

MAINE STATE LEGISLATURE

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THE MILL ACT, THE ABANDONED DAMS ACT
AND THE NEGLECTED DAMS ACT
Encouraging Small Dam Hydroelectric
Power Development in Maine

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INTRODUCTION

The construction of nineteenth and early twentieth century dams on the streams and pond outlets of the State of Maine has left a complex legal legacy. Corporate charters, private grants, the Mill Act, and simply uncontested obstruction have supplied the justification for interference with water flow and flooding of others' land. Yet damming activity and related laws, appropriate to Maine in the 1800's, are often ill-suited to today's needs and increased interests in the use of water.

The current search for sources of energy has called forth legislative attempts to encourage the development of small dam hydroelectric power; existing dams are looked to for a new employment; new dam sites are sought. As dams must be repaired and modernized to supply the optimum benefit to Maine today, so, too, must the legal mechanisms for resolving conflicts between water users, particularly dam owners and owners of property on impoundments, be updated.

The focus of this paper is upon the predominant statutory regulation of dams in Maine: the Mill Act, the Abandoned Dams Act and the Neglected Dams Act. Part I reviews the history and content of the Mill Act in an attempt to state the current postures of various relevant parties; it also critiques the Abandoned Dams Act and Neglected Dams Act. Appendix A contains the footnotes to Part I. Part II explains the revision of the Mill Act presented in Appendix B. Part III does the same for the redraft of the

Abandoned Dams Act set forth in Appendix C, and discusses the repeal of the Neglected Dams Act.

The foundation of this work is a concern that the State, in trying to foster small dam hydroelectric power development, constitutionally deal with property rights in land and water created by or resulting from the legal scheme instituted to accommodate past industrial growth. Statutory resolutions of competing interests that abrogate private rights, in favor of other private interests are constitutionally unacceptable.

A final word needs to be said about the use in this paper of the term "riparian." Applying a narrow definition, a riparian is an owner of riverbank property, while a littoral owner possess shore property on a lake or pond. In this paper, the term "riparian" is most often used in a broader sense to encompass both categories of land owners.

PART I: DAMS AND MAINE LAW

I. Water Law: Reasonable Use and Prior Appropriation

The dictates of nature, the contrast of western and eastern American climate and terrain, underlie the development in the United States of two distinct water rights doctrines. In the humid East, abundant water permitted the adoption of the traditional doctrine of riparianism: owners of land contiguous to a stream, river, pond, or lake have a right to the natural water flow or level, subject to interruption through the reasonable use of the water by other riverbank or shoreline owners. The arid West, always thirsting for water, developed a different approach to water rights allocation: prior appropriation of water by anyone establishes for him a right, paramount to later users' rights, to the continued use of that quantity of water. While riparianism remains the basis of water law in the East, increasing competing demands for water use created difficulties with the doctrine, which assured to no riparian a fixed quantity of water. The dawn of industrial development called forth a legislative response to problems of riparianism that included prior appropriation principles.

II. The Mill Act

A. Provisions

The Massachusetts Mill Act of 1714 embodied the earliest response to increased numbers and ambitions of water users. With the expanding use by riparians of water to power mills, suits by other riparians arose seeking injunctions or damages due to the damming of the natural flow and unreasonable detention of waters. The Mill Act legislated a limited prior appropriation approach to remove this impediment to development.

Maine's Mill Act, evolved from the Massachusetts law, demonstrates this combination of riparianism and prior appropriation. It provides that only an owner of property along a water course, a riparian, may erect a dam on his land to harness the water's energy.¹ However, the first riparian to do so is accorded protection as the first user, being assured of the continued use of the quantity of water he appropriates. Other dams may be constructed but must not interfere with the first dam owner's original needs for water.² Riparian proprietors of land below the dam site maintain their right to the natural flow, subject to the reasonable interruption by dam owners.³

The Mill Act diverges from the traditional concept of riparianism and prior appropriation principles, however, in its treatment of upstream riparians. Beyond merely interfering with natural conditions, dam owners may, under the Mill Act, flow the property of land owners above the dam site.⁴ Permissible flowage may extend to the creation of water storage reservoirs.⁵ The Mill Act supersedes common law remedies, including the ability to seek a cessation of the injurious activity, for damage caused by this flowage.⁶ The upstream riparian may only initiate a complaint under the statutory provisions and must be satisfied with the compensation he receives.⁷ As part of the procedures awarding damages to an upstream riparian, the height of impounded waters may be restricted.⁸ If greater flowage occurs, however, the injured land owner is limited to another complaint for damages under the Mill Act.⁹ Owners of land below the dam are not covered by these provisions; lower riparians

retain recourse to common law remedies for any unreasonable interference with the water flow or damage to their property. 10

B. Flowage rights

A 1919 Opinion of the Justices 11 characterized the flowage rights obtained under the Mill Act as an easement appurtenant to the manufacturing plant. An easement is a property interest in some use of another's property; appurtenant means that the right attaches to the property benefited. Thus, when the property benefited is conveyed, the easement passes with it. Whether a dam standing alone is considered part of the manufacturing plant to which the flowage right attaches, or whether the property benefited includes working machinery only is a question that must be answered in determining the length of the existence of a flowage easement.

Dam owners may gain flowage rights in ways other than through the Mill Act's provisions for payment to upstream riparians. If land has been flowed by a dam, damaging the property, for 20 consecutive years, the dam owner may gain a flowage right through this long adverse use of another's land. This right, acquired by prescription and not compensation, becomes an easement, a vested property right.

A dam owner may purchase a flowage right without benefit of the Mill Act. If the upstream proprietor will grant a right to flow his land to the dam owner, the easement created may be recorded along with the deed to the dam. The possession of a written grant clearly evidences the property right in the dam owner to flow the described lands.

Finally, certain flowage rights were acquired through

the process of incorporation of water companies, log driving companies and manufacturing companies. Various corporations, chartered through private laws passed by the Legislature, were given the power to build dams and flow lands, usually accompanied by a requirement of compensation for those whose lands were flowed.¹²

C. Affected Waters

The Mill Act permits the erection of dams only upon nonnavigable streams. Rivers or streams navigable in law include only those waters where the tide ebbs and flows. Most states now designate rivers that are in fact capable of passage navigable. Under Maine's Mill Act, dams may be constructed on streams navigable in fact, or floatable. The dam owner, however, must maintain or allow a passage-way for the public on floatable streams.¹³

The owner of property along the bank of a floatable stream owns the bed to the middle of the channel. On rivers navigable in law, rivers where the tide ebbs and flows, along with the public right to in-place use of the surface waters goes state ownership of the riverbed.¹⁴ Great ponds, natural ponds of 10 acres or more, are also held in public trust by the state. Thus, proprietors of shore property along public waters own up to the natural low water mark,¹⁵ the state owning the submerged basin. While dams may be constructed on streams flowing from great ponds,¹⁶ the waters may not be drawn down below the low water line.¹⁷

D. Applicability to hydroelectric dams

The language of the Mill Act limits its applicability to dams for certain uses: mills and machinery,¹⁸ cranberry

19 culture, and ice cutting and harvesting. 20 Whether the Act's benefits may be enjoyed by the operator of a dam for the purpose of generating electricity is not spelled out.

21 In a 1960 case, however, the Law Court did not question Central Maine Power Company's ability to purchase a dam and flowage rights, created under the Mill Act, to be used for hydroelectric power generation.

