

MAINE STATE LEGISLATURE

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Dams & Regulation
38 M.R.S.A. § 811 et seq.
12 M.R.S.A. § 301 et seq.
37-A M.R.S.A. § 180 et seq.
12 M.R.S.A. § 251 et seq.

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To: Connie Zwicker
Executive Department

From: Allan A. Toubman, Asst. Atty. Gen.

Subject: Maintenance of Dam Structures

Date: October 10, 1978

You have requested whether the State has the authority to require a dam owner to repair the physical structure of his dam.

Statutory authority to regulate dams is found in 38 M.R.S.A. § 811 et seq.; 12 M.R.S.A. 301 et seq. (Neglected Dams); 37-A M.R.S.A. § 180 et seq.; and 12 M.R.S.A. § 251 et seq. (Abandoned Dams).

Upon proper request, the "inspector of dams" will personally inspect any dam or reservoir, hear testimony of witnesses, and report on the condition to the Commissioner of Agriculture, 38 M.R.S.A. § 811. If deemed unsafe, the Commissioner shall notify the dam owner, riparian owners, and other interested parties, § 811. If the dam is "unsafe or dangerous to the lives or property of persons residing, carrying on business, or employed near or below same," the owners must immediately make repairs specified by the inspector. If the owner fails to do so, he may be enjoined by the Superior Court from using the dam or containing water with it. § 812.

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The purpose of the "Neglected Dam" law is to establish a normal water level for a body of water which is impounded by a dam. This law applies only to dams for which the owner makes no "beneficial use." An example of a beneficial use is generation of power. 12 M.R.S.A. § 304(1). Of 464 registered dams in the State, there are only 7 orders establishing normal water levels. Orders are generally only issued upon the request of 10% of the littoral proprietors. 12 M.R.S.A. § 304(1). In establishing this level, the Soil and Water Conservation Commission considers, among the eight standards, "the water level necessary to prevent creation of a hazardous condition to littoral proprietors and the public." Evidence regarding the structural integrity of the dam would be relevant in determining whether a particular water level would threaten the dam's integrity.

When the Commission issues an Order setting the water level at a dam, pursuant to 12 M.R.S.A. § 304(4), the dam owner is responsible for maintaining the water level at that height. If the dam is in danger of collapse, it may be possible to obtain an injunction against the dam owner to force him to repair it. 12 M.R.S.A. § 305. The basis for obtaining the injunction would be the necessity of complying with the Commission order. Whether a court would issue an injunction would depend on the factual circumstances of the case, including the cost of rebuilding the dam.

The Bureau of Civil Defense is authorized to act to "... provide emergency plans and actions for the safe operation of dams and resevoirs" 37-A M.R.S.A. § 180. The Bureau, in an emergency, may issue an order to a dam owner to protect the public against the threat of flooding. It is also authorized to directly act to reduce the immediate threat of flooding. Such action could include reducing the water level. When there is imminent danger due to the threat of flooding, it may be possible for the Bureau to either order the dam owner to make repairs, § 184(2), or directly make repairs, § 184(5). If there is no such immediate danger, the Bureau is not authorized to require repairs.

One of the legislative findings in the "Abandoned Dam" law is "dams are or may become in such a state of disrepair as to present a danger to human life, private and public property, including the public resources of wildlife, fisheries, waters, and water uses, and otherwise to the public health, safety and general welfare." However, that law does not provide jurisdiction over dams in disrepair. It merely provides that a person may claim ownership in a dam that has been abandoned.

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While there are a number of alternative routes to require repair of a dam, none of them are unequivocal in requiring repairs. It depends on the circumstances as to which is most effective. If there is any possibility of immediate flooding, the Bureau of Civil Defense should be contacted. 37-A M.R.S.A. § 180 et seq. If there is a possibility that a dam is unsafe, and repairs may be necessary, the dam inspector should be contacted. 38 M.R.S.A. § 811 et seq. If there is only inconvenience caused by a dam in disrepair, and for which no beneficial use is made, the Soil and Water Conservation Commission would be the agency to contact. 12 M.R.S.A. § 301 et seq.

If none of the statutory provisions apply, the Attorney General may be requested to investigate to determine whether a public nuisance exists. Withee v. Lane and Libby Fisheries Company, 120 Me. 121, 123-24 (1921). It exists if the common law test of public nuisance is met. There must be an unreasonable interference with the public's rights.

There are a multiplicity of agencies involved -- the Department of Agriculture, Soil and Water Conservation Commission, Bureau of Civil Defense, and Department of Transportation (DOT must cooperate with the Commissioner of Agriculture). -- A review of the functions of each of these agencies may be appropriate. It would appear that centralization of dam functions may be more efficient.



Allan A. Toubman

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