the future
4. estimated cost of construction
5. estimated income of facility
6. cost per kilowatt hour
7. life expectancy of facility
8. financing plans for the facility
9. alternatives to plant's size
10. the method by which power will be generated and what other types were considered, and
11. what other federal, state or local or other governmental bodies require permits, licenses or authorizations.

The petition shall be set for a public hearing.[105] In its order, the Commission shall make specific findings with regard to the need for such facilities.[106] If the Commission finds that a need exists, it shall issue a certificate of public convenience and necessity for the proposed facility.[107] The order of the Commission is subject to all other provisions of law and the right of any other agency to approve such facilities.[108]

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105 Id.
106 Id.
107 Id.
108 Id.

2. Board of Environmental Protection.

The developer, in determining whether to secure approval from the Board, must ascertain the jurisdiction of the Board. The Board, through the Site Location of Development Act, regulates "developments" and "structures".

The Board of Environmental Protection may exercise the police power to control the location of developments substantially affecting the local environment in order to insure that the development will be located in a manner which will have a minimal adverse impact on the natural environment of their surroundings.[109] "Developments substantially affecting the local environment" are defined as any state, municipal, quasi-municipal, educational, charitable, commercial or industrial development which occupies a land or water area in excess of 20 acres or which is a structure.[110] A structure includes a building on a single parcel constructed or erected with a fixed location on or in the ground which occupies a ground area in excess of 60,000 square feet.[111]

It appears most certain that a dam would qualify as a development, but only in the event the land or water area was in excess of 20 acres. Any dam under that size would not need the approval of the Board, provided that the the pumping station and appurtenant works do not cover a ground area in excess of 60,000 square feet. Where that is the case, the dam would qualify as a structure and require the approval of the board. The statute, in defining "development" requires a land or water area of 20 acres. It is not clear from that definition whether a combination of land and water area that equals 20 acres would be a development, but it is likely it would.

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[109] Me. Rev. Stat. tit. 38 §481 (1965).
[110] Id., §482.
[111] Id., §482(6).

A further jurisdictional issue must be determined before the Board may be asked to approve the development or structure. The developer must have "title, right or interest" in a proposed development site as a necessary jurisdictional prerequisite to any decision of an agency.[112] In order to establish such interest the developer must demonstrate to the finder of fact that he has control over the site and that the site can be developed as proposed within a reasonable period of time.[113] Sufficient control would include not only ownership in fee but also some lesser interest including a contract or option to purchase or other contractual agreement to acquire a right to develop the land, which right is enforceable by way of specific performance.[114]

Assuming the developer has met the requisite jurisdictional requirements, the Board's approval would be sequenced in the following manner:

(1) Any person intending to construct or operate a development must notify the Board in writing of that intent before commencing construction or operation.[115] This notice should contain the nature and location of the development. The Board shall, within 30 days of receipt of such information, either approve the proposed development upon such terms and conditions as are appropriate and reasonable, or disapprove the proposed development setting forth the reasons therefor or schedule a hearing.[116]

(2) Any person as to whose development the Board has issued an order without a hearing may request a hearing within 30 days after notice.[117] The request must set forth the findings and conclusions to which the person objects, the basis

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112 Walsh v. Brewer, 315 A.2d 200 (Me., 1974).
113 Opinion of the Attorney General, Aug. 9, 1974.
114 Id.
115 Supra, note 109 §483 (Supp. 1973).
116 Supra, note 109 §483 (Supp. 1973).
117 Supra, note 109 §483 (Supp. 1973).

of such objections and the nature of the relief requested. The Board will schedule and hold a hearing limited to the matters set forth in the request.

(3) The Board shall give notice of the date, time, and place of the hearing.[118] At the hearing the Board shall determine whether the development will in fact substantially affect the environment or pose a threat to the public's health, safety or general welfare. In that regard, the Board shall approve a development proposal whenever the following conditions are met:

a. The developer has the financial capacity and technical ability to meet state air and water pollution control standards.

b. The developer has made adequate provision for traffic movement of all types out of or into the development area.

c. The developer has made adequate provision for fitting the development harmoniously into the existing natural environment and that the development will not adversely affect existing uses, scenic character, or natural resources.

d. The proposed development will be built on soil types which are suitable to the nature of the undertaking, and

e. In the case of a permanently installed power generating facility of more than 1,000 kilowatts, the developer shall also have secured approval of the Public Utilities Commission.[119]

(4) Within 30 days after the board adjourns the hearing, it shall make findings of fact and issue an order granting or denying permission to the developer to construct or operate the development.[120]

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118 Supra, note 109 §484 (Supp. 1978).

119 The approval required is that under Me. Rev. Stat. Tit 35 §13-A (1965) regarding the certificate of public convenience and necessity.

120 Supra, note 109 §484 (Supp. 1978).

3. Land Use Regulation Commission.

The developer proposing development in an unorganized or deorganized township must also proceed through the regulatory system of the Land Use Regulation Commission. Any person who proposes to:

1. erect, change, convert, alter or enlarge a structure
2. construct on any lot, or sell any lot, or
3. commence any construction or operation of a development

must secure a permit from the commission.[121]

A development is defined as any land use activity directed toward using air, space, land, water, or other natural resources.[122] Land use activity is not defined. Assuming it refers to any use of land, a dam in its use of the banks would constitute a land use activity. The dam would then be a "development" as it is an activity directed toward using water for the development of electricity.

Structures shall mean anything constructed or erected with a fixed location on or in the ground, or attached to something having a fixed location on or in the ground.[123] A dam, utilizing the banks of a stream would have a fixed location on the ground and hence qualify as a structure.

