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

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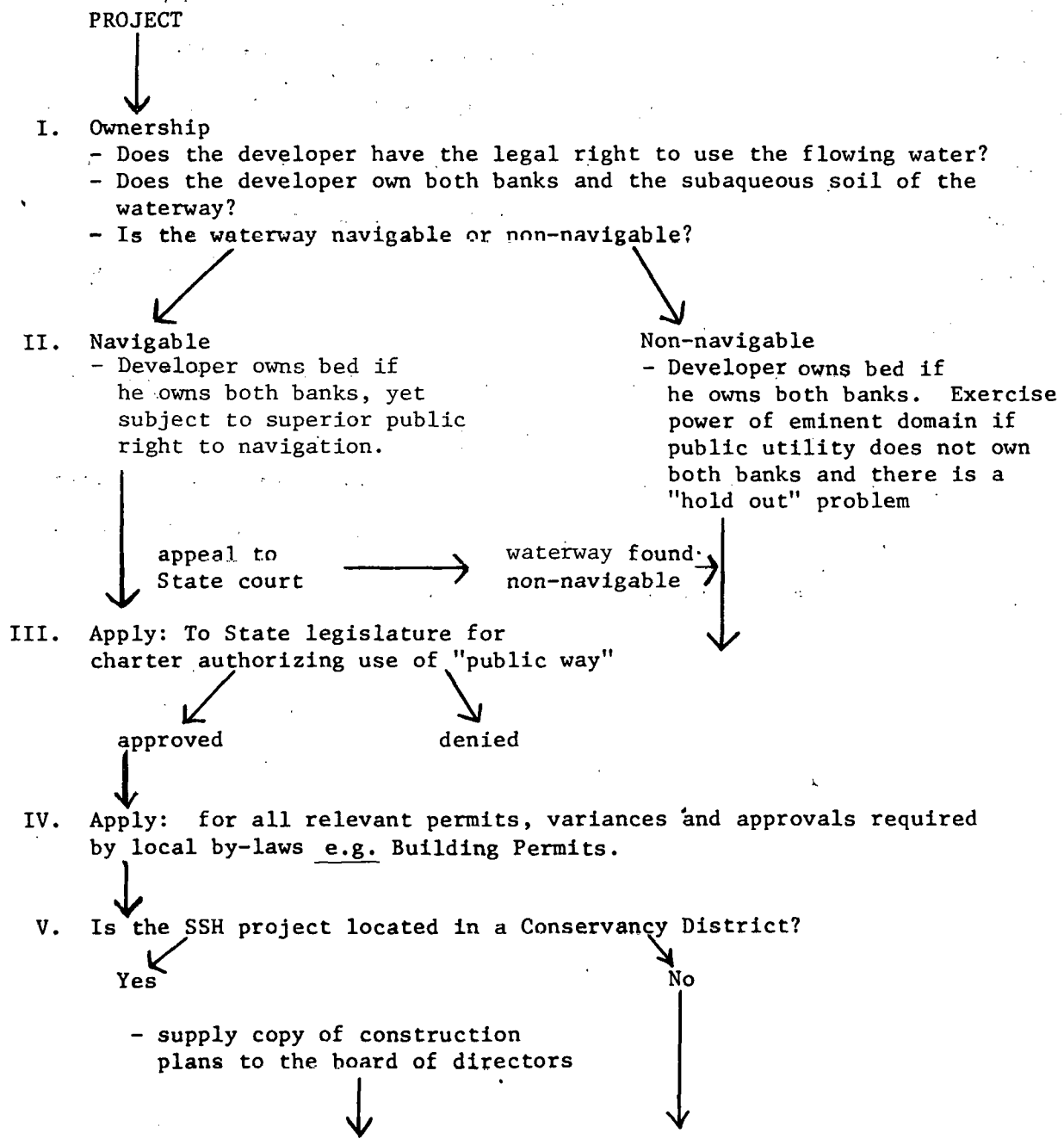
[z] See Florida Lime and Avocado Growers Inc. v. Paul, 373 U.S. 132 (1963).

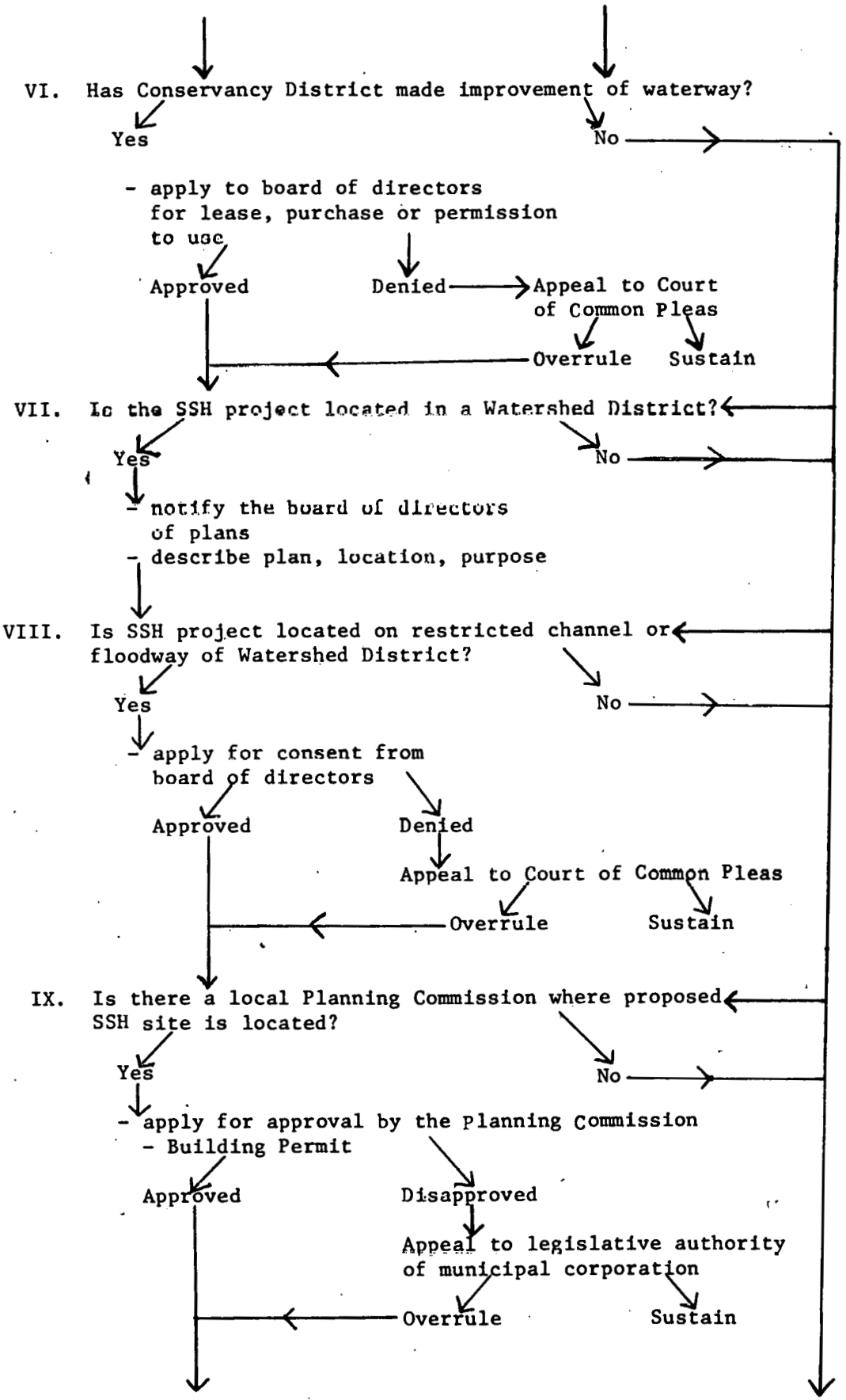
[aa] See F.P.C. v. Oregon, 349 U.S. 435 (1955).

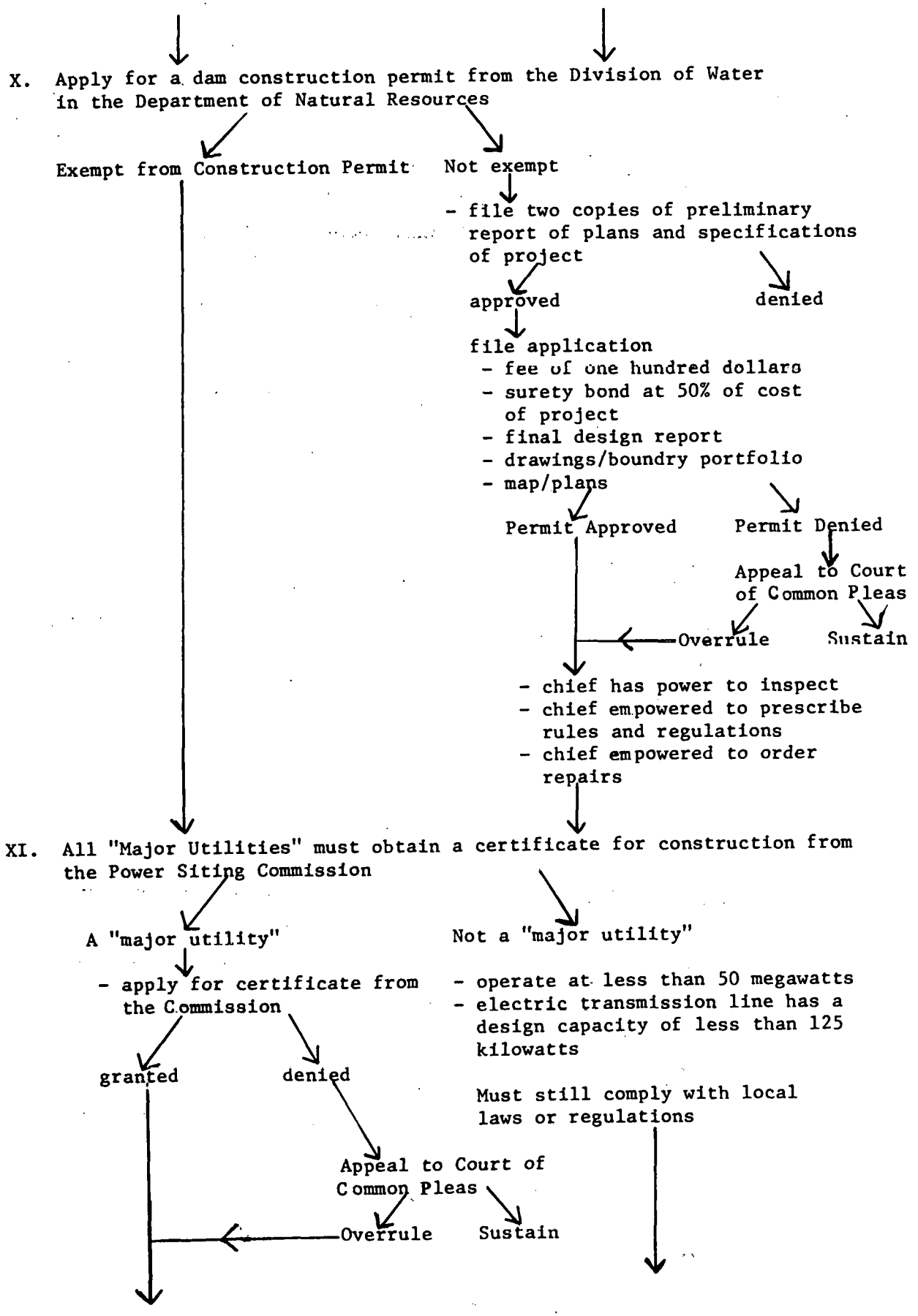
With respect to PURPA, the federal agency, FERC, will establish the guidelines for rates for sales and exchanges of power between electric utilities and qualifying small hydroelectric projects and will prescribe rules for exemptions from state and federal regulation. These standards and rules will be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

