

MAINE STATE LEGISLATURE

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FIRST REGULAR SESSION

ONE HUNDRED AND NINTH LEGISLATURE

Legislative Document

No. 1531

S. P. 467

In Senate, March 26, 1979.

Referred to the Committee on Public Utilities. Sent down for concurrence and ordered printed.

Presented by Senator Trafton of Androscoggin.

Cosponsor: Senator Huber of Cumberland.

MAY M. ROSS, Secretary of the Senate

STATE OF MAINE

IN THE YEAR OF OUR LORD NINETEEN HUNDRED
SEVENTY-NINE

AN ACT to Assure the Appropriate Development of the Hydro Power Potential of
Maine Rivers.

Be it enacted by the People of the State of Maine, as follows:

Sec. 1. 12 MRSA c. 5, as enacted by PL 1973, c. 787, § 1, is repealed.

Sec. 2. 12 MRSA c. 6, as enacted by PL 1975, c. 542, and as amended, is repealed.

Sec. 3. 38 MRSA §§ 611-A and 611-B are enacted to read:

§ 611-A. Findings; purpose

The Legislature finds and declares that the State faces an urgent need for indigenous, renewable sources of energy, and that hydroelectric generation can satisfy a part of this need. The Legislature further declares that hydroelectric development should not unreasonably affect the natural environment, and that it is desirable for littoral proprietors and the public to have water levels in bodies of water impounded by dams to be maintained to protect the public interest.

It is the purpose of this chapter to encourage the development of hydroelectric power generation, and to resolve disputes between dam owners and owners of

riparian rights. It is further the purpose of this chapter to regulate hydroelectric development to maintain fish and wildlife habit, to prevent unnecessary erosion of shorelines, to provide reasonable access to impoundments and to generally protect the public safety and welfare.

§ 611-B. Definitions

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 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. **Department.** "Department" means the Department of Environmental Protection.
4. **Great pond.** "Great pond" is a body of water with no perceptible flow, which in its natural state is greater than 10 acres in area.
5. **Person.** "Person" means any individual, firm, association, partnership, corporation, trust, municipality, quasi-municipal corporation, state agency, federal agency or other legal entity.

Sec. 4. 38 MRSA § 654 is repealed and the following enacted in its place:

§ 654. Restrictions

The uses of mill privileges shall be reasonably related to the purposes of this chapter and may be restricted and regulated by the verdict of a jury, or report of the commissioners, as follows:

1. **Height.** The height to which water may be raised;
2. **Duration.** The length of time during which water may be impounded by a dam;
3. **Releases.** The quality of water released each season from impoundments; and
4. **Divisions.** The quantity of water diverted by canals.

Sec. 5. 38 MRSA §§ 660 to 662 are enacted to read:

§ 660. 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 for the purposes of this chapter for any continuous period, beginning after January 1, 1980, of 20 years or more. This section does not affect rights acquired by deed or prescription.

§ 661. State acquisition of dams

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

2. **Powers.** The Bureau of Public Lands may acquire dams in the name of the State, by purchase, condemnation, lease or otherwise. The bureau may further repair, maintain and operate these dams.

3. **Conditions.** This authority may be exercised only under the following conditions:

- A. The acquisition of the dam shall be in the public interest;
- B. No reasonable options, other than state acquisition, are available; and
- C. The Bureau of Public Lands has established contracts whereby individuals, firms, corporations or municipal corporations have obligated themselves for the payment of the costs of acquisition, maintenance and operation of the dams.

§ 662. Municipal authority to construct and maintain dams

1. **Municipal dams.** Municipalities may acquire, construct, maintain or repair dams across any lake or stream adjoining or within the limits of the municipality.

2. **Plan for operation or acquisition.** Whenever it is deemed necessary to acquire, construct, maintain or repair any dam, a plan, with specifications and cost estimates, shall be prepared and presented to the governing body of the municipality for adoption. Cost estimates may include the estimated cost of maintenance for a period of years. When adopted by the governing body, the plan shall be submitted to the department or proper officer of the United States for approval. No work shall be done pursuant to the plan until it has been approved.

3. **Condemnation and purchase of lands.** For the purpose of this section, a municipality may purchase or condemn lands within its limits.

4. **Municipal assessments.** The municipality may assess property for benefits derived from the improvement mentioned in subsection 2 or from the acquisition and maintenance of a dam. If the excess of benefits over damages accruing to property within the assessment district is not sufficient to pay the costs of the improvement, the municipality may pay the balance, either out of its general fund or out of any special fund created for that purpose. The municipality may issue its

negotiable bonds to pay for improvements. The Department of Environmental Protection and the Public Utilities Commission, upon request of a municipality, shall assist in engineering, surveying and determining charges necessary in establishing special assessment districts under this section. The cost of the services provided in this section shall be funded by the municipality requesting the services. The municipality may recover its costs by assessing the various parcels of land in the special assessment district in direct proportion to the benefits derived by each parcel of land.

