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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

December 14, 1977

Honorable Charles P. Pray
66 Winter Street
Millinocket, ME 04462

Dear Senator Pray:

In your letter of October 24, 1977, to and subsequent telephone conversation with this office, you made the following inquiries:

- a. What rights, generally, does the Great Northern Paper Company possess in the West Branch of the Penobscot River, and
- b. What rights, specifically, does Great Northern Paper Company possess to construct a hydroelectric dam across said river?

In brief, Great Northern Paper Company, like any other riparian owner on this type of river, may construct a hydroelectric dam provided that permits from all appropriate state and federal regulatory agencies are obtained. While Legislative approval was formerly required for any obstruction of the public right of passage on floatable streams for fish, boats and logs, the Legislature has recently delegated its authority to permit such obstructions to administrative agencies.

A general description of a riparian owner's rights was given in Central Maine Power Company v. Public Utilities Commission, 156 Me.295, 327 (1960):

Riparian ownership extends to the thread of the stream and includes a right to the natural flow of the river with the reasonable and private use of it subject only to the public right of passage for fish and for boats and logs when the stream is naturally of sufficient size to float boats or logs. The riparian proprietor may use the power for manufacturing and industrial purposes if the water is not thereby unreasonably detained or essentially diminished The proprietor may not unlawfully or unreasonably divert the water.

At common law, a riparian owner may erect a dam where the waters raised flow only onto lands owned by him. Jones v. Skinner, 61 Me.25, 26 (1873). Where the flowed lands belong to others, the riparian owner may construct his dam pursuant to the Mill Act, 38 M.R.S.A. §611 et seq. (1965).

As the court noted in Central Maine Power Co. v. Public Utilities Commission, supra, a riparian owner's rights to the reasonable use of a floatable stream are subject to the public right of passage for fish, boats, and logs. Formerly, Legislative approval was required if a riparian owner sought to obstruct one of these rights. See, e.g., Mullen v. Penobscot Log Driving Co., 90 Me.555 (1897); Treat v. Lord, 42 Me.552 (1856). However, the Legislature has enacted statutes which delegate its power to authorize such obstructions to administrative agencies. For instance, the Commissioner of Inland Fisheries and Wildlife, pursuant to 12 M.R.S.A. §2201 (1974), may require fishways to be provided by owners of dams as he deems expedient. He may also, pursuant to the Stream Alteration Law, 12 M.R.S.A. §2206 et seq. §2207 (Supp.1976), permit the erection of a dam if the ". . . proposed activity will not unreasonably interfere with existing recreational and navigational uses . . . "

Even if a riparian owner's dam across a floatable stream were not to obstruct any public right of passage, by the provision of a fishway or a sluiceway or passageway by or through the dam, he would still be required to file notice with and obtain permits from several state and federal regulatory agencies. The following list of notices and permits is intended to be illustrative only and should not be relied upon as complete.

A. In townships and plantations where the Land Use Regulation Commission has jurisdiction, a landowner is required to obtain a development permit from LURC. Where the Interim Land Use Districts are in effect for the region concerned, a use such as a hydroelectric dam is not a permitted use within the P-3 and P-9 Subdistricts. Where Permanent Land Use Districts are effective, water impoundment is a permitted use within the analogous Shoreland Protection and Wetland Protection Subdistricts. In any event, a landowner may petition LURC, pursuant to 12 M.R.S.A. §685-A(8) (Supp.1976), for a change in the boundary of a land use district, for instance, from a Protection Subdistrict to an Interim Development District or a Permanent Commercial and Industrial Development Subdistrict. If such a petition were granted, the landowner would then be in a position to request the appropriate development permits. Similar requirements exist as to any proposed accessory structures to the dam, such as out-buildings and transmission facilities.

B. Where the total project of a proposed dam, including its accessory structures exceeds three acres, a Site Location Permit is required from the Board of Environmental Protection, pursuant to 38 M.R.S.A. §481 et seq. (Supp.1976).

C. (1) Notice of the building of a dam must be given to the Commissioner of Inland Fisheries and Wildlife pursuant to 12 M.R.S.A. §2203 (1974).

(2) As discussed above, a permit must be obtained from the Commissioner of Inland Fisheries and Wildlife under the Stream Alteration Law, 12 M.R.S.A. §2206 et seq. (Supp.1976).

D. If any of the transmission facilities from the proposed dam are to run alongside of any public way, a permit must be obtained from either the State Highway Commission or the county commissioners, as appropriate. 35 M.R.S.A. §2482 et seq. (Supp.1973).

E. (1) Plans for the proposed dam must be filed with the Public Utilities Commission pursuant to 35 M.R.S.A. §11 (1965).

(2) Unless the electricity to be generated by the dam is to be solely for use by the landowner and not for sale to others, a certificate of public convenience and necessity is required for the facilities from the Public Utilities Commission. 35 M.R.S.A. §13-A (Supp.1973).

F. Pursuant to 33 U.S.C.A. §1341(a)(i) (Supp.1977), the Department of Environmental Protection must certify to the appropriate federal agencies that the proposed project complies with the point source effluent limitations of the Federal Water Pollution Control Act Amendments of 1972.

G. Subject to (F), a Dredge and Fill permit must be obtained from the Secretary of the Army, pursuant to 33 U.S.C.A. §1344(a) (Supp.1977). This approval is subject to a disposal site veto by the Administrator of the Environmental Protection Agency, pursuant to 33 U.S.C.A. §1344(c) (Supp.1977).

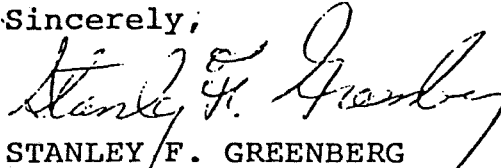
H. The landowner must also obtain a license for the construction of the proposed dam from the Federal Energy Regulatory Commission, successor to the Federal Power Commission in this area. 16 U.S.C.A. §817 (1974); P.L. 95-91 §402(a)(1)(A) (91 Stat. 565) (1977).

As a final note, the Charter of the West Branch Driving and Reservoir Dam Company, as enacted by the Legislature in 1903, does not exempt Great Northern Paper Co. from any of the foregoing permit requirements. See Private and Special Laws 1903, c.174. Since the time this company was organized for log-driving purposes, it has transferred all its rights and obligations to Great Northern Paper Co. Under Section 13 of its Charter, WBD & RDC was authorized

. . . to erect and maintain a dam across the West branch of Penobscot river in the vicinity of Sourdnehunc falls, and another dam across said West branch in the vicinity of Ambijejus falls for the purpose of facilitating the driving of logs and lumber . . . (emphasis supplied)

Because these dams were limited to the purpose of facilitating log drives, their Legislative authorization does not exempt Great Northern Paper Co. today from obtaining all required state permits for its proposed hydroelectric dam.

Sincerely,



STANLEY F. GREENBERG
Assistant Attorney General
Natural Resources Section

SFG/kp