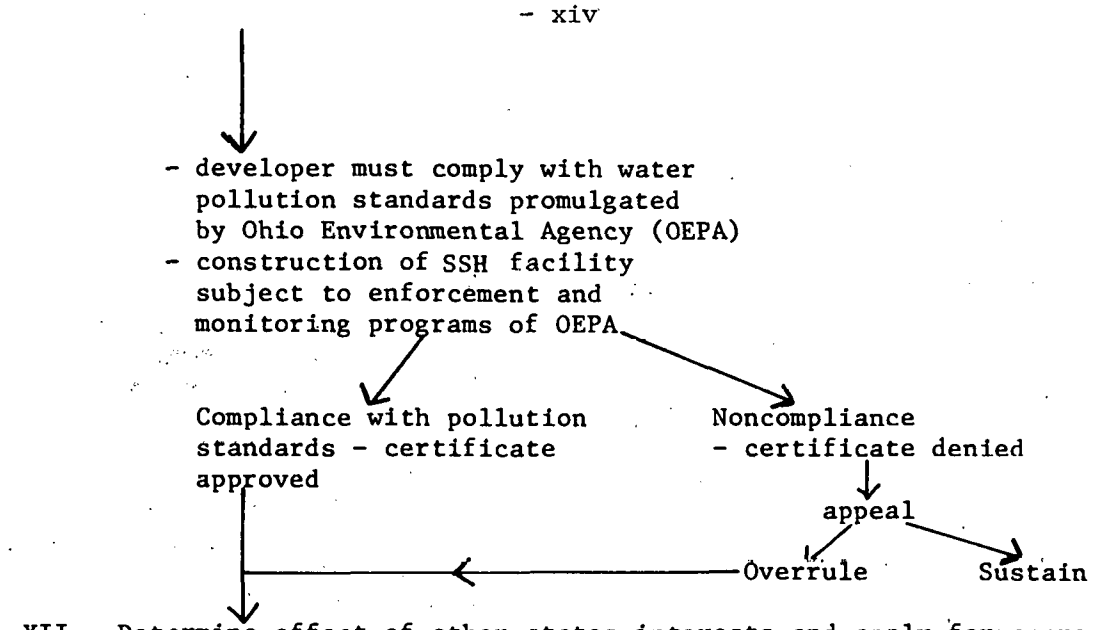
The regulatory system which is presently in place with regard to clean water will confront the developer at the state level. In most states, this federally-conferred authority will be administered by an agency such as the Department of Natural Resources. These agencies will require the developer to meet 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 OHIO



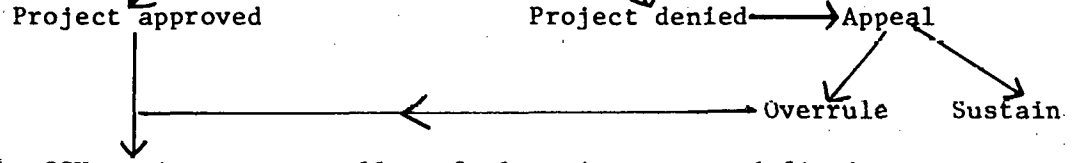

VI. Has Conservancy District made improvement of waterway?
Yes
No
- apply to board of directors for lease, purchase or permission to use
Approved
Denied
Appeal to Court of Common Pleas
Overrule
Sustain
VII. Is the SSH project located in a Watershed District?
Yes
No
- notify the board of directors of plans
- describe plan, location, purpose
VIII. Is SSH project located on restricted channel or floodway of Watershed District?
Yes
No
- apply for consent from board of directors
Approved
Denied
Appeal to Court of Common Pleas
Overrule
Sustain
IX. Is there a local Planning Commission where proposed SSH site is located?
Yes
No
- apply for approval by the Planning Commission
- Building Permit
Approved
Disapproved
Appeal to legislative authority of municipal corporation
Overrule
Sustain


X. Apply for a dam construction permit from the Division of Water in the Department of Natural Resources
Exempt from Construction Permit
Not exempt
- file two copies of preliminary report of plans and specifications of project
approved
denied
file application
- fee of one hundred dollars
- surety bond at 50% of cost of project
- final design report
- drawings/boundry portfolio
- map/plans
Permit Approved
Permit Denied
Appeal to Court of Common Pleas
Overrule
Sustain
- chief has power to inspect
- chief empowered to prescribe rules and regulations
- chief empowered to order repairs
XI. All "Major Utilities" must obtain a certificate for construction from the Power Siting Commission
A "major utility"
Not a "major utility"
- apply for certificate from the Commission
- operate at less than 50 megawatts
- electric transmission line has a design capacity of less than 125 kilowatts
granted
denied
Must still comply with local laws or regulations
Appeal to Court of Common Pleas
Overrule
Sustain



XII. Determine effect of other states interests and apply for appropriate permits.

- Fish ladder requirements by Division of Wildlife in Department of Natural Resources
- Permission of Historic preservation companies if dam construction will affect them.
- Comply with regulations of Director of Natural Resources regarding wild and scenic rivers.
- Comply with regulation of Division of Natural Areas and Preserves regarding endangered species and donated nature preserves.



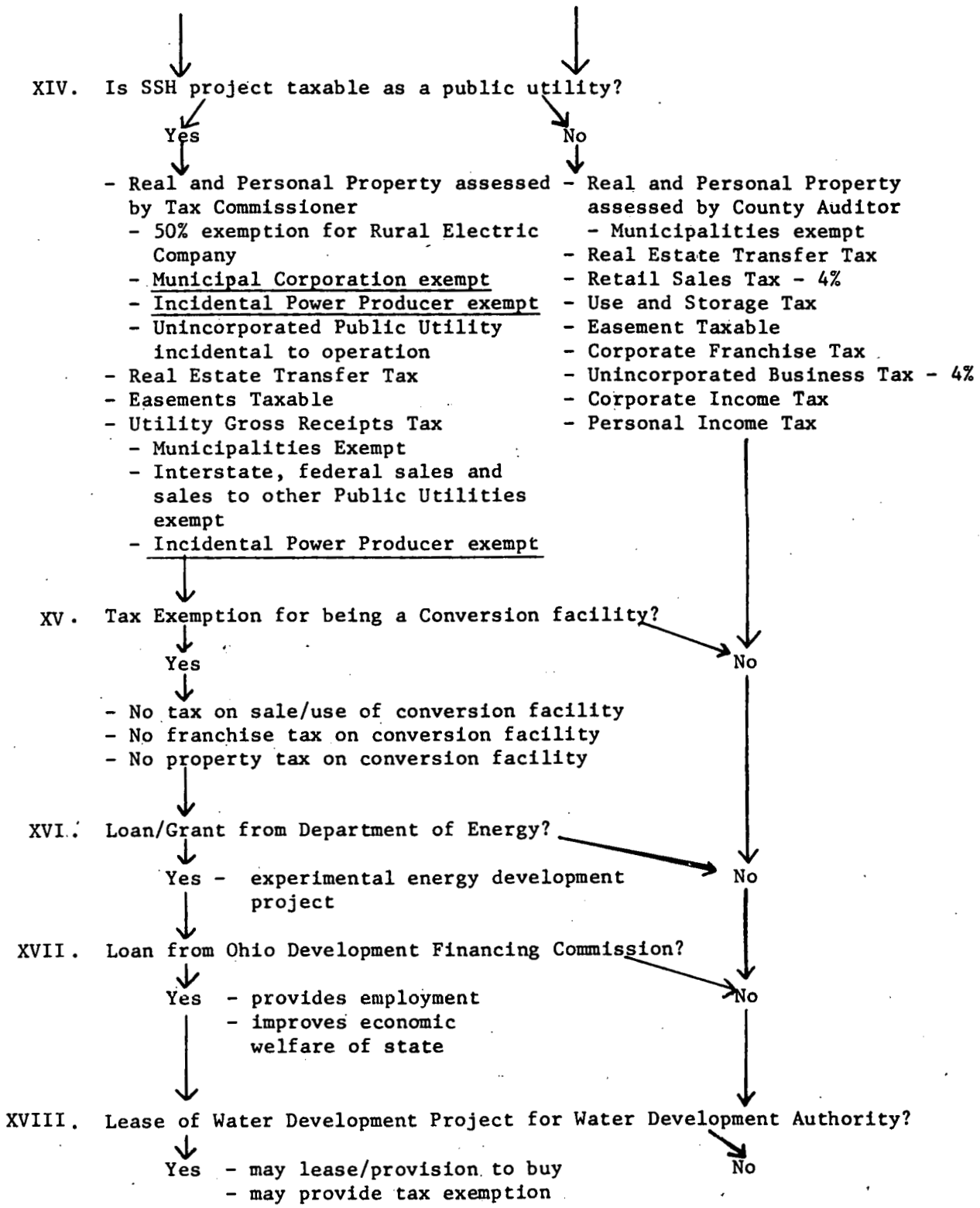
XIII. Is the SSH project, as a seller of electric energy, defined as a public utility?

Yes

- comply with PUC regulations
- rate regulation
- stock and bond regulation
- regulation of accounts
- file rate schedules with PUC
- assessment
- certified territories
- file demand reports to Department of Energy
- major utility must file energy forecast report to division of planning and forecasts with Department of Energy

No

- Non-profit companies
- Municipal corporations


XIV. Is SSH project taxable as a public utility?
Yes
No
- Real and Personal Property assessed by Tax Commissioner
- 50% exemption for Rural Electric Company
- Municipal Corporation exempt
- Incidental Power Producer exempt
- Unincorporated Public Utility incidental to operation
- Real Estate Transfer Tax
- Easements Taxable
- Utility Gross Receipts Tax
- Municipalities Exempt
- Interstate, federal sales and sales to other Public Utilities exempt
- Incidental Power Producer exempt
- Real and Personal Property assessed by County Auditor
- Municipalities exempt
- Real Estate Transfer Tax
- Retail Sales Tax - 4%
- Use and Storage Tax
- Easement Taxable
- Corporate Franchise Tax
- Unincorporated Business Tax - 4%
- Corporate Income Tax
- Personal Income Tax
XV. Tax Exemption for being a Conversion facility?
Yes
No
- No tax on sale/use of conversion facility
- No franchise tax on conversion facility
- No property tax on conversion facility
XVI. Loan/Grant from Department of Energy?
Yes - experimental energy development project
No
XVII. Loan from Ohio Development Financing Commission?
Yes
- provides employment
- improves economic welfare of state
No
XVIII. Lease of Water Development Project for Water Development Authority?
Yes
- may lease/provision to buy
- may provide tax exemption
No

XIX. Construction, Operation and Maintenance of SSH Dam
- Comply with conditions of all permits and licenses
- Fishways
- Utilize power to appropriate
- Ohio utilizes negligence theory for dam breach/ Trespass theory for water seepage or percolation
- Obtain liability insurance for dam breach
- Is project feasible under prevailing rates?
- In terms of insurance, costs, is project worth risk?

Yes

No

I. OHIO WATER LAW

A. Title to the Streambed and the Natural Flow/Reasonable Use Doctrine

1. Use of the Streambed

All developers confront the obstacle of obtaining the authority to use the bed of a river or stream. Hence, a developer must determine ownership of the streambed and the procedure for obtaining title or use of it.

The title of abutting land owners on both navigable and non-navigable streams extends to the middle of a stream and includes the subaqueous soil.[1] The riparian proprietor may convey his estate in the bed of a stream or river separately from the bed.[2] Therefore, to obtain title, right or interest to the bed of a navigable or non-navigable watercourse, the developer must obtain title from the proper riparian owners.

Although title to subaqueous soil to the center of a stream is legally that of the riparian owner, if the stream is classified as navigable, title and ownership is subject to the public right of navigation.[3] In like manner, if a riparian owner has property on opposite sides of a navigable stream, such owner has title to land from bank to bank under the stream, subject to the public right of navigation.[4]

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[1] State ex rel. Brown v. Newport Concrete Co., 44 Ohio App.2d 121, 336 N.E.2d 453 (1975); State ex rel. Anderson v. Preston, 2 Ohio App.2d 244, 207 N.E.2d 664 (1963); Day v. Pittsburg, Y. & C. R. Co., 44 Ohio St. 406, 7 N.E. 528 (1886).

[2] City of Mansfield v. Balliet, 65 Ohio St. 451, 63 N.E. 86 (1901).

[3] Newport Concrete Co., 336 N.E.2d at 455.

[4] Id.

Navigable waters are held by the state of Ohio in trust for those Ohioans who wish to use the stream for all legitimate purposes, be they commercial, transportational or recreational.[5] A riparian proprietor cannot impede the free use of navigable watercourses by the public without State and/or Federal permission.

All waters are held navigable in law, and subject to public use, which are by their character capable of use as highways for purposes useful to trade or agriculture.[6] A river is classified as navigable based upon its capacity for use in transportation and commerce. Navigability is not determined by frequency of use of the watercourse as a public highway.[7] In determining navigability, consideration may be given for its capacity for navigation after making reasonable improvements in the watercourse and its accessibility by the public.[8] Susceptibility to use is the test. Natural barriers or obstructions, such as rapids, sandbars or falls do not preclude a finding that a waterway is legally navigable in at least certain stretches.[9]

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[5] Id. 336 N.E.2d at 457.

[6] Hickok v. Hine, 23 Ohio St. 523 (1872).

[7] Id. 23 Ohio St. at 527.

