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LEGAL OBSTACLES AND INCENTIVES TO THE DEVELOPMENT OF SMALL SCALE HYDROELECTRIC POTENTIAL IN ILLINOIS

MASTER

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

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

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

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

requirements making compliance with both impossible.[g]

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

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

B. Pre-emption and Hydroelectric Development

1. The Federal Power Act

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

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

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

h U.S. CONST. art. I, § 8, cl. 3.

i Id.

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

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

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

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

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

m Id. at 180.

n 16 U.S.C. § 802(b) (1976).

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

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

2. The Public Utility Regulatory Policies Act of 1978

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

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

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

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

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

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

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

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

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

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

[v]§ 210 (e)(1) of PURPA.

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

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

3. Federal Clean Water Act

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

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

[x] § 210 (d)(1) of PURPA.

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

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

C. The Practical Use of Pre-emption

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

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

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

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

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

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

FLOW DIAGRAM OF ILLINOIS DAM REGULATION

I. OWNERSHIP
-Does developer own or have rights to both banks and bed of waterway?
-Does developer own property, have easements or permission to backflood?
-Does developer have legal right to use of flowing water?

If yes:

If no, developer must obtain before developing

II. Is stream a public body of water, i.e., is title in the state or is the stream subject to easement of navigation?

If yes, developer must apply to DOT for Work-In-Water Permit

If no, permit is not required

III. Will dam be either: (1) 25' or more in height and impound more than 15 acre-feet of water, or (2) an impoundment of more than 50 acre-feet of water and more than 6' in height?

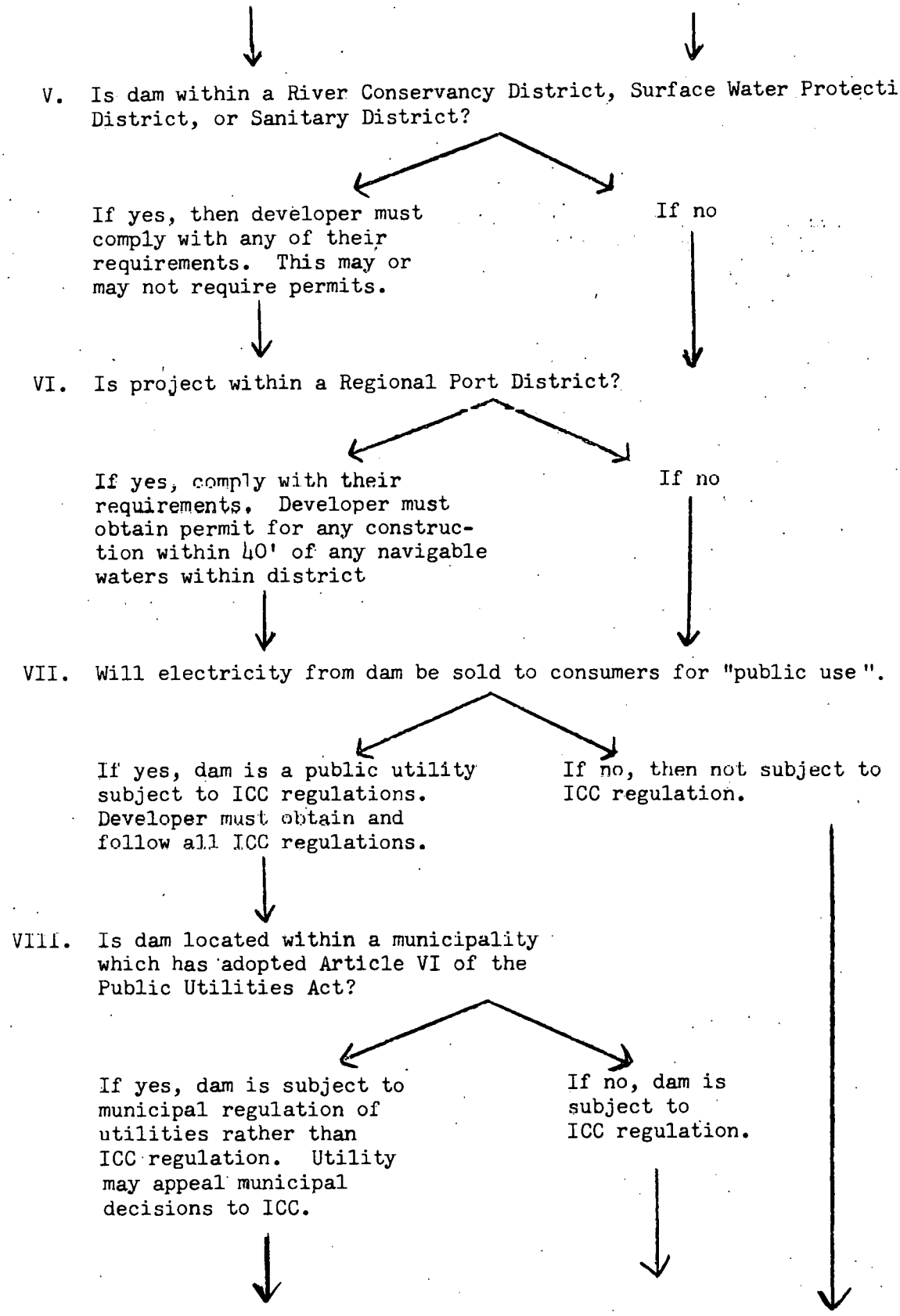
If yes to either (1) or (2) above, developer must apply to DOT for construction and operation permits.

If no, DOT permits are not required.

IV. Is dam site within a municipality?

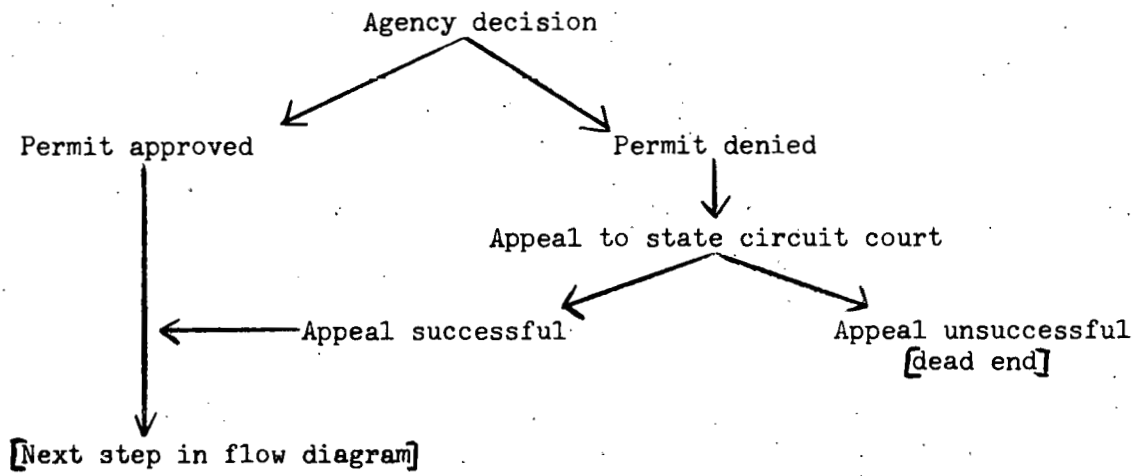
If yes then developer must comply with any Levee Improvement Commission, Municipal Planning Commission, and zoning and building requirements. These may or may not involve permits.

If no


V. Is dam within a River Conservancy District, Surface Water Protection District, or Sanitary District?
If yes, then developer must comply with any of their requirements. This may or may not require permits.
If no
VI. Is project within a Regional Port District?
If yes, comply with their requirements. Developer must obtain permit for any construction within 40' of any navigable waters within district
If no
VII. Will electricity from dam be sold to consumers for "public use".
If yes, dam is a public utility subject to ICC regulations. Developer must obtain and follow all ICC regulations.
If no, then not subject to ICC regulation.
VIII. Is dam located within a municipality which has adopted Article VI of the Public Utilities Act?
If yes, dam is subject to municipal regulation of utilities rather than ICC regulation. Utility may appeal municipal decisions to ICC.
If no, dam is subject to ICC regulation.

IX. Once operating dam owner must obtain Operating Permit from DOT every five years.

X. Appeal procedure. All final decisions of the DOT, the ICC or any of the Regional Port Districts (steps II, III, VI, VII and IX above) may be appealed to the state circuit court. The procedure is as follows:



I. ILLINOIS WATER LAW

A. The Doctrine of Riparianism

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

Illinois follows the riparian theory of water law.[1] Under this theory, private rights in the flowing water of a river or stream are vested in those landowners whose lands border the river or stream.[2] Riparianism contrasts with the theory of water law that has been adopted by a number of western states, the prior appropriation doctrine. Under prior appropriation, the private right to utilize flowing water vests in the earlier user regardless of the location of any land the developer might own.[3]

Riparianism constitutes a cost to the developer because the right to utilize the flowing water at the proposed site is dependent upon the acquisition of property interests in the abutting land on both sides of the waterway. The normal procedure for obtaining such

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[1] See Evans v. Merriweather, 4 Ill. (3 Scam.) 492, 38 Am. Dec. 106 (1842).

[2] Leitch v. Sanitary Dist. of Chicago, 369 Ill. 469, 473, 17 N.E.2d 34 (1938).

[3] See generally 1 Robert E. Clark, Waters and Water Rights, § 51 et seq. (1967).

rights is for the developer to purchase or lease the requisite interests from the appropriate landowners. In certain circumstances, the developer may obtain the authority to acquire abutting land by eminent domain.[4]

1. Title to Stream Beds

In addition to obtaining the necessary interests in the banks of a stream, the developer must be able to utilize the stream bed. In Illinois, a riparian owner (i.e., one who owns land abutting a river or stream) takes title to the middle or "thread" of the river or stream.[5] This principle operates as a legal presumption unless the seller of the real estate by the terms of the grant, indicates clearly that there is to be a different boundary.[6] Thus the owner of land on both sides of the river generally owns the bed of the stream.[7] However, the bed of a stream may be divided and conveyed just as other

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

[5] Middleton v. Pritchard, 4 Ill. (3 Scam.) 510, 520, 38 A.D. 112 (1842).

[6] Allot v. Wilmington Light & Power Co., 288 Ill. 541, 550, 123 N.E. 731 (1919).