A clear command for a permit arises from the regulations of the commission. The Commission requires a permit for all public utility structures.[124] Public utility structure is not defined, but given a common sense reading a dam would be included. Given the Public Utilities Commission's definition of public

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121 Me. Rev. Stat. tit 12 §685-B (Supp. 1978).
122 Id., §682(7)(1965).
123 Id., §682(4)(1965).
124 Land Use Regulations, Ch. 7 §2 (1977).

utility as any electrical company, a hydroelectric dam would be considered a public utility structure, provided it was first considered a structure. Assuming the developer must comply with the land use permit, the following procedures apply:

(1) An application form for approval is provided by the commission; it shall be completed and signed by the applicant and shall be accompanied by the following:

a. a plan of the proposed structure or development showing the intended use of the land, the proposed change, and the details of the project, and

b. the fee prescribed by Commission rules, such fee to be the greater of $10 or 1/10 of 1% of the total construction costs.[125]

(2) In approving applications, the Commission may impose such reasonable terms and conditions as deemed appropriate. No application shall be approved unless the following conditions are met:

a. adequate technical and financial provision must be made for complying with the requirements of state environmental laws, including the Site Location Act;[126]

b. adequate provision must be made for loading, parking, and circulation of land, air and water traffic;[127]

c. adequate provision must be made for fitting the proposal harmoniously into the natural environment;[128]

d. use of soil must meet standards of current soil suitability;[129] and

e. the proposal is in conformance with the requirements of the statute.[130]

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125 Supra, note 121 §685-B(2).
126 Supra, note 121 §685-B(4)(A).
127 Supra, note 121 §685-B(4)(B)(1974).
128 Supra, note 121 §685-B(4)(C).
129 Supra, note 121 §685-B(4)(D).
130 Supra, note 121 §685-B(4)(E).

(3) Any person aggrieved by a decision of the Commission may petition for a hearing within 30 days of such decision.[131] The Commission shall respond to the request within 30 days of receipt by notifying the petitioner in writing of the date, time, and place set for the hearing or the denial of the request. The Commission may determine on its own motion to hold a hearing with 45 days of receiving the application. Within 45 days after the Commission adjourns any hearing, it shall make findings of fact and issue an order granting or denying approval to the applicant.

(4) Any person aggrieved by final actions of the Commission has the right of appeal.[132]

III. WRITTEN NOTICE STATUTES

Regardless of which agency will regulate the developer's project, two statutes require written notice of the developer's intent to construct a dam. These statutes are concerned with the effect the dam will have on fishlife in the watercourse. The agency may impose a requirement of a fishladder to minimize the impact of the dam on the ecosystem. This notice may be given at any time prior to construction. It is suggested that this notice be given after some progress has been made in acquiring the permits of the preceding section, as the notice will go to one of two agencies depending upon geographical location. The two agencies are the Department of Inland Fisheries and Wildlife and the Department of Marine Resources. The former regulates dams in the inland waters of the state while the latter regulates dams in the state's tidewater area. The following are the requirements and procedures imposed by these departments.

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131 Supra, note 121 §685-B(3).

132 Supra, note 121 §689.

A. Department of Inland Fish and Wildlife.

The written notice is required of any developer seeking to build a dam in any rivers, streams, or brooks of the state, and must be filed with the Commissioner of Inland Fish and Game.[133] The written notice should identify the brook, river, or stream and indicate the location of the structure on a good map.[134] A fishway may be required by the Commissioner of any dam above tidewater, the waters of which are frequented by salmon, shad, alewives or other migratory fish.[135] The Commissioner may also hold a hearing as follows to determine the need for a fishway in an existing dam.

(1) Whenever he shall be petitioned by two-hundred (200) citizens of a municipality in which such dam is located;

(2) Whenever he shall be petitioned by a majority of the county commissioners;

(3) Whenever he shall be directed by the Inland Fish and Game Legislative Committee that such a dam exists.[136]

Fourteen (14) days written notice of the hearing shall be given to the owners of the dam. Notice of hearing, time and place shall be published once a week for two (2) successive weeks prior to the week of the hearing.[137]

After the hearing, the Commissioner by written order, may require the owners of the dam to provide a suitable fishway. The Commissioner shall prescribe the time during which the fishway shall be kept open.[138]

An aggrieved party may appeal to the Superior Court within fourteen (14) days of any order of the Commissioner.[139]

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133 Me. Rev. Stat. tit 12 §2203(1965).
134 Department of Inland Fish and Wildlife notice form.
135 Supra note 133 at §2201.
136 Supra, note 133 at §2201.
137 Supra, note 133 at §2201.
138 Supra, note 133 at §2201.
139 Supra, note 133 at §2201.

B. Department of Marine Resources.

The written notice of intent to build a dam must be filed with the Commissioner of the Department. It must contain plans for construction, the location and the time when the dam will be built.[140] The Commissioner will reply to the developer within 30 days of the receipt of such notice stating whether or not he will require a fishway.[141] Jurisdiction of the Commissioner in that matter extends to tidewaters which historically or presently are frequented by alewives, shad, salmon, sturgeon or any other andronomous fish species.[142]

The Commissioner also has a maintenance function that allows him to examine all dams to determine any need for improvement or repair of fishways. If he determines that changes for improvement, repair or construction are necessary in existing dams, he shall prescribe by written order, in reasonable detail, specific plans and description of the fishway he proposes and the conditions of its use including how and where the fishway shall be constructed or changed and at what time it shall be kept open.[143]

The owners of the dam shall be given an opportunity to carry out the improvements or changes ordered by the Commissioner. If they fail or refuse, the Commissioner may proceed to have the fishway constructed or changes carried out.[144]

The Commissioner shall hold a public hearing on the order for the proposed fishway.[145] A copy of the order and notice shall be sent by registered mail fourteen (14) days prior to the hearing to the owner of the dam.[146] The order