[8] Mentor Harbor Yachting Club v. Mentor Lagoons Inc., 170 Ohio St. 193, 163 N.E.2d 373 (1960).

[9] Newport Concrete Co., 336 N.E.2d at 456; compare, 16 U.S.C. § 796 (8) (1976).

In Newport, the court stated that evidence showing that the Little Miami River was in fact used for recreational purposes, e.g., canoeing, warranted the trial court in classifying the watercourse as navigable.[10]

When a waterway is classified as navigable, a developer cannot interfere with the public's paramount easement of navigation without first obtaining a Federal and/or State permit to erect his dam.[11] Ohio's permit requirements shall be discussed in Part II of this paper.

A developer's right in a navigable waterway is subject to any improvement the State or Federal government may make for purposes of navigation. In other words, riparian ownership is subject to the dominant right of the government to improve navigation. Although an improvement might result in substantial injury to a developer's ability to generate power, he will be left without a remedy.[12]

By its police power, a state may regulate the use of navigable waterways; pursuant to the commerce clause, the federal government may also regulate navigable waterways.

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[10]Newport Concrete Co., 336 N.E.2d at 457.

[11]See Pollack v. Cleveland Ship Bldg. Co., 56 Ohio St. 655, 47 N.E. 582 (1897).

[12]See Richard R. Powell, The Law of Real Property, § 723 et seq. (1977).

These regulations may diminish, or possibly destroy the value of property; however, as long as the property still remains in the owners' possession there is no taking.[13]

For example, the Unites States Supreme Court has held that an owner of a hydroelectric dam, located on a navigable stream, was not entitled under the Fifth Amendment to compensation from the United States for a reduction in the generating capacity of the plant, which resulted from an authorized navigation improvement that raised the level of the water in the navigable stream above ordinary high-water mark.[14] The Court stated that there can be no recovery for damages sustained as a result of an improvement to navigation because the dam owner's right to a certain water level is subordinate to the public's interest in navigable waters.[15]

As previously stated, a developer must obtain title or interest to a streambed from the proper riparian owners. Ohio provides assistance to an electric company in this undertaking by providing it with the power of eminent domain in the event it is unable to reach a purchase agreement with the riparian proprietors.[16] The requirements and procedure for the use of

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[13]See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

[14]United States v. Willow River Co., 324 U.S. 499 (1945).

[15]Willow River Co., 342 U.S. at 509.

[16]OHIO REV. CODE ANN. § 1723.01 (Page 1978).

eminent domain power will be discussed in Section B of Part I of this paper.

Whether the watercourse is classified as navigable or non-navigable, a developer must obtain permission from the State. The appropriate agency to contact in Ohio is the Department of Natural Resources.[17]

The advantage of locating a Small Scale Hydro (Hereinafter SSH) site on a non-navigable stream is that the stream will not be subject to the public easement of navigation. An obstacle to development on a navigable or non-navigable stream is the difficulty of locating the holder of the title to the bed. The holder of the title to the bed may be an individual other than the owner of the abutting land. A determination of where title is located involves time, effort and cost, i.e., "search cost."

When a dam site is located on a navigable stream, both search costs and the burden of the public easement of navigation affect the developer.

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[17] Id. § 1501.01 (Page Supp. 1977).

2. The Natural Flow/Reasonable Use Theory

Apart from the title to the subaqueous soil, a riparian owner's rights regarding flowing waters that abut or flow through his land extend to the natural flow and reasonable use. There is no right of property in such water in the sense that it is subject to exclusive appropriation and dominion; rather, the property interest is usufructuary.[18]

The two theories of Natural Flow and Reasonable Use are very dissimilar; however, the Ohio courts have combined the two by using the terminology of the Natural Flow theory while applying the standards of Reasonable Use.

The characteristics of the Natural Flow theory are that each riparian proprietor has the right to have the stream water remain in its natural state, free from any unreasonable diminution in quantity and free from any unreasonable pollution in quality.[19]

The characteristics of the Reasonable Use Theory are that each riparian proprietor has the right to make maximum use of the water in the stream provided such use does not unreasonably interfere with the like use by other riparians.[20] Under this theory, the stress is laid, not on the effect the use has on the

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[18] Akron Canal and Hydraulic Co. v. Fontaine, 72 Ohio App. 93, 50 N.E.2d 897 (1943).

[19] See Robert Emmet Clark, Waters and Water Rights, Vol VII, § 611 et seq. (1976).

[20] Id.

stream in its natural condition, but upon the effect the use has on other riparians.

The Ohio courts have combined the two theories stating that each riparian proprietor has the right to have the natural flow of the stream come to his land and to use it for reasonable purposes subject to a like right of the upper proprietors and an obligation to lower proprietors to permit the water to pass unaffected except by such consequences as follows from just and reasonable use.[21]

In Fontaine, the court held that the building of a dam on a non-navigable stream did not give the proprietor ownership of the water stored behind the dam; rather, his rights were the same as he had in the stream before the dam was erected. The proprietor of the dam has exclusive use of the water stored provided the use is reasonable and does not unreasonably diminish the natural flow of the stream. The Fontaine court apparently applied the Natural Flow Doctrine.

In Canton v. Shock, however, the Ohio Supreme Court appeared to apply the Reasonable Use Doctrine.[22] There, the defendant, a municipal corporation, bordered a stream and used the stream water to supply its inhabitants with water for domestic, commercial and manufacturing purposes.

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[21] Fontaine, 50 N.E.2d at 901.

[22] 66 Ohio St. 19, 63 N.E. 600 (1902).

Plaintiff, located on the stream below the city, used the stream water to power his mill. The growth of the city with its consequent increased use of the water, coupled with a dry season, forced plaintiff to close his mill. In a suit for damages, the court ruled that the municipality had a right to use the water it needed for its own purposes, returning to the stream all that was not consumed in such use; but it could not transport water out of the watershed or divert it from its natural course.[23]

The court asserted that the primary use of all water was to satisfy domestic needs, e.g., watering livestock, and that water used for power purposes was a secondary use. An upper riparian may use all the water of a stream for domestic purposes, and the lower riparian will have no cause of action.[24] All waters used for domestic purposes must be used within the watershed.

In the utilization of water for power purposes, the city had a right to supply water for manufacturing within its limits equal to the right of a lower riparian for the same commercial purpose. Where both upper and lower proprietors of a stream use the water for power purposes, and the water is insufficient to fully supply the needs of both, each one has a right to the reasonable use of the water, considering all the

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[23] Id. at 29, 63 N.E. at 602.

[24] Id. at 31, 63 N.E. at 603.

circumstances. The water of the stream should be divided and used so that each proprietor shall bear his fair proportion of the loss caused by the shortage of water.[25]

A riparian proprietor can use the water from a stream so long as he returns it uncorrupted and without essential diminution. The court defined "without essential diminution" to mean that water not lawfully used or consumed must be returned to the stream, or an opportunity given for it to flow back into the stream by ordinary channels. The water cannot be lawfully diverted or transported outside the watershed.[26]

Apparently, the court applied the Reasonable Use Doctrine in Canton, otherwise neither the defendant nor the plaintiff could make use of the water if each were guaranteed the natural flow of the water. The court apportioned the water according to its reasonable use.

In Kistler v. Watson, the Ohio Court of Appeals held that even though the defendant had a legal right to erect a dam across a stream, the court ordered the defendant to remove his dam because the defendant could not justify the impoundment of water as a reasonable use.[27] The court stated that the erection and maintenance of the dam unreasonably diminished the natural flow of the stream, to the plaintiffs injury.[28]

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[25] Id. at 30, 63 N.E. at 603.

[26] Id. at 33, 63 N.E. at 603.

[27] 79 Ohio App. 552, 156 N.E.2d 833. (1959).

[28] Id. 156 N.E.2d at 836.

The Kistler court mixed the two doctrines, but appeared to stress the Reasonable Use doctrine. This is particularly evident in that no injury to the plaintiff need be shown under the Natural Flow doctrine. However, the Kistler court based its holding on the fact that the defendants unreasonably impounded the water to the plaintiff's injury. Under the Reasonable Use Doctrine a plaintiff must show not only unreasonable use, but also actual damage.[29]

Hence, a dam developer, as a riparian, will be allowed to reasonably use the waters of a stream so long as he does not unreasonably interfere with the like right of other riparians.

In addition, a person whose property is injured through flooding caused by the impoundment of water by a lower riparian may bring an action under trespass or nuisance for actual injuries sustained.[30] The dam owner may be liable for damages or may be enjoined from flooding lands of upper riparians.

B. The Power to Appropriate by Electric Companies

Ohio gives the power to appropriate private property to any company organized for the purpose of erecting or building dams across rivers or streams to raise and maintain a head of water for the generation of electricity.[31] The power extends to erecting or maintaining dams, poles, wires and cables to carry and transmit electricity.[32] It also extends to areas of land overflowed by reason of the construction of the dam, or any riparian rights or interests therein.[33]

Giving an electric company the power of eminent domain, greatly reduces the common-law barriers to developing SSH. The

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[29] Keiser v. Mann, 102 Ohio App. 324, 143 N.E.2d 146 (1957).

[30] Cooper v. Hall, 5 Ohio St. 321 (1832).

[31] OHIO REV. CODE ANN. §§ 1723.01 (Page 1978); 4933.15 (Page 1977).

[32] Id. § 1723.01 (Page 1978).

[33] Id.

power of eminent domain eliminates "hold out" problems with riparians who refuse to sell out to a company developing SSH, thus making the development of SSH more expedient and economical.

An electric company wishing to appropriate property must comply with regulations and restrictions as prescribed by the state, county or township.[34] The power to appropriate does not include the power to appropriate any public way or land situated within any municipal corporation without the municipality's consent.[35]

To acquire the power of eminent domain, an electric company must first engage in private negotiations for the purchase of the real estate in question.[36] If the negotiations fail, an electric company may commence proceedings in common pleas or probate court to appropriate each parcel, interest or right needed to construct the dam.[37]

The known owners of the property to be appropriated must be notified of the filing of the petition to appropriate.[38] The property owners may file an answer to the petition which: denies the company's right to make an appropriation; the inability of the parties to agree; and, the necessity for the appropriation.[39]

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[34] Id. § 1723.02.

[35] Id. § 1723.03.

[36] Id. § 163.04 (Page 1978).

[37] Id. § 163.05.

[38] Id. § 163.07.

[39] Id. § 163.08.

The court resolves these questions.[40] If the court rules in favor of the appropriation, a jury will assess the compensation to be paid to the land owner.[41] The property will be valued at a date prior to the time its value began to decline as a result of public knowledge of the impending appropriation.[42] The jury will assess the compensation and damages without deduction for general benefits as to the property of the owner.[43] The electric company may take possession of the appropriated property after depositing with the court the amount of the award.[44] The judgment of the court may be appealed; however, the electric company's right to take and use the property appropriated shall not be affected by such appellatereview, unless the trial court suspends the execution of its appropriation order.[45]

Although the Ohio Constitution allows the Ohio legislature to grant to any electric company the power of eminent domain, private property can only be taken for public use.[46] In other

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[40] Id.

[41] Id. § 163.09.

[42] In re Appropriation of Property of Brunner, 28 Ohio Misc. 165, 276 N.E.2d 677 (1971).

[43] OHIO REV. CODE ANN. § 163.14 (Page 1978).

[44] Id. § 163.15.

[45] Id. § 163.19.

[46] OHIO CONST. art. II, §1; art. XIII, §5; art. I, §19.

words, no company may utilize the power of eminent domain unless the appropriation is done for a public purpose.

The United States Supreme Court has held that the manufacturing, supplying and selling of hydroelectric power to the public is a public use, justifying the exercise of eminent domain.[47] A state statute providing for condemnation of property for water power purposes is not unconstitutional as taking property without due process of law.[48]

Following this holding, electric companies which are public utilities are constitutionally authorized to exercise the power of eminent domain, since they manufacture, supply and sell electricity for public use.[49] On the other hand, electric companies which are not public utilities cannot constitutionally exercise the power of eminent domain. An example of an electric company which would not be a public utility, would be a company which manufactured electricity solely for its own use. Note, that an electric company, such as those owned by electric cooperatives, may still be classified as a public utility and have the power of eminent domain, even though they do not come under the jurisdiction of the Public Utilities Commission.[50] Thus,

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[47] Mt. Vernon - Woodberry Cotton Duck Co. v. Alabama Interstate Power Co., 240 U.S. 30 (1916).

[48] Id. 240 U.S. at 33.

[49] Telephone conversation with Mr. Donn Rosenblum of the Legal Section of the Ohio Public Utilities Department (July 10, 1979).