[7] The People v. Economy Power Co., 241 Ill. 290, 318, 89 N.E. 760 (1909), writ of error dismissed sub nom., Illinois v. Economy Power Co., 234 U.S. 497 (1914).

property rights may be conveyed. Consequently, one person may own the bank, another the shore and another the bed of a stream.[8] Therefore, a developer should make certain, when acquiring title, that the title to the bed is included and that some previous owner has not divided and sold separately the rights to the bed of the stream.

Whether a stream is navigable or non-navigable has no effect on the ownership of the stream bed in Illinois.[9] Riparian owners have rights to the beds of all Illinois streams whether actually navigable or not.[10] This stands in contrast to the policies of many other states in which the beds of navigable streams are owned by the state in trust for the people. However, in Illinois, although the beds of all rivers and streams are privately owned, the rights of riparian owners on navigable streams are subject to a public easement of navigation.[11] The significance of this easement is that should the state invoke its right the consequences to the developer may be very harsh indeed. Though an improvement in navigation by the state or Federal government might result in substantial injury to the developer's ability to generate power,

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[8] Sikes v. Moline Consumers Co., 293 Ill. 112, 122, 127 N.E. 342 (1920).

[9] Leitch v. Sanitary Dist. of Chicago, 369 Ill. 469, 474, 17 N.E.2d 34 (1938).

[10] Id.

[11] Id. at 475.

the developer may be left without a remedy.[12]

These public rights give rise to extensive regulation of navigable waterways under both state and federal law. Regulation by the State of Illinois will be discussed extensively in Part II of this paper.[13] However, it should be emphasized that even though a developer owns the bed of a stream a permit must be obtained from the Illinois Department of Transportation before any work of any kind whatsoever in any river, stream or lake may be undertaken, whether the stream is navigable or not.[14]

2. Title to Lake Beds

Up to this point, this discussion has focused only on ownership of stream or river beds. Many dams, however, are located at lake outlets. Therefore, it is necessary to consider the ownership of lake beds as well. The Illinois Supreme Court's treatment of lake bed ownership has been entirely different from that of stream beds. The title to all navigable lakes and bodies of water

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[12] See 2 Robert E. Clark, Waters and Water Rights, §101.3 et seq. (1967); compare People v. Metropolitan Ry. Co., 285 Ill. 246, 120 N.E. 748 (1918), appeal dismissed, 252 U.S. 573 (1920) with The People v. Economy Power Co., 241 Ill. 290, 89 N.E. 760 (1909), writ of error dismissed sub nom. Illinois v. Economy Power Co., 234 U.S. 497 (1914).

[13] For an extensive discussion on what the federal regulations are see the Energy Law Institute report: P. Brown & T. Buxton, Federal Legal Obstacles and Incentives to the Development of the Small Scale Hydroelectric Potential of the Nineteen Northeastern United States, DOE Contract #ET-78-5-02-4934 (January 30, 1979).

[14] Ill. Ann. Stat. ch. 19, §65 (Smith-Hurd Com. Supp. 1979). Permit requirements will be discussed extensively in Part II of this paper.

within the State of Illinois is vested in the state in trust for the people.[15] For purposes of lake bed ownership navigability is to be determined at the time Illinois was admitted to the Union.[16] If at that time an inland lake was navigable, without improvement, the title to the bed of the lake is vested in the state in trust for all the people.[17]

In separate opinions the court has also held that the waters and beds of lakes which have been meandered on the U.S. Government survey maps are held by the state in trust for all the people, for fishing, boating and similar purposes.[18] A "meander line" is a line drawn on a survey map indicating the approximate location of the water's edge. It was used by the government surveyors to estimate the actual acreage of dry land in a parcel which had a watercourse for a boundary. The Illinois Supreme Court has interpreted the use of a meander line by the surveyors to mean that the body of water was of a significant size and therefore navigable.[19] Hence, the beds of all lakes which are meandered on the U.S. Government survey maps are held in trust for the

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[15] Wilton v. VanHessen, 249 Ill. 182, 188, 94 N.E. 134 (1911).

[16] State of Illinois v. New, 280 Ill. 393, 399, 117 N.E. 597 (1917).

[17] Id.

[18] Fuller v. Shedd, 161 Ill. 462, 493, 44 N.E. 286 (1896).

[19] Wilton v. VanHessen, 249 Ill. 182, 189, 44 N.E. 134 (1911).

people whether they are actually navigable or not.[20] Where a lake or pond is not navigable and has never been meandered by the Federal government, which has surveyed and sold the land as though no body of water were there, the purchasers from the government own the bed of the lake or pond and are entitled to the exclusive possession of the portions owned by them.[21] Thus, if a lake is navigable and/or meandered on the government survey it is owned by the state and the use of the lake bed will be subject to state regulation. However, if the lake is non-navigable and not meandered, the bed is privately owned and is not subject to state regulation.

3. Navigability Defined

The distinction between navigable and non-navigable watercourses is important not only in determining whether a stream or lake is subject to the public easement of navigation but also because many of the statutes regulating dams apply only to navigable waterways.

The English common law defined navigable waters as those waters which were affected by the ebb and flow of the tide.[22]

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[20] Id.

[21] Id.

[22] Schulte v. Warren, 218 Ill. 108, 118, 75 N.E. 783 (1905).

This test is obviously unacceptable for use by the inland United States and therefore the courts in those states developed various navigable-in-fact tests. One such test, the saw-log test of navigability, is used by many states as well as the Federal government.[23] Essentially, under this test if a stream is large enough to float a log to a mill then it is considered navigable.

The Illinois Supreme Court, however, specifically rejected the saw-log test of navigability.[24] In Illinois, the fact that fishermen and hunters can traverse a stream in small boats does not render a stream navigable.[25] Nor do artificial improvements make a non-navigable waterway navigable for the purpose of determining riparian rights.[26] Such would constitute a taking of private property for public use without just compensation.[27] A stream is not deemed navigable if it is only capable of carrying commerce once a year during the two to four weeks of spring floods.[28]

In Illinois, to be navigable, a stream must, in its ordinary and natural condition, furnish a common passage capable of carrying commerce of practical utility to the public in the customary mode in which such commerce is conducted by water.[29]

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[23] Connecticut Light and Power Co., 9 FPS 606 (1976), aff'd. Connecticut Light and Power Co. v. FPC, 557 F.2d 349 (1st Cir. 1977).

[24] Schulte v. Warren, 218 Ill. 108, 118,75 N.E. 783 (1905).

[25] Id.

[26] The People v. Economy Power Co., 241 Ill. 290, 324, 89 N.E. 760 (1909).

[27] Id.

[28] Id. at 332.

[29] Sanitary District v. Boening, 267 Ill. 118, 126, 107 N.E. 810 (1915).

To be navigable the water must be of sufficient depth to afford a channel for useful commerce.[30] It must be of common or public use for the carriage of boats and lighters, and of bearing up and floating vessels for the transportation of property conducted by the agency of man.[31]

Thus, it appears that the Illinois common law definition of navigability is narrow enough so that many, or at least some, watercourses which are capable of producing hydroelectric power may be considered non-navigable. Development of sites on such non-navigable streams would be somewhat simpler because the developer would not have to comply with those statutory requirements pertaining to navigable waterways (e.g., a work-in-water permit would not be necessary).

As was mentioned above, the Illinois definition of navigability is narrower than the federal definition. The two tests should not be confused. Even though a site is located on a non-navigable stream according to the Illinois definition, the stream will very likely be navigable according to the very broad federal definition.[32] Therefore while the developer may escape some state regulation the federal regulations must still be complied with.[33]

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[30] Schulte v. Warren, 218 Ill. 108, 119, 75 N.E. 783 (1905).

[31] The People v. Economy Power Co., 241 Ill. 290, 332, 89 N.E. 760 (1909).

[32] Connecticut Light and Power Co., 9 FPS 606 (1976), aff'd. Connecticut Light and Power. Co. V. FPC, 557 F.2d 349 (1st Cir. 1977).

[33] Supra note 13

4. Use of the Water

The basic law of riparian rights in Illinois is enumerated in the leading case of Evans v. Merriweather.[34] Evans and Merriweather each owned a mill on a small stream. Both used the water of the stream to generate steam power. Under normal conditions there was more than enough water to operate both mills. However, during one particular year there was a drought which resulted in there not being enough water to run either mill all of the the time. Evans, the upstream owner, built a dam across the stream and used all of the water himself. Merriweather brought a suit at law for damages for obstructing and diverting a water-course and obtained a judgment which was sustained on appeal. The court laid down the following principles in its opinion:

1) Water flows in its natural course and having taken a certain course cannot be diverted, so that all through whose lands it naturally flows may enjoy the privilege of using it. The property in the water is not a property right in the fluid itself but is a right to the impetus or flow of the water which is dependent on the ownership of riparian land.[35] This is, essentially, what is known as the natural flow doctrine. Mere priority of appropriation of running water confers no exclusive right.[36]

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[34] Evans v. Merriweather, 4 Ill. 492, 38 Am. Dec. 106 (1842).

[35] Id. at 494.

[36] Id.

2) This doctrine is tempered by allowing for a reasonable use of the water. Each riparian proprietor is bound to use the running water so as to do as little injury to those below or above him as is consistent with a valuable benefit to himself.[37]

3) Water uses are divided into two categories: artificial and natural. Natural uses are those that are absolutely essential to human existence such as drinking purposes, household wants, and water for cattle or stock. For these uses the upper riparian may use all of the water in a stream, if necessary, to supply his natural wants, even if it results in there being no water left for the lower riparians. Artificial uses, on the other hand, are those which provide for the riparian's comfort and increase his prosperity such as industrial and agricultural uses. Where the stream is small, and does not furnish sufficient water to supply the natural wants of the different proprietors living on it, none of the proprietors can use the water for artificial uses.[38] Where the water of a stream is not needed to supply natural wants, and there is not sufficient water for each proprietor to carry on his manufacturing purposes, no proprietor has a right to use all of the water; all have a right to share in its benefit, and an action will lie against a party who directs or consumes the whole of the stream.[39]

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[37] Id. at 495.

[38] Id.

[39] Id. at 496.

4) Reasonable use is a question of fact which will vary from case to case. For this reason the court refused to formulate a rule governing reasonable use but decided that it must be left to the jury to determine whether the party complained of has used, under all the circumstances, more than his just proportion of the water.[40]

From this statement of basic riparian law, it appears to be fairly clear that using water to produce hydroelectric power is an artificial use, at least if you are planning to sell the power or use it for anything other than your own personal household use. Unfortunately, the court's definition of reasonable use in Evans v. Merriweather does not lend itself to predictability. To obtain a better idea of what constitutes a reasonable use it is necessary to look at subsequent cases.