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140 Me. Rev. Stat. tit. 12 §3709(6)(1965).
141 Id.
142 Id.
143 Id., §3709(2).
144 Id., §3709(2).
145 Id., §3709(3).
146 Id., §3709(3).

and notice shall be published once a week for two (2) successive weeks prior to the hearing. After the hearing the Commissioner may amend the order. Certified copies of the written order shall be mailed to the owner of the dam.[147] The owner shall have thirty (30) days to reply to the order stating that he will carry out the order within the time specified.[148]

IV. ALTERATION AND CONSTRUCTION IN WATER COURSE PERMITS

Before the developer may begin the actual preparation of the land parcel and water bed for the construction of the dam he must further navigate the regulatory system to acquire what are commonly known as dredge and fill permits and wetlands permits. The developer's need for these permits will once again depend upon the geographical location of the dam and impact upon the type of waterbody.

Generally, the development located in nontidal waters will require a permit from the Commissioner of Inland Fish and Wildlife while the development located in tidal waters will require a permit from the Board of Environmental Protection. The former is known as a stream alteration permit and the latter as a coastal wetlands permit. In the event that the dam is located on a great pond the developer must secure a permit to dredge and fill and construct from the Board of Environmental Protection. A discussion of the requests and procedures of each of these permits follows.

A. Stream Alteration Permit.

The developer may not dredge or cause to be dredged, fill or cause to be filled, or erect or cause to be erected any permanent structure above

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147 Id., §3709(3).
148 Id., §3709(3).

the head of tide in such a manner that any dredged spoil, fill or structure may fall or be washed into the waters, without first obtaining a permit from the Commissioner of Inland Fisheries and Wildlife.[149] For the unorganized territory, the application should be filed directly with the Land Use Regulation Commission.[150]

All developers need not seek this permit. The statute allows two categories of exemption. Where the development is a public works project which will not alter more than a total of three hundred feet in any mile of shore a permit is not required.[151] In the event the development is a private crossing or dam project which does not alter more than a total of one hundred feet in any mile of shore a permit is not required.[152] The act requires that both shores of the waterway be combined in arriving at the total shore footage altered.[153] However, if there is erosion or other harmful effects, as described in the act, as a result of the exempt alteration, these secondary effects will be subject to the act.[154]

In seeking approval of the project, the developer must demonstrate to the satisfaction of the Commissioner that the activity will not unreasonably:

1. interfere with existing recreational and navigational uses;
2. cause soil erosion;
3. interfere with the natural flow of any waters;
4. harm any fish habitat or wildlife habitat;
5. lower the quality of any waters.[155]

The Department suggests that an application form be sent well in advance of the proposed starting date of the project as processing may require thirty days.[156]

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[149] Me. Rev. Stat. tit. 12 §2206(1965).
[150] Stream Alteration Permit Application Form 1978.
[151] Supra, note 149, §2212.
[152] Supra, note 149, §2212.
[153] Supra, note 149 §2212.
[154] Stream Alteration Permit Application Form 1978.
[155] Supra, note 149 §2207.

The department will not consider an application where the applicant has not demonstrated:

1. that he has sufficient title, right and interest in all of the property which is proposed for alteration;[157]
2. that the alteration will not violate any local zoning ordinances;
3. and that the applicant has the technical and financial capacity to complete the alteration satisfactorily in accordance with any conditions specified in the permit.[158]

In the event an application for a permit is denied or granted on terms objectionable to the developer, an appeal may be taken. Thirty days from the receipt of the notice of decision the applicant may file a notice of appeal with the Commissioner.[159] The applicant will then be given a hearing within thirty (30) days of receipt of the notice of appeal. Any person aggrieved by the final order or decision of the Commissioner may appeal to the Superior Court.

The above discussion concerns the process that is required by the statute. In at least one instance the enactment of this statute has an interesting side effect.

The Stream Alteration Act and the Mill Dam Act appear to be in conflict. Both Acts allow the construction of a dam in waters where the tide does not flow. The Mill Act labels such waters non-navigable, while the Stream Alteration Act refers to waters above the head of the tide. Under the Mill Act, any person may construct and maintain a dam. It contains no reference to any environmental restrictions. The Stream Alteration Act states that if one were to construct a dam he must do so in such a manner that the dredge, fill or the structure

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157 See the discussion in Part II(B)(2) of this paper.
158 Department Regulations for Processing Applications, §1.5b.
159 Supra, note 149 §2208.

may not fall or be washed into the water course. If a dam is constructed in such a manner a permit will be required. Nowhere does the Act define what "in such a manner" may mean.

If the phrase covers the construction phase of any project, then the Mill Acts erection of dams provision is limited by the need to obtain the Stream Alteration Permit. If the phrase covers only situations where the event may happen, as the language suggests, then the Mill Act is not affected except where the event is determined to be one that may happen. The difficulty is that of determining when an event may occur.

The regulations promulgated under the statute resolve the matter, but do so by ignoring the problem. It states in part that "the purpose and effect of the Stream Alteration Act...is reasonably evident from the language...of the statute. Under the Act any dredging, filling or the erection of a permanent structure cannot be conducted without first obtaining a permit."[160] This result requires a permit for dam construction under the Mill Act. In reaching this result the regulations may have exceeded the authority of the statute. Court action may be required to resolve that question.

It is significant to the developer that, by interpretation of the department, he will be required to obtain a permit for any dam construction in non-tidal waters. The burden the developer must meet is a showing that his project will not unreasonably effect navigation, soil erosion, the natural flow of the water, wildlife habitats, and water quality. A dam will have some impact in all of these areas. Future dam construction will depend upon a determination of what is a reasonable impact in these areas.