[50] See Ohio Power Co. v. Village of Attica, 23 Ohio St. 2d 37, 261 N.E.2d 123 (1970).

for an electric company to constitutionally exercise the power of eminent domain, it need only be classified as a public utility. The definition of a public utility will be discussed in section A of Part IV of this paper.

C. Liability for Dam Breach, Percolation, Seepage

In Ohio, a defendant is liable for negligence for the breach of his dam.[51] Ohio courts recognize the application of res ipsa loquitor as a rule of circumstantial evidence which permits a jury to draw an inference of negligence.[52]

Res ipsa loquitor is a rule of evidence which permits a jury to draw an inference of negligence where: (1) the instrumentality causing the damage was under the exclusive management and control of the defendant; and, (2) the accident occurred under such circumstances that in the ordinary course of events it would not have occurred if ordinary care had been observed.[53]

Mattern dealt with an action by a lower riparian owner for damages caused by the breaking of a dam constructed by defendant ice company. The court stated that the fact that the dam broke, absent any extraordinary flood, allowing water to escape and injure plaintiff's lands, made out a prima facie case of liability under the doctrine of res ipsa loquitor. The court stated that since the dam broke under rains that could have been reasonably anticipated,

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[51]East Liverpool City Ice Co. v. Mattern, 101 Ohio St. 62 , 127 N.E. 408 (1920).

[52]Id. at 64, 127 N.E. at 409.

[53]Soltz v. Colony Recreation Center, 151 Ohio St. 503, 87 N.E.2d 167 (1949).

the defendant was liable in negligence for not constructing his dam to withstand anticipated floods.[54]

A dam owner is required to use reasonable care and engineering skill in the construction and maintenance of his dam, to avoid damage to the property of riparian proprietors, which experience taught might be reasonably expected to occur at any time. However, a dam owner is not required to anticipate and use precautions to prevent injury from floods caused by unusual, extraordinary and unexpected storms which reasonable foresight would not have foreseen. Nor is he liable for an extraordinary act of God, so overwhelming and destructive, that the injury would have occurred regardless of the dam owner's negligence. In such a case, the dam owner's negligence would not be held to be the proximate cause of the injury.[55] However, if a dam owner's negligence concurs with an act of God, then the dam owner will be liable since the dam owner's negligence would be considered the proximate cause of the injuries.[56]

On occassion, dam construction and its impoundment of water may cause water to seep or percolate onto adjoining lands. If by the damming up and impounding of water, water flows, oozes, percolates or seeps from its reservoir onto another's land, injuring it, then the seepage constitutes a trespass.[57] The dam owner is liable for damages or injunction to the injured land owner whether

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[54]Mattern, 101 Ohio St. at 63, 127 N.E. at 409.

[55]Lythe v. Pennsylvania R. Co., 91 Ohio App. 232, 108 N.E.2d 72 (1951); City of Piqua v. Morris, 98 Ohio St. at 42, 120 N.E. at 300 (1918).

[56]Lythe, 108 N.E.2d at 76; Morris, 98 Ohio St. at 48, 120 N.E. at 302.

[57]City of Barberton v. Mikach, 128 Ohio St. 169, 190 N.E. 387 (1934).

or not he used due care in the construction and maintenance of the dam and the water it impounds.[58] In other words, a dam owner is strictly liable for water percolation and seepage; he will be liable regardless of negligence. A plaintiff need only prove that the water seeped from defendant's dam.

In Miksch, defendant, a city, had constructed a reservoir. Percolation and seepage from the reservoir caused plaintiff's adjoining farmland to become wet and swampy and unsuitable for agriculture. Plaintiff brought an action for damages. The defendant contended that it was exercising a governmental function in the construction and maintenance of the reservoir. The court held that the function of supplying water to its inhabitants was proprietary. Upon a finding by the jury that the percolation was caused by the impoundment of water, the defendant was found liable for trespass as a matter of law, without regard to its care in constructing the reservoir. Upon the jury's further finding that the trespass was likely to be permanent, by a preponderance of the evidence, the court held that the plaintiff was entitled to recover the difference between the most valuable use of the land prior to the trespass and its most valuable use after.[59]

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[58] Id. 190 N.E. at 388.

[59] Id.

Holding dam owners liable for negligence for dam breach does not constitute a significant obstacle to the development of SSH. Dam owners are merely required to use reasonable due care in building their dams. Such a standard of due care is a normal risk which will not, for example, make the cost of insuring a dam prohibitive.

In contrast, holding dam owners strictly liable for water seepage constitutes a significant obstacle to the development of SSH. Dam owners will be liable for all seepage, regardless of fault. This creates a greater risk of ownership and may make the cost of insurance, for example, prohibitive.

The risk involved in constructing and owning a dam is of great concern to a dam developer. The greater the risk of ownership, the greater the costs will be to construct and maintain the SSH project.

D. Ohio Public Trust Theory

Properties held in trust by the State for use by the public warrant significant consideration by the developer. Properties of particular concern include: parklands; historic sites; navigable waters; and Lake Erie.

The significance of this doctrine is that lands devoted to one public use cannot be devoted to another inconsistent use without governmental authorization. The State, as trustee for the people with respect to water of Lake Erie and the land under it, cannot abandon the trust property or permit a diversion of it to a private use different from the object for which the trust was created.[60]

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[60] State ex rel. Squire v. City of Cleveland, 150 Ohio St. 303, 82 N.E.2d 709 (1948).

The public trust theory may be applied to the water resources of the State so as to retain their free and unobstructed use, even though the title to the subaqueous soil is in private hands.[61]

In Ohio, because the bed of navigable watercourses are privately owned, the right of the public is limited. The public use is limited to the right of navigation.[62] The public can only fish on watercourses where a public easement to fish has been created between the Ohio Division of Wildlife and the proper riparian owners. The public has the right to fish in most navigable watercourses.[63] Because the State of Ohio owns the bed of Lake Erie, the public has the right to fish in its waters.[64]

Note, that a private individual has no authority to bring a civil action in equity to abate a public nuisance such as an obstruction to navigation. Rather, the Attorney General of Ohio is the one empowered to institute any necessary legal action to protect the property rights of the state, and the rights of its citizens pertaining to the use and enjoyment of such property.[65]

II. Licensing, Permitting, and Review Procedures

A. The Division of Water in the Department of Natural Resources

No dam may be constructed in a watercourse for any purpose unless the person or government agency has a construction permit for such dam issued by the Chief of the Division of Water.[66]

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[61] State ex rel. Brown v. Newport Concrete Co., 44 Ohio App.2d 121, 336 N.E.2d 453 (1975).

[62] Pollock v. The Cleveland Ship Building Co., 56 Ohio St. 655, 47 N.E. 582 (1897).

[63] Telephone Conversation with Mr. Richard Francis, Assistant Law Enforcement Supervisor in the Ohio Department of Natural Resources, Division of Wildlife (August 6, 1979).

[64] East Bay Sporting Club v. Miller, 118 Ohio St. 360, 161 N.E. 12 (1928).

[65] Newport Concrete Co., 336 N.E.2d at 458; see also OHIO REV. CODE ANN § 3745.01 et seq. (1971).

[66] OHIO REV. CODE ANN § 1521.06 (Page 1978).

There are seven (7) specific exemptions to this general requirement:

(1) dams constructed by a conservancy district according to plans and specifications of a registered professional engineer employed or retained by the district;

(2) dams constructed according to plans and specifications prepared by the technical staff of a soil and water conservation district;

(3) dams less than ten (10) feet in height from the natural stream bed to the spillway level, unless the product of the storage capacity of the impoundment at spillway level in acre feet and its height in feet is greater than one thousand (1,000);

(4) dams designed and constructed by the United States Army Corps of Engineers;

(5) dams constructed by the State of Ohio, Department of Natural Resources, provided that the design report, plans and specifications are prepared by a registered professional engineer and are filed and approved by the Chief;

(6) dams placed by the Chief in "Class V" of design storm and flood capacities; and,

(7) dams constructed for the reclamation of strip-mining land.[67]

Those SSH developers not exempt from the construction permit requirement must submit a written preliminary report to the Chief, which shall consist of the following:

(1) a general description of the dam and all appurtenances, including a statement of the purpose for which the dam is to be used, a statement setting forth the environmental impact of such

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[67] OHIO REV. CODE ANN. § 1521.06 (Page 1978); Ohio Department of Natural Resources, Division of Water, Ohio Laws for Issuing Construction Permits and Making Periodic Inspections of Dams, Dikes and Levees and Administrative Rules for Issuing Construction Permits, (Hereinafter DOW Construction Permits), Rule 1501: 21-19-01 (June 1974).

dam as it relates to endangering life, health and property, and a proposed classification of the dam (discussed infra);

(2) maps showing: the location of the proposed structure; the County, Township and Section lines; the outline of the reservoir; the locations of state, county and township roads; the locations of utilities, i.e., pipe lines, transmission, telegraph and telephone lines; the topography; and, any other structure or facility affected by the proposed dam;

(3) a written report of the surficial conditions, i.e., geology, topography, and culture;

(4) typical cross-sections of the dam accurately showing elevations, proposed pool levels and top width;

(5) logs of borings in the foundation and in the borrow areas, and results of seismic and resistivity subsurface investigations, when they are readily available;

(6) preliminary design assumptions, tentative conclusions and references. The design assumptions shall pertain to such hydrologic features as drainage area, rainfall data, runoff, inflow, area-capacity-elevation data and flood routing, in addition to geologic and soils engineering assumptions;

(7) a preliminary cost estimate of the structure and appurtances; and,

(8) other pertinent information as may be required by the Chief.[68]

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[68]DOW Construction Permits, Rule 1501:21-5-03 (June 1974).

Upon examining the preliminary report, the Chief determines inwhich "class" to place a dam. All dams are divided into five (5) classes and the following paragraphs act as a guideline in the classification of dams:

(1) if dam breach would result in probable loss of human life or serious damage to downstream property, then the dam will be placed in Class I. Dams having a storage volume greater than 10,000 acre feet or a height greater than 50 feet will be placed in Class I;

(2) if dam breach would result in a possible health hazard or probably loss of high-value property, the dam will be placed in Class II. Dams having a storage volume greater than 1,000 acre feet, or a height greater than 35 feet will be placed in Class II;

(3) if dam breach would result in loss of low-value property, and no loss of human life or health is envisioned, the dam will be placed in Class III. Dams having a height greater than 25 feet, or a storage volume greater than 150 acre-feet, or a total drainage area of more than 320 acres will be placed in Class III;

(4) if dam breach would result in property losses restricted to the owner's property, and no loss of human life or hazard to health is envisioned, the dam will be placed in Class IV. Dams having a height greater than 20 feet, or a storage volume greater than 50 acre-feet, or a total drainage area of more than 100 acres, will be placed in Class IV; or,

(5) if dam breach would injure only the dam itself, and no loss of human life or hazard to health is envisioned, the dam may be placed in Class V. Only dams which are 20 feet or less in height,

and have a storage volume of 50 acre-feet or less, and have a total drainage area of 100 acres or less, will be placed in Class V.[69]

If the dam is placed in Class V, the Chief will notify the applicant in writing that the dam was placed in Class V and is exempt from a construction permit.[70]

The significance of these classifications to the dam developer concerns the capacity to which a dam developer must design his project to withstand storms and floods. The minimum design capacity for each classification is:

(1) Class I: probable maximum storm;

(2) Class II: 50 per cent of the probable maximum storm;

(3) Class III: 25 per cent of the probable maximum storm; and,

(4) Class IV: 100-year storm.[71]

Apparently, these classifications replace the common-law standard of care for dam breach. Hence, the owner of a Class I dam will be liable for negligence if his dam breaches during the occurrance of a "probable maximum storm." These classifications broadly define a dam owner's standard of care, and are not significantly different from the common-law which states that a dam owner is liable for negligence if his dam cannot withstand anticipated floods.[72]

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[69] Id. Rule 1501:21-13-01.

[70] Id. Rule 1501:21-5-03.

[71] Id. Rule 1501:21-13-02.

[72] See Mattern, 101 Ohio St. at 63, 127 N.E. at 409.

Within thirty (30) days of receiving the preliminary report, the Chief responds either approving or disapproving the report.[73] If the Chief approves of the preliminary report, then the SSH developer must file an application with the Chief. This application shall be accompanied by a fee of one hundred (100) dollars, a surety bond equal to fifty (50) per cent of the estimated cost of the project, and two copies of the final design report, the plans, the specifications and a detailed cost estimate.[74]

The applicant's final design report shall include:

(1) a report of the field and laboratory investigation of the foundation soils and/or bedrocks, and the materials that will comprise the dam. Stability and settlement analysis, and seepage and under-seepage studies shall be required, unless the applicant can demonstrate to the satisfaction of the Chief that these analyses are not necessary;

(2) the bases, references, calculations and conclusions relative to hydrologic studies and design of spillways;

(3) structural and hydrologic design studies and calculations; and,

(4) a detailed cost estimate of the structure and appurtenances thereto.[75]

The plans of the project must consist of a portfolio of the drawings with all sheets being the same size.[76] Sheet one must show the name of the project, its location and the name of the owner or applicant. The classification of the dam must also be shown.

