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

June 8, 1979

Honorable Harold L. Silverman
Maine Senate
State House
Augusta, Maine 04333

Dear Senator Silverman:

This is in response to your inquiry on behalf of a camp owner's association which wishes to reconstruct a dam at the mouth of Pleasant Pond in Alexander, Maine. You have asked us to determine who owns rights to the waters in the pond. For the reasons explained below, we take this question to be one of whether there is any legislative action which is required to permit the project to proceed. Our answer is that no legislative action is needed, but that any person intending to construct a dam may have to comply with a number of regulatory and other statutes regarding dams.

We understand Pleasant Pond to be greater than ten acres in size in its natural state, and therefore a "great pond" as that term is understood in Maine, Flood v. Earle, 145 Me. 24 (1950). In general, the common law rule with regard to such bodies of water in Maine is that the bottom and waters thereon are owned by the State and may be disposed of "as it thinks proper." City of Auburn v. Union Water Power Co., 90 Me. 576, 587 (1897). Thus, if the proposed project were to involve the removal of water from Pleasant Pond, legislative approval would be required. Similarly, if the project were to impinge upon the bottom of the great pond, a lease would have to be obtained from the Bureau of Public Lands, which has been delegated the authority to issue such interests in land by the Legislature. 12 M.R.S.A. § 554; 30 M.R.S.A. § 4162.

We suspect, however, that the proposed construction project will not take place in the pond itself, but rather on whatever stream serves as its outlet. If that is the

case, no problem arises as to the use of the stream bottom, assuming it is under the control of the camp owner's association. There may, however, be legal impediments attendant upon the obstruction of the water at the point in question. At one time it was the case in Maine that affirmative legislative approval was required to dam a body of water if such a dam would constitute an obstruction to the public right of passage. See, e.g., Mullen v. Penobscot Log Driving Co., 90 Me. 555 (1897); Treat v. Lord, 42 Me. 552 (1856). That, however, no longer seems to be the case. As indicated in the opinion of December 7, 1977, of Stanley Greenberg of this office to Herbert Hartman, Director of the Bureau of Parks and Recreation (attached hereto), "the Legislature has enacted statutes which appear to delegate its power to authorize such obstructions to administrative agencies." Moreover, this delegation is not restricted to dams on navigable streams; obstruction on any stream may now be subject to regulations. A list of the kind of notices and permits which might be required of a dam project is included in the attached opinion. However, the identification of which notices or permits are required for the Pleasant Pond project is beyond the scope of this opinion; we would suggest that the camp owner's association confer with private counsel with regard to this question.

In addition, it should be noted that there is a general common law rule that a riparian owner may only construct a dam in a manner not inconsistent with the private rights of other riparian owners. Jones v. Skinner, 61 Me. 25, 26 (1873). In Maine, this rule has been varied somewhat by the Mill Act, 38 M.R.S.A. § 611, et seq., which permits such construction on a stream upon the payment of damages. Again, however, it is beyond the scope of this opinion to apply these rules to the Pleasant Pond situation. We would suggest that private counsel be retained to address these questions, as well as those relating to the giving of notice and the obtaining of permits.

In short, therefore, it appears that there is no action which the Legislature needs to take in order to permit the reconstruction of the Pleasant Pond dam, assuming that such construction will not occur in the pond itself. The camp owner's association may avoid violating any public rights in the water by complying with such regulatory statutes as may apply, and may avoid violating any private rights by complying with the Mill Acts.

I hope this information is helpful. Please feel free to contact me if I can be of further service.

Sincerely,


RICHARD S. COHEN

Attorney General

RSC/ec
Enclosure

STATE OF MAINE

Inter-Departmental Memorandum Date December 7, 1977

Herbert Hartman, Director

Dept. Bureau of Parks & Recreation

From Stanley Greenberg, Assistant

Dept. Attorney General

Subject Approval Requirements for Proposed Great Northern Paper Company
Hydroelectric Dam

You have inquired whether the Great Northern Paper Company must obtain Legislative Approval prior to construction of its proposed hydroelectric dam between Ripogenus Gorge and Sourdnhunk Falls on the West Branch of the Penobscot River.

While such 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. Presently, 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.

* * *

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 — 561 (1856) However, the Legislature has enacted statutes which appear to delegate its power to authorize such obstructions to administrative agencies. For instance, the Commissioner of Inland

Fish 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 Fish 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 Fish 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 Commissioner 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 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.