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[160]Department Regulations for Processing Applications, §1.5b.

B. Coastal Wetlands Permit.

The Board of Environmental Protection maintains two regulatory systems that the developer in the coastal wetlands terrain should consider. One system regulates development by requiring a permit, while the other system requires that the developer comply with conditions promulgated by the Board for land use in a coastal wetland. The coastal wetlands developer must comply with both systems.

The coastal wetlands permit is required for any dredging, draining, filling or erection of a permanent structure in, on or over any coastal wetlands.[161] A coastal wetland is tidal or subtidal lands and any swamp, marsh, bog, beach, flat or other contiguous lowland subject to tidal action.[162] The standard the developer must meet to acquire the permit is a showing that the project will not unreasonably interfere with the environment.[163] Specifically, the project must not unreasonably interfere with existing recreational and navigational uses, with the natural flow of water, with the quality of water, nor harm fish-life or wildlife, nor cause unreasonable soil erosion. The Board must issue or deny the permit setting forth the reasons for so doing, within thirty (30) days of receipt of the application or thirty (30) days after the adjournment of any requested hearing.[164]

The second system allows the Board to adopt orders regulating dredging, filling, or otherwise altering a coastal wetland.[165] At least twenty one (21) days prior to adoption of an order a public hearing and notice are required.[166] Upon adoption of the order it is recorded by the Board in the registry of deeds for

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161 Me. Rev. Stat. tit. 38 §471 (Supp. 1978).
162 Id., §472.
163 Id., §474.
164 Id., §474.
165 Me. Rev. Stat., tit. 12 §4754 (1965).
166 Id., §4755.

the county where the wetlands are located.

The developer, should he have a recorded interest in any wetlands affected by such an order, may within ninety (90) days after notice, appeal to the Superior Court.[167] The purpose of the appeal is to determine whether the order so restricts the use of the property as to deprive the owner of its reasonable use or constitutes the equivalent of a taking without compensation.[168] If the court so finds, it will enter a decree that the order does not apply. In that event the Board may negotiate for the purchase of the land or may take by eminent domain if it determines that an emergency situation exists which would cause an immediate threat to public safety, health and welfare.[169]

This bifurcated regulatory system exists as a result of the ability of the permitting system to so regulate land by permit denial as to constitute a taking by eminent domain. The orders system by including a provision for court appeal and non-application of the order seeks to remedy what otherwise would be an unconstitutional taking.

In a recent case the Maine Supreme Judicial Court addressed this situation.[170] A landowner had been denied a permit to fill his coastal wetlands. The landowner claimed that the denial of the permit so restricted the use of his land that it amounted to a taking without compensation and hence was unconsitutional. The Court held that the permit denial left the landowner with commercially valueless land and hence was a taking for which just compensation must be paid.

The impact of this case for the developer as landowner is that, should the order render his land commercially valueless the Court will not enforce it. A burden is then placed on the state to purchase the land or take it by eminent

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[167] Id., §4757 (Supp. 1978).
[168] Id., §4757 (Supp. 1978).
[169] Id., §4757 (Supp. 1978).
[170] State v. Johnson, 265 A.2d 711 (Mr. 1970).

domain. As both situations require expenditure of capital by the state it is questionable how often the state would proceed after a court decree of non-application of the order.

C. Great Ponds Permit.

The developer contemplating a project on any body of water defined as a great pond must obtain a permit from the Board of Environmental Protection. A great pond as defined by the statute is much broader than the common law definition.[171] A great pond is any inland body of water which in its natural state has a surface area in excess of ten acres and any body of water artificially formed which has a surface area in excess of thirty acres, the shore of which is owned by two or more persons.[172]

A permit is required for the following activities:

1. dredging or removing material from below the high water level in a great pond;
2. constructing or repairing any permanent structure; or,
3. depositing any dredged spoil or fill in a great pond.[173]

The Board shall grant a permit upon proper application and upon such terms as it deems necessary when it finds that the proposed activity will not unreasonably:

1. interfere with existing aesthetic, recreational, navigational or scenic uses;
2. harm the natural environs of the great pond;

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171 See discussion in Part I(B)(2) for the common law of great ponds.
172 Me. Rev. Stat., tit. 38 §392 (Supp. 1978).
173 Id., §391.

3. cause soil erosion;

4. harm any aquatic or wildlife habitat;

5. lower the quality of water;

6. interfere with the natural flow.[174]

While the act does not specifically refer to "dams", the definition of permanent structure clearly includes them in the act. A permanent structure is any structure...which is fixed in the water for a period exceeding seven months each year.[175]

V. CONTINUING OBLIGATIONS

The developer, as owner of a completed and operating hydroelectric plant now enters a phase of regulation that will continue for as long as the dam exists. This section will discuss the life-span regulations of sale of power, inspections, and liability for breach. It is important for the owner of the dam to comply with these requirements as the penalties for non-compliance may be financially severe enough to call an end to the enterprise.

A. Public Utilities Commission.

The price for which the owner of the dam may sell his hydroelectric power will be regulated by the Public Utilities Commission.[176] The statute requires the dam owner to be a corporation organized under title 13-A for the purpose of generating electricity. A corporation must produce at least 1,000 kilowatts to be a title 13-A corporation. By inference, corporations under

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174 Id., §393.
175 Id., §392.
176 1978 Me. Acts, ch. 633, enacting Me. Rev. Stat., tit. 35 §2314.

1,000 kilowatts would not be subject to rate regulation by the Commission. Presumably, they could set their own rate.