Plumleigh v. Dawson[41] involved a suit by a lower riparian against the upper riparian for diversion of three-fourths of the stream's natural flow to produce water power to run the upper riparian's mill. The flow diverted was then returned to the stream at a point below the plaintiff-lower riparian's land. Enough water still passed through the natural channel for agricultural and domestic purposes and the plaintiff was unable to show any actual damage. The court decided that no special damages need be shown to recover for a diversion.[42] However, the recovery would be only

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[40] Id.

[41] 6 Ill. (1 Gilm.) 544, 41 Am. Dec. 199 (1844).

[42] Id. at 551.

for nominal damages to protect the plaintiff's right to the water against a prescriptive easement by the defendant.[43] Presumably the plaintiff could not enjoin the diversion without showing actual damage.

In reaching its decision the court held the following:

1) Every riparian proprietor has an undoubted right to use a watercourse for hydraulic purposes so long as s/he does not injure another riparian proprietor.[44]

2) The water power to which a riparian proprietor is entitled, consists in the fall of the stream, when in its natural state, as it passes through the riparian's land, or along the boundary of it, and the water must pass from the land in its accustomed channel.[45]

3) Property rights in water are indivisable, and all riparian proprietors are entitled to an equality of rights therein. They must use it as an entire stream, in its natural channel, and there can be no severence into parts for hydraulic purposes without consent.[46]

4) An upper riparian proprietor may erect a dam and hydraulic works, and use the whole stream to propel the mill, if the water is permitted to flow in its accustomed channel to the land of the lower proprietor.[47]

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[43] Id.

[44] Id.

[45] Id.

[46] Id. at 552.

[47] Id.

In Fink v. Board of Trustees of Southern Illinois Univ.[48], a much more recent case involving an injunction against a dam, the court used a balancing test to determine reasonable use. The plaintiffs brought suit to enjoin construction of a dam upstream on an intermittent watercourse which flowed past their property. The defendant had placed a dam across one branch of the watercourse to impound a lake. The lake water was to be used for heating and cooling and recreation purposes. The only complaint concerning the dam was that it would reduce the flow of water through plaintiff's property. The dam would impound water on one of two branches of the watercourse and only such quantities from that source as go over the spillway would flow past plaintiff's land. In addition, the court found that the plaintiff did not use the water for drinking or household purposes. The court held that where, as in this case, the loss, if any, to plaintiffs by any decrease in the flow was minimal and the benefits to defendant from construction of the dam were substantial, a refusal to enjoin construction of the dam was proper.[49]

In conclusion, it appears from this recent case that Illinois has adopted a balancing test to apportion competing rights to the use of water for artificial purposes from the same watercourse. Thus, the riparian hydroelectric developer has the right to use the water for hydroelectric power so long as his use does not

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[48] 71 Ill. App. 2d 276, 218 N.E. 2d 240 (1966).

[49] Id. at 242.

unreasonably interfere with another riparian's artificial use. The reasonableness of the use is to be determined by a jury, but generally unless there is actual damage and interference with another riparian's use the developer does not have to fear an injunction. Even when there are actual damages the developer need only be concerned about an injunction if the damages are of a nature which cannot be adequately compensated for in a suit at law such as monetary payment. In such a case the court will afford relief by injunction, but lawful and useful business may not be stopped on account of trifling or imaginary annoyances which do not constitute real injury.[50] Of course, the dam, which is an artificial use, may never interfere with another riparian's natural use. This is prima facie unreasonable and an injunction would be proper.[51]

B. Liability of Dam Owner

1. Backflooding

After acquiring the rights to use the water, the banks, and bed of the stream, the developer must be concerned with backflooding or ponding of water. Many states have mill dam acts which permit a dam owner to backflood land not his own upon payment of damages, without fear of a court injunction. Illinois, however, has

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[50] Clark v. Linday Light and Chemical Co., 341 Ill. App. 316, 93 N.E. 2d 441, 443 (1950).

[51] Evans v. Merriweather, 4 Ill. 492, 495, 38 Am. Dec. 106 (1842).

repealed its mill dam act.[52] Therefore, under the common law, in order to continuously or repeatedly flood land to create a pond, reservoir or lake behind a dam, the developer must own either the land, or an easement, or have a contract (i.e., permission) to flood the land. Everyone has a right to construct a mill dam upon their land, provided they do no injury to another thereby, but they have no right to interfere with their neighbor's rights and privileges, or to set back the waters of a stream one foot upon their neighbor's land, unless they have so long enjoyed the privilege as to have obtained a prescriptive right to do so.[53] Anytime a dam does backflood another's land the owner is liable for damages.[54] Under certain circumstances (i.e., continued nuisance) an injunction may issue to have the dam removed.[55]

In many cases dam developers will be buying old mill dams and retro-fitting them for the generation of hydroelectric power. In such cases the backflooding rights may have been already acquired by the previous dam owner through prescription. But, a prescriptive right to flood the lands of another can only arise where the lands have been flooded for a period of 20 years or more, and where the flooding was adverse and uninterrupted and

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[52] Ill. Ann. Stat. ch. 92, §1 - 11 (Smith-Hurd 1966).

[53] Hill v. Ward, 7 Ill. (2 Gilm.) 285, 298 (1845).

[54] Stout v. McAdams, 3 Ill. (2 Scam.) 67, 69, 33 Am. Dec. 441 (1839).

[55] See Deterding v. Central Ill. Public Service Co., 231 Ill. App. 542 (1923), affirmed 313 Ill. 562, 145 N.E. 185 (1924).

took place with the knowledge and acquiescence of the landowner.[56]

2. Dam Breach

There is only one case in Illinois case law dealing directly with liability for dam breach.[57] In that case the defendants built a dam across a small creek for the purpose of making a lake for gathering ice, fishing and boating. The dam gave way and flooded plaintiff's land, damaging his crop. The plaintiff contended that the defendants were negligent, either in the construction or in the maintenance of the dam and that the injury was the result of such negligence. After judgment for the plaintiffs, the defendants appealed on the ground that the plaintiffs had not proved any actual acts of negligence by the defendants nor had they proved what caused the dam to give way. The court stated the following:

> It is not denied that the dam gave way. The presumption is, then, that it was not maintained as it should have been. It was built for appellant's sole profit, and it was their duty to maintain it so that others would not be injured by it. Their [plaintiffs'] right of recovery does not depend upon their ability to specify or prove what mistake or insufficiency in the construction of the dam caused it to give way.[58]

The defendants were held liable for the damage. In general, a person who diverts or restrains any flow of water must provide

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[56] Wills v. Babb, 222 Ill. 95, 106, 78 N.E. 42 (1906).

[57] Whiteside v. Collier, 100 Ill. App. 611 (1901).

[58] Id. at 613.

against the consequences of unusually heavy rainfall (a 100 year flood) and is liable for damages caused by failure to make such provision.[59] A railroad could not escape liability for flooding plaintiff's lands as a result of making changes in an embankment obstructing the natural flow of water, on the grounds that the rainfalls which caused the overflow were an act of God, because the railroad was guilty of negligence in that it failed to anticipate the affects on the embankment of normal rainfall.[60]

Thus it appears that unless dam breach or backflooding was caused by a reasonably unforeseeable act of God and the dam owner is able to prove that he was not negligent then s/he will be held liable for all damage which results from the breach or backflooding.

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[59] Miller v. Mobile & Ohio R. Co., 265 Ill. App. 414, 418 (1932).

[60] Id.

II. DIRECT REGULATION

Hydroelectric dams are not directly regulated by the state of Illinois as individual entities. However, Illinois directly regulates the construction and operation of dams in general. In addition, Illinois regulates all public utilities. Taken together, these regulatory activities constitute the major and most important state authorities affecting small scale hydroelectric development. In addition, municipalities, water districts, and counties also have certain powers over the use of water and watercourses within their jurisdiction. These authorities may directly affect the development of small scale hydroelectric power.

A. Dam Regulation - The Department of Transportation

The Illinois Department of Transportation (DOT) has general jurisdiction and supervision over all rivers and lakes in which the State of Illinois or the people of the state have any rights or interests.[61] In addition the DOT has been given broad authority to exercise the state's police power to regulate the water levels and carrying capacity of all streams of the state regardless of ownership to preserve the fish and other aquatic life in the stream and to safeguard the health of the community.[62] Under this statute it is unlawful for any person, persons, corporations, counties, cities, municipalities, or other agencies to make any fill, deposit, or encroachment in, deposit or placement of felled or trimmed woody

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[61] Ill. Ann. Stat. ch. 19, §52 (Smith-Hurd 1972).

[62] Id. at § 70.

plant upon or along the banks, or erect any bridges over any of the streams of this state, until plans, profiles and specifications and other data which may be required, have been first filed with the DOT and a written permit received.[63] The DOT is also authorized, in case of existing dams, to require that they be maintained in a proper state of repair, and at a height for proper control of water levels in the disposal of flood waters, as well as at normal stages, and for such purposes to require changes and modifications in dams and to compel the installation of fishways in dams wherever deemed necessary, as recommended by the Illinois Department of Conservation.[64]

1. Permitting Procedure

In accordance with and under the authority of the above statute,[65] the DOT Division of Water Resources (DWR) has issued regulations entitled "Interim Dam Operation and Construction Rules."[66] As the title indicates, these regulations are only temporary. Permanent regulations will be issued in the fall of 1979.[67] Although there probably will be changes in the interim

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[63] Id.

[64] Id.

[65] Id.

[66] Illinois Department of Transportation, Division of Water Resources, Rules and Regulations, Part 804, Interim Dam Operation and Construction Rules (Amended May 18, 1979). These may be obtained free from DOT/DWR at 2300 South Dirksen Parkway, Springfield, Ill., 62764.

[67] Telephone conversation with Ms. Cheryl Sylvester, Assistant Chief Counsel, Dept. of Transp., Div. of Water Resources, June 18, 1979.

rules, a discussion of the basic requirements and permits is useful to provide some indication of what is involved in licensing a dam.