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[73]DOW Construction Permits, Rule 1501:21-5-03 (June 1974).

[74]OHIO REV. CODE ANN. §§ 1521.06, 1521.061 (Page 1978).

[75]DOW Construction Permits, Rule 1501: 21-5-05 (June 1974).

[76]Id. Rule 1501:21-5-06.

It must also contain a vicinity map, showing the project's location with respect to the boundaries of political subdivisions, streams, highways, airports and railroads.[77]

A map must be included, showing the outline of the reservoir and the ownership of the abutting property. The remainder of the plans must be accurately drawn in sufficient detail so as to clearly indicate the extent and complexity of the work.[78]

The specifications of the plans must include the following:

(1) the general provisions, specifying the rights, duties and responsibilities of the owner, applicant, applicant's engineer and builder, and the prescribed order of the work;

(2) the technical provisions describing approved work methods, equipment, materials and desired end results; and,

(3) special provisions as may be required, describing those technical details that are not usually contained in standard technical provisions.[79]

The Chief has thirty (30) days from receipt of the application, fee and bond to issue or deny a permit. He may also issue a permit conditioned upon the making of changes he deems advisable upon a determination that construction in accordance with the original plans

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[77] Id.

[78] Id.

[79] Id. Rule 1501:21-5-07.

would endanger life, health or property.[80]

The Chief may deny a permit if he finds that construction in accordance with the plans would endanger life, health or property because of improper or inadequate design, or for other reasons as the Chief may determine. The Chief must submit his reasons for denial in writing.[81] A developer may appeal from an order denying him a permit to the Court of Common Pleas in the county in which the developer's business is located, or in the county in which he is a resident.[82]

If a permit is issued, the Chief has the power to inspect a dam or dam site at any time.[83] In addition, a registered engineer must perform inspections at all phases of construction and file periodic reports with the Chief.[84]

Approval of the construction itself does not occur until the Chief finds that it has been completed in accordance with the terms of the permit and the plans and specifications approved by him. The bond or other security is not released until one (1) year after approval of the construction. The Chief is empowered to prescribe rules and regulations for the design and construction of dams for

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[80] OHIO REV. CODE ANN. § 1521.06 (Page 1978).

[81] Id.

[82] Id. § 119.12 (Page Supp. 1978).

[83] Id. § 1521.06 (Page 1978).

[84] Id.

which a permit is required and provide for the periodic inspection of all dams. He may also determine under what conditions bonds are forfeited.[85]

All dams constructed in the state that are ten (10) or more feet in height and not exempted by the Chief must be inspected by the Chief periodically. The Chief determines the intervals for inspection, but they may not exceed five (5) years. The Chief may order the dam owner to perform such repairs, maintenance or other remedial measures that in his judgment are necessary to safeguard life, health and property.[86]

The Chief may also correct or remove, at the owner's expense, any unsafe structure found to be in violation of its permit or constituting a hazard to life, health or property. Any cost incurred by the Chief in corrective measures or removal will be taxed to the dam owner.[87] In addition, the Chief and his employees are empowered to enter upon lands for purposes of surveys and inspections.[88]

For a detailed, yet succinct, review of Ohio's laws and administrative rules on issuing construction permits for dams, a developer should contact the Ohio Department of Natural Resources (DNR). The Division of Water in DNR publishes a booklet which covers permit procedures for the construction of dams, dikes and levees.

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[85] Id.

[86] Id. § 1521.062.

[87] Id.

[88] Id. § 1521.07.

B. Power Siting Commission

A "major utility facility" cannot be constructed unless a developer has first obtained a certificate from the Power Siting Commission.[89] A certificate is required for any substantial addition to a facility in operation as well. The Commission defines what constitutes a substantial addition.[90]

A major utility facility is defined as:

(1) an electric generating plant and associated facilities designed for, or capable of, operation at a capacity of fifty (50) megawatts or more; and,

(2) an electric transmission line and associated facilities of a design capacity of one hundred twenty-five (125) kilovolts or more.[91]

If a developer's SSH dam is classified as a major utility facility, then the developer must apply for a certificate from the Commission. All applications must contain the following information:

(1) a description of the location and the facility to be built;

(2) a summary of any studies which have been made by or for the applicant of the facility's environmental impact;

(3) a statement explaining the need for the facility;

(4) a statement of the reasons why the proposed location is best suited for the facility; and,

(5) such other information as the applicant considers relevant or as the Commission deems necessary.[92]

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[89] Id. § 4906.04 (Page 1977).

[90] Id. § 4906.05.

[91] Id. § 4906.01

[92] Id. § 4906.06 (A) (Page Supp. 1978).

The application must be filed not less than two (2) years, except one (1) year, in the case of transmission lines, nor more than five (5) years prior to the planned date of commencement of construction. The Commission may waive such periods for unforeseen emergencies.[93]

Upon granting or denying the application as filed, the Commission issues an opinion stating its reasons for the action taken.[94] A developer may appeal from an order denying him a certificate to the Court of Common Pleas in the county in which the developer's business is located, or in the county in which he is a resident.[95]

The Commission will not grant a certificate for the construction, operation or maintenance of a major utility facility unless it finds and determines:

(1) the basis of the need of the facility;

(2) the nature of the probable environmental impact;

(3) that the facility represents the minimum adverse environmental impact;

(4) in case of an electric transmission line, that such facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving Ohio and interconnected utility systems; and that such facilities will serve interests of electric system economy and reliability;

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[93] Id.

[94] Id. §§ 4906.10; 4906.11 (Page 1977).

[95] Id. § 119.12 (Page Supp. 1978).

(5) that the facility will comply with pollution control standards; and,

(6) that the facility will serve the public interest, convenience and necessity.[96]

Those SSH projects classified as major utility facilities will be exempt from the state or local laws or regulations; while those SSH projects not classified as major utility facilities shall be subject to state or local laws or regulations.[97]

C. Water Pollution Control - The Ohio Environmental Protection Agency

The Ohio Environmental Protection Agency (hereinafter OEPA) administers all laws pertaining to the preservation, control and abatement of air and water pollution, public water resource management planning and the disposal and treatment of solid wastes.[98]

The Director of OEPA has powers and duties under the Water Pollution Control Act to develop plans and programs for the abatement of water pollution in Ohio.[99] All major utility facilities (which may include SSH) must comply with pollution control requirements of OEPA, and such facilities are subject to the enforcement and monitoring powers of the Director.[100]

After a developer obtains a certificate to build from the Power Siting Commission, he must comply with pollution control standards and regulations adopted by the OEPA.[101]

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[96] Id. § 4906.10 (Page 1977).

[97] Id. §§ 4906.05; 4906.13

[98] Id. § 3745.01 (Page Supp. 1978).

[99] Id. § 6111.03 (Page 1977).

[100] Id. § 4906.10 (Page 1977).

[101] See Chapters 3704., 3734., and 6111 of the Revised Code.

During the first two (2) years of the developer's operation, the OEPA monitors the facility for pollution. If a facility constructed in accordance with the terms and conditions of its Power Siting certificate is unable to operate in compliance with all applicable pollution requirements, then the developer may apply to the Director of OEPA for a conditional operating permit. The operation of the facility in compliance with such a conditional operating permit is not in violation of its certificate. After two (2) years, the facility remains under the OEPA's jurisdiction, and must comply with all laws, regulations and standards pertaining to pollution.[102]

Any state officer or person adversely affected by a developer's violation of pollution standards may file a written complaint with the Director of OEPA. The Attorney General of Ohio prosecutes, or bring actions to enjoin violations of laws dealing with pollution.[103]

D. Conservancy Districts

If a SSH developer intends to construct a dam in an area where a Conservancy District has been established, he must first supply a copy of the construction plans to the Secretary of the Conservancy District for the Board of Director's examination. The Board of Directors have the authority to prescribe the manner of building any dam and may make and enforce such rules and regulations as it deems necessary to preserve the water supply of the District and to prevent pollution or unnecessary waste of such water supply.[104]

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[102] OHIO REV. CODE ANN. § 4906.10 (Page 1977).

[103] Id. § 3745.08 (Page Supp. 1978).

[104] Id. § 6101.19 (Page 1977).

Conservancy Districts are organized for purposes which may include: preventing floods; regulating stream channels; reclaiming or filling wet or overflowed lands; providing for irrigation; providing for the flow of streams; diverting in whole or eliminating in part watercourses; providing for water supply; providing for the disposal of sewage; and, arresting erosion along Lake Erie.[105]

Wherever the organization of, or improvements made by a Conservancy District make possible a greater, better or more convenient use of, or benefit from, the waters of the District for any purpose, such waters become the property of the District. Such property rights may be leased, sold or assigned to a developer of SSH by the District in return for reasonable compensation.[106]

A developer of SSH desiring to secure such use of the waters or watercourses of the District, or of the District's rights, may apply to the Board of Directors of the District for lease, purchase or permission for such use. Such application must state the purpose and character of such use, the amount of water desired and the place of use.[107]

The Board cannot lease, sell, assign, permit or otherwise part with control of the use of such waters for more than fourteen (14) years. After fourteen (14) years, such assignments or leases will be renewed for a reasonable period not to exceed fourteen (14) years, on condition that a new determination is made on a reasonable charge, and that there are no other applications on file showing a greater need or more reasonable use of such

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[105] Id. § 6101.04.

[106] Id. § 6101.24.

[107] Id.

facilities. Such applications will have preference.[108]

Compensation for the use of the waters of the District may be made by payment according to a unit price for theoretical horsepower developed, or in any other reasonable measurement of value received through use of the District's waters. A Board of Appraisers determine the benefits and damages accruing to property affected by the District's water improvement. Property owners may obtain a hearing on appraisals in the Court of Common Pleas within that District.[109]

E. Watershed Districts

As is true with a Conservancy District, a Watershed District, once created, may have a significant impact upon the construction and operation of SSH.

The OEPA creates a Watershed District when it files a map and description of the territory with the Secretary of the State and the County Commissioners of the affected county.[110]

Upon appointment of a Board of Directors for the Watershed District, the Board prepares a comprehensive plan for the water resources within the District, and submits such plan to the OEPA.[111]

If a developer plans to construct or alter any dam within the Watershed District, he must notify the Board, in writing, of such

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[108] Id.

[109] Id. §§ 6101.24; 6101.27; 6101.33.

[110] Id. § 6105.02 (Page 1977).

[111] Id. § 6105.12.

plans. Such notice must briefly describe such plan, its location and the purpose for which it is intended.[112]

The Board also designates specific reaches in a channel of a watercourse as a restricted channel or floodway for safety purposes, and files with the county engineer a map and description of such restricted channel or floodway. No developer may construct a dam in a restricted channel or floodway without first receiving the written consent of the Board. Application for such written consent must be filed with the Secretary of the Board and shall be accompanied by plans, profiles, specifications and other information the Board may require.[113]

The Board shall, within sixty (60) days of the date of receipt of such application, grant or refuse its consent to such construction, or may incorporate in and make a part of its consent such conditions, regulations or restrictions as it deems advisable.[114]

In the event the Board refuses to grant its consent to such construction, or makes a part of its consent conditional on restrictions not included in the original application, the Board notifies the applicant, in writing, of its decision. The applicant may appeal from the Board's decision to the court of common pleas in the county in which the dam is to be located. Such appeal must be filed within fifteen (15) days from the receipt of the Board's notice.[115]

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[112] Id. § 6105.13.

[113] Id. §§ 6105.131; 6105.132; 6105.133.

[114] Id. § 6105.133.

[115] Id. §§ 6105.133; 6105.134.

F. Zoning

Each city or village may establish a Planning Commission to institute a systematic planning of the municipal corporation. The Planning Commission makes plans and maps of the municipal corporation, showing the Commission's recommendations for the general location, character and extent of public grounds, ways, property and buildings, and the general location of public utilities and terminals, whether publically or privately owned or operated. The Commission has no power with respect to the construction, maintenance, use or enlargements of improvements by any public utility on its own property if such utility is owned or operated by an individual, partnership, association or corporation for profit.[116]

Whenever the Commission makes a plan of the municipal corporation, no public property or utility, whether publically or privately owned, shall be constructed in the municipal corporation unless the location, character and extent is approved by the Commission. In case of disapproval, the Commission shall communicate its reasons for denial to the legislative authority of the municipal corporation and to the head of the department which has control of the construction of the proposed utility. The legislative authority, by a vote of not less than two-thirds (2/3) of its members and of such department head, together may overrule such disapproval.[117]

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[116] Id. §§ 713.01; 713.02 (Page 1976).