22 The constitutionality of the Mill Act, though accepted, has been questioned on the grounds that it authorizes the taking of private property, through the flowing of upstream lands, for a private, not public, use. The first mills, which inspired the Mill Act, ground grains, were regulated in so doing, 23 and in some instances were required to accept the grain of any member of the community. The argument that the Mill Act benefited the public was much stronger at this time than in later years when small grist mills were replaced by huge manufacturing plants operated for private profit. While providing electricity solely for manufacturing purposes is outside the scope of public benefit, supplying the general public with electricity has been viewed as justifying the exercise of the state's power of eminent domain. 24 To permit the Mill Act to benefit producers of small dam hydroelectric power seems possible in light of the greater public use of electricity than of industrial mills.

A Law Court interpretation broadened the Act's reach to a situation, the creation of a reservoir dam 80 miles above the mill, which "probably did not enter the legislative mind" 25 at the time of enactment. Though the generation of

electricity from hydropower for public consumption could not have been contemplated by the 1821 legislature, the user of dams for this purpose could be allowed to profit from the Mill Act for, as the Court concluded, "The Mill Act speaks²⁶ as of to-day."

III. Competing Interests: Dam Owners and Shoreline Owners

Seeking to put small dams into use generating electricity raises concerns for the interests of lake shore property owners and others who use the headwaters of a dam for recreational enjoyment. The fluctuation of water levels that a hydroelectric dam operating economically and efficiently could produce to the detriment of those accustomed to stable water levels can be an obstacle to small dam hydroelectric power development.

A. Water level rights

It is impossible to say who holds the legal upper hand in the debate about rights between dam owners and shoreline proprietors. The argument that owners of property along a body of water maintained by a dam have a right to the water levels to which they have become accustomed finds support in one view of traditional legal theories. Shoreline owners can claim that the concepts of negative reciprocal easements and estoppel apply to their situation to preclude a dam owner from lowering or raising customary water levels. Maine case law concerning the acquisition of a right to an artificial source of water, the receipt of water for household use through an aqueduct,²⁷ can be relied upon to support an analogous right to artificially maintained water levels. Yet dam owners may counter all of these claims.

A different view of negative reciprocal easements and

estoppel uncovers elements of these theories which do not fit when applied to water level controversies. Maine cases concerning mill dams and water levels for purposes other than those of shoreline owners²⁸ indicate that neither riparians nor the public can acquire a right to other than the natural, not artificially created, water condition. Furthermore, even if a water level right is found to exist for shoreline owners, they may not be able to place perpetual responsibility on a dam owner for dam maintenance.²⁹

B. Flowage rights

If the argument shifts to the question of lost or retained flowage rights, the shoreline owners hoping that flowage rights will have to be renegotiated at satisfactory water levels, reasonable opposing views can again be advanced. Owners of shore property can claim that the easement to flow their lands, whether created under the Mill Act, by prescription, or grant, is extinguished when a dam is used for hydroelectric generation and not to power mills. Or a long period of non-use of the dam may have caused the abandonment of flowage rights. Again, the dam owners may argue a contrary position.

It is difficult, and in some cases legally impossible,³⁰ to abandon property. Mere non-use cannot constitute abandonment, though a lengthy idleness may create a presumption,³¹ not proof, of abandonment. Whether extinguishment of flowage rights occurs upon a use which differs from the original is an open question requiring interpretation of the Mill Act's scope, or the scope of prescriptive or granted rights.

The unanswered questions concerning rights of dam

owners and shoreline owners pose a problem without ready-made solutions. Interests in water often create rights of use not ownership, generating difficulty in applying traditional property law principles. Each side in the debate can make a plausible argument; only a court's choice of one position over another could bring a final resolution. Yet the need to encourage small dam hydroelectric generation and the desire to protect shoreline owners' expectations will not be addressed by the choice of a winning argument. The ability to be creative, to fashion compromise and aim directly at fairness is the merit of a legislated solution.

IV. An Attempted Partial Solution: The Abandoned Dams Act and Neglected Dams Act

The Abandoned Dams Act and Neglected Dams Act present an interrelated approach to resolving certain water level problems. The Neglected Dams Act specifically exempts from its coverage, however, beneficial use dams, which include those used for hydro-³²electric generation and other economically beneficial uses.

A. Abandoned Dams Act

The Abandoned Dams Act permits the Soil and Water Conservation Commission to award ownership of a dam, including appurtenant works, whose current owner is unknown, to the³³ most suitable petitioner for the award. The provisions for notice and hearing accord any claimants for current ownership sufficient due process to overcome a challenge to the Act on such grounds. The state's power to award a dam of unknown ownership to another may be based on the concept of escheat: property of a person who dies without heirs reverts to the State. The Abandoned Dams Act can be classified with those statutes which presume death where

ownership is unknown.

B. Neglected Dams Act

The Neglected Dams Act is of more dubious constitutionality. As a purported regulation of dams, it is most plausibly justified as a provision for public health, safety and welfare. While the legislative findings which preface the Act apparently limit its application to dams impounding public waters (great ponds in their expanded definition, which includes some large artificial ponds), and speak of public concerns,³⁴ the actual provisions of the Act go beyond mere regulation for public benefit to a taking of private property for a largely private use.

The Neglected Dams Act requires the registration of all dams not owned by the State or Federal Governments. If a dam is not registered it is deemed abandoned and the provisions of the Abandoned Dams Act apply.³⁵ This abandonment provision is a harsh penalty for failure to register. Furthermore, the labelling of a dam of known ownership abandoned creates an awkward situation: the Abandoned Dams Act, by its terms, applies only to dams of unknown ownership. Permitting a dam of known ownership to be awarded to a private petitioner seems an unconstitutional taking.

The Neglected Dams Act permits shoreline owners to petition to have a water level set on a water body maintained by a dam not in beneficial use. The Commission is to consider the water level necessary for navigation, fish and wildlife maintenance, and the preservation of shore property,³⁶ but is not directed to consider the flowage rights that may attach to the dam and its owner. To set a water level that may limit these rights without considering them or providing

for compensation for flowage rights taken seems also beyond the constitutional pale.

Further provisions require that a dam owner maintain his dam so as not to violate a Commission order setting a water level.³⁷ A fine is designated for the violation of an order; a shoreline owner is permitted to commence a suit to enjoin the violation.³⁸ The maintenance requirements seem a severe treatment of a dam owner whose property is of no economic benefit to him. The maintenance expense and effort involved in abiding by an order may cause a forced sale of the dam, or result in a choice not to register a dam and risk or accept losing it through the abandonment provisions. To demand maintenance of a dam at significant expense and effort for other than specific public concerns, such as safety, seems a deviation from concern for public welfare and, rather, the provision of a boon to a limited segment of the public, the owners of property on the shore. The likelihood that a dam owner may pragmatically be forced to give up his property is of further benefit to interested private parties who might acquire the dam. The constitutionality of this approach to accommodating water level concerns is doubtful.

PART II: A REVISION OF THE MILL ACT

The revamping of the Mill Act presented in Appendix B is an attempt at modernization, updating the current Mill Act provisions to meet today's needs, the primary concern being to facilitate small dam hydroelectric power development while acknowledging the interests of shoreline property owners. Though a complete revision may prove too great an undertaking, sections of the redraft offered here could be incorporated in the existing Mill Act to clarify intent and modernize procedure.

The bracketted section numbers in the margin of the revised Mill Act denote, unless otherwise indicated, the sections of the current Mill Act from which the redrafted provisions are derived. The discussion to follow will explain the most significant changes made by this revision of the Mill Act.

I. Procedural changes

A. Settlement

Section 10, subsection 2 of the revised Mill Act replaces the sections of the current Mill Act which provide, in certain situations, for offers of compensation for claimed damages due to flowage or water division and agreement, outside of court, upon a satisfactory compensation (See 38 MRSA §§718, 719, 720 and 723). The new section 10, subsection 2 allows the parties greater flexibility in arriving at a resolution of a dispute without resort to trial; it retains the requirement that an agreement be recorded.

