

MAINE STATE LEGISLATURE

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1 FIRST REGULAR SESSION
2

3 ONE HUNDRED AND TWELFTH LEGISLATURE
4

5 Legislative Document

No. 836

6
7 H.P. 565

House of Representatives, February 28, 1985

8 On Motion of Representative Michaud of Medway, referred to the
9 Committee on Energy and Natural Resources. Sent up for concurrence and
ordered printed.

EDWIN H. PERT, Clerk

10 Presented by Representative Masterman of Milo.

Cosponsored by Speaker Martin of Eagle Lake, Representative Law of
Dover-Foxcroft and Representative Ruhlin of Brewer.

11
12 STATE OF MAINE
13

14 IN THE YEAR OF OUR LORD
15 NINETEEN HUNDRED AND EIGHTY-FIVE
16

17 AN ACT to Permit Mediation of Water
18 Level Disputes.
19

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

22 38 MRSA c. 5, sub-c. I, art. 3-A, sub-art. 5 is
23 enacted to read:

24 SUBARTICLE 5. MEDIATION

25 §843. Findings and purpose

26 The Legislature finds and declares that there are
27 dams impounding bodies of water in the State for
28 which water level regimes cannot be imposed by the
29 State because the dams are licensed or operated under
30 federal law which preempts state regulation. These
31 dams impound waters that are subject to public use
32 and public and private development, and these dams
33 may be operated in ways that raise concerns about the
34 public health, safety and welfare, and the public re-

1 sources of wildlife, fisheries, water and water uses.
2 The Legislature further finds and declares that con-
3 flicts over water levels of bodies of water im-
4 pounded by these dams may cause threats to public
5 health, safety and welfare and to significant contri-
6 bution to the general welfare of the citizens of the
7 State made by operation of these dams.

8 It is the purpose of this subarticle to create a
9 forum for expeditious, inexpensive, flexible resolu-
10 tion of conflicts concerning water levels of bodies
11 of water impounded by these dams. By requiring the
12 parties to certain water level conflicts to attempt a
13 mediated resolution prior to any court action con-
14 cerning the conflict, the Legislature is protecting
15 the public health, safety and general welfare by en-
16 couraging resolution by agreement, without imposing a
17 resolution on the parties and without entering into a
18 preempted area of federal regulation.

19 §844. Mediation of water levels

20 1. Power. If the board or commissioner receives
21 a petition meeting the requirements of subsection 2
22 that requests the establishment of a water level
23 regime for a body of water impounded by a dam, and
24 the petition does not meet the requirements for ac-
25 tion under any other section of this subchapter, the
26 board shall refer the petition to mediation under
27 section 846. Once the petition has been brought, no
28 court action on the issues raised by the petition may
29 be initiated against any of the persons described in
30 subsection 2 by any of the persons described in sub-
31 section 2 until termination of the mediation, except
32 that an action for temporary relief shall not be af-
33 fected by the bringing of the petition. If a court
34 action, other than an action for temporary relief,
35 has been commenced against any of the persons de-
36 scribed in subsection 2 by any of the persons de-
37 scribed in subsection 2 on any of the issues raised
38 by the petition prior to the bringing of the peti-
39 tion, that action shall be stayed until termination
40 of the mediation.

41 If any other persons are designated parties under
42 section 846, subsection 2, the provisions of this
43 subsection concerning the initiation and staying of

1 court actions shall apply to those persons at the
2 time of the designation.

3 2. Petition. A petition requesting the estab-
4 lishment of a water level regime for a body of water
5 impounded by a dam may be acted upon by the board un-
6 der this subarticle if filed with the commissioner or
7 board by any of the following:

8 A. The lesser of at least 25% or 50 of the
9 littoral or riparian proprietors;

10 B. Fifty or more persons owning property within
11 the floodplain downstream of a dam; or

12 C. The owner, lessee or person in control of a
13 dam.

14 3. Notice. The board shall provide public no-
15 tice of its intent to refer the petition to mediation
16 by providing written notice to the owner, lessee or
17 person in control, if known, of any dam on the body
18 of water and to any petitioner under this subarticle.
19 The board shall give public notice of the mediation
20 under Title 5, section 9052. The board shall also
21 file notice of its intent to refer the petition to
22 mediation in the municipal office of any municipality
23 and in the clerk's office of any county in which the
24 body of water is located. The notice shall contain
25 the date, time and place, to be determined by the
26 board, of the organizational meeting of the media-
27 tion.