In the event the developer is a title 13-A corporation he may sell his electricity to any public utility corporation or cooperative.[177] The rate he will be paid by the public utility must be just and reasonable.[178] In the event of a rate dispute, the Commission may determine the rate and any other conditions that will safeguard the rights and interests of both the generating corporation and the public utility.[179] "Other conditions" is not defined in the statute. However, a letter from the Maine Energy Office states that "other conditions" include the possibility of making utilities "wheel" electrical energy.[180]

B. Inspections.

The developer must contend with inspections of his dam by two different agencies. Inspections authorized under the Mill Act will be made by an inspector of dams appointed by the Commissioner of Agriculture.[181] Investigation and inspection by the Bureau of Civil Defense is permitted as deemed necessary.[182] In addition the Bureau has emergency regulatory powers. Both agencies can impose severe restraints, financial and otherwise upon the dam owner who runs afoul of the following requirements.

A Mill Act inspection will commence upon the petition of ten resident taxpayers of any town or several towns, the selectmen or the assessors of any town.[183] This petition directs the inspector of dams to inspect any dam or reservoir except those licensed and inspected by any agency of the federal government.[184]

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[177] Id.
[178] Id.
[179] Id.
[180] Letter from Gerald Dawbin, Economist, Maine Energy Office to Jim Burns, New Hampshire Governor's Council on Energy, March 27, 1978.
[181] 1978 Me. Acts, ch. 684, enacting Me. Rev. Stat. tit. 38 §811.
[182] Me. Rev. Stat. tit. 37-A §184 (Supp. 1978).
[183] Supra, note 181.
[184] Supra, note 181.

The inspector of dams, following personal examination of the dam or reservoir and after hearing the testimony of witnesses, shall report to the Commissioner of Agriculture his findings and his opinion of the safety and sufficiency of the dam or reservoir.[185]

If after such personal inspection, the inspector reports that the dam or reservoir is unsafe or dangerous to the lives or property of persons residing, carrying on business or employed near or below the dam, the owner shall immediately make such alterations, repairs and additions to the dam as the inspector recommends.[186]

Severe penalties may follow in the event the owner is in default of the inspector's recommendations. The inspector may make an application to the superior court seeking to enjoin the use of the dam.[187] The inspector may also order that the impoundment area be drained in such a manner as he directs.[188]

In cases where the dam is judged by the inspector of dams to be unsafe or insufficient, the Commissioner of Agriculture shall collect from the owner of the dam the total expenses incurred by the State for the inspection.[189]

The inspection scheme formulated by the Bureau of Civil Defense may have equally as great an impact on the dam owner. Occurance of inspections and investigations are not tied to the happening of any event. They occur when deemed necessary.[190] In the event of a violation an injunction may be sought.[191] The statute does not delineate any triggering mechanism for an inspection or what constitutes a violation. Other provisions of the act may help to clarify the matter.

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185 Supra, note 181.
186 Me. Rev. Stat. tit. 38 §812 (1965).
187 Id.
188 Id.
189 Id., §813.
190 Supra, note 182 §184(3).
191 Supra, note 182 §184(4).

The remainder of the act pertains to emergency regulation by the Bureau. An emergency is any situation deemed by the Bureau to present a potential, but real and imminent danger to life or property due to flooding.[192] Thus it may be argued that inspections will be necessary only to check for flood control capability and that the scope of the inspection is limited to that need. A violation would be limited to a violation of a measure needed for flood control.

In the event that an emergency situation exists the Bureau is given extensive powers. These powers are remedial measures that include:

a. full charge and control of any dam;

b. lower the water level;

c. drain the reservoir;

d. other actions necessary to safeguard life and property including breaching or removing the dam.[193]

The developer may not seek redress against the Bureau for any of these actions. These provisions appear to cover the "Act of God" situation with which the developer must live. In the event the developer's project is one licensed by the Federal Energy Regulatory Commission or certified by the Public Utilities Commission, it will be exempt from the jurisdiction of the Bureau.[194]

C. Liability for Breach.

The developer's relationship to the downstream riparian is not limited to passing on the natural flow of the stream. While the developer may flow the upstream lands by utilizing the Mill Dam Act, he may not flow downstream lands without incurring liability under tort law.

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[192] Supra, note 182, §181.
[193] Supra, note 182, §184.
[194] Supra, note 182, §184.

If water is accumulated in a dam, the dam operator must at least exercise ordinary care in letting it again pass into its ordinary and accustomed channels.[195] If the accumulated water is not let out with ordinary care, the operator will be liable at common law for negligence.[196]

Whether the operator has breached this duty of ordinary care by an unreasonable exercise of his rights under all the circumstances of the case, is a question of fact for the determination of a jury.[197]

The above principles were applied in situations where the operator had let down water in such a quantity as to overflow the downstream lands. In neither case did this flooding result from a breach of the dam itself. However, the result of breach or of excessive letting-down of water is the same; that of a flooding. Thus it may be inferred that a court would utilize the same theory in the event of a dam breach.

D. Neglected Dam Statute.

The Neglected Dam Statute presents a dam owner with three possible requirements. A developer of a hydroelectric dam generally will have to comply with only the first and second requirements. The cost of this compliance is slight however, as it involves only registration and notice provisions. The third requirement concerns the regulation of impounded waterlevels. Hydroelectric dams are exempt from this requirement.

Application of the Act requires that the dam be within the statutory definitions. The three requirements mentioned above flow from inclusion under the act as a "dam".

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[195] Frye v. Moor, 53 Me. 583 (1886).

[196] Id.

[197] Barker v. French, 102 Me. 407, 67 A. 308 (1907).

flow from inclusion under the act as a "dam".