B. Referees

The use of county commissioners to determine the extent of damage to a plaintiff's property (See 38 MRSA §705) is an outdated practice that does not mesh with modern court proce-

dure. Section 11, subsection 1 of the revised Mill Act substitutes the option of the appointment of a referee, under Maine Rule of Civil Procedure 53, for the use of county commissioners. Rule 53 governs the conduct of the referee and provides for his or her compensation. The parties are permitted the option of having a jury decide the damage issue to accommodate the constitutional guarantee of a trial by jury. (See Me. Const. Art. I, §20). Hopefully, the parties will usually agree to employ a skilled outsider appointed by the court to investigate the question of damages since this expedited procedure will save them the expense of producing their own experts on damages at trial.

Section 11, subsection 2(A) of the revised Mill Act represents the only significant substantive change from current Mill Act provisions in the matters to be considered by the county commissioners' replacement, the referee. Section 654 of the Mill Act permits the height to which water may be raised by a dam to be restricted pursuant to a jury verdict or commissioners' report. Section 11, subsection 2(A) of the revised Mill Act allows the entire question of water level fluctuation, including low water level limits, to be considered. Section 11, subsection 3(C) permits these considerations to be translated by the court into the final legal description of the flowage right accorded the dam operator by the Mill Act.

The justification for the state's ability to regulate the dam operator's use of water in this new manner lies in a modern perception of the reasonable use of water that differs from the nineteenth century view that accompanied the Mill Act's initial enactment. In the case of a dam that affects the water levels

of great ponds, the state's authority for limiting water level fluctuation is augmented by its status as public trustee of the ponds.

C. Mediation

Public Law 465, enacted in the First Regular Session of the 109th Legislature, amends the Mill Act to include provisions on the licensing of small hydroelectric power projects at existing dam sites. Section 25, subsection 2 and sections 26, 27 and 28 of the revised Mill Act amend Public Law 465 to address the concerns of shoreline property owners for the maintenance of traditional water levels despite the existence of flowage rights, created by deed, prescription, or statute, which do not contain restrictions on water level fluctuation. Affected shoreline property owners are required to intervene at the initial stages of an application for a small hydroelectric power project license if they wish to raise concerns about the maintenance of traditional water levels. The conflicting water level interests and property rights of the hydroelectric developer and riparians are to be submitted to mediation. Through negotiation the parties are to work out an agreement establishing water levels that meet individual needs without unduly infringing on the interests of other parties to the mediation. This agreement becomes part of the application for the Board of Environmental Protection review prescribed by Public Law 465 (See §§29, 30 and 31 of the revised Mill Act).

The approach taken at Swan Lake to resolving problems between riparians and a hydroelectric developer provided the inspiration for the requirement of a mediated water level agreement under the revised Mill Act (See "Swanville dam agreement

hailed as a model pact," Maine Sunday Telegram, sec. A, p. 22, Aug. 5, 1979). The Board's hearing process does not provide an appropriate method for resolving concerns addressed through mediation. If riparian interests in traditional water levels are raised in the context of a great pond or of flowage permission first granted to a corporate dam owner through a special legislative act, then the foundation for the state's involvement in setting upper and lower water levels may exist. However, when flowage rights have been acquired through the Mill Act, by deed, or prescription, and the waters in question are not public waters, the state's ability to meet constitutional constraints is limited.

For the Board to establish water levels that diminish a flowage right for the benefit of private property owners is either to regulate property for a private, not public, benefit or to take property for nonpublic use and without just compensation. When riparians claim to have acquired reciprocal property rights in traditional water levels the same constitutional concerns apply to state manipulation. Thus, the mediation process is an attempt to overcome constitutional objections and avoid lengthy litigation by limiting state regulation to the parties involved and not their property interests. State concern for avoiding disputes, for encouraging hydroelectric development and for permitting only the reasonable use of water can justify the requirement of the submission of water level disputes to mediation. When private parties voluntarily relinquish or restrict their property rights through negotiation in the best interest of all, the state is not implicated in unconstitutional regulation or condemnation.

If the mediation process is an unacceptable solution to the problem of resolving conflicts between shoreline property owners and applicants for small hydroelectric power project licenses, then at least one addition should be made to Public Law 465. Section 626 of the current Mill Act, enacted by Public Law 465, contains the criteria the Board must consider in deciding upon a license application. The law should add to these criteria, as a minimal acknowledgement of possible existing property rights, a consideration of any flowage rights, created by the Mill Act, deed, or prescription, attached to the dam or possessed by the applicant. This form of consideration may not avoid a constitutional challenge to the diminishment of flowage rights at the behest of private property owners, but it will at least permit the state to argue that flowage rights were considered and constitutionally regulated.

II. Substantive changes

A. Hydroelectric power production

Section 2, subsection 5 of the revised Mill Act simply adds an explicit statement of the availability of Mill Act benefits for the production of hydroelectric power (See Part I, section II D. of this report for the discussion of the implied availability of the Mill Act's provisions for this purpose), an express recognition carried throughout the appropriate sections of the revised Mill Act (See §§3, 6 and 17 of the revised Mill Act).

B. Violation of restrictions

Section 13 of the revised Mill Act permits a shoreline property owner to seek an injunction when a dam operator violates judicially imposed restrictions on the extent of flowage or diversion of water, replacing section 722 of the current Mill Act. The remedy for a violation of the restrictions by a dam

operator under section 722 is simply the imposition of double damages. While section 14 of the revised Mill Act permits the imposition of greater compensation for damage subsequent to a judgment, a shoreline property owner should also be able to seek the cessation of greater flowage or diversion that is of little or no benefit to the dam operator. In a suit for an injunction, a court will be able to balance the riparian's claim of unnecessary greater damage against the dam operator's claim of the necessity of violating a previous restriction and decide whether an injunction or greater compensation should issue.

C. Lost Mill Act rights

Section 16 of the revised Mill Act merely changes a rebuttable presumption under the common law into an irrebuttable presumption that 20 years nonuse of rights acquired under the revised Mill Act constitutes abandonment.

III. Omitted sections

A. Action for unpaid damages

Sections 713 through 715 of the current Mill Act, pertaining to unpaid damages, liens and execution sales, have been omitted as unnecessary given other provisions of Maine law. Title 14, sections 552, 2010 and 4651 and Maine Rule of Civil Procedure 69 provide sufficient means for recovering unpaid Mill Act damages through an execution sale if necessary.

B. Dissatisfaction with compensation

Section 716 of the current Mill Act has been omitted as being contrary to the principle of res judicata, that a court decision on a particular matter is conclusive. Dissatisfaction with an amount of compensation established through proper court action should not permit the institution of another action based

on the original claim. If greater damage occurs the riparian retains a right to seek increased compensation (See §314 of the revised Mill Act).

C. Other omissions

Article 4, dealing with meetings of dam or mill owners concerning repairs, and Article 5, dealing with grist mill regulations, have been deleted from the Mill Act as unnecessary. Dam or mill owners can arrange their own business affairs without statutory direction. Grist mills are no longer an integral part of community life; the regulation of their business in terms of outdated needs seems unfair. Either of these omitted articles could, however, be easily re-inserted in the Mill Act.

IV. Clarification of water reservoir provisions

Sections 931 through 933 of the current Mill Act can create confusion about the status of water storage reservoirs. It is unclear whether the creation of water storage reservoirs requires specific legislative authorization since the enactment of these provisions, or whether authorization is required only for artificial additions of water to the reservoir and the laying of pipes and the like for this purpose. A review of the legislative history of the subchapter sheds light on this question.