5. Joint municipal dam ventures. Whenever 2 or more municipalities propose to cooperate in acquiring, constructing, maintaining or repairing a dam, their governing bodies shall determine a method to share costs in accordance with the provisions of Title 30, chapter 203. The method of proceeding and the plan of apportionment shall be embodied in a resolution adopted by the governing bodies of the cooperating municipalities acting jointly and later the resolution shall be adopted by each of the governing bodies acting separately.

Sec. 6. 38 MRSA § 934 is enacted to read:

§ 934. Investigation of water levels in impoundments

The board, upon its own motion, at the request of the Attorney General, or upon complaint of not less than 10 owners of property on any water storage impoundment on a great pond, may make a preliminary investigation of conditions affecting the use and enjoyment of impounded water, whenever the board deems that the investigation would be in the public interest. If a preliminary investigation indicates that the value of shore property above the dam, riparian rights below the dam or the benefits of impounded water to the public are seriously and adversely affected by the management and control of the water, the board may further investigate to ascertain the respective rights of all interested parties, including the public. A public hearing shall be conducted in accordance with the provisions of section 345 if requested by 10 or more interested persons, or if deemed necessary or desirable by the board.

If, as a result of further investigation, the board determines that the management and control is lawful, but that changes in the manner of the exercise of the right of management and control would benefit others without injury to the owner of the outlet, it may recommend to the operator of the dam any changes that would benefit the public and private interests.

After public hearing, the board may issue an order restricting the alteration of water levels during certain seasons under the following conditions:

1. Protect littoral property. Changes in operation of a dam are necessary to protect littoral property; and
2. Compensation for low water use. Littoral property owners are willing to compensate the dam owner for the just value of the lost water use.

Any person aggrieved by this order may appeal as provided in section 346.

Sec. 7. 38 MRSA c. 5, sub-c. III is enacted to read:

**SUBCHAPTER III
ABANDONED DAMS**

§ 941. Notice of intent to abandon dams

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.

§ 942. Procedure

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.

§ 943. Breaching of a dam

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.

§ 944. Maintenance of water levels

1. **Protest of removal or abandonment.** The landowners along the shore of an impoundment may petition, protesting the removal or abandonment of a dam. If the majority of the landowners sign this petition, the board may require sufficient operation and maintenance of the dam to preserve traditional water levels.

2. **Expenses of operation and maintenance.** If the requirements of subsection 1 are an undue burden on the dam owner, the board may order the protesting landowners to pay a part or all of the expenses of operation and maintenance.

In determining the maintenance and operating costs, if any, to be shared by the dam owner and the littoral proprietors, the board shall consider the following:

- A. The cost of maintaining the dam;
- B. The value of the dam and the appurtenant property and easements;

C. The cost of necessary improvements, if any, to the dam in order for the dam to operate safely;

D. The financial ability of the dam owner and littoral proprietors to maintain the dam;

E. The benefits derived by the dam owner and littoral proprietors to include, recreation, water for domestic use, flood control, increased property values attributed solely to the location of the property near impounded water and any income derived as a result of the dam or ventures associated with the dam; and

F. Potential economic opportunities afforded by the existence of the dam.

§ 945. Limitations

No provisions of this chapter affect the title to any property, except as provided in section 946.

No provisions of this chapter affect the responsibility or liability of any dam owner established by deed, contract, other statute or common law.

§ 946. Petition for ownership of dams

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 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 may 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 any hearing is held, or if none is held, no sooner than 60 days after the date of last publication, the commission may determine, by majority vote, to award the dam to a petitioner. In the case that there is more than one petitioner, the commission 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.

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.

STATEMENT OF FACT

This bill clarifies Mill Act authority to regulate water levels, and provides for more orderly abandonment and subsequent redevelopment of dam sites. It is the intent of the bill to encourage hydroelectric generation, while providing for consideration of littoral property owners and others.

Section 3 provides statement of purpose and clarifies relevant definitions. Section 4 amends an existing section of the Mill Act. The changes provide that water use must be related to the purposes of this chapter.

Section 5 provides forfeiture of Mill Act rights for unused dams. This will make mill privileges available for development, and will ensure Mill Act compensatory provisions when redevelopment takes place. Section 5 also permits the State and municipalities to acquire and redevelop dam sites. They can do this for power generation, or enhance water flow and stabilize water levels.

Section 6 authorizes the Department of Environmental Protection to investigate water level disputes. If necessary, the department can recommend solutions to the Legislature.

This bill also repeals the existing Abandoned and Neglected Dams Act, and substitutes a new simplified procedure under the Department of Environmental Protection. The department will not require dam owners to pay for maintaining

fixed water levels. If a dam owner indicates he is no longer interested in maintaining a dam, and the majority of the littoral owners want the dam maintained, the board may require the littoral owners to pay for the operation and maintenance of the dam.