"Dam" means any artificial barrier of any kind whatsoever which impounds or diverts water, and which:

> Is two (2) feet or more in height in the natural bed of the stream or watercourse in which it is constructed measured at the downstream toe of the barrier, or from the lowest elevation from the outside limit of the barrier, if it is not across a stream, channel or watercourse, to the maximum capable water storage elevation, or is located at the outlet of a great pond.[198]

The first requirement, applicable to all developers, except state and federal governments, is annual registration of the dam with the Soil and Water Conservation Commission.[199] Such registration must be made on or before the first day of January of each calendar year on a form provided by the Commissioner.[200] The registration requires an annual fee of ten dollars.[201] The penalty for non-registration is a declaration of the dam as abandoned.[202]

A second requirement, of written notice, applies to all dams. The owner of any dam shall provide written notice to the commission ninety (90) days prior to:

(1) Transfer of ownership;

(2) Breach or destroy a dam. Any act by him or at his direction to breach or destroy a dam, in whole or in part; or

(3) Alteration or discontinuation. The alteration or discontinuation of any useful or beneficial purpose for which such dam has theretofore been maintained.[203]

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198 Me. Rev. Stat., tit. 12 §301 (Supp. 1978).
199 Id., §303.
200 Id.
201 Id.
202 Id. See the discussion in Part I(A)(1) of this paper for the consequences of abandonment.
203 Id.

The third requirement is that of establishing a normal water level for a body of water impounded by a dam. Exempted from this requirement are dams operated or maintained for the beneficial use of the owner or operator or other downstream littoral proprietor.[204] Beneficial users shall include but not be limited to the generation of hydroelectric power, the maintenance of public or private water supplies, the maintenance of commercial transportation, the dilution of waste-water or sewage discharges or any other similar use economically beneficial to the owner or operator or other downstream littoral proprietor.[205]

A further exemption from this requirement is given where the dam owner is also the sole littoral owner on the impounded body of water and the impounded body of water is not a great pond as defined by statute.[206]

A hydroelectric developer, feeling comfortable with his exemption, should not ignore the possibility of this requirement being applied to his dam. The policy of the Act appears to be applicable to all dams and the Act has been the subject of criticism.[207] The policy statement includes the maintenance of water levels to provide navigation on such body of water in the customary fashion, to maintain customary habitat for fish and wildlife, to prevent the exposure of unsightly shorelines and to provide for access to the water in the customary fashion, to prevent erosion of shorelines from severely fluctuating lake levels, and to provide and maintain other rights to which such littoral proprietors and the public have through the passage of time become entitled.[208]

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204 Id., §304.
205 Id., §304.
206 Id., §305. See Parts I(B)(2) and V(C) for law concerning great ponds.
207 See Waite, 19th Century Dams and 20th Century Problems, 28 Me. L. Rev. 419 (1977).
208 Supra, note 198.

One critic has suggested that the failure to apply the water level requirement to all dams results in an arbitrary classification of dams.[209] It is suggested by that author that the application of the maintenance and operation features should be expanded to include all dams and the evidence gathered at the water level hearings should be expanded to include the water levels and mode of operation necessary to accomplish the beneficial purpose, if any, of the owner.[210] The Commission would then consider the mode of operation as one of the circumstances pertinent to framing its water level order.

The developer of a hydro facility seeking to avoid this additional regulatory phase, should argue that his exemption does not create an arbitrary classification. The legislature sought to regulate the fluctuating water levels caused by dams for the permissible purposes enunciated in the policy of the Act. Failure to include hydroelectric dams in that legislation could be the result of a determination that they are distinct from other types of dams.

The nature of operation of hydroelectric dams requires fluctuating water levels. Such dams are already the subject of regulation by other statutes and agencies of the state. Purpose statements in the Act need not be read so broadly. The Act is concerned with water level maintenance of dams no longer in use. These dams present the greatest hazard in terms of "wash-outs" as their lack of use usually results in a lack of maintenance. Dams categorized as beneficial use dams under the Act are exempt from these requirements as the harm envisioned is much less from an operating dam.

As the statute is of recent origin, no litigation has occurred to support either determination. The following represents the process the dam developer

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209 Supra, note 207.
210 Supra, note 207 at p. 433.

would incur should he be subject to the act.

The Commission, upon its own motion or upon the receipt of petitions from ten per cent of the littoral proprietors on any body of water impounded by a dam shall conduct a public hearing for the purpose of establishing a normal water level for such body of water.

The Commission shall provide public notice of its intent to hold such hearing by providing written notice to the owner, if known, of any dam on such body of water and to any petitioner who has petitioned for a hearing with respect to such body of water. Written notice shall be made by registered mail and shall identify the time and place of the hearing and the purpose for which it shall be conducted. Notice shall be provided to the owners and petitioners at least sixty (60) days prior to such hearing. The Commission shall give notice of its intent to hold such hearing by filing written notice in the municipal office of any municipality in which such body of water may be located and by publication at least five (5) times in a newspaper of general circulation within the county or counties in which the body of water is located, the date of first publication to be not less than sixty (60) days and the date of the last publication to be not less than fifteen (15) days prior to such hearing.[211]

At the hearing, the Commission shall hear testimony for the purpose of establishing a normal water level for such body of water, including but not limited to:

(a) The water level necessary to maintain traditional navigation and boating;

(b) A water level necessary for the maintenance of fish and wildlife habitat;

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[211] Supra, note 198 at §304.