The interim rules cover: permit guidelines and procedures for construction and reconstruction of dams; permit guidelines for operation of safe dams; emergency procedures for dams that have been inspected and found to be high hazard dams; and procedures and guidelines for provisional permits to operate dams while necessary safety repairs are being made. Under these regulations two permits are required: (1) a construction permit (includes reconstruction); and (2) an operation permit. These permit requirements apply only to dams which (1) are twenty-five feet or more in height or (2) have an impounding capacity of fifty acre-feet or more. Not included are barriers which are six feet or less in height, regardless of storage capacity, and barriers which have a storage capacity at maximum water storage elevation of fifteen acre-feet or less, regardless of height.[68] The owner of a dam or proposed dam which is larger than the above minimum size requirements must apply to the DOT/DWR for a Construction Permit to construct or reconstruct each dam and appurtenant works which impounds or diverts water.[69] Once the permit is granted, the developer must notify DWR immediately if any changes in the construction schedule are made.[70] Effective January 1, 1980 the

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[68] Supra note 66, at §804.03.

[69] Illinois Department of Transportation, Division of Water Resources, Part 804, Interim Dam Operation and Construction Rules (Amended May 18, 1979).

[70] Id. §804.05.

owner of a new or existing dam meeting the size requirements must apply to DWR for an Operating Permit to operate each new or existing dam and appurtenant works which impounds or diverts water.[71] Persons proposing to build new dams must obtain operating permits prior to filling operations.[72] All operating permits expire five years after the date of initial issuance, and must be renewed by the owner of the dam.[73]

The U.S. Army Corps of Engineers' "Recommended Guidelines for Safety Inspection of Dams," a copy of which may be obtained from DWR, is the basis of DWR's review and approval of the structural and foundation design requirements as well as the hydrologic and hydraulic design requirements of dams subject to these rules.[74]

a. Construction Permit

Application for a construction permit must be made on forms provided by DWR.[75] The application must include inter alia: (a) certification by a professional engineer; (b) computations of all engineering aspects of the dam and spillways including an assessment of the threat to life and property in the event of failure; (c) time schedule for construction of the dam (applicant must notify DWR immediately if any

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[71] Id.

[72] Id. § 804.06.

[73] Id.

[74] Id. § 804.04.

[75] Id. § 804.05

changes of schedule are made); (d) "as built" plans and specifications; (e) an authorization to DWR to enter upon the dam property, in the event that the dam is found to be in immediate danger of failure, if DWR finds it necessary to act to prevent or alleviate dam burst damage; and (f) an agreement to compensate DWR for costs reasonably incurred by such emergency action.[76]

b. Operating Permits

All applications for operating permits shall be made on forms provided by DWR and shall include the following: (a) for existing dams, a report by an Illinois registered engineer, assessing the safety or deficiency of the dam; (b) details of the maintenance program to be carried out on the dam and appurtenant works; (c) documentation of financial capability to adequately operate and maintain the dam in safe condition; (d) authorization to DWR to enter dam property to prevent or alleviate dam burst damage if necessary and agreement to compensate DWR for costs reasonably incurred by the emergency action; and (e) for existing dams, computations for a dam burst wave analysis.[77] The applicant can meet the financial responsibility requirement by showing that s/he can obtain within ten days funds in the amount required to safely breach the dam.[78] If the applicant does not adequately demonstrate

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[76] Id.

[77] Id. §804.07.

[78] Id. §804.06.

financial capability, DWR may request the applicant to post a performance bond. The amount of the bond will be the amount which would be required to safely breach the dam if the condition of the dam became a threat to life and property. However, should the cost of repair to place the dam in a safe condition be less than the cost of breaching, the performance bond will be used to repair rather than breach.[79]

In addition, once licensed and operating, the dam owner must conduct, at her/his own expense, an annual inspection by an Illinois registered professional engineer in accordance with these rules. The report of the inspection must then be submitted to DWR stating that the dam is safe, or specifying deficiencies found, and remedial measures necessary to render the dam safe. If there are serious deficiencies, DWR will rescind the standard permit and may issue instead a provisional permit if the owner indicates a willingness to correct specified deficiencies. These must then be remedied according to a submitted time schedule and if not the provisional permit will be revoked as well and the dam could be dewatered, or breached.[80]

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[79] Id.

[80] Id.

c. Fishladder Clearance

As mentioned above this statute also authorizes the DOT to compel the installation of fishways in dams wherever deemed necessary, as recommended by the Illinois Department of Conservation.[81] Fishways are not mentioned anywhere else in the Illinois statutes. When contacted the DOT indicated that fishladders have never been required because the Department of Conservation does not believe that they are effective.[82] However, should one ever be required it would be paid for by the dam developer.[83] Clearance for the fishladder requirement is obtained from the Department of Conservation by DOT as part of the normal processing of a construction permit. The dam developer is not required to file any special applications regarding fishways or to contact the Department of Conservation him/herself.[84]

d. Work-in-Water Permit

In addition to the dam operating and construction permits described above, the DOT also requires a permit to fill or deposit material or to build or commence the building of any wharf, pier, breakwater, bulkhead "or any other structure or do any work of any kind" in any public bodies of water.[85]

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[81] Ill. Ann. Stat. ch. 19, §70 (Smith-Hurd 1972).

[82] Supra note 67.

[83] Id.

[84] Id.

[85] Ill. Ann. Stat. ch. 19, §65 (Smith-Hurd Cum. Supp. 1979).

Public bodies of water under this section include:

> all open public streams and lakes capable of being navigated by watercraft, in whole or in part, for commercial uses and purposes, and all lakes, rivers and streams which in their natural condition were capable of being improved and made navigable, or that are connected with or discharged their waters into navigable lakes or rivers within, or upon the borders of the State of Illinois, together with all bayous, sloughs, backwaters, and submerged lands that are open to the main channel or body of water and directly accessible thereto.[86]

It is necessary to note that the language of this section includes waters which would not be included under the Illinois common law definition of public waters. However, in conversations with DOT, department officials have indicated that they believe that under this section DOT's authority only extends as far as the common law definition of public waters. The common law definition includes all navigable streams and lakes as well as meandered lakes. DOT believes that the language in the statute extending their authority to include waters navigable when improved is unconstitutional.[87] However, this has not been tested in court as of this writing. The permit required under this section is called a work-in-water permit[88] and essentially protects the state's interest in navigation.[89] The developer constructing on any of the applicable waters must submit plans, profiles and specifications to the DOT.

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[86] Id.

[87] Supra note 67.

[88] Id.

[89] Ill. Ann. Stat. ch. 19, § 70 (Smith-Hurd 1972).

The DOT shall then issue a permit if such proposed use shall not interfere with navigation.[90]

It should be emphasized that the work-in-water permit and the construction and operating permits do not always overlap. If the dam is not located on a public body of water as defined by the statute it will not require a work-in-water permit although it may need construction and operating permits because of its size. On the other hand, if the dam is small it may not need construction and operating permits but it may be located on a public body of water, therefore necessitating a work-in-water permit. The developer should check with DOT to be certain which permits are required.

B. Public Utility Regulation - The Illinois Commerce Commission

The other major group of regulations which may have a significant impact on the development of small scale hydroelectric power are those regulations governing public utilities. In Illinois the entity which has regulatory authority over public utilities is the Illinois Commerce Commission (ICC).[91] It replaces the Public Utilities Commission, which no longer exists. The ICC has general supervision of all public utilities.[92] This supervision is very far reaching. It includes the manner and method in which the business is conducted, as well as the general condition, franchises, capitalization, rates,

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[90] Id.

[91] Ill. Ann. Stat. ch. 111 2/3, § 1 - 95 (Smith-Hurd 1966).

[92] Id. § 8 (Smith-Hurd Cum. Supp. 1979).

and other charges of the utility, and the manner in which their plants, equipment and other property are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service but also with respect to their compliance with the Public Utilities Act.[93] If small dam developers are subject to the ICC's authority, compliance with this extensive regulation could be very expensive. It may be prohibitive for small scale hydroelectric development. However, one advantage to being a public utility is that under certain circumstances a public utility may be granted the power of eminent domain by the state.[94] The threshold question to be answered, then, is what makes a particular business a public utility?

1. Public Utility Defined

The Public Utilities Act defines a public utility as:

> every corporation, company, association, joint stock company or association, firm, partnership or individual, . . . that owns, controls, operates or manages, within this state, directly or indirectly, for public use, any plant, equipment or property used or to be used for or in connection with, or owns or controls any franchise, license, permit or right to engage in: . . . the production, storage, transmission, sale, delivery or furnishing of heat, cold, light, power, electricity or water.[95]

"Public utility" does not include any municipal corporations owned by any political subdivisions of the state, nor does it

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[93] Id.

[94] Id. §6.3 (Smith-Hurd 1966).

[95] Id. §10.3 (Smith-Hurd Cum. Supp. 1979).

include electric cooperatives.[96]

This very broad definition appears to cover practically anyone who produces electricity. However, the scope of the definition is considerably narrowed by the requirement that the power produced must be for "public use." This "public use" requirement is the basis of the ICC's jurisdiction since the purpose of the Public Utilities Act is to bring under control of the public, for the common good, property applied to a public use in which the public has an interest. The owner of such property must submit to being controlled by the public to the extent of its interest as long as such public use is maintained.[97]

The important distinction, thus, is between public and non-public uses. To constitute a public use all persons must have an equal right to use the utility. The use must be in common and upon the same terms, however few the number who avail themselves of it.[98] While the use must concern the public as distinguished from an individual or any particular number of individuals, the use of the utility need not extend to the whole public or political subdivision but may be confined to a particular district and still be public.[99]

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[96] Id.

[97] Palmyra Tel. Co. v. Modesto Tel. Co., 336 Ill. 158, 164, 167 N.E. 860 (1929).

[98] Id.

[99] Id.

Applying this principle, the Illinois Supreme Court held that a gas company which sold natural gas to selected industrial customers and to public utilities for resale to the public, but did not create the impression that it was holding itself out to serve gas to the general public, was not a "public utility."[100] The court based its decision on two main points: (1) The public interest was protected by the regulation of the public utilities which resold the gas; and, (2) the fact that the gas company had refused service to other industrial applicants indicated that it was not holding out its services to the general public.[101] The mere fact that a product sold by a company is of the sort ordinarily sold by public utilities does not of itself render the company a public utility.[102] In order that the property owned by a person should be affected by a public use, all persons must have an equal right to the service, and it is the right of public use rather than the extent to which an instrumentality is in effective use that determines whether or not the instrumentality is a public utility.[103]

It appears from the cases that the dedication to public use is, to some extent, in the control of the company, and is

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[100] Mississippi River Fuel Corp. v. Illinois Commerce Commission, 1 Ill. 2d 509, 116 N.E. 2d 394, 399 (1941).