Sections 931 through 933 were enacted in 1959 as Public Law 325. Though the language of the sections is unchanged in the current version of Title 38, the title of the subchapter and section headings have been condensed, detracting from the clearer statement of legislative intent contained in the title and headings of Public Law 325.

Current sections 931 through 933 were enacted under the title "AN ACT Relating to the Augmenting of Stored Water;"

Section 931 was originally captioned "Right of Mill owners to augment stored water by pumping or otherwise;" the heading of section 932 originally read "Authorized to acquire lands and rights-of-way for pipes, penstocks, tunnels and canals by eminent domain." Apparently the Legislature's concern focused upon the augmenting of existing stored water and the use of eminent domain for this purpose, and not upon the damming and flowage undertaken in the initial creation of reservoirs.

An additional section of Public Law 325 buttresses this interpretation. Central Maine Power Company sought, in the same bill that created sections 931 through 933 of the current Mill Act, to avail itself of the new provisions by requesting legislative authorization to augment the natural water supply in an existing reservoir by pumping water from a lake into the reservoir. The Legislative Record contains a discussion between Representatives Aliberti and Pike that emphasizes that the purpose of the sections on reservoirs is to provide for the use of eminent domain for pump storage. (See 2 Leg. Record 1733-4, 1821 (1959)). Section 4 of the revised Mill Act attempts to clarify sections 931 through 933 of the current Mill Act to more readily express this legislative intent.

PART III: A REVISION OF THE ABANDONED DAMS ACT AND THE DEMISE OF THE NEGLECTED DAMS ACT

The revised Abandoned Dams Act, set forth in Appendix C, tracks certain provisions of L.D. 1531, introduced in the First Regular Session of the 109th Legislature. Additions to and deletions from LD 1531 are made in an attempt to constitutionally provide for water level maintenance, to insure public safety and welfare, and to permit the repeal of the Neglected Dams Act.

I. The Revised Abandoned Dams Act

A. Board of Environmental Protection

The revised Abandoned Dams Act, following the lead of LD 1531, shifts responsibility for abandoned dams from the Soil and Water Conservation Commission to the Board of Environmental Protection. This change appropriately consolidated much of the regulation of dams since the Board is given the assignment, in Public Law 465, of licensing small dam hydroelectric power projects. Furthermore, significant environmental considerations enter into any decision concerning the disposition of a dam about to be abandoned. Thus, under section 3 of the revised Abandoned Dams Act, the Board, after its own investigation of the dam and hearing, decides what disposition of the dam best comports with concerns for public health, safety and welfare.

B. Intent to abandon dams

Though the revised Abandoned Dams Act retains provisions for dealing with dams whose ownership is unknown (See §4 of the revised Abandoned Dams Act), section 2 adds provisions, borrowed from LD 1531, for a dam owner to give notice of intent to abandon a dam. It is more likely that the owner of an unmaintained dam is known; such dams would probably be deemed neglected under the

Neglected Dams Act. Section 2 affords the dam owner who no longer wishes to take responsibility for his dam an opportunity to relinquish control in an orderly way.

C. Private party acquisition

Under section 4 of the revised Abandoned Dams Act, which retains provisions contained in both the current Abandoned Dams Act and L.D. 1531, private persons may petition for ownership of dams whose owner is unknown, or, in a change from the current Abandoned Dams Act, may seek ownership of a dam whose owner has given notice of intent to abandon. Subsection 5 of section 4 requires that a hearing be held so that other options, beside an award to a petitioner, may be explored with the view towards best providing for the public's protection and interest.

Subsection 5 also states that an award of a dam to a petitioner may be subject to restrictions for the public's welfare. This addition emphasizes that the state's responsibility must be for public concerns and not private interests. Thus, if shoreline owners are concerned that the notice of intent to abandon threatens traditional water levels, they must take it upon themselves to petition for control of the dam, or hope that the state's disposition or regulation of the dam for public purposes will coincidentally uphold their private interests. The state's role cannot constitutionally be to protect private concerns.

D. State acquisition

The provisions of section 5 of the revised Abandoned Dams Act recognize that there may be instances where state control of the dam is necessary to protect the public. The emphasis, in having the Bureau of Public Lands accept title to a dam, is upon

providing for the public's health and safety; thus, merely fencing certain dams or minimal repairs may suffice. Section 6, which permits an unsafe dam to be breached, further contains the amount of maintenance the state must undertake. Finally, the Bureau may convey a state acquired dam at a later date to a suitable private owner, thus alleviating the state's burden.

E. Flowage rights

Section 7 of the revised Abandoned Dams Act permits flowage rights connected to old dams to live on though the dam has been in disuse, unless the original grant of the rights stated that they would be extinguished upon disuse. This section applies only to dams erected prior to January 1, 1981, thus complementing section 16 of the revised Mill Act pertaining to termination of Mill Act flowage rights upon prolonged disuse. The purpose of the protection against extinguishment is to enhance the attractiveness of old and idle dams to potential new owners such as hydroelectric power developers.

II. The repeal of the Neglected Dams Act

The provisions in Article 3 of the current Mill Act (Article 4 of the revised Mill Act) for state inspection of dams upon request and the possibility of requiring maintenance to repair or prevent unsafe conditions supply one ground for repealing the Neglected Dams Act. Concern by riparians or others over dangerous conditions caused by a neglected dam may be addressed through the inspection mechanism. If the owner of the neglected dam does not desire to meet the expense of required maintenance he may, under the revised Abandoned Dams Act, give notice of intent to abandon. The revised Abandoned Dams Act then gives shoreline property owners the opportunity to petition for ownership of

the dam and hence control of water levels. Of course at any time, under any circumstances, riparians may negotiate a private sale of the dam. The repeal of the Neglected Dams Act and revision of the Abandoned Dams Act rest on the premise that riparians should assume paramount responsibility for protecting their private interests and may often have to determine the worth to them of certain water levels.

CONCLUSION

This study has attempted to raise the proper questions rather than to primarily provide solutions to the problems surrounding the revitalization of small dams in Maine. Though new approaches to statutorily addressing small dam use are offered, the suggestions merely reflect one possible path for change; other avenues are open and improvement is likely.

At a discussion of some of the proposals put forth in this paper, various revisions and different approaches were suggested. For example, an intriguing thought is to abandon the Mill Act, retaining the provisions in section 621 et. seq., which permit one-stop licensing of hydro-power projects at existing dams. To this could be added sections establishing a similar one-stop licensing procedure for the construction of new dams, tailored to include consideration of, and perhaps compensation for, damage to riparian land.

Many other possibilities for conquering the problems surrounding small dam hydroelectric power development exist. One necessary ingredient might be a court's resolution of the questions of property rights to flowage and traditional water levels. Another might be a clear statement by the State of whether the provision of energy is deemed a public purpose. Another area that should be explored more fully concerns the role of corporation charters, buried in Maine's older Private and Special Laws, in securing, and perhaps providing a vehicle for amending, flowage rights.

The list of ideas of how to proceed to encourage small dam hydro-power projects, while protecting others' interests in the use of water and shore property, can be a long one. In essence,

this study seeks to present, to document and to emphasize, that whatever course the State chooses in resolving the problems discussed in this paper, property rights must be recognized and accorded constitutional treatment. In looking at the Mill Act, the Abandoned Dams Act and the Neglected Dams Act, the difficulties inherent in a failure to focus on this concern are apparent.