(c) The water level necessary for the prevention of exposing unsightly shores;

(d) The water level necessary to prevent the erosion of shorelines;

(e) The water level necessary to provide customary access to the water by littoral proprietors and the public;

(f) The water level necessary to accomodate precipitation and runoff of waters;

(g) The water level necessary to prevent creation of a hazardous condition to littoral proprietors and the public; and

(h) The historical fluctuations in water levels and the affect of such fluctuations on littoral proprietors and the uses of such body of water.[212]

Based on the evidence solicited at the hearing the Commission shall, within sixty (60) days after adjournment, make written findings and issue an order to the owner of any dam thereon establishing a normal water level for the body of water impounded by such dam. The Commission shall cause a copy of such order to be delivered to the dam owner and each petitioner, if any, and shall cause the same to be filed in the appropriate registry of deeds.[213]

After issuance of an order establishing a normal water level for any body of water, no owner of a dam thereon, shall operate or maintain such dam in any manner that will cause such level of water to be higher or lower than that permitted by the order of the Commission.[214]

VII. FINANCIAL CONSIDERATIONS

A. Tax Structure.

The state of Maine does not directly tax public utility and dam property.[215] In fact, the state's Uniform Property Tax was repealed in 1977.[216]

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[212] Supra, note 198 at §304.
[213] Supra, note 198 at §304.
[214] Supra, note 198 at §305(1).
[215] "Appraisal of Electric Utility Property"; Board of Taxation, Property Tax Division position paper.
[216] Me. Rev. Stat. tit. 36 §451(2) (1978).

Property tax collection is now carried out at the local level by local assessors.[217] The state does require, however, that local governments assess and collect a tax for the support of local education.[218] The State Tax Assessor determines the amount to be assessed on each municipality and unorganized territory.[219] In determining such amount, the state values public utility property at historical or original cost less depreciation, plus an allowance for construction work in progress.[220] Should the utility be non-operating property, the valuation method used by the state is replacement cost less depreciation or current market value as reflected in actual market activity.[221] A hydroelectric dam site is valued by looking at current factors influencing the economic value of the land and appurtenant water rights and adjusting such figure with an allowance for transmission expenses in remote locations.[222]

The method described above lays out the system used by the state to determine the total tax each town is required to collect for educational purposes. Towns, then, must assess and collect the amount determined as above, and use those monies for support of local schools.[223] However, in carrying out their assessments, towns are not bound to use the same valuation methods used by the state, as set out above.[224]

Although there are no statutory provisions limiting a town's choice of valuation methods, there is extensive caselaw relative to this discussion.

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[217] Me. Rev. Stat. tit. 36 §251, 252 (1978).

[218] Board of Taxation position paper, supra, at n.215.

[219] Me. Rev. Stat. tit. 36 §451(3) (1978).

[220] Board of Taxation position paper, supra, at n.215.

[221] Id.

[222] Id.

[223] Id.

[224] Id.

1. Methods of Valuation.

The Main State Constitution requires that "all taxes upon real and personal estate ... shall be apportioned and assessed equally according to the just value thereof."[225] Real estate, for tax purposes, is defined as "all lands in the state and all buildings ... and other things affixed ... together with the water power, shore privileges and rights ... and lines of electric light and power companies ..."[226] Personal property is defined as all tangible goods and chattel and includes personal property employed in the trade and manufacturing inventories of raw materials.[227]

The capability of a site to produce water power is one factor increasing the value of land and thus the tax paid upon such land.[228] Thus, water power is not a distinct subject of taxation, but is taxable only in connection with and as incident to the mill which it operates.[229] The Supreme Judicial Court has found that the determining factor in valuing land with a potential dam site is that the land is made more valuable by the stream and the fall upon it.[230] The key factor involves the value of land as increased "by the fact that its topography is such that a dam may be maintained across a stream upon it and water power thereby created."[231] The Court has found that although the power is developed is nonetheless increased in value by the capability of the stream to produce such power.[232] Thus, assessors may consider capability to produce water power in determining tax assessments even though the dam site

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[225] Me. CONST. art. IX §8.

[226] Me. Rev. Stat. tit. 36 §551 (1978).

[227] Me. Rev. Stat. tit. 36 §§502, 601 (1978).

[228] Union Water Power Co. v. Auburn, 90 Me. 60 (1897).

[229] Central Main Power Co. v. Town of Turner, 128 Me. 486, 148 At. 799 (1930).

[230] Id., at p. 489.

[231] Penobscott Chemical Fibre Co. v. Town of Bradley, 99 Me. 263.

[232] Shawmut Manufacturing Co. v. Town of Benton, 123 Me. 121 (1923).

is undeveloped, unused, or submerged by its owner's operation of a downstream dam.[233] The Court based its holdings on the principle that land is to be assessed at its greatest value regardless of present use.[234] Water power production of the capability of such production increases land use potential and thus value. Therefore dam developers must consider high tax rate possibilities.

Although Maine case law does not provide an example of methods of valuation of hydro dams, there are many cases on methods of tax valuations of public utilities. Since hydro dams produce electricity as do other public utilities, an analogy may be drawn.

Just value, as required by the Maine Constitution, has been interpreted as true or real or market value.[235] The courts have found it inequitable to hold local assessors to a rigid formula since public utility property is adapted to a single use and its value depends on the continuance of that use.[236] The courts have therefore held that the market value of single purpose property "must be determined by consideration of all factors calculated to influence an assumed buyer and seller in reaching a fair price in a free market."[237] Thus, assessors may consider: 1) the price the property will bring in the market; 2) the purchase price if not sold under stress; 3) reproduction cost with an allowance for depreciation; 4) original construction cost less depreciation; and, 5) capacity to earn money.[238] No one factor is controlling and each may be considered in estimating value for tax purposes.[239]

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[233] Central Maine Power Co. v. Town of Turner, supra, at p. 492-493.

[234] Id.

[235] Kittery Electric Light Co. v. Assessors of Town of Kittery, (Me.) 219 A.2d 728 (1966).

[236] Id., at pp. 736, 737.

[237] Id., See also Maine Consolidated Power Co. v. Inhabitants of Town of Farmington, (Me.) 219 A.2d 748 (1966).