[117] Id. § 713.02.

The Planning Commission may divide the municipal corporation into zones or districts in the interest of the public's health, safety and welfare. Such zones or districts regulate the location, use, height, bulk, set back and dimension of buildings and other structures as a reasonable exercise of the municipality's police power. No building permit may be issued to any person who does not comply with the zoning ordinances and regulations of the municipality. However, either the Administrative Board or Planning Commission may permit exceptions to and variations from the zoning regulations in the classes of cases or situations specified in the regulations.[118]

The only limitation upon a municipality's power to zone is that such ordinances cannot be unreasonable or arbitrary and they must have some substantial relation to health, safety and morals to be within the police power of the municipality.[119]

III. Indirect Considerations

A. Endangered Species

The Chief of the Division of Natural Areas and Preserves adopts rules and sets forth criteria for identifying and designating endangered species and endangered plants native to Ohio. The Chief makes a list of those endangered species and plants, which include those species and plants listed in the Federal "Endnagered Species Act of 1973."[120]

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[118] Id. §§ 713.06; 713.11 See also OHIO CONST. art. XVIII, § 3.

[119] See Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[120] OHIO REV. CODE ANN. § 1518.01 (Page 1978); 16 U.S.C. 1531 - 1543 (1976); 50 C.F.R. § 17.1 et seq. (1978).

The Attorney General of Ohio, upon the request of the Chief, prosecutes any person who violates rules set forth to protect Ohio's endangered species.[121]

A SSH developer should find out what plants are on the endangered species list in Ohio and determine if his project threatens any such species or plants. Determining what impact a SSH project may have on such plants may effectively delay or abate a project.

B. Wild, Scenic and Recreational Rivers

Watercourses qualifying as one of these rivers must be a substantially natural channel with recognized banks and bottom, in which a flow of water occurs, with an average of at least five (5) miles of length. The Director of Natural Resources may propose for establishment as a wild, scenic or recreational river area a part of any watercourse in Ohio, which in his judgment possesses water conservation, scenic fish, wildlife, historic or outdoor recreation values which should be preserved.[122]

Declaration by the Director that an area is a wild, scenic or recreational river area does not authorize the Director, or any agency to restrict the use of land by the owner or anyone acting under his authority. In addition, no municipality or state agency may modify or cause to modify the channel of any watercourse within a wild, scenic or recreational river area which is outside the municipality's limits, without having first obtained approval from the Director of Natural Resources.[123]

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[121] OHIO REV. CODE ANN. §1518.05 (Page 1978).

[122] Id. § 1501.16.

[123] Id. §§ 1501.16; 1501.02.

The inclusion of a watercourse within the state's wild, scenic and recreational river system may operate as a bar to SSH development, hence, it warrants the developer's consideration. The developer should consult the Director of Natural Resources to determine the status of a river or stream before constructing his SSH project.

C. Department of Natural Resources

1. The Division of Wildlife

This Division plans, develops and institutes programs for the preservation and management of wild animals, including aquatic wildlife, throughout Ohio.[124]

The Division prohibits any person from placing any obstruction in Ohio's waters which prevent the natural transit of fish.[125] Although fish ladders are rarely required, if a developer must construct a fish ladder on his dam, then he must bear its cost.[126]

Upon petition of not less than five freeholders of a county, the Board of County Commissioners of such county must erect a fish passageway or chute over a state owned dam, which shall be constructed by the Department of Natural Resources.[127] The County Commissioners, on petition of five or more freeholders of the county, shall construct fish chutes across a dam owned and erected by private interests

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[124] Id. § 1531.03.

[125] Id. § 1533.59.

[126] Telephone Conversation with Mr. Jack Erickson, Staff Biologist at the Division of Wildlife (June 19, 1979).

[127] OHIO REV. CODE ANN. § 307.64 (Page 1979).

as well.[128] Most probably, the county shall bear the cost of erecting fish chutes in this situation.[129]

The construction and maintenance of fish chutes or ladders, if paid for by the developer, will significantly add to the cost of constructing and operation SSH and may block or delay the development of SSH. A developer should consult with the Director of the Department of Natural Resources to determine if his dam must be equipped with a fish ladder.

2. Division of Natural Areas and Preserves

This Division is charged with the responsibility of acquiring a system of natural areas and preserves by articles of dedication or gift. The power of eminent domain is not conferred upon this Division. Articles of dedication executed by the owner of land have the same effect as a conveyance of an interest in land. The Chief of this Division exercises administrative responsibility over such nature preserves, e.g., wild, scenic and recreational rivers, and is required to preserve the natural or aesthetic condition of the preserve.[130]

The establishment of a nature preserve may significantly affect a SSH developer. If a SSH project adversely affects a nature preserve, the project may be abated. However, a developer may request the Department of Natural Resources to amend the articles of dedication so as to allow his SSH project to coexist. Yet, the Department cannot amend the

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[128] OP ATT'Y GEN. 3158 (OHIO 1931).

[129] Telephone Conversation with Mr. Jack Erickson, Staff Biologist at the Division of Wildlife (June 19, 1979).

[130] OHIO REV. CODE ANN. §§ 1517.05; 1517.02 (Page 1978).

terms and conditions of any article of dedication which would destroy the natural or aesthetic condition of a preserve.[131]

3. Shore Erosion

The Chief Engineer of the Department of Natural Resources may enter into agreements with political subdivisions for the purpose of constructing and maintaining projects to prevent and arrest erosion along the south shore of Lake Erie, bays and rivers connected with the lake, and any watercourses that flow into it.[132]

Arresting soil erosion may affect SSH. A developer should consult with the Department of Natural Resources to see if such a project is planned on a watercourse where his dam resides.

D. Historic Preservation - Lands and Memorials

Any incorporated association may acquire real estate for the preservation of public parks, memorial sites, historic sites or prehistoric sites for the free use and benefit of the public.[133]

A developer should consult with the proper person, association or corporation owning or having custody of such parks or grounds during the early planning stages to determine whether his SSH project will adversely affect such parks or grounds. Otherwise, a developer will be liable for damages or his project enjoined if his dam injures structures, trees or plants within a park or historical site.[134]

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[131] Id. § 1517.05.

[132] Id. § 1507.05.

[133] Id. §§ 1743.06; 1743.07 (Page 1978).

[134] Id. § 155.05 (Page 1978).

E. Great Lakes Basin Compact

This Compact promotes the comprehensive development, use and conservation of the water resources of the Great Lake Basin. The Compact establishes an intergovernment agency which has the power to recommend methods and means of attaining the Compact's proclaimed purpose. No action of the Commission has force in law in, nor is it binding upon, any party state.[135]

The Commission's jurisdiction extends to all rivers, ponds, streams and other watercourses which are tributaries or which comprise a part of any watershed draining into one of the Lakes. Of particular interest to SSH developers is that each member state agrees to consider the Commission's recommendations on suitable hydroelectric power development. A developer may wish to consult with one of Ohio's Commissioners, which would be either the Director of Natural Resources or the Director of Environmental Protection, to determine how this Compact affects SSH.[136]

F. Ohio River Sanitation Compact

This Compact pledges cooperation among the signatory states with regard to the control of any pollution of the rivers, streams and waters of the Ohio River Basin. The Compact creates the Ohio Valley Water Sanitation Commission, which is authorized to administer and enforce the Compact's provisions. The Compact requires all signatory states to treat sewage and wastes

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[135] Id. § 6161.01 (Page 1977) Article I; Article VI.

[136] Id. Article III; Article VII (f); § 6161.02 (Page Supp. 1978).

discharged into the Ohio River and its tributaries.[137]

The Compact does not declare dams to be a point source; however, if a dam increased the pollution of the Ohio River waters, then it is likely that the Commission would have jurisdiction over the SSH project. A developer of SSH should contact the Director of Environmental Protection to see if the Commission's regulations affect SSH.

G. Sanitary Districts

The creation of a Sanitary District may significantly affect SSH. A Sanitary District has the duty and power to:

(1) prevent and correct pollution of streams;

(2) clean and improve stream channels;

(3) regulate the flow of streams;

(4) provide for the collection and disposal of waste;

(5) provide a public water supply; and,

(6) exterminate or prevent insects, and abate their breeding places.[138]

Since the Board of Directors of a Sanitary District has a dominant right of eminent domain over water power companies in carrying out its duties, the Board may greatly interfere with a SSH project.[139] For example, a Sanitary District may make regulations to prohibit a developer of SSH from constructing a

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[137] Id. § 6113.01 (Page 1977) Article I; Article VI.

[138] Id. § 6115.04 (Page 1977).

[139] Id. § 6115.21.

reservoir if the Board believed it would breed insects.[140] However, the Board is required not to interfere with the operation or usefulness of a public utility beyond that actually necessary.

Every Sanitary District must prepare maps, plans, profiles and other data for the purposes for which the District was established. If a developer's SSH project is located in a Sanitary District, he should see whether the District's plans adversely affect his project.

H. Removal of Milldams

Ohio does not have a "Milldam Act," permitting the erection of milldams. However, Ohio does have a process by which milldams may be removed. Whether a SSH dam would be considered a milldam is unclear. Historically, milldams where characterized as dams which produced water power for the grinding of grain and the sawing of lumber. However, the term has taken on a broader meaning and has been applied to dams which impound water for any manufacturing purpose, including the purpose of generating electricity.[141] Thus, a SSH dam in Ohio may be subject to removal at any time. Unfortunately, there is no case law clarifying this issue.

Two-thirds (2/3) of the owners of land adjoining or adjacent to a stream may petition the County Auditor for the removal of a milldam. Upon notifying the milldam's owner, the Board of County

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[140] Id. § 6115.24.

[141] See, e.g., Zamani v. Otter Tail Power Co., 182 Minn. 355, 234 N.W. 457 (1931).

Commissioners conduct hearings to determine whether removal is conducive to the public health, convenience and welfare.[142]

Costs for removal of a milldam are apportioned among the landowners benefited. If the parties cannot agree on compensation to be paid, or if any of the petitioners object to the compensation price, then the parties may appeal to the Court of Common Pleas. In the event the petition is approved, the County Engineer appraises the property taken. A hearing is provided, in which the Board of County Commissioners determines the amount of damage the milldam owner is entitled to and the fair market value of any land taken.[143]

Any interested landowner may appeal to the Court of Common Pleas on the following questions: (1) Is the improvement necessary?; (2) Is it conducive to the public welfare?; (3) Are the costs greater than the benefits?; and, (4) Is any award for compensation or damages just?[144]

In the event that a milldam owner is refused compensation, he is entitled to a jury trial.[145]

If a SSH dam is classified as a milldam and subject to removal at any time, then this constant threat requires significant attention by the developer.

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[142]OHIO REV. CODE ANN. §§ 6155.01; 6155.03 (Page 1977).

[143]Id. §§ 6155.09; 6155.11; 6131.15; 6131.61; 6131.19.

[144]Id. § 6131.25.

[145]Id. §§ 6131.32; 6131.33.

IV. Ohio Public Utilities Commission

A. Public Utility Defined

The Ohio Public Utilities Commission states that an electric light company, when engaged in the business of supplying electricity for light, heat or power purposes to Ohio consumers, is a public utility, and subject to their jurisdiction. Nonprofit companies, or those owned and operated by any municipal corporation are exempt from the Commission's purview.[146]

Supplying electricity to consumers has been interpreted to mean both producing the electricity and distributing it to the public.[147] In Ohio Mining, the Ohio Supreme Court stated that an electric company that sold its entire product to a public utility, who in turn sold that product to consumers, was not to be recognized as a public utility for purposes of the Commission's jurisdiction. However, the Court found the electric company (the producer) to be a public utility, since the electric company and the distributing company were owned by the same enterprise, (i.e., the same stockholders owned the property of each company). Hence, the Court held that both the electric company and the distributing company were subject to the Commission's jurisdiction.[148]

The Ohio Supreme Court has stated that in determining whether a company is a public utility, it is immaterial that

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[146] Id. §§ 4905.03; 4905.02.

[147] Ohio Mining Co. v. P.U.C., 106 Ohio St. 138, 140 N.E. 143 (1942).