[101] Id.

[102] Id. at 398.

[103] South Suburban Motor Coach Co. v. Levin, 269 Ill. App. 323 (1933).

determined by the company's actions and its stated purpose in its articles of incorporation. For example, in the above case, where the articles of incorporation of a gas company declared that the company was not to be a public utility corporation, the court held that the ICC could not require it to act, against its incorporated powers and authority, as a public utility.[104] The company had also not held itself out as supplying gas to anyone willing to pay for it, but had limited itself to specific industrial and utility customers. The court stated that since sales to industrial customers are always by special contracts, entered into after negotiations with the customer and the contracts vary as to terms and conditions, this type of sale was not to the general public and hence was not a public use.[105]

Thus a small scale hydroelectric corporation may control to some extent whether or not it will be subject to ICC authority by the way it defines its purpose in its articles of incorporation and by the type of customers and sales agreements into which the corporation enters.

In most circumstances, however, a small scale hydroelectric facility which constitutes the entire business of a corporation and which sells to a very few industrial companies or to a public

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[104] Mississippi River Fuel Corp. v. Illinois Commerce Commission, 1 Ill. 2d 509, 116 N.E. 2d 394, 397 (1941).

[105] Id. at 398.

utility for resale will not be regarded as a public utility.[106] In most cases, unless the power of eminent domain is absolutely essential to the implementation of the project, it will be to the advantage of small scale hydroelectric development not to be considered a public utility since the developer will escape the myriad regulatory requirements of the ICC. Therefore, a broader and more clearly defined definition of a public utility company such as that used in New Hampshire is not recommended here. In New Hampshire, in order to be considered a small power producer, the developer may not sell electricity to more than three consumers.[107] Only public utilities may do so. In Illinois, on the other hand, the gas company discussed above was selling to eighteen consumers but was not a public utility because it had not dedicated itself, by its actions, to a public use. The public use definition of public utility used in Illinois allows more fliexibility than the strict numerical limitation definition used in New Hampshire. This flexibility, in turn, is an incentive to small scale hydroelectric development because, on the one hand, without the numerical limitation the small dam developer has a much larger potential market for his product without the costs that would be incurred by having to comply with public utility regulation. On the other hand, if eminent domain is essential to develop a particular site the developer may be able to get a

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[106] Telephone conversation with Michael Ginsberg, Assistant Chief Counsel, Illinois Commerce Commission, June 12, 1979.

[107] 1978 N.H. Laws enacting N.H. Rev. Stat. Ann. ch. 362-A:2-a, as amended by H.B. 771 of 1979.

public utility classification and the power of eminent domain by dedicating the company to public use.

If the dam developer has not sought public utility designation, and therefore has not contacted the ICC, the developer who is not clearly a public utility will usually not have any contact with the ICC unless and until another electric company files a complaint with the ICC alleging that the dam developer is infringing on its franchise area.[108] Upon the filing of a complaint the commission will serve a copy of the complaint upon the person or corporation complained of, which will be accompanied by a notice requiring that the complaint be satisfied and answered within a reasonable time or by a notice fixing a time and place where a hearing will take place to settle the complaint.[109] After administrative remedies are exhausted, the rulings of the ICC may be appealed to a court of law.[110]

2. Powers of Illinois Commerce Commission

Once it has been determined that a business engaged in producing and selling electricity is a public utility subject to ICC supervision it must meet all the requirements of the ICC. The most important requirements are discussed briefly below. The developer found to be a public utility is advised to obtain and carefully follow all ICC regulations.

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[108] Supra note 106.

[109] Ill. Ann. Stat. ch. 111 2/3, §68 (Smith-Hurd 1966).

[110] Id. §72 (Smith-Hurd Cum. Supp. 1979).

The ICC supervises the management and manner of business of all public utilities. It keeps informed of the manner of plant and facility construction, maintenance and operation. This supervision includes any non-public utility business carried on by public utilities if such non-public utility business affects any provisions under the Public Utilities Act.[111] The ICC may hold hearings, adopt reasonable rules and regulations and recommend necessary legislation.[112] All proceedings and documents are public records.[113]

The ICC requires a uniform system of accounts to be kept by a public utility.[114] Forms required by the ICC shall show income, amounts due, revenues, and revenue sources. Expenses for new construction, extensions and additions shall be clearly distinguished.[115]

The ICC requires public utilities to file schedules of rates and charges and may hold public hearings to determine their reasonableness.[116] No service may be undertaken by a public utility until schedules of rates and any agreements with other public utilities relating to service or products have been filed with the ICC.[117] Rate changes are also regulated by the ICC, which

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[111] Id. §8.

[112] Id.

[113] Id.

[114] Id. §11 (1966).

[115] Id. §13.

[116] Id. §§32, 33 and 34.

[117] Id. §§33, 34 and 35.

requires thirty days notice to the commission and the public of such changes.[118]

The ICC may, after a hearing, determine the reasonableness, sufficiency, safety, adequacy and justness of public utility business rules and regulations, service methods and practices and equipment and facility conditions.[119] The ICC also regulates the abandonment, discontinuance, sale, lease and transfer of service areas.[120] The ICC may regulate or require additions, expansions, repairs and changes in existing public utility facilities and services.[121] It may determine and fix service standards and carry out inspections of public utility property.[122] The ICC shall require certificates of public convenience and necessity of all public utilities to transact business or construct generation facilities.[123] A certificate of public convenience and necessity does not grant the holder a monopoly or an exclusive privilege, immunity or franchise.[124] The ICC may regulate and require the installation of safety devices on public utility facilities.[125]

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[118] Id. § 36 (Smith-Hurd Cum. Supp. 1979).

[119] Id. § 49 (1966).

[120] Id. § 49a (Smith-Hurd Cum. Supp. 1979).

[121] Id. § 50 (1966).

[122] Id. § 54 (Smith-Hurd Cum. Supp. 1979).

[123] Id. § 56 (1966).

[124] Id.

[125] Id. § 61 (Smith-Hurd Cum. Supp. 1979).

All public utilities may exercise condemnation powers, subject to the eminent domain statutes in Chapter 47 of the Illinois Revised Statutes.[126]

Obviously, complying with these numerous ICC regulations would increase a small power producer's costs considerably. Therefore, it is to the small power producer's advantage not to be classified a public utility.

3. Electric Suppliers Act

In addition to the Public Utilities Act, Illinois has also enacted the Electric Suppliers Act.[127] Under the act electric suppliers may contract to determine respective service areas for each in order to minimize disputes and avoid duplication of facilities and services.[128] An electric supplier is defined as an electric cooperative or public utility which furnishes electric service.[129] Thus, a small power producer who is considered a public utility is subject to this act. The ICC must approve proposed additions to service areas and shall adjudicate disputes related to franchise areas.[130] The ICC also promulgates rules and regulations and hears complaints of inadequate service.[131]

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[126] Id. §63 (1966).

[127] Id. §401 et seq.

[128] Id. §402.

[129] Id. §403.5.

[130] Id. §§404, 405, 406 and 408.

[131] Id. §§409, 410 and 411.

This act does not apply to areas within corporated municipalities nor to electric suppliers authorized to construct facilities under the Public Utilities Act.[132]

C. Municipal Powers

1. In General

Cities within the state may regulate public utilities operating within their boundaries.[133] To do this they must adopt, by a majority vote of the legal voters within the city, Article VI of the Public Utilities Act.[134] Once this article has been adopted by any city, the authority of the city supersedes the powers of the Illinois Commerce Commission in most matters of utility regulation.[135] Such regulatory authority includes: regulation of the quantity, quality, adequacy and safety of public utility service; the authority to require extensions of facilities; and, the promulgation and fixing of reasonable rates and rules and the inspection of facilities, service methods and records.[136] A public utility under such municipal regulation shall file with the municipality copies of all reports made to the ICC. In addition, the municipality may require monthly accounting reports.[137] Any public utility

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[132] Id. §414.

[133] Id. §85.

[134] Id. §§ 85 - 90.

[135] Id. §89.

[136] Id. §85.

[137] Id. §86 (Smith-Hurd Cum. Supp. 1979).

dissatisfied with any action of a city under the terms of the Public Utilities Act may apply for a review of the action of the city by the ICC.[138] Upon a majority vote of its residents any city may surrender the powers conferred upon it by this article with respect to public utilities.[139] Once a city has surrendered its powers the ICC shall regain all powers under the Public Utilities Act as to public utilities within the city.[140]

In addition to the above direct and comprehensive regulation of public utilities, municipalities also have other powers which may directly affect hydroelectric development if the particular facility is located within their jurisdiction.

A municipality has the power to adopt regulations for the inspection of all plants and machinery of any person exercising any right, grant, or franchise from such municipality.[141] Every public utility must provide equal and uniform service to all residents of a particular municipality. It is unlawful and a sufficient ground for the forfeiture of any franchise for a public utility to discriminate in rates or service between residents of any municipality.[142] Municipalities may create Levee Improvement Commissions to regulate docks, industrial development, and

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[138] Id. § 88 (1966).

[139] Id. § 90.

[140] Id.

[141] Id. ch. 24, § 4-5-10 (1962).

[142] Id. § 4-9-3 (Smith-Hurd Cum. Supp. 1979).

facilities on river or lake fronts.[143] Municipalities may impose zoning ordinances regulating building and structure heights and location, set back lines on water run-off channels, the location of trades and industries and building construction standards.[144] Municipalities may create Municipal Planning Commissions. Such Commissions may prepare and develop comprehensive plans for municipal development, regulating, among other items, rights-of-ways for public service facilities. Such plans are advisory only until adopted by ordinance.[145]

All the above municipal regulations can only be seen as an obstacle to small scale hydroelectric development because complying with them is yet another costly step in the development of a hydroelectric site.

2. Municipal Utilities

In the statutes enabling municipalities to form and operate municipal utility companies, municipalities were granted many important powers which may affect the development of small scale hydroelectric power. Municipalities were granted the right to acquire, construct, own and operate within their corporate limits any public utility the product or service of which is to be supplied to the municipality or its inhabitants. The municipality may

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[143] Id. §§ 11-114-1 and 11-114-2 (1962).