[238] Id.

[239] Id.

The courts show great deference to the judgment of the assessors.[240] A complainant against the tax must show an overvaluation resulting in an injustice which amounts to an in invidious discrimination.[241] Such showing requires grossly oppressive action which willfully transgresses or disregards the law.[242]

In terms of the small dam developer, the tax structure and methods of valuation as presented above, essentially amount to uncertainty, and thus increased investment costs. Case law gives vast discretion to assessors in determining the tax value. Five methods are listed, but this list is by no means conclusive. Developers, then, may face varying taxes depending on the town in which the dam site is located. Overcoming the presumption of reasonableness favoring the assessors is next to impossible according to the courts' requirements as set out above.

2. Tax Exemptions.

There are two major tax exemption areas that may affect LHH dam development.

First, municipal corporations constructing dams are exempt from taxation within the municipality's corporate limits.[243] However, should the dam structure and lands extend into another municipality's corporate limit, that other town may tax the dam and water power rights.[244]

Second, water pollution and air pollution control facilities are exempt from real property taxation.[245] However, such structures must be in operation primarily for the purpose of reducing, controlling or eliminating water or air

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[240] Kittery Electric Light Co. v. Assessors of Town of Kittery, supra, at 739.

[241] Id.

[242] Id.

[243] Me. Rev. Stat. tit. 36 §651(1)(D,E)(1978).

[244] City of Bangor v. City of Brewer, 142 Me. 6, 45 A2d 434 (1946).

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pollution caused by industrial wastes.[246] It is unlikely that LHH dams will qulaify as air or water pollution control facilities since they are not promarily used for the purpose of eliminating wastes. There are no other relevant tax exemptions for dams. Thus, unless a dam developer is a municipal corporation, there are no tax exemptions in Maine.

3. Miscellaneous Taxes.

Only one other tax was relevant to public utility and LHH property in Maine. However, that tax, a corporate franchise tax, has been repealed.[247]

B. Loan Program.

The State Development Office (hereinafter SDO) is responsible for the creation of job opportunities by encouraging and assisting the expansion and improvement of new and existing economic activities within the state. Having assumed the powers of the former Department of Commerce and Industry, the SDO generally is a promotional agency which implements programs to attract new industries and helps existing businesses find a market for their products. The Director does have the power to employ outside technical consultants to assist industry in feasibility studies.[248]

SDO does not give financial assistance but does get involved in site location assistance and does make various information contacts. Such assistance would not be afforded to small dams for the generation of electricity. It is important to note that the enabling legislation would not bar technical assistance from SDO but the creation of job opportunities must be involved.[249]

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[246] Id.

[247] Me. Rev. Stat. tit. 36 §2401 (1978).

[248] Me. Rev. Stat. tit. 5 §§7001, 7002 (Supp. 1978-79).

[249] Telephone interview with Mr. Tom Heel, SDO, December 22, 1978.

The Maine Guarantee Authority (hereinafter MGA) works closely with the SDO. MGA was created to provide financial aid and technical assistance to expanding industrial, manufacturing, fishing, agricultural and recreational enterprises. Financial assistance is available in the form of revenue obligation securities and mortgage insurance. MGA also provides financial aid to municipalities for construction of modern industrial buildings in planned industrial parks.[250] Typically the MGA will assist a job producing, manufacturing industry. They have never financed a facility which produces electricity. Such a project would be outside the scope of MGA's enabling legislation. MGA does work closely with various state departments, but any project which would come to MGA for assistance from another department would be subject to the statutory provisions of both.[251]

Another state department which provides assistance to industry is the Office of Energy Resources (hereinafter OER). OER primarily formulates state energy policy and provides vaious energy information to public and private groups. But an additional purpose for OER is to encourage the development of new sources of energy.[252]

Such encouragement occurs several ways. OER may provide planning and technical assistance. sponsor research and direct and find experimental projects in conjunction with private industry. OER may directly assist electric power generating plants by providing conservation ideas and compiling a list of statutes pertaining to energy. The Maine Legislature has created the Maine Energy Resources Development Fund and the State Energy Resources Advisory Board to accomplish the OER objectives listed above.[253]

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[250] Me. Rev. Stat. tit. 10 §§671-879 (Supp. 1978-79).

[251] Telephone interview with Mr. Phil Clifford, MGA, December 27, 1978.

[252] Me. Rev. Stat. tit. 5 §§5001-5004 (Supp. 1978-79).

[253] Id., §§5006-5009.

For direct financial assistance, a developer would have to go from the OER to the MGA. MGA has never worked with OER. Such a relationship is not incompatable by statute, but must appease MGA's employment and manufacturing concerns.[254]

VII. SUMMARY

The purpose of this paper has been to guide the developer through the de facto regulatory system for small dam construction and operation as it exists in Maine. It is not an easy system to master, due in part to its hybrid nature. Legal ambiguity permeates the system in the form of uncertain wording in statutes, questions of effect of one statute upon another, and uncertainty of legal outcome where a determination is to be made on a "reasonable" basis. The decentralized nature of the regulatory system is an additional burden for the prospective developer. Regulation of environmental concerns in Maine in some instances is divided among as many as six agencies. Dam operation and construction may require as many as four permits from four different agencies. The result of this is a system that may be time inefficient and financially costly for both the state and the developer.

It is suggested that a possible one-stop procedure be developed within the Board of Environmental Protection. The Board could act as a sole permitting authority for all environmental and land use matters. In this proposed system the other agencies having environmental concerns would sign off on each application. The Public Utilities Commission would still certify a plant where applicable.

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[254]Telephone interview with Mr. Phil Clifford, MGA, December 27, 1978.

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