

MAINE STATE LEGISLATURE

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FIRST REGULAR SESSION

ONE HUNDRED AND THIRTEENTH LEGISLATURE

Legislative Document

NO. 484

H.P. 370 House of Representatives, February 20, 1987
Reference to the Committee on Energy and Natural
Resources suggested and ordered printed.

EDWIN H. PERT, Clerk

Presented by Representative NUTTING of Leeds.

Cosponsored by Representatives TRACY of Rome, RUHLIN of
Brewer and Senator KANY of Kennebec.

STATE OF MAINE

IN THE YEAR OF OUR LORD
NINETEEN HUNDRED AND EIGHTY-SEVEN

1. AN ACT Concerning Inspection, Registration
2 and Abandonment of Dams.
3

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

6 Sec. 1. 38 MRSA §817, sub-§3, as enacted by PL
7 1983, c. 417, §6, is amended to read:

8 3. Dam. "Dam" means any man-made artificial
9 barrier, including appurtenant works, the site on
10 which it is located and appurtenant rights of flowage
11 and access, which impounds or diverts a river, stream
12 or great pond and which is 2 feet or more in height
13 and has an impounding capacity at maximum water stor-
14 age elevation of ~~15-acre feet~~ 15 acre-feet or more.
15 Any such artificial barrier constructed solely for
16 the purpose of impounding water to allow timber to be

1 floated downstream in a logging operation shall not
2 be considered a dam for the purposes of this ~~Article~~
3 article, unless it has been repaired, modified or
4 maintained by or with the knowledge of the owner,
5 lessee or person in control since the discontinuance
6 of its use in connection with logging operations.
7 Any adjacent property, easements, roads, bridges or
8 works not necessary for the operation or maintenance
9 of a dam shall not be included under the provisions
10 of this ~~Article~~ article.

11 Sec. 2. 38 MRSA §821, as enacted by PL 1983, c.
12 417, §6, is amended to read:

13 §821. Inspection of dams

14 1. Appointment. The commissioner shall appoint
15 dam inspectors who are licensed as professional engi-
16 neers under Title 32, chapter 19, or who are profes-
17 sional hydrologists with suitable experience. The
18 commissioner may appoint inspectors to serve on a
19 full-time, part-time or independent contract basis.
20 The commissioner shall provide the inspectors with
21 necessary professional, technical, clerical and sec-
22 retarial assistance. Any inspectors appointed under
23 this subsection shall be experienced in dam design
24 and construction or the investigation and safety of
25 existing dams.

26 2. Compensation. If the inspector of dams is an
27 independent contractor, he shall receive, as full
28 compensation for his services, ~