[144] Id. §§ 11-13-1, 11-11-1 and 11-30-2.

[145] Id. §§ 11-12-4 through 11-12-7.

lease any public utility owned by the municipality to any corporation organized under the laws of Illinois for the purpose of operating that public utility, for a period not longer than 20 years, and fix the rates and charges for the product sold and the services rendered by any such public utility.[146]

Any municipality may acquire any public utility or portion of a public utility authorized or operating in the municipality under a license, permit, or franchise, or operating in the municipality without any license, permit, or franchise, by any agreement with the public utility, or it may procure the condemnation of the public utility in the manner provided by law for the taking and condemning of private property for public use.[147] Municipalities may, in granting a franchise to a public utility, reserve the right to take over all or any part of the property, plant, or equipment of the public utility or grant such rights to a third party.[148]

Because municipal utilities may utilize the power of eminent domain they are in an excellent position to develop small scale hydroelectric power sites within their municipal limits. Once they have acquired the site they can either develop it themselves or lease it to a private Illinois corporation to develop and operate the site for them.

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[146] Id. §11-117-1 (Smith-Hurd Cum. Supp. 1979).

[147] Id. §11-117-7 (1962).

[148] Id. §11-117-6.

D. Water Management Districts

The Illinois statutes provide for three types of water management districts: (1) river conservancy districts; (2) surface water protection districts; and, (3) regional port districts. Each district has jurisdiction over the use of certain watercourses within its boundaries. These districts are obstacles to the development of hydroelectric power because they all have regulations and permit requirements which the developer must comply with. The powers of the three districts are briefly summarized to provide an indication of the obstacles which they present.

1. River Conservancy Districts

Wherever the unified control of a lake or river system is deemed conducive to its efficient management and conservation the lake or river system may be organized into a conservancy district under the River Conservancy Districts Act.[149] The district is established upon a majority vote of the proposed districts' legal voters.[150]

The districts are authorized and empowered among other things to clean, widen, straighten, deepen or alter watercourses; they may: divide or direct the flow of water in watercourses both in or out of the district; construct and maintain dams, ditches, reservoirs, holding basins, floodways and pumping stations; and

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[149] Id. ch. 42, § 383 (1976).

[150] Id.

acquire by condemnation any easements, riparian rights, real property, reservoirs, mill dams, water power, or franchise necessary to carry out its work. Such districts are prohibited from furnishing water power or electricity for public or private use.[151]

A district may supervise and regulate the flow of waters over any and all dams on any stream, river or watercourse within the district; provided however, that in doing so the district shall not abridge or curtail any vested water power rights.[152] Thus, if a dam owner owns the right to vary the flow of water to produce hydroelectric power the district cannot regulate the water to the extent that it interferes with the dam's ability to generate electricity.

The districts must construct and efficiently maintain fishways through or over all dams or other water flow obstructions within the district.[153] Having the district construct and maintain fishladders would normally be an incentive to small scale hydroelectric development since fishladders can be extremely expensive. However, since the Illinois Department of Conservation does not require fishladders[154] the issue is of little importance.

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[151] Id. §392a.

[152] Id.

[153] Id.

[154] Supra note 67.

2. Surface Water Protection Districts

In addition to River Conservancy Districts, municipalities may establish, upon majority vote of the legal voters, Surface Water Protection Districts.[155] Such Districts shall adopt ordinances and provide adequate protection from surface water damage.[156] Surface Water Protection Districts may acquire by condemnation any necessary real property, personal property, rights of way and privileges, necessary to provide adequate protection from surface water damage, including dams, retention basins, and spillways.[157]

If a developer's dam site is located within one of these Districts, s/he should contact the District Board to determine what, if any, jurisdiction and requirements they may have over the proposed project.

3. Regional Port Districts

In addition to the above districts the Illinois statutes also provide for twelve Regional Port Districts. They have numerous powers, which may vary from port district to port district, among which is the authority to issue permits for any construction of any kind in or within 40 feet of any navigable waters within the port district. Thus, if a dam site is within one of these port districts, the developer must contact the district to determine what permits,

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[155] Ill. Ann. Stat. ch. 42, §§448, 450, 451 and 451a (Smith-Hurd 1976).

[156] Id. §§463 and 464.

[157] Id. §§448, 463 and 464.

if any, are required.[158]

4. Sanitary Districts

Illinois statutes provide for the creation of sanitary districts which have the power to deepen, widen, improve or alter watercourses; to construct dams, sluices and necessary works; to divert waters above the high water mark; to provide sewage disposal and treatment plants; and, to prevent water pollution and to drain and protect lands from water overflow for sanitary purposes.[159] Again, should a developer's dam site be located within one of these districts s/he would contact the District Board to determine what, if any, jurisdiction and

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[158] Following is a list of the twelve districts and their location in the statutes.

Chicago Regional Port District, ch. 19, § 152 et seq;

Waukegan Port District, ch. 19, §179 et seq;

Joiliet Regional Port District, ch. 19, §251 et seq;

Tri-City Regional Port District, ch. 19, §284 et seq;

Seneca Regional Port District, ch. 19, §351 et seq;

Shawneetown Regional Port District, ch. 19, § 401 et seq;

Southwest Regional Port District, ch. 19, § 451 et seq;

Kaskaskia Regional Port District, ch. 19, § 501 et seq;

Havana Regional Port District, ch. 19, §601 et seq;

Mt. Carmel Regional Port District, ch. 19, § 701 et seq;

White County Regional Port District, ch. 19, § 751 et seq;

Illinois Valley Regional Port District, ch. 19, § 801 et seq.

[159] See Ill. Ann. Stat. ch. 42 §§ 247 et seq., 276 et seq., 298, 299 et seq. 320 et seq., and 501 et seq. (Smith-Hurd 1972).

requirements they may have over the proposed project. Complying with sanitary districts' regulations is an obstacle to small scale hydroelectric development.

E. County Powers

Counties may establish Regional Planning Commissions or Joint-County Regional Planning Commissions.[160] Such Commissions may develop and prepare plans regulating, among other items, easements for public service facilities and flood water run-off channels.[161] However, these plans are advisory only unless adopted by ordinance by municipalities.[162]

Counties may zone to regulate the location and use of buildings, structures, industries and trade. However, counties have no right to regulate the type or location of public utilities facilities. Municipal zoning supersedes county zoning.[163]

Any county board may establish a department of public works with the authority to exercise complete supervision in the county over any of the projects authorized by the Water Supply, Drainage and Flood Control Act.[164] Such powers include, among other things, the authority to construct dams, reservoirs and holding basins. The county may also acquire by condemnation any real or personal property, easement, riparian right, sluice, reservoir, holding basin, mill dam, water

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[160] Ill. Ann. Stat. ch. 34, §§3001 and 3003 (Smith-Hurd 1970).

[161] Id. §§3006 and 3007.

[162] Id. §3004.

[163] Id. §§422 and 3151 (Smith-Hurd Cum. Supp. 1979).

[164] Id. § 3102.

power or franchise in the county.[165] Counties may supervise, regulate and control water flows over and through dams and other obstructions in rivers and streams, so long as the counties do not abridge or curtail vested water power rights.[166] Thus, if a dam owner owns the right to vary the flow to produce electricity the county cannot regulate the water flow in such a way that it abridges or curtails the dam owner's ability to generate electricity. However, unless the developer has vested rights to regulate the flow through the dam the developer's flow schedule must comply with the sanitary district's regulations of the flow. Obviously, complying with sanitary district regulations is an obstacle to small scale hydroelectric development.

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[165] Id. § 3106 (1960).

[166] Id. § 3107.

III. INDIRECT REGULATION

In addition to the above political entities and their regulations which directly impact on small scale hydroelectric power development, there are many other agencies and regulations which, although they may not normally require any direct action by the dam developer, may in certain circumstances affect or be of interest to small scale hydroelectric development. The more important aspects are briefly summarized in the following sections. For a complete picture of any regulation or agency the reader is advised to contact the agency directly and to read the statute in its entirety.

A. The Department of Transportation

In addition to DOT's power to regulate and permit dam construction and operation, DOT is also empowered to regulate other aspects of water resources.

DOT is required to prepare reports on the availability of various streams for water power development which shall assess the amount of such capabilities and promote the preservation of public and state rights in navigation.[167] DOT may also cooperate with state agencies such as the Environmental Protection Agency and the Pollution Control Board to regulate and control pollution of Lake Michigan and other state waters.[168] DOT shall prepare comprehensive studies of watersheds. These studies include hydrologic aspects of watersheds as well

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[167] Ill. Ann. Stat. ch. 19, §67 (Smith-Hurd 1972).

[168] Id. §61a (Smith-Hurd Cum. Supp. 1979).

as the possibility of economical development and utilization of water power.[169] When surplus waters are available, DOT may maintain and operate power plants and may sell or dispose of any power generated thereby.[170]

DOT is empowered to define flood plains by township and may permit or deny construction in defined flood plains.[171] DOT regulates the development of flood control improvements as well as watershed and low water flow conservation projects.[172] DOT must hold public hearings on any projects undertaken.[173]

DOT may study, investigate, and control lake levels and water use on Lake Michigan and on waterways within the Lake Michigan watershed.[174]

In addition, DOT shall regulate and control structures on, use of, and tolls for, the Illinois Waterway.[175] Such powers include the use or lease of water power or electrical energy generated thereby.[176] DOT may grant a public utility the right to lay facilities and lines under the waterway.[177] Before any sale or lease of surplus water or water power DOT must hold public hearings thereon and require

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[169] Id. § 126e (1972).

[170] Id. § 126f.

[171] Id. § 65f (Smith-Hurd Cum. Supp. 1979).

[172] Id. §§ 126a-d (1972).

[173] Id. §§ 74 - 79.

[174] Id. §§ 1119 - 120.11.

[175] Id. §§ 84 - 85.6.

[176] Id. § 85.3.

[177] Id. § 85.13.

that plans, specifications and contracts therefore be submitted to it for approval.[178] Such leases shall not exceed 30 year periods and shall be subject to evaluation every 10 years.[179] Such contracts shall specify that the lessee shall turn all water power works over to the state upon expiration of the lease.[180] DOT has promulgated rules and regulations for the waterway and for the lessees of water power.[181] DOT may not allow the stage of water in the pool levels to be lowered nor currents to be increased to an extent that will prevent or impede navigation.[182]

Since the developer must obtain work-in-water, construction, and operating permits from the DOT, any conflicts between the above powers of DOT and the dam permit should surface during the permitting process.