[148] Id. at 151, 140 N.E. at 147.

a company has never invoked the power of eminent domain, did not hold itself out to serve the public generally, and only sold to select consumers by private contract. Regardless of the right of the public to demand and receive service, the question whether a business enterprise constitutes a public utility is determined by the nature of its operations. Each case must stand upon the facts peculiar to it. A corporation that serves such a substantial part of the public as to make its rates, charges and methods of operations a matter of public concern, welfare and interest subjects itself to regulation by the Commission.[149]

In Industrial Gas, the Court held that a gas company, which had fifty (50) miles of pipe line running through four counties supplying nineteen (19) industrial plants with natural gas, was rendering service to a substantial part of Ohio so as to be subject to the Commission's jurisdiction.[150]

Thus, the Commission has jurisdiction over retail sales of electricity sold by a public utility. An electric company will be classified as a public utility if it serves a substantial part of the public so as to make its rates, a matter of public concern.[151]

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[149] Industrial Gas Co. v. P.U.C., 135 Ohio St. 408, 21 N.E.2d 166 (1939). See also Ohio Power Co. v. Village of Attica, 23 Ohio St. 2d 37, 261 N.E.2d 123 (1970).

[150] Industrial Gas, at 412, 21 N.E.2d at 168.

[151] Telephone Conversation with Mr. Donn Rosenblum of the Legal Section of the Public Utilities Department (July 23, 1979).

B. The Public Utilities Commission

Once within the Commission's jurisdiction, SSH is subject to myriad regulations.

The Commission supervises all public utilities within its jurisdiction; has the power to examine such public utilities; keep informed as to their general condition; capitalization; franchising; and as to the manner in which their properties are leased, operated, managed and conducted with respect to the adequacy or accommodation afforded by their service; the safety and security of the public and employees; and their compliance with all laws, orders of the Commission, franchises and charter requirements.[152]

The Commission is empowered to enter a utility's premises to inspect operations owned, operated or controlled by public utilities, municipalities or by nonprofit utilities. The power to inspect includes the power to prescribe any rule or order necessary for the protection of public safety.[153]

The Commission may establish a system of accounts to be kept by a public utility, including those owned or operated by municipalities, and may prescribe the manner in which the accounts should be kept.[154]

The Commission is to be kept informed of all new construction and may prescribe construction accounts. If the Commission so determines, a utility must carry a depreciation account. No utility furnishing service or facilities may abandon

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[152] OHIO REV. CODE ANN. § 4905.06 (Page 1977).

[153] Id.

[154] Id. § 4905.13.

such services or facilities without the approval of the Commission. A utility must furnish necessary and adequate services and cannot charge unreasonably for any service, or in excess of that allowed by law or by order of the Commission.[155]

Every public utility must print and file with the Commission, schedules showing all rates, joint rates, rentals, tolls, classifications and charges for service of every kind furnished by it. Every utility may file a schedule or enter into any reasonable rate arrangement with another public utility or with its customers, consumers or employees. However, the cost data or factors upon which such rates are based and fixed must be filed with the Commission and such arrangements shall be under the Commission's supervision and regulation, and will be subject to change, alteration or modification by the Commission.[156]

The Commission may change the rules or regulations, measurements or practices of a public utility with respect to its public service when, after a hearing, it deems them unjust or unreasonable. The Commission may also order reasonable plant improvements for the public convenience and welfare.[157]

Any municipal corporation may require of any public utility to make additions or extensions to its distributing plant within the municipality. Such requirements are subject to the Commission's review.[158]

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[155] Id. §§ 4905.17; 4905.18; 4905.20; 4905.21; 4905.22.

[156] Id. §§ 4905.30; 4905.31.

[157] Id. §§ 4905.37; 4905.38.

[158] Id. § 4905.39.

The Commission's power to regulate extends to stocks, bonds and notes issued by a utility. There is an exemption for short-term notes issued by an electric light company. With the Commission's permission, any two or more public utilities may operate there lines or plants in conjunction with each other; may purchase, sell or lease the property, plant or business of any other utility; and purchase the stock of any other utility.[159]

Every utility having any equipment on, over or under any street or highway must, for a reasonable compensation, permit the use of such equipment by any other public utility whenever the Commission deems it necessary. If the parties cannot agree on compensation, the Commission may direct it.[160]

C. Certified Territories for Electric Companies

Every electric supplier, including electric light companies organized as nonprofit corporations but not including municipal utilities, are restricted to boundries of a certified territory in which an electric company may provide electricity.[161] Restrictions on the supplying of electricity to certified territories only applies to the retail sale of electricity, not to the wholesale of electricity.[162] Hence, a developer of SSH selling to a public utility is not confined to selling his electricity in just one territory.

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[159] Id. §§ 4905.40; 4905.401; 4905.48

[160] Id. § 4905.51.

[161] Id. § 4933.82 (Page Supp. 1978).

[162] Telephone Conversation with Mr. Donn Rosenblum of the Legal Section of the Public Utilities Department (July 23, 1979).

The Commission establishes these boundries, and supplies a map of the certified territory to each electric supplier. Each electric supplier has the exclusive right to furnish electric service to all electric load centers (consuming facilities) located within its certified territory, and cannot furnish, make available, render, or extend its electric service for use in the certified territory of another electric supplier.[163]

Nothing impairs a municipal corporation from requiring franchises or contracts for the provision of electric service within its boundries. Any electric supplier may extend its facilities through the certified territory of another electric supplier to connect any of its facilities, to serve electric load centers within its own certified territory or to interconnect with other electric suppliers. Electric suppliers must furnish adequate facilities to meet the reasonable needs of the consumers and inhabitants in the certified territories they are to serve. Territory rights may be assigned or transferred only with the Commission's approval.[164]

Municipalities retain the right to generate, transmit, distribute or sell electric energy. The services of a municipality owned electric system includes all of the municipality's incorporated area and that territory within a line substantially equidistant between its existing distribution lines and the nearest existing distribution line of any electric supplier in every direction.[165]

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[163] OHIO REV. CODE ANN. §§ 49.33.82; 4933.81; 4933.83 (Page Supp. 1978).

[164] Id. §§ 4933.83; 4933.85

[165] Id. §§ 4933.87; 4933.82.

Every electric supplier must file with the Commission a map showing all of its existing distribution lines and the proposed boundries of its certified territory.[166]

D. Fixation of Rates

The Commission is empowered to fix reasonable rates for public utilities. The Commission may investigate the value of a utility's property in order to ascertain the reasonableness of its rates.[167] In determining a rate, the Commission considers, among other things: (1) the valuation of certain property of the utility used and useful in its service; (2) a fair and reasonable rate of return; (3) the dollar annual return to which a utility is entitled; and, (4) the cost of the utility of rendering the utility service for the test period less the total of any interest on cash or credit refunds paid by the utility during the test period.[168]

In City of Cleveland v. P.U.C., a telephone rate case, the Ohio Supreme Court held that a rate base is established by determining the dollar amount of reconstructing the utility's property, which is used and useful in rendering telephone service, less existing depreciation of such property.[169] The Commission determines what percentage will represent a fair

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[166] Id. § 4933.82.

[167] Id. §§ 4909.01; 4909.02 (Page 1977).

[168] Id. § 4909.15 (Page Supp. 1978).

[169] 164 Ohio St. 442, 132 N.E.2d 216 (1956).

annual rate of return on the utility's property used in rendering a public service by fixing a rate above a point which would become confiscatory, but somewhat less than the full value of the service to the public.[170] The rate of return is added to the dollar amount of the annual expenses, e.g., taxes, to arrive at an allowable gross annual revenue. The Commission fixes rates to provide the utility with an amount equal to such allowable gross annual revenue.[171]

Municipalities are empowered to fix the rates of utilities within their incorporation. Notwithstanding, a public utility may still file an application with the Commission to fix a reasonable rate for its services. If the public utility does not accept the municipality's rate schedule, then the Commission fixes a just and reasonable rate for the services of such public utility within the municipality.[172]

V. The Ohio Department of Energy

The Ohio Department of Energy may be helpful to a developer of SSH. The Director of Energy assesses the potential of water power resources in Ohio and makes recommendations for its development to the state government. The Department's purpose is to develop an effective energy program which would provide technical advice and assistance on energy production and development, particularly concerning the development of renewable resources. The Department evaluates Ohio's energy demand and supply, monitors technical

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[170] City of Portsmouth v. P.U.C., 108 Ohio St. 272, 140 N.E. 604 (1923).

[171] City of Cleveland, 164 Ohio St. at 444, 132 N.E.2d at 217.

[172] OHIO REV. CODE ANN. § 4909.34 (Page 1977).

advancements in energy, evaluates policies governing the establishment of rates and prices for energy and reviews laws, rules and state policies affecting energy utilization and recommends changes to achieve energy development.[173]

Since the General Assembly declared it an essential function and purpose of Ohio to promote the development of renewable energy resources, the Department should be eager to help a developer of SSH.[174] The developer of SSH should contact the Department to see how they may be of assistance.

If a SSH project is already established and generating power, then the developer must annually file with the Department a report in quintuplicate stating:

(1) the total demand, stated in terms of kilowatt hours or cubic feet, that the company projects will be expected of the company for the following twelve (12) months;

(2) with respect to electric supply companies, the supply of fuel for the generation of electricity that they will possess as of the first day of July and the first day of November; and,

(3) where it appears from a comparison of the information reported in 1 or 2 that the total demand projected by the company for the twelve (12) months following the date of the report will exceed the ability of the company to furnish it, the means by which the company intends to employ in order to prevent any interruption or curtailment of service.[175]

In addition, each person owning or operating a major utility facility (as defined by the Power Siting Commission), or furnishing

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[173] Id. §§ 1551.04; 1551.05 (Page 1978).

[174] Id. § 1551.18.

[175] Id. § 4905.14 (Page Supp. 1978).

electricity directly to more than twenty-five (25) consumers within Ohio, must annually furnish a report to the Division of Planning and Forecasts, within the Department of Energy, containing a ten (10) year forecast of loads, resources and prospective sites. The report must describe the facilities which will be required to supply system demands during the forecast period.[176]

Although the Department adds to the bureaucratic paperwork of a developer, it may provide valuable information and assistance to a developer of SSH.

VI. Incidental Provision

A. Administrative Procedure

All government agencies authorized to promulgate rules, make adjudications or issue licenses are subject to Ohio's provisions regarding administrative procedure.[177] These provisions do not apply to the Public Utilities Commission.[178] Instead, the Public Utilities Commission has authority to adopt rules to govern its proceedings and to regulate the mode and manner of its investigations independent of Ohio's administrative procedure.[179]

In the adoption, amendment or recission of any rule an agency must provide reasonable public notice, a full text of the proposed rule and a hearing for those persons affected by the proposed action.[180]

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[176] Id. § 1551.17 (Page 1978).

[177] Id. § 119.01 et seq. (Page 1978).

[178] Id. § 119.01 (A).

[179] Akron & Barberton Belt Rd. Co. v. P.U.C., 165 Ohio St. 316, 135 N.E.2d 400 (1956).

[180] OHIO REV. CODE ANN. § 119.03 (Page 1978).

No adjudication order is valid unless an opportunity for a hearing is afforded. An agency must notify a party of his right to a hearing and the reasons for the proposed action. Every agency shall afford a hearing where a license has been denied. Any party adversely affected by any order of an agency may appeal from an agency's order to the Court of Common Pleas of the county in which his place of business is located or to the county where he is a resident.[181]

VII. Financial Considerations

A. Tax Systems Affecting SSH

SSH will be taxed as a public utility if it is classified as a public utility. Otherwise, SSH may be taxed as a private business enterprise. The following sections examine the taxing of SSH under each of these systems.

1. Taxing Public Utilities

The Tax Commissioner assesses all the property owned or operated by a public utility for taxation, which includes the utility's plant, real estate and all other property, including all monies, credits, investments, deposits, stocks and all other intangible property. All real estate and personal property of incorporated companies within Ohio are taxable, whether such property is used in connection with the public utility or not.[182] Easements and rights-of-way are taxable as real property.[183] Water-power rights of hydroelectric dam owners are not taxable.[184]

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[181] Id. §§ 119.06; 119.07; 119.12.

[182] Id. §§ 5727.06; 5709.02 (Page 1973).

[183] Ross v. Franko, 139 Ohio St. 395, 40 N.E.2d 664 (1942).

[184] Telephone Conversation with Mr. Keith Smith, Supervisor of Public Utilities in the Ohio Department of Taxation (June 7, 1979).

Information supplied by the public utility guides the Tax Commissioner in determining the true value of the utility's property. The value of real and personal property of public utilities, but not intangible property, is apportioned either between taxing districts within a county, between counties or between states in proportion which the property located within each tax district, county or state bears to the entire value of the utility's property.[185]

Public property is exempt from taxation, e.g. a municipally owned utility.[186] If public property, or any part thereof, is leased or sold to a private corporation or individual, that portion of the public property leased or sold shall not be exempt from taxation.[187] Hence, public property leased by a developer of SSII will not be exempt from taxation.