APPENDIX A

FOOTNOTES

1. Me. Rev. Stat. Ann. tit. 38, §651 (1978).
2. Id. at §653.
3. Wilson v. Campbell, 76 Me. 94 (1884).
4. Supra, note 1 at §655.
5. Id. at §931. See also Brown v. DeNormandie, 123 Me. 535, 124 A. 697 (1924).
6. Id. at §721.
7. Id. at §655.
8. Id. at §654.
9. Id. at §724.
10. Barker v. French, 102 Me. 407, 67 A. 308 (1907).
11. 118 Me. 503, 106 A. 865 (1919).
12. See, e.g., Priv. L. ch. 8, 1929 Me. Acts 408.
13. Veazie v. Dwinel, 50 Me. 479 (1862).
14. Boothbay Harbor Condominiums, Inc. v. Department of Transp., 382 A. 2d 848 (Me. 1978).
15. Opinion of the Justices, 118 Me. 503, 106 A. 865 (1919).
16. Brown v. DeNormandie, 123 Me. 535, 124 A. 697 (1924).
17. Fernald v. Knox Woolen Co., 82 Me. 48, 19 A. 93 (1890).
18. Supra Note 1 at §651.
19. Id. at §656.
20. Id. at §657.
21. Central Maine Power Co. v. Public Utilities Commission, 156 Me. 295, 163 A. 2d 762 (1960).
22. Jordan v. Woodward, 40 Me. 317 (1855).
23. See Me. Rev. Stat. Ann. tit. 38, §§891, 892 (1978).

24. *Brown v. Gerald*, 100 Me. 351 (1905).
25. *Brown v. DeNormandie*, 123 Me. 535, 545, 124 A. 697, 701 (1924).
26. *Id.*
27. *Cole v. Bradbury*, 86 Me. 380, 29 A. 1097 (1894); *Dority v. Dunning*, 78 Me. 381, 6 A. 6 (1886).
28. *Weare v. Chase*, 93 Me. 264, 44 A. 900 (1899); *Pearson v. Rolfe*, 76 Me. 380 (1884).
29. *Inhabitants of Town of Sabattus v. Bilodeau*, 391 A. 2d 357 (Me. 1978); *Hammond v. Antwerp Light and Power Co.*, 230 N.Y.S. 621, 132 Misc. 786 (1928).
30. See *Pickens v. Richardson*, 146 Me. 29, 77 A. 2d 191 (1951).
31. *Farrar v. Cooper*, 34 Me. 394 (1852).
32. Me. Rev. Stat. Ann. tit. 12, §305(3) (Cum. Supp. 1978).
33. *Id.* at §253.
34. *Id.* at §301.
35. *Id.* at §303.
36. *Id.* at §304.
37. *Id.* at §305.
38. *Id.* at §306.

APPENDIX B

THE REVISED MILL ACT

[ORIGIN]

§1. Definitions.

As used in this chapter, unless the context otherwise indicates, the following terms shall have the following meanings:

1. Canal. "Canal" means an excavation in the ground, a pipe, conduit, penstock, tunnel, closed flume or other similar means of conveying water. [\$652 & §931]

2. Dam. "Dam" means any artificial barrier, including the land it is on and all appurtenant works, easements and flowage rights, which impounds or diverts water, and which: [Abandoned Dams Act §252]

A. Is 2 feet or more in height from the natural bed of the stream or watercourse measured at the downstream toe of the barrier, or from the lowest elevation of the outside limit of the barrier, if it is not across a stream channel or a watercourse, to the maximum capable water storage elevation; or

B. Has an impounding capacity at maximum water storage elevation of 15-acre feet or more.

3. Person. "Person" means any individual, firm, association, partnership, corporation, trust, municipality, quasi-municipal corporation, state agency, federal agency, or other legal entity.

ARTICLE 1. ERECTION AND OPERATION
OF DAMS AND CANALS

§2. Construction of dams.

Subject to the conditions and limitations of this chapter, any person may construct, maintain and operate dams on land he owns or leases across any stream not navigable for the following purposes:

1. Mills and machinery. To raise water for [§651] propelling mills and machinery.

2. Water storage reservoirs. To create and maintain water storage reservoirs or basins for working mills or hydroelectric power production facilities. [Brown v. DeNormandie]

3. Cranberry culture. To create ponds for [§656] the purpose of cranberry culture.

4. Ice cutting and harvesting. To create ponds for the cutting and harvesting of ice for the market on streams not navigable or floatable, but emptying into tidewaters navigable in the winter, and may flow the lands above during November, December, January, February, March and April; but they shall draw off the water to its natural [§657] state by the 20th day of May yearly. This section shall not be construed as authorizing any persons or corporations to cut ice on any pond created as provided over any area the soil of which such persons or corporations do not own or lease or possess as tenants at will, or by reason of a valid agreement with the owner or lessee or tenant thereof when said owner or lessee is not the State and the pond is not a great pond.

5. Hydroelectric power production. To raise water for the generation of hydroelectric power at a power production facility.

§3. Canals for working mills or producing hydroelectric power.

Subject to the conditions and limitations of [§651] this chapter any person may build, maintain and operate canals which divert the water of a stream not navigable from its natural channel for the purposes of working mills or producing hydroelectric power. The construction of canals for these purposes is subject to the following further conditions:

1. Land ownership; length limit. A canal [§651] may be constructed under this chapter only upon land the dam operator owns or leases. A canal may not exceed one mill in length unless the conditions of subsection 2 are met.

2. Length limit exception. A canal greater [§652] than one mill in length may be constructed under this chapter provided the dam operator is the owner of all riparian rights on the stream diverted between the point of division and the point at which the waters are returned to the stream.

§4. Augmenting and discharging stored water.

1. Augmenting and discharging stored water; right to [§931] flow land. Any person may raise the level of the waters in storage resevoirs or basins by augmenting the supply of stored water from sources other than the natural drainage area by means of pumping or otherwise; retain and discharge said stored water;

build, maintain and operate canals for the purpose of augmenting and discharging said stored water for use by such persons. Such persons are authorized to flow such lands as may be necessary to carry out the purposes of this section, and damages caused by the flowing of such lands shall be ascertained and determined in the manner as prescribed by this chapter.

2. Authorization to acquire property for [§932]
canals by eminent domain. Any person authorized to build, maintain and operate canals under subsection 1 is further authorized to exercise the power of eminent domain by taking and holding as for public uses in the manner and subject to the limitations prescribed in Title 35, sections 3243 to 3252, such lands and rights-of-way as such person may require for such purposes when water stored and discharged through the use of such canals is devoted to public use.

3. Authorization required. Any person authorized to augment stored water by pumping or otherwise under subsection 1 and acquire by eminent domain for public uses lands and rights-of-way for canals under subsection 2 is authorized to exercise the rights and benefits under this chapter, but only when such person shall have received the necessary authority by legislative Act. [§933]
§5. Unlawful obstruction or diversion.

The owner or mortgagee in possession, as [§611]
well as any tenant, of any mill used for manufacturing lumber is liable for the acts of such tenant in unlawfully obstructing or diverting the water of any river or stream by the slabs or other mill waste from his mill, but no action shall be maintained therefor without a demand of damages, at least 30 days prior to its commencement. Such unlawful obstruction or di-

version by the tenant shall, at the election of the owner or mortgagee and on written notice to the tenant, terminate his tenancy.

§6. Injury to existing mill, hydroelectric power production facility or canal.

No dam shall be erected or canal constructed [§653] to the injury of any mill, hydroelectric power production facility or canal lawfully existing on the same stream; nor to the injury of any mill or hydro-electric power production facility site, on which a mill, hydroelectric power production facility or dam has been lawfully constructed, unless the right to maintain a mill or hydroelectric power production facility has been lost or defeated.

§7. Applicability.