28 The board shall also inform the following of its in-
29 tent to refer the petition to mediation: The Depart-
30 ment of Conservation; Department of Inland Fisheries
31 and Wildlife; Department of Marine Resources; Depart-
32 ment of Transportation; Maine Historic Preservation
33 Commission; Office of Energy Resources; Public Utili-
34 ties Commission; Maine Land Use Regulation Commission
35 where the dam, body of water impounded by the dam or
36 floodplain downstream of the dam is within the juris-
37 isdiction of that commission; and the Federal Energy
38 Regulatory Commission where the dam is licensed by
39 that commission.

40 §845. Mediators

1 1. Selection. Upon referring a petition to me-
2 diation under section 844, the board shall select a
3 mediator to conduct the mediation from a rotating
4 roster of qualified persons maintained by the commis-
5 sioner. The board shall select the person whose name
6 appears at the top of the roster. A representative
7 of the group of persons described in section 844,
8 subsection 2, paragraph A, a representative of the
9 group of persons described in section 844, subsection
10 2, paragraph B, and the owner, lessee or person in
11 control of the dam may each object to 2 choices of a
12 mediator by the board. If a mediator is objected to,
13 the board shall select the person whose name appears
14 next on the roster. When a mediator is agreed to, or
15 when all possible objections have been made, the
16 board shall contact the person selected to determine
17 if the person is willing and able to conduct the me-
18 diation of the petition. If the person is unwilling
19 or unable to serve as a mediator, the board shall
20 contact the next person whose name appears on the
21 roster, unless an objection is possible and is made
22 to that person. The board may refuse to select a
23 person from the roster if the board finds that the
24 person has a financial, business or personal rela-
25 tionship with the persons described in section 844,
26 subsection 2, paragraphs A and B, or the owner, les-
27 see or person in control of the dam that causes a
28 conflict of interest.

29 2. Qualifications. For a person to be placed on
30 the roster of persons qualified to serve as media-
31 tors, the person must:

32 A. Have a law degree; a master's degree in natu-
33 ral resource management, a natural science, engi-
34 neering or a comparable discipline; or a bache-
35 lor's degree and at least 5 years' experience in
36 natural resource management, a natural science,
37 engineering or a comparable discipline; and

38 B. Have specialized training in the techniques
39 of mediation and negotiation, with this require-
40 ment to be met as specified by the board.

41 3. Compensation. The mediator shall receive, as
42 full compensation for his services, \$100 for every
43 day he meets with any of the parties to the mediation

1 or with any experts advising the parties, \$50 for ev-
2 ery day on which he conducts any other research or
3 prepares any paperwork in connection with the media-
4 tion, and his actual expenses. The mediator's com-
5 pensation and expenses shall be audited by the de-
6 partment. The parties to the mediation shall pay the
7 compensation and expenses of the mediator. Unless a
8 different arrangement is agreed to by the parties,
9 each person or group of persons designated a party
10 shall be responsible for an equal share of the
11 mediator's compensation and expenses.

12 §846. Mediation process

13 1. Goal. The goal of the mediation on the peti-
14 tion is to achieve an agreement among the parties
15 that establishes a water level regime for the body of
16 water impounded by the dam.

17 2. Organizational meeting. The organizational
18 mediation meeting on the petition shall occur in a
19 building provided or arranged for by the board and in
20 the place, on the date and at the time specified in
21 the notice under section 844, subsection 3. At the
22 organizational meeting, the group of persons de-
23 scribed in section 844, subsection 2, paragraph A;
24 the group of persons described in section 844, sub-
25 section 2, paragraph B; and the owner, lessee or per-
26 son in control of the dam shall choose no more than 3
27 persons, each to represent their interests as parties
28 to the mediation.

29 The organizational meeting shall be open to the pub-
30 lic and any other persons interested in being parties
31 to the mediation shall request at the meeting to be
32 designated as parties. The mediator shall establish
33 with the representatives of the persons described in
34 section 844, subsection 2, paragraphs A and B, and
35 the owner, lessee or person in control of the dam a
36 method for determining what other persons, if any,
37 may be included as parties to the mediation. If any
38 other persons are designated parties to the media-
39 tion, the mediator shall inform them within a reason-
40 able time prior to the next mediation meeting and re-
41 quest that they choose no more than 3 persons to
42 represent their interests as parties to the media-
43 tion. The date and time for the 2nd mediation meet-
44 ing shall be set at the organizational meeting.

1 3. Second meeting. At the 2nd mediation meet-
2 ing, the mediator shall assist the parties in defin-
3 ing the issues to be mediated, the process to be fol-
4 lowed in mediating and in choosing a schedule of me-
5 diation sessions. If no persons other than the per-
6 sons described in section 844, subsection 2, para-
7 graphs A and B, and the owner, lessee or person in
8 control of the dam request to be designated as par-
9 ties at the organizational meeting, the matters set
10 for the 2nd meeting may be taken up at the organiza-
11 tional meeting, with the public excluded if any party
12 so requests.