B. Miscellaneous Statutes

There are a number of statutes creating boards, commissions, districts and compacts which have only a limited affect, if any, on small scale hydroelectric power development. For this reason they are only briefly summarized below.

1. The Natural Resources Development Board

The Natural Resources Development Board studies and reports on the adequacy of water supplies to meet state water requirements

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[178] Id. § 99.

[179] Id.

[180] Id.

[181] Id. § 100.

[182] Id.

and trends in water use and emerging water problems. The Board coordinates all state agencies, plans, projects and programs in water resources. The board shall review all such state water resources projects and report to the Governor on such programs. The board administers any technical and financial aid programs available to local units of government and local water resources management commissions.[183] Although the statute creating this board has not been repealed, after repeated attempts at contacting the board, it is not clear that it still exists.

2. The Water Resources Commission

The Water Resources Commission studies state and local problems in waterways, drainage, flood control, water pollution and water resources. The commission examines the necessity and feasibility of comprehensive plans and examines the administrative costs and sources of revenue of water projects. The commission studies the laws of the state, ordinances and zoning codes of municipalities and counties in relation to water resources and determines the need for revision, uniformity or codification of these areas. The commission may conduct public hearings and allow interested parties to participate by the submission of written statements. The commission cooperates with the Division of Water Resources of DOT and the Governor's Task Force on Flood Control in conducting such studies. The commission makes a detailed

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[183] Id. §§1077. - 1077.13.

report every year to the General Assembly of Illinois on its findings.[184]

3. The Illinois Institute of Natural Resources

The Institute was created to conduct research and provide assistance, and information relating to environmental protection, energy, natural history, geology, water resources and archeology.[185] In addition to other powers the Institute administers for the state any state energy programs and activities under federal law, regulations or guidelines and coordinates such programs and activities with other state agencies.[186] The Institute only began operations on January 1, 1979 and when contacted indicated that at present they are not studying or administering any programs relating to hydroelectric power.[187]

C. Environmental Protection Statutes

1. The Illinois Constitution

The State of Illinois has provided for the protection of the environment in its constitution. "The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations. The General Assembly shall provide by law for the implementation and enforcement of this public policy."[188]

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[184] Id. §§145.41 - 145.46 (Smith-Hurd Cum. Supp. 1979).

[185] Id. ch. 96 1/2 § 7401 (Smith-Hurd 1979).

[186] Id. §7403.

[187] Telephone conversation with Earl Heffley, Public Information Officer, Illinois Institute of Natural Resources, 217-782-3871, July 20, 1979.

[188] Ill. Const. art. XI, § 1.

In addition the Constitution also provides that "Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law."[189]

The General Assembly has provided for the implementation, limitation and regulation of this article of the Constitution primarily in its creation of the Pollution Control Board and its administrative arm the Environmental Protection Agency. Other agencies which are concerned with environmental protection are the Department of Conservation and the Department of Agriculture. In addition to these three, the legislature has provided extensive statutory law to carry out this constitutional provision, but such law has either already been covered in other sections of this paper or is not pertinent to hydroelectric power such as air pollution statutes. Therefore, this section will only discuss the three agencies mentioned above.

2. The Pollution Control Board and the Environmental Protection Agency

The Environmental Protection Agency (EPA) and the Pollution Control Board (PCB) are responsible for the coordination and implementation of a unified, state wide program, supplemented by private remedies, to restore, protect and enhance the quality of the environment, and to assure that adverse affects upon the

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[189] Id. § 2.

environment are fully considered and borne by those who cause them.[190] The PCB determines, defines and implements the environmental control standards applicable in Illinois and may adopt rules and regulations to accomplish this goal.[191] The EPA is the agency which actually implements these standards for the PCB.[192] Among other responsibilities, the Agency has the duty to administer such permit and certification systems as may be established by the Illinois Environmental Protection Act or by regulations adopted thereunder.[193] It is not clear from the statutes that anything under this act would apply to the development of hydroelectric power. When contacted, personnel at the EPA stated that there are no permits required by them for the construction of dams.[194] EPA does not consider a dam to be a point source of pollution.[195] The Agency is designated as the water pollution agency for the state for all purposes of the Federal Water Pollution Control Act.[196] Federal permits required

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[190] Ill. Ann. Stat. ch. 111 1/2, § 1002 (Smith-Hurd 1977).

[191] Id. § 1005 (Smith-Hurd Cum. Supp.).

[192] Id. § 1004.

[193] Id.

[194] Telephone conversation with Stan Stowers, Engineer, Illinois Environmental Protection Agency, June 21, 1979.

[195] Id. Cf. South Carolina Wildlife Federation of Alexander, F. Supp. (D.S.C. 1978) (holding that hydroelectric dams cannot be said as a matter of law not to be point sources). But see 40 CFR S 131.11(j) (1978) in which the Federal Environmental Protection Agency specifically categorized dams as non-point sources of pollution.

[196] Supra note 192, 33 U.S.C.A. § 1251 et seq.

to comply with this act are signed off on by the agency.[197] There are no other permits or certifications required by EPA that affect small scale hydroelectric development.[198]

3. Department of Conservation

The Department of Conservation may take all necessary measures for the conservation, preservation, propagation and distribution of fish, flora and fauna in the waters of the state to protect against the destruction of such species by pollution.[199] For purposes of hydroelectric development the DOT accomplishes this by having the Department of Conservation sign off on the developers work-in-water and construction permits.[200] According to DOT, this is a very routine matter. No permits have been denied because of the Department of Conservation.[201]

The Department also controls state conservation areas.[202] The Department may acquire areas of great natural scenic beauty for public use.[203] An advisory board to the Department formulates long range plans to protect wildlife, fish and game resources and to create new impoundment areas.[204]

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[197] Supra note 194.

[198] Id.

[199] Ill. Ann. Stat. ch. 127, §§ 63a1 and 63a5 (Smith-Hurd 1967).

[200] Supra note 67.

[201] Id.

[202] Ill. Ann. Stat. ch. 105 § 468i (Smith-Hurd Cum. Supp. 1979).

[203] Id. ch. 127, § 63a19 (1967).

[204] Id. § 6.08 (Smith-Hurd Cum. Supp. 1979).

The Department of Conservation has been designated the state agency to administer the Federal Wild and Scenic Rivers Act.[205] The Department studies and recommends the designation of state and local wild and scenic river areas.[206] However, it should be noted that the Federal Wild and Scenic Rivers Act does not designate any Illinois rivers as wild, scenic or recreational. No Illinois rivers are on the list of potential additions.[207] Hydroelectric projects are prohibited on rivers designated as either wild or scenic.

The state retains concurrent jurisdiction with the United States Government in matters of fish and water resources in the Upper Mississippi River Wildlife and Fish Refuge.[208]

4. The Department of Agriculture

The Illinois Department of Agriculture controls state soil and water conservation districts. The Department may establish such districts after a hearing and upon a majority vote of those inhabiting such proposed districts.[209] Such districts may survey and investigate soil and water resources and erosion, floodwater and sedimentation control. The districts shall

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[205] Id. ch. 105, § 492, and 16 U.S.C. § 1271 et seq.

[206] Ill. Ann. Stat. ch. 105, § 492 (Smith-Hurd Cum. Supp. 1979).

[207] 16 U.S.C. § 1276a (West Cum. Supp. 1978).

[208] Ill. Ann. Stat. ch. 143, § 32 (Smith-Hurd 1964).

[209] Id. ch. 5, §§ 113-126 (1975).

develop comprehensive plans regulating such matters; construct and improve necessary structures including dams; formulate and enforce land use regulations subject to approval by a three-fourth majority vote of district residents; shall adopt guidelines and regulations for development; and construct such structures necessary to prevent impairment of dams and reservoirs.[210] The Department of Agriculture establishes guidelines with which district programs and policies must comply.[211] This program of soil and water conservation shall be consistent with soil and water resources programs adopted by DOT's Division of Water Resources and its coastal zone management program for Lake Michigan.[212] The Department of Agriculture signs off on the dam permits required by DOT so that no additional action is required by the developer.[213]

D. Interstate Compacts

Illinois is a member of The Great Lakes Basin Compact.[214] The Commission created by the compact studies the use, conservation and development of water resources in the Great Lakes Basin.[215] The Commission's power is entirely advisory.[216] It recommends legislation

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[210] Id. §§ 127 - 138.10

[211] Id.

[212] Id.

[213] Supra note 67.

[214] Ill. Ann. Stat. ch. 127, §192.1 et seq. (Smith-Hurd 1967).

[215] Id.

[216] Id.

in water resources management to the various member states and studies and recommends the feasibility of certain sites for the development of hydroelectric power.[217]

E. Historical Preservation

The Historical Sites Advisory Council within the Department of Conservation nominates sites for inclusion on the National and the Illinois Registers of Historic Places.[218] The council requires permits to demolish or alter such sites.[219] The council must hold public hearings on such matters.[220] There are no statutory provisions for land acquisitions.

Municipal historic preservation authorities may also designate landmarks and provide for their preservation through rules regulating construction, alterations and demolition of such sites.[221] These authorities may acquire land through eminent domain proceedings.[222] Municipal authorities must hold public hearings on permit applications.[223] Denials of permits or imposition of orders requiring the cessation of certain construction works constitutes a taking for which the

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[217] Id.

[218] Id. § 133d1 et seq. (Smith-Hurd Cum. Supp. 1979).

[219] Id.

[220] Id.

[221] Id. ch. 24, § 11 - 48.2-1 et seq.

[222] Id.

[223] Id.

municipality must make just compensation.[224] The dam developer merely needs to be aware that such sites exist and should make certain the dam is not going to affect an historical site.

F. Administrative Procedure Provisions

The Illinois Administrative Procedure Act applies to all state agencies. It governs rule-making, hearing, review and licensing procedures.[225] An agency is defined as any state board, commission, department or officer authorized by law to make rules or determine contested cases.[226] When dealing with a state agency the developer should be aware that such rules exist.

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[224] Id.

[225] Id. ch. 127, § 1001 et seq.

[226] Id.