This chapter applies to mills and dams erected [§612] upon streams forming the boundary line of the State although a part of the dam is not in the State. The rights and remedies of all parties concerned shall be ascertained and determined as if the whole of such streams were in the State. This chapter shall not apply to mills and dams erected upon streams whose waters ultimately reach the ocean at a point wholly outside the territorial limits of the United States of America unless said dams are authorized by Act of the Legislature or by a decree of the Public Utilities Commission made after public notice and hearing on petition for such authorization.

ARTICLE 2. DAMAGE BY FLOWAGE OR DIVERSION

SUBARTICLE 1. PRIVATE LANDS

§8. Action for damages.

Any person whose lands are damaged by being flowed by a dam, or by the diversion of water by a canal, may obtain compensation for the injury, by complaint to the Superior Court in the county where any part of the lands are; but no compensation shall be awarded for damages sustained more than 3 years before the institution of the complaint. The plaintiff shall proceed in the following manner:

1. Complaint. The complaint shall contain such a description of the land flowed or injured, and such a statement of the damage, that the record of the case shall show the matter heard and determined in the action.

A. No complaint for so flowing lands or diverting water abates by the death of any party thereto; but it may be prosecuted or defended by the surviving plaintiffs or defendants, or the executors or administrators of the deceased.

B. If such complaint is abated or defeated for want of form, or if, after a verdict for the plaintiff, judgment is reversed, he may bring a new complaint at any time within one year thereafter and thereon recover the damages sustained during the 3 years pre-

ceding the institution of the first complaint,
or at any time afterwards.

2. Service. The complaint shall be filed and [§702]
service made as in other actions.

§9. Defenses.

The owner or occupant of such mill or canal may [§701]
answer that the plaintiff has no right, title or es-
tate in the lands alleged to be injured; or that he
has a right to maintain such dam, and flow the lands,
or divert the water for an agreed price, or without
any compensation; or any other matter, which may
show that the plaintiff cannot maintain the action;
but he shall not answer that the land described is
not injured by such dam or canal.

§10. Trial and costs; settlement.

1. Trial and costs. When any answer is filed [§704]
and an issue in fact or in law is joined, it shall
be decided as similar issues are decided at com-
mon law. If judgment is for the defendant, he
shall recover his costs.

2. Settlement. The parties may, instead of [§718, §719, §720,
proceeding with trial, settle a claim at any time. [§723]
The settlement agreement shall be recorded in the
office of the clerk of court.

§11. Determination of damages.

1. Jury or referee. When the only issue to [§705]
be decided is the extent of damage and the amount
of compensation, issues of liability having been
decided in favor of the plaintiff, or the de-

fendant having defaulted, the party or parties may choose to have the issue decided by a jury, or agree to have a referee appointed by the court to make appropriate findings and recommendations pursuant to Maine Rule of Civil Procedure 53.

2. Findings of fact. To determine the extent of damage to the plaintiff's interests and the amount of compensation to be paid by the defendant, the jury or referee shall consider:

A. The degree of water level fluctuation required by the defendant for reasonable pursuit of an activity permitted by this chapter. [§654]

B. The quantity of water that may reasonably be diverted by a canal constructed under this chapter. [§654]

C. The portion of the year during which land must be flowed or water diverted by the defendant in reasonable pursuit of an activity permitted by this chapter. [§654]

D. The reasonable compensation for damage, if any, done to the plaintiff's land. Damage [§655]

shall include timber or other property that must be removed by the defendant from the land flowed for reasons of safety. Compensation shall include the value of the timber or other property removed or to be removed from the land flowed, and any further sum deemed just. [§658]

Damages caused by flowage of lands from which [§659]

timber or other property shall have been removed shall be assessed as though there had been no severance, and the amount paid for such timber or other property with interest to the date of the judgment shall be credited thereon, provided the owner of the land shall have the right to elect whether his damages shall be assessed for flowage as of the time of taking or of flowing.

E. All factors relevant to a determination as to whether compensation shall be paid in gross or in yearly payments.

[\$705, \$706, \$707
& \$711]

3. Conclusions. The conclusions of the court, or referee if so directed, shall include:

A. A statement of the compensation, if any, to be paid to the plaintiff by the defendant and whether payment shall be in gross or in yearly payments. The court may order the defendant to give security for the payment of yearly compensation.

[\$712]

B. A description of any restrictions upon the quantity of water to be diverted by a canal or the time of year when such diversion shall occur.

C. A description of the flowage right obtained by the defendant in terms of any water level fluctuation limitations and restrictions on flowage during certain times of year.

§12. Verdict or report bars future action.

The verdict of the jury or the report of the

[\$710]

referee so accepted is a bar to any action brought for such damages. The owner or occupant shall not flow the lands nor divert the water during any portion of the period when prohibited, nor divert the water beyond the quantity allowed by the referees or jury.

§13. Injunction if restrictions violated.

If, after judgment, the restrictions imposed respecting the flowing or diverting of the waters are violated, the party injured may seek an injunction in a civil action prohibiting such violation. [§722]

§14. Judgment no bar to new complaint.

A judgment against a plaintiff as not entitled to any compensation, or as entitled to a set compensation, is no bar to a new complaint for damages, arising after the former judgment, and for compensation for damages subsequently sustained. [§707, §716 & §724]

§15. Common law remedy limited.

No action shall be sustained at common law for the recovery of damages occasioned by the overflowing of lands or for the diversion of the water as before mentioned, except to enforce the payment of damages after they have been ascertained by process of complaint. [§721]

§16. Discontinuation of use

All rights, powers and privileges conferred upon any person by this chapter for any dam shall terminate if this dam is not used [L.D. 1531, Sec. 5]

for the purposes of this chapter for any continuous period, beginning after January 1, 1981, of 20 years or more. This section does not affect rights acquired by deed or prescription.

SUBARTICLE 2. PUBLIC LANDS

§17. Petition to raise ways and enlarge water vents.

When owners of mills or hydroelectric power production facilities caused by the water of a stream, or the owners of water power for operating mills or hydroelectric power production facilities find or apprehend that the necessary head of water for working or reservoir purposes cannot be obtained, or when their existing rights in respect to the same cannot be exercised without overflowing some highway or town way, they may petition the county commissioners for permission to raise such ways and to enlarge the water vent thereof. Such commissioners shall appoint a time and place for a hearing on the petition and give notice thereof to all parties interested as provided in Title 23, section 2052, and such notice may be provided in the manner therein provided. [§772]

§18. Proceedings of commissioners.

On the day appointed, the county commissioners shall meet, examine the premises described in the petition and hear the parties present, and thereupon they shall determine whether said ways shall be raised and the water vents enlarged and to what [§773]

extent, and shall prescribe the manner in which it shall be done and what portion of the expenses thereof and the costs of the hearing shall be borne by the petitioners, and what portion, if any, by the town where the way is located.

§19. Alterations to be made.

If the decision is in favor of the plaintiffs, [§774] said commissioners shall direct the town, in writing, to make the alterations prescribed and fix the time within which the same shall be done, and if not done within the time fixed, the same may be done by the plaintiffs. Whether by the town or by the plaintiffs, it shall be done in a faithful manner and to the acceptance of the commissioners. Whichever party makes said alterations has a claim upon the other for the proportion fixed by the commissioners for said other party to pay, and if it is not paid within 30 days after its approval by said commissioners and a demand therefor it may be recovered in a civil action.

§20. Costs.

If the decision of the county commissioners [§775] is against the plaintiffs, they shall pay the costs of the hearing, taxed as in other cases before county commissioners.

§21. Appeals.

Any party aggrieved may appeal from the decision of said commissioners in the same manner and subject to the same conditions as in case of [§776]

highways.