13 4. Technical assistance. The state agencies
14 listed in section 845, subsection 3, and the depart-
15 ment shall provide the mediator with necessary pro-
16 fessional and technical assistance at the mediator's
17 request. The board shall provide the mediator with
18 any necessary clerical and secretarial assistance he
19 requests.

20 5. Agreement. If the parties achieve an agree-
21 ment as described in subsection 1, the agreement
22 shall be reduced to writing and signed by the par-
23 ties. The agreement may include provisions for the
24 monitoring, enforcement and revision of any parts of
25 the agreement and for the release of any rights to
26 pursue any court actions. When signed by the par-
27 ties, the agreement shall be enforceable in court as
28 any other contract.

29 6. Termination. The mediator shall report to
30 the board on the progress of the mediation no later
31 than 30 days after the organizational meeting and ev-
32 ery 10 days after the first report. The mediation
33 shall be terminated when the mediator reports to the
34 board that a signed agreement or an impasse has been
35 reached in the mediation on the petition and the
36 board accepts the report or when the board requests
37 termination of the mediation after receiving a report
38 from the mediator on the progress of the mediation.
39 Termination of the mediation shall permit the initia-
40 tion or continuation of any court actions precluded
41 by section 845, subsection 1.

42 §847. Miscellaneous

1. Confidentiality. All mediation sessions under this subarticle are confidential. The admissibility in court of evidence of conduct or statements by any person present at a mediation session under this subarticle is governed by the Maine Rules of Evidence, Rule 408.

2. Attorneys. Parties to the mediation may have their attorneys present at all mediation sessions. Unless an attorney has been chosen as one of the persons to represent a party's interests in the mediation, the attorney may participate in the mediation discussions only as permitted by the mediator. Any party may at any time during a mediation session request a break in the mediation discussions to confer with the party's attorney.

STATEMENT OF FACT

The purpose of this bill is to provide on a statewide basis some method for addressing concerns and conflicts over water levels on bodies of water impounded by dams that cannot be regulated under existing provisions of state law. The State's need to provide this method of addressing water level conflicts lies in its interest in the public interest in water, water uses, other natural resources associated with water and benefits to the general welfare produced by the operation of dams.

Current law permits the State to establish water levels for bodies of water impounded by dams when the Board of Environmental Protection grants a permit for the construction or reconstruction of a hydropower project, orders alterations to a dam after a safety inspection, awards ownership of an abandoned dam or establishes a water level regime for a dam not regulated by federal law. If a petition for establishment of a water level regime cannot be acted upon under any of these provisions of State law, the provisions of this bill will at least permit the board to refer the matter to mediation with the goal of encouraging the parties to reach an agreement that resolves the dispute without resort to court.

1 The Maine Revised Statutes, Title 38, section
2 843, in this bill sets forth the Legislature's find-
3 ing and purpose in creating a mediation forum for
4 certain water level disputes. The section declares
5 the State's interest in the water impounded by dams
6 operated under federal law, the State's interest in
7 the productivity of these dams and the State's recog-
8 nition that the operation of dams regulated under
9 federal law cannot be regulated by the State. The
10 section states that the purpose of the bill is to es-
11 tablish a forum for the mediation of water level dis-
12 putes because of the State's interests in resolving
13 conflicts about these disputes outside of court and
14 in a way that does not preclude the parties' right to
15 court action or interfere with federal law.

16 Section 844 states the authority of the Board of
17 Environmental Protection to refer a water level peti-
18 tion to mediation if it cannot be addressed by the
19 board under the provisions of law. The section pre-
20 cludes court action on the subject matter of the pe-
21 tition, except action for temporary relief, until the
22 mediation is terminated. It also states who may pe-
23 tition for a water level setting and how a notice of
24 the mediation is to be provided.

25 Section 845 establishes how a mediator is to be
26 selected from a rotating roster of qualified persons.
27 The section describes the qualifications mediators
28 must possess and provides for their compensation to
29 be paid by the parties to the mediation.

30 Section 846 provides for an organizational meet-
31 ing of those people who may petition for mediation
32 and any other persons interested in being parties to
33 the negotiation. The section describes how parties
34 are to be determined and how the actual negotiators
35 for each party are to be chosen. The section pro-
36 vides that the 2nd meeting will begin the mediation
37 process and that technical assistance is to be made
38 available to the mediator by various state agencies.
39 It requires the mediator to report on the progress of
40 the mediation and describes what happens if the par-
41 ties reach an agreement or if an impasse in negotia-
42 tion is reached.

1 Section 847 provides for the confidentiality of
2 mediation sessions and for the use of attorneys by
3 the parties.

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