IV. FINANCIAL CONSIDERATIONS

A. Taxation

1. Property Taxes

Property taxes apply to all real property located in Illinois.[227] The property tax also applies to all monies, credits, bonds or stocks and other investments, the shares of stock of incorporated companies and associations, all other personal property, including property in transit to or from Illinois, and the capital stock of companies and associations incorporated under the laws of Illinois.[228] Property exempted from this tax include shares of capital stock where the tangible property or capital stock is assessed to the corporation, and capital stock, including franchise, of all companies and associations created under or subject to the Not-For-Profit Corporation Act and that did not have the tax assessed on them prior to 1978.[229]

The tax statute also contains a provision exempting all personal property as to which the personal property tax was abolished on or before the effective date of the 1970 Illinois Constitution.[230] This provision has proven to be very confusing and the law is not yet settled in this area. A very recent Illinois case held that the corporate personal property

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[227] Id. ch. 120, § 499.

[228] Id.

[229] Id. § 502.

[230] Id. § 499.

tax is unconstitutional for 1979 and thereafter.[231]

Except in counties with a population of more than 200,000 which classify real property for purposes of taxation, real property shall be valued at 33 1/3% of its fair cash value.[232] This includes taxable leasehold estates as well as buildings and structures located on the right-of-way of any canal, railroad or other company leased or granted to another company or person for a term of years.[233] In the assessment of real estate encumbered by public easement, any depreciation occasioned by such easement shall be deducted in the valuation of the property.[234] Water power is not taxed separately from the real estate it is associated with, but is taxed as incidental to the dam site and machinery operated by it.[235] For example, machinery operated by water power is worth more than the same machinery lying idle. Likewise a dam using water power to generate electricity is worth more than a dam not generating.

All personal property is valued at 33 1/3% of its fair cash value.[236] In addition, the capital stock of all companies and

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[231] Client Follow-up Co. v. Hynes, (Circuit Court of Cook County), January 19, 1979.

[232] Ill. Ann. Stat. ch. 120, § 501 (Smith-Hurd Cum. Supp. 1979).

[233] Id.

[234] Id.

[235] Id.

[236] Id. §502.

associations created under the laws of this state, except the capital stock, of all companies and associations created under or subject to the Not-For-Profit Corporation Act that did not pay this tax prior to 1978 and companies and associations organized for purely manufacturing purposes, shall be valued at 33 1/3% of the fair cash value of such capital stock, including the franchise, over and above the assessed value of the tangible property of such company.[237] Unfortunately, producing electricity is not considered to be manufacturing and such companies are therefore not exempt.[238]

Real estate is assessed at the place where it is situated and personal property is generally assessable at the place where the owner resides or at the principle office of the corporation.[239]

2. Real Estate Transfer Tax

Illinois also has a real estate transfer tax which is imposed on the transfer of title to real estate.[240] The rate is $.50 per $500 of valuation or fraction thereof, but does not apply to the amount of any mortgage remaining outstanding on the property at the time of transfer.[241]

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[237] Id.

[238] People v. Wyanet Electric Light Co., 306 Ill. 377, 137 N.E. 834 (1923).

[239] Ill. Ann. Stat. ch. 120, §538 (Smith-Hurd Cum. Supp. 1979).

[240] Id. §1003.

[241] Id.

3. Public Utilities Tax

The Public Utilities Revenue Act imposes a tax upon persons engaged in the business of distributing, supplying, furnishing or selling electricity to persons, other than municipal corporations owning and operating a local transportation system for public service in this state, for use or consumption and not for resale at the rate of 5% of the gross receipts from such business. This tax applies to municipal and cooperative utilities as well as private.[242] The tax applies to any person who sells electricity for consumption and not for resale whether they are otherwise regulated by the ICC or not.[243] Therefore, it appears that this tax would apply to any small scale hydroelectric company which sells electricity for consumption even though the company is not a public utility.

In addition, a special administrative cost tax is applied to all utilities subject to regulation by the Illinois Commerce Commission at a rate of .08% of their gross receipts.[244] If a small scale hydroelectric company is considered a public utility this tax applies.

4. Corporate Franchise Tax

For the privilege of exercising the corporate franchise or the authority to transact business in Illinois a tax is imposed

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[242] Id. § 469 (1974).

[243] Id.

[244] Id. ch. 111 2/3, § 7a.5 (1966).

on every corporation subject to the Business Corporation Act.[245] There are three franchise taxes: (1) an "initial" franchise tax at the time the corporation files its reports of issuance of shares; (2) an "annual" franchise tax; and, (3) an "additional" tax each time the corporation issues new shares or reports an increase in stated capital.[246] These taxes would apply to any dam developer who's business is incorporated. The basis of the tax is the proportion of the sum of the stated capital and paid-in surplus, determined by the proportion which the sum of (1) the value of property located in the state; and (2) the gross amount of business transacted at or from places of business in the state bears to the sum of such factors everywhere, unless the corporation elects to pay upon its entire stated capital and paid-in surplus, or fails to file its annual report.[247]

The "initial" franchise tax on domestic and foreign corporations is 1/12 of 1/10 of 1% for each calendar month between the date of issuance of the certificates of incorporation and July 1 of the next succeeding calendar year, with a minimum tax of $25 and a maximum of $1,000,000.[248]

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[245] Id. ch. 32, §157.131 (Smith-Hurd Cum. Supp. 1979).

[246] Id.

[247] Id. §§157.132, 157.139.

[248] Id. §§157.133, 157.140.

The "additional" franchise tax is 1/12 of 1/10 of 1% for each calendar month or fraction thereof, between the date of each respective increase in the sum of stated capital and paid-in surplus and July 1 of the next succeeding calendar year.[249]

The "annual" franchise tax is 1/20 of 1% for the 12 month period commencing on July 1 of the year in which payable.[250] In addition there is a "supplemental annual" franchise tax of the same rate but in no event shall the two taxes be less than $25 or more than $1,000,000.[251]

5. Corporate Income Tax

A 4% tax is imposed on the net income of corporations.[252] Corporation includes associations, joint-stock companies, and cooperatives.[253] This tax would apply to a dam developer whose business is incorporated. Net income is that portion of the taxpayer's base income allocable to Illinois less the standard exemption.[254] Base income of a corporation is federal taxable income plus: (1) amounts paid or accrued as interest to the extent excluded in computing federal taxable income; and, (2) Illinois income tax to the extent deducted in computing federal taxable income.[255]

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[249] Id.

[250] Id.

[251] Id.

[252] Id. ch. 120, § 2-201 (1974).

[253] Id. §15-1501.

[254] Id. § 2-202.

[255] Id. § 2-203 (Smith-Hurd Cum. Supp. 1979).

6. Corporate Organization Fee

Domestic corporations subject to the Business Corporation Act pay initial fees at the time of filing their first reports of issuance of shares at the rate of 1/20th of 1% of the entire consideration received for the issued shares.[256]

7. Sales Tax

Persons engaged in the business of selling tangible personal property for consumption and not for resale are subject to a sales tax of 4%, which tax may be collected from the purchaser.[257] The generation and sale of electricity is not a sale of tangible personal property and therefore is not subject to this tax.[258] However, there are no exemptions in Illinois which apply to machinery used for hydroelectric development.[259] Therefore, the purchase of any equipment or machinery used to retro-fit or build a new dam is subject to the sales tax.

8. Use Tax

The basic purposes of the Use Tax Act are to complement the Sales Tax Act by preventing evasion of tax on interstate purchases and to protect state retailers from competitive advantage of out-of-state retailers.[260] The tax is imposed on the privilege

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[256] Id. ch. 32, §§157.128, 157.129.

[257] Id. ch. 120, §§440, 441, 442.

[258] Farrand Coal Co. v. Halpin, 10 Ill. 2d 507, 140 N.E. 2d 698 (1957).

[259] Ill. Ann. Stat. ch. 120, § 441 (Smith-Hurd Cum. Supp. 1979).

[260] Illinois Road Equipment Co. v. Department of Revenue, 32 Ill. 2d 576, 207, N.E. 2d 425 (1965).

of using in this state tangible personal property purchased at retail at the rate of 4%.[261] A person either pays a sales tax or a use tax but not both. Any machinery which a developer did not pay a sales tax on such as machinery purchased out of state would be subject to the use tax.

B. Financial Assistance Programs

1. Illinois Industrial Development Authority

The Illinois Industrial Development Authority has the power to receive, evaluate and determine applications for financial aid for the development and construction or acquisition of an industrial project.[262] The authority may build the project itself and then lease or sell it to the developer or it may grant loans to the developer.[263] However, this authority was created primarily to respond to unemployment problems and therefore it is only authorized to assist industrial projects in areas certified by the Department of Business and Economic Development as being areas of surplus labor.[264] In addition, industrial projects which would compete with any existing privately owned public utility rendering a service to the public at rates or charges subject to regulation by the Illinois Commerce Commission are not eligible under this Act unless the

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[261] Ill. Ann. Stat. ch. 120, §§439.2, 439.3 (Smith-Hurd Cum. Supp. 1979).

[262] Id. ch. 48, §837.

[263] Id.

[264] Id. §835.

ICC determines that in the area to be served by the industrial project there is need for an increase in such service which the existing public utility is not able to meet through existing facilities or through an expansion which it agrees to undertake.[265] This provision might not apply to a wholesaler of electricity who sells to the utility instead of competing with it.[266]

2. Illinois Institute of Natural Resources

Another program which might assist hydroelectric development is the new Illinois Coal Development Bond Act.[267] Under this act the Illinois Institute of Natural Resources is authorized: (1) to expend gifts, grants or any form of assistance from any source including the federal government; and, (2) to enter into contracts with business, industrial, university, governmental and other qualified persons to promote development of coal and other energy resources.[268] "Other energy resources" includes solar energy, geothermal, wind generation, solid waste or any other energy system except that which is generated by nuclear energy.[269] It may expend money and enter contracts for

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[265] Id. § 833.

[266] The effect on this Act of Title IV of the Public Utilities Regulatory Policies Act of 1978, P.L. 95 - 617 (1978), is not clear.

[267] Ill. Ann. Stat. ch. 93, § 401 et seq. (Smith-Hurd Cum. Supp. 1979).

[268] Id. § 403.

[269] Id. § 402.

planning, design, acquisition, development, construction, improvement, construction and financing a site or sites and facilities for establishing plants, projects or demonstrations for the development of coal resources and research and development of other forms of energy.[270] From the title and wording of the statute it appears that this program only applies to coal and to research and development of new alternative energy sources. However, the definitions are broad enough so that an imaginative application for small scale hydroelectric power might be approved.[271]

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[270] Id. §403.

[271] Supra note 266.

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