ARTICLE 3. LICENSING OF HYDROELECTRIC
FACILITIES

§22. Purpose

The Legislature declares that it is the policy [§621] of the State to support and encourage the development of hydroelectric generating facilities by simplifying requirements for permits and licenses. It is the purpose of this subarticle to provide a single license application for small hydroelectric facilities on existing dams. The license application shall be administered by the Department of Environmental Protection, while allowing others to intervene in accordance with the Maine Administrative Procedure Act, Title 5, chapter 375.

§23. Definitions.

As used in this subarticle, the following [§622] meanings.

1. Board. "Board" means the Board of Environmental Protection.
2. Department. "Department" means the Department of Environmental Protection.
3. Existing dam. "Existing dam" means any dam, the construction of which was completed on or before January 1, 1979, and which does not require any construction or enlargement of impoundment structures, other than repairs, in connection with the installation of any small hydroelectric power project.
4. Fossil fuel. "Fossil fuel" means materials

extracted from the earth and used as a source of concentrated energy, including, but not limited to, peat, coal, oil and natural gas.

5. Riparian. "Riparian" means any owner of shoreline property on a water body or water course affected by an application for a permit under this article.

6. Small hydroelectric power project. "Small Hydroelectric power project" means any hydroelectric power project which is located at the site of any existing dam, which uses the water power potential of the dam, which has not more than 1,500 kilowatts of installed capacity, and which, prior to its construction or operation must secure a permit under any of the following statutes: Site location of development statutes, section 481 to 488; the wetlands laws, sections 471 to 478; the great ponds laws, sections 391 to 394; or the stream alteration laws, Title 12, sections 2206 to 2211.

§24. Prohibition.

No person shall initiate construction or operation of any small hydroelectric power project after January 1, 1980, without first obtaining a permit from the board. [§623]

This subarticle shall not apply to any small hydroelectric power project which has received a Federal Energy Regulatory Commission license prior to the effective date of this Act.

§25. Application and notice procedures.

An application for a permit required by section 623 shall be made on forms provided by the department and shall be filed with the board. [§624]

Notice of the filing shall be given in the following manner:

1. State departments. Within 10 working days of receiving a completed application, the Commissioner of Environmental Protection shall notify the applicant of the official date on which the application was accepted and circulate the application among the Department of Conservation, Department of Inland Fisheries and Wildlife, Public Utilities Commission, the Department of Transportation and the Office of Energy Resources.

2. Riparians. Within 10 working days of receiving a completed application, the Commissioner of Environmental Protection shall notify the clerk of each municipality in which the dam and flowage are located of the filing of an application.

Within 10 working days of receiving notification from the Commissioner, each clerk shall give written notice of the application, including information on intervention, to riparians owning property within the municipality.

3. Public notice. Public notice of the filing [§624] shall be made as required by the board.

§26. Board action.

The board shall, within 45 days of the receipt [§625] of an application, either approve the proposed small hydroelectric power project, upon such terms and conditions as are appropriate and reasonable, or disapprove the proposed small hydroelectric power project setting forth the reasons therefor, or submit the application to mediation in the manner provided in section 27, or schedule a hearing thereon

in the manner provided in section 30.

§27. Intervention; mediation.

1. Intervention. If, within 45 days of receipt of a completed application, the board has received any written requests for intervention in the application process from riparians concerned about the maintenance of water levels to which they have become accustomed in the use and enjoyment of their property, and the board finds a potential conflict of interest between the riparians and the applicant the board shall grant the requests for intervention.

2. Mediation. The board shall require all riparian intervenors and the applicant to mediate a resolution of the conflict. The board shall appoint a mediator to organize and conduct the mediation. The subject matter of the mediation shall be limited to the following considerations:

A. Concerns by riparians for the maintenance of water levels to which they have become accustomed in the use and enjoyment of their property.

F. Flowage rights possessed by the applicant or appurtenant to the existing dam created by statute, deed, or prescription.

C. The water flow required for economical, efficient operation of the small hydroelectric power project.

3. Mediation report. Within 30 days of the appointment of the mediator, he shall submit to the board an agreement reached by the applicant and riparian intervenors resolving their conflicting interests. The report shall be treated as part of the application for the purposes of section 29.

§28. Riparian remedy limited.

Riparians with concerns for the maintenance of water levels to which they have become accustomed shall raise these concerns solely through the process of intervention and mediation. No action shall be sustained at common law based on such concerns, nor can these concerns be raised at any subsequent hearing on the application before the board.

§29. Final board action.

The board shall, within 30 days of receipt of a final application, which includes a mediation report, either approve the proposed small hydroelectric power project, upon such terms and conditions as are appropriate and reasonable, or disapprove the proposed small hydroelectric power project setting forth the reasons therefor, or schedule a hearing thereon in the manner provided in section 30. [§625]

§30. Administrative appeal and hearing.

Within 30 days of the applicant's receipt of a board decision made without hearing, any person aggrieved by the decision may request a hearing [§625]

before the board. The request shall set forth the findings and conclusions of the board to which the person objects, the basis of the objections and the nature of the relief requested. Upon receipt of the request, the board shall schedule and hold a hearing. The hearing shall be scheduled in accordance with section 345.

At the hearing, the board may receive testimony on the economic effect of the proposed facility.

At any hearing held under this section, the burden shall be upon the applicant to demonstrate to the board that, over the expected life of the facility, the advantages of the project outweigh any adverse impacts and that the public's health, safety and welfare will be adequately protected.

Within 30 days after the board adjourns any hearing held under this section, it shall make findings of fact and issue an order granting or denying authority to the person proposing the facility to construct or operate the facility as proposed, or granting the authority upon such terms and conditions as the board may deem advisable to protect and preserve the environment and the public's health, safety and general welfare.

§31. Criteria.

The board shall approve any project where the adverse impacts over the life of the facility. In making this determination, the board shall con-

[\$626]

sider, as a minimum the following:

1. Energy. The total energy and capacity the facility will provide and the amount of fossil fuel generation that will or may be displaced;

2. Flow regulation. The advantages of the facility is stabilizing stream flow, including maintaining minimum flows and providing flood control and adverse impacts, if any, from fluctuating water levels;

3. Fish and wildlife. The fish and wildlife habitat created or altered by the facility;

4. Other uses. Any benefits to or conflicts with recreation, navigation or other public uses of the stream or impoundment; and

5. Environmental considerations. Whether the proposed project will significantly harm the natural environs of any great pond, river or stream, cause undue soil erosion or lower existing water quality.

Any small hydroelectric facility receiving approval of the board under this subarticle shall not require permits under the site location development statutes, sections 481 to 488; the wetlands statutes, sections 471 to 478; the great ponds statutes, sections 391 to 394; or the Stream Alteration statutes, Title 12, sections 2206 to 2211, as any of these statutes may apply, notwithstanding their terms.

ARTICLE 4. INSPECTION OF DAMS AND RESERVOIRS

§32. Appointment of engineer; duties.

The Commissioner of Agriculture shall annually [§811] appoint a competent and professional engineer licensed to practice in this State, pursuant to Title 32, chapter 19, who is a citizen of the State as inspector of dams. The inspector of dams shall hold office until his successor is appointed and qualified. Upon the petition of 10 resident taxpayers of any town or several towns, the selectmen or assessors of any town or the county commissioners of any county, the inspector of dams shall inspect any dam or reservoir, except dams licensed and inspected by any agency of the United States Government, located in the town or county and erected for the purpose of saving water for manufacturing or other uses. Following personal examination of the dam or reservoir and after hearing the testimony of witnesses summoned for the purpose, the inspector of dams shall forthwith report to the Commissioner of Agriculture his findings and his opinion of the safety and sufficiency of the dam or reservoir. In the case of finding a dam to be unsafe or insufficient, the Commissioner of Agriculture shall notify all interested parties, including owners with riparian rights, municipalities in which the dams are located and any other persons or organizations that the Commissioner of Agriculture deems necessary. The

inspection of dams, as provided in this section, shall be under the sole jurisdiction of the Department of Agriculture.