Real estate of unincorporated public utilities, incidental to its operations, is not taxed. Transmission lines, transformers, wires, tools and all other property except real estate, motor vehicles and intangible property owned by a rural electric company is assessed and taxed at only fifty (50) per cent of its true value in money.[188]

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[185]OHIO REV. CODE ANN. §§ 5727.10; 5727.15 (Page 1973).

[186]Id. § 5727.05.

[187]Bd. of Park Comm's of City of Troy v. Bd. of Tax Appeals, 160 Ohio St. 451, 116 N.E.2d 725 (1954).

[188]OHIO REV. CODE ANN. §§ 5727.29; 5727.30. (Page 1973).

A rural electric company means any nonprofit corporation, association or co-operative engaged in the business of supplying electricity to its members in an area the major portion of which is rural.[189]

In addition, an electric light company is not taxed as a public utility if the company is engaged in some other primary business to which the supplying of electricity or power to others is incidental, or which supplies electricity or power to its tenants whether for a separate charge or otherwise, or whose primary business in Ohio consists of producing, refining or marketing petroleum or its products.[190]

An excise tax is imposed on the gross receipts of all public utilities derived from intrastate business. Ohio taxes three and thirty-five one hundredths per cent of all such gross receipts. The only public utilities receipts exempt from this tax are those receipts derived solely from interstate sales, business done with the federal government or sales to other public utilities.[191]

Another excise tax is imposed on utilities for the privilege of carrying on its intrastate business. Known as the "poor relief tax," it amounts to sixty-five one hundredths of one per cent of the gross receipts of every utility. Electric light companies are allowed to

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[189] Id. § 5727.01 (D).

[190] Id. § 5727.02.

[191] Id. §§ 5727.38; 5727.33.

deduct twenty-five (25) thousand dollars from their gross receipts before computing this excise tax.[192]

The corporate organization tax may affect SSH. Corporations admitted to do business in Ohio are required to file its first report and pay the tax in and for the calendar year immediately succeeding the date of its organization.[193]

Ohio's real estate transfer tax may affect SSH. This tax is not to exceed thirty (30) cents per one hundred (100) dollars, for each one hundred (100) dollars of value of the real property.[194]

Ohio also has a four (4) per cent retail sales tax, storage tax and use tax, however, sales of electricity by a public utility are specifically exempt from this tax.[195]

The developer of SSH will be liable for personal income tax imposed by the state.[196] A developer may be liable for a personal income tax imposed by the municipality in which he derives profits. However, no municipal personal income tax may exceed one (1) per cent of the net profit

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[192] Id. § 5727.81.

[193] Id. § 5733.16.

[194] Id. § 322.02 (Page 1979).

[195] Id. §§ 5739.02; 5741.02. (Page 1973).

[196] OHIO CONST. art. XII, §§ 8; 9. See OHIO REV. CODE ANN. § 5747.02 (Page 1973).

derived within the municipality.[197] And any personal income taxes paid to a municipality will be credited toward state personal income taxes.

2. Regular Business Taxes

Private businesses' real property is taxable and its value is assessed by the auditor of each county.[198] The county auditor uses good faith and all resources available to ascertain the true value of the land, all growing crops, all buildings, structures, improvements, fixtures and all rights and privileges belonging or appertaining thereto.[199] A private recorded easement is an example of a right or privilege belonging or appertaining to the land which is taxable.[200]

Personal property such as machinery and equipment used for the generation or distribution of electricity is assessed and taxed at fifty (50) per cent of its true value in money.[201] Transmission lines and wires, not attached to the land, are taxed as personal property as well.[202] To ascertain the true value of personal property, book value less depreciation together with current market prices is used.[203] The

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[197]OHIO REV. CODE ANN. § 718.01 (Page 1973).

[198]Id. § 5713.01 (Page 1973).

[199]McCurdy v. Pruch, 59 Ohio St. 465, 55 N.E. 154 (1899); OHIO REV. CODE ANN. § 5701.02 (Page 1973).

[200]Ross v. Franko, 139 Ohio St. 395, 40 N.E.2d 664 (1942).

[201]OHIO REV. CODE ANN. §§ 5701.03 (Page 1973); 5711.22 (Page Supp. 1978); Syro Steel Co. v. Tax Comm'r, 34 Ohio St. 2d 9, 295 N.E.2d 194 (1973).

[202]Telephone Conversation with Mr. Dale Runck, Assistant Manager of Personal Property in the Ohio Department of Taxation (June 6, 1979).

[203]R.H. Macy Co. v. Schneider, 176 Ohio St. 94, 197 N.E.2d 807 (1964); OHIO REV. CODE ANN. §§ 5711.16; 5711.18; 5711.22 (Page 1973).

taxing situs of personal property lies where the property is located.[204]

All private corporations in Ohio are subject to the corporation franchise income tax. The tax charged each corporation is either the sum of divisions (a) and (b) or the sum of division (c), whichever is greater:

(a) Four (4) per cent upon the first twenty-five (25) thousand dollars of the value of the corporation's issued and outstanding shares of stock; and,

(b) Eight (8) per cent upon the value so determined in excess of twenty-five (25) thousand dollars; or,

(c) Five (5) mills times that portion of the value of the issued and outstanding shares of stock.[205]

The minimum payment for all corporations is fifty (50) dollars. This tax does not limit the power of municipalities to impose an income tax on the income of such corporations.[206]

Ohio also imposes a corporate franchise tax on corporations. It is a fee of one tenth of one per cent upon the certified value of the corporation's issued and outstanding stock. The value of the issued and outstanding shares of stock is the total of the corporation's capital,

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[204] Telephone Conversation with Mr. Dale Runck, Assistant Manager of Personal Property in the Ohio Department of Taxation (June 6, 1979).

[205] OHIO REV. CODE ANN. § 5733.06 (Page 1973).

[206] Id.

surplus, undivided profits and reserves, without deducting the value of any federal securities owned by the corporation The minimum franchise tax is twenty-five (25) dollars.[207]

Private businesses are subject to Ohio's corporate organization tax, real estate transfer tax and personal income tax as are public utilities.

To arrive at an unincorporated business income tax, the adjusted gross income must be multiplied by a fraction, the numerator of which is the sum of the property factor, the payroll factor and the sale factor, and the denominator of which is three.[208]

An excise tax of four (4) per cent is levied on businesses engaging in the business of making retail sales as well.[209]

A four (4) per cent sales, use or storage tax is levied on all retail sales, including retail sales of electricity by private businesses. Sales of personal property used or consumed directly in rendition of a public utility service are exempt. Sales of electricity by a public utility are exempt and sales to the state are exempt.[210]

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[207] OHIO REV. CODE ANN. § 5733.01; Fifth Union Trust Co. v. Peck, 161 Ohio St. 169, 118 N.E.2d 398 (1954).

[208] OHIO REV. CODE ANN. § 5747.21. See also § 5747.22. (Taxation of Partnerships).

[209] Id. § 5739.10.

[210] Id. §§ 5739.01; 5739.02.

B. Tax Exemptions for Energy Conversion Facilities

If a company converts from natural gas to an alternative fuel or power source, other than propane, butane or naphtha, by building an energy conversion facility in a commercial building or site, or in an industrial plant or site, then such facility, upon certification by the Tax Commissioner, shall be exempt from taxation so long as the certificate is in force. An energy conversion facility means any additional property or equipment designed, constructed or installed in a commercial building or site or in an industrial plant or site necessary for the primary purpose of energy conversion.[211]

Although no SSH developer has filed for a certificate to obtain a tax exemption for building an energy conversion facility, nothing precludes a SSH developer from filing for such a certificate.[212]

When applying for a certificate, a developer must describe the proposed facility and list all the equipment and materials acquired or to be acquired by the developer for the purpose of energy conversion. Prior to issuing an energy conversion certificate, the Tax Commissioner must obtain a written opinion regarding the application from the Director of the Department of Energy. The Director's opinion includes his determination of whether the facility is likely to reduce fuel or power usage and

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[211] Id. §§ 5709.45; 5709.46; 5709.50 (Page Supp. 1978).

[212] Telephone Conversation with Mr. Arthur M. Suchta of the Legal Section of the Ohio Department of Taxation (June 18, 1979).

consumption of natural gas. If the Commissioner, after obtaining the Director's opinion, finds that the proposed facility was designed primarily for energy conversion, is suitable and adequate for such purpose and is intended for such purpose, he shall issue a certificate.[213]

The Director of Energy's opinion greatly influences the Tax Commissioner's decision to issue a certificate; facilities approved by the Director of Energy are likely to receive a certificate.[214] A SSH project within the description of an energy conversion facility stands a fair chance of obtaining a certificate from the Tax Commissioner since the Director of Energy is to develop and encourage Ohio's renewable resources.

Energy conversion facilities issued certificates shall not be considered:

(1) an improvement on the land for the purpose of real property taxation;

(2) as used in business for the purpose of personal property taxation; and,

(3) as an asset of any corporation in determining the value of the property owned and used by it in Ohio for the purpose of the franchise tax.[215]

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[213] OHIO REV. CODE ANN. § 5709.46 (Page Supp. 1978).

[214] Telephone Conversation with Mr. Arthur M. Suchta of the Legal Section of the Ohio Department of Taxation (June 18, 1979).

[215] OHIO REV. CODE ANN. § 5709.50 (Page Supp. 1978).

Tangible property incorporated into an energy conversion facility is not subject to a sales or use tax either.[216]

Legislation concerning tax exemptions for energy conversion facilities is recent and its boundaries undefined. A SSH developer, who is building his project for the primary purpose of converting from the present use of non-renewable resources, should apply for a certificate from the Tax Commissioner.

C. Loan Programs Affecting SSH

1. The Department of Energy

The Department of Energy is empowered to make grants, enter into agreements or enter into contracts for the construction and operation of experimental, pilot or demonstration energy resource development facilities. Such development projects and grants, however, appear to be limited to the development of experimental projects, where there is little opportunity for private interests to recapture their investment through normal commercial exploitation.[217]

Notwithstanding, a SSH developer should apply for financial assistance from the Department since the development of SSH promotes Ohio's asserted goal of developing its renewable energy resources.[218]

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[216] Id.

[217] Id. § 1551.15 (Page 1978).

[218] Id. § 1551.18.

2. The Ohio Development Financing Commission

This Commission lends financial and technical assistance to industrial, commercial, distribution and research activities to create or improve employment opportunities and to improve the economic welfare of Ohioans.[219]

The Commission's lending authority is conditioned upon a project benefitting the people of Ohio by increasing opportunities for employment and strengthening the state's economy. Also, the borrower must be unable to finance the project through ordinary financial channels upon reasonable terms and at reasonable interest rates.[220]

If a SSH project qualifies for financial assistance, such assistance includes construction, reconstruction, enlargement and improvement of a project.

3. The Ohio Water Development Authority

In developing and managing Ohio's water resources, the Water Development Authority makes loans and grants for the acquisition or construction of water development projects, e.g., dams. Such loans and grants are limited to governmental agencies.[222]

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[219] Id. § 122.41 (Page 1978).

[220] Id. § 122.43.

[221] Id. § 122.39.

[222] Id. §§ 6121.03; 6121.04 (Page 1977).

The Water Development Authority may acquire, construct, reconstruct, enlarge, improve, furnish, equip, maintain, repair, operate, lease or rent to, or contract to operate by a governmental agency or person, water development projects.[223]

The Authority can also make available the use or services of any water development project to one or more persons, one or more governmental agencies, or any combination of the two, for a reasonable rental.[224]

Although loans are not available for private developers of SSH, the Authority could construct or renovate a dam itself, then lease or rent it to a private developer. This bypasses the developer's headache of acquiring, building and financing a SSH facility himself.

The contract for lease may provide for acquisition by the developer of all or any part of the water development project for such consideration payable over the period of the contract.[225] A contract provision to acquire the project could be beneficial to the developer who wanted to own a SSH project, but could not afford to acquire, build or finance such a project from the start.

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[223] Id. § 6121.04.

[224] Id. §§ 6121.04; 6121.13.

[225] Id. § 6121.13.

Note also, that the Authority is exempt from all taxation on any of its water development projects. Income derived from the project is tax exempt and no tax may be levied on the transfer to or from the Authority of title or possession of any project.[226] A private developer, as a leasee, may be exempt from taxation; however, that is very unlikely since he is not acting as a state agency and the project is not used exclusively for a public purpose.

[226] Id. § 6121.16.

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