§33. Correction of unsafe conditions.

If, after such personal survey and inspection, [§812] the engineer reports that such dam or reservoir is unsafe or dangerous to the lives or property of persons residing, carrying on business or employed near or below the same, then the owners, occupants or lessees thereof shall immediately make such alterations, repairs and additions to said dam or reservoir as such engineer recommends. In default thereof, upon application of said engineer to the Superior Court, the said owners, occupants or lessees shall be enjoined from the use of such dam or reservoir and the water therein contained, until they or either of them comply with the requirements of said engineer, and the water contained in said dam or reservoir may be discharged therefrom, by order of said engineer, in such manner as he directs as in his judgment most conducive to the safety of human life, and consistent with the protection of property.

§34. Compensation of engineer.

The engineer shall receive, as full compensation [§813] for his services, \$75 a day while actually employed in this service, together with his actual traveling expenses to be audited, allowed and paid from the Department of Agriculture. In

cases where the dam or reservoir is judged by the inspector of dams to be unsafe or insufficient, the Commissioner of Agriculture shall collect from the owner of the dam the total expenses incurred by the State for the inspection. In the event that the owner of a dam, which is judged to be unsafe or insufficient, fails to pay the total cost of inspection as required in this section, the Commissioner of Agriculture shall forthwith commence a civil action in the name of the State for the recovery of the cost of the inspection.

§35. Utilization of other agency resources.

The Commissioner of Agriculture may, with the approval of the Commissioner of Transportation, utilize the engineering expertise that exists in the Department of Transportation to assist in the evaluation of dams that are potentially hazardous to Maine citizens. [§814]

APPENDIX C

THE REVISED ABANDONED DAMS ACT

[ORIGIN]

§1. Definitions

[L.D. 1531, Sec. 3]

As used in this chapter, unless the context otherwise indicates, the following terms shall have the following meanings.

1. Board. "Board" means the Board of Environmental Protection.

2. Dam. "Dam" means any artificial barrier, including the land it is on and all appurtenant works, easements and flowage rights, which impounds or diverts water, and which:

A. Is 2 feet or more in height from the natural bed of the stream or watercourse measured at the downstream toe of the barrier, or from the lowest elevation of the outside limit of the barrier, if it is not across a stream channel or watercourse, to the maximum capable water storage elevation; or

B. Has an impounding capacity at maximum water storage elevation of 15-acre feet or more.

3. Person. "Person" means any individual, firm, association, partnership, corporation, trust, municipality, quasi-municipal corporation, state agency, federal agency or other legal entity.

§2. Notice of intent to abandon dams

[L.D. 1531, Sec. 3]

No person shall remove or abandon a dam without first filing notice with the board. This

notice shall be on a form provided by the board, and contain the dam owner's name and address, a brief description of the dam and its location and any other information the board may require.

This notice will serve to indicate that the dam owner is willing to convey title of the dam to another person, and that the dam owner no longer intends to maintain and operate his dam.

§3. Procedure

[L.D. 1531, Sec. 3]

Upon receipt of notice under this chapter, the board shall fix a time and place for a public hearing and shall give written notice of the hearing to the Public Utilities Commission and the clerk of each municipality in which the dam and flowage are located. The board may give additional notice as it deems necessary and may require the applicant to give notice of the hearing as provided in the Maine Administrative Procedure Act, Title 5, chapter 375.

Prior to the hearing, the board or its representative shall investigate the dam, and shall make recommendations as to the type of requirements, if any, which would be necessary to protect the public safety and welfare.

At the hearing, the board shall consider any petitions for ownership of the dam under section 4, the advisability of state acquisition of the dam under Section 5 and the feasibility of requiring the dam owner to continue ownership and maintenance of the dam. The board's decision

shall be made with reference to the recommendations produced by the board's investigation of the dam.

§4. Petition for ownership of dams

[L.D. 1531, Sec. 7]

1. Petition for ownership. Any person may petition the board to be awarded ownership of any dam, the owner of which is unknown, or has filed notice of intent to abandon a dam under this chapter.

2. Notice. Upon receipt of a petition containing the information required by the board, together with a fee in the amount of the cost of publication of notice, the board shall give notice of the petition, in writing, to the municipality in which the dam is located and also by publication at least 5 times in a newspaper of general circulation within the county or counties in which the dam is located and at least once in the state paper. In addition to setting forth the nature of the petition, the notice shall state that the owner of the dam is unknown, or has abandoned the dam. The notice shall also state that anyone claiming ownership of the dam shall file notice of such ownership with the board within 60 days of the date of the last publication, in such form as the board may by regulation require, and shall also invite any interested person to petition for award of the ownership of the dam within 60 days of the date of last publication.

3. Claims for ownership. Upon receipt of a claim of ownership by any person within 60 days

of the date of last publication, the board shall notify the petitioners and shall suspend all further proceedings until such time as a court of competent jurisdiction, in an action for declaratory judgment brought against such claimant by any person, determines that such claimant is not the owner of the dam, or the claimant withdraws his claim.

4. Public hearing. No sooner than 60 days after the date of last publication, the board shall schedule and conduct a public hearing for the purpose of receiving evidence and information as may aid it in making a determination.

5. Award of dam. After a hearing is held, the board may determine, by majority vote, to award the dam to a petitioner. In the case that there is more than one petitioner, the board shall base its determination upon a consideration of the technical, financial and administrative ability of each petitioner, the purpose and intent of each petitioner with regard to maintenance, repair or removal of the dam, the effect of each petitioner's proposal upon private and public property, including the public resources of wildlife, fisheries, waters and water uses, the effect otherwise upon the public's health, safety and general welfare, and the willingness of each petitioner to accept ownership of the dam upon reasonable times and with reasonable restrictions for public health, safety and welfare.

6. Acceptance of dam. No sooner than 45 days after notice to all petitioners of its proposed decision, the board shall cause a copy of its decree or decision, signed by the petitioner to whom the dam is awarded and acknowledging acceptance of the dam subject to such terms as are reasonable, to be filed in the registry of deeds for the county in which the dam is located. Upon the filing of such decree or determination, the interests of all other persons in the dam shall be deemed to have been abandoned and the petitioners to whom the dam is awarded shall be deemed the owner thereof, in fee simple absolute, for all purposes.

§5. State acquisition of dams

1. Purpose. For the purposes of this chapter, including power generation conservation and control of waters in streams, ponds and impoundments the board and the Bureau of Public Lands are authorized to exercise the powers provided in this section.

2. Powers. The board may recommend that the Bureau of Public Lands accept title to or acquire dams in the name of the State where a dam owner has given notice of intent to abandon a dam or ownership of a dam is unknown. The Bureau may further repair, maintain and operate these dams for purposes of public health, safety and welfare. The Bureau may convey these dams to any person who agrees to accept reasonable restrictions on his ownership

and use of the dam for purposes of public health, safety and welfare.

§6. Breaching of a dam

[L.D. 1531, Sec. 7]

If the board determines that a dam, if abandoned, would be a threat to the public safety, it may require this dam to be breached.

§7. Flowage rights

If a dam is deemed abandoned, any flowage rights appurtenant to the dam and obtained prior to January 1, 1981 shall not be deemed extinguished without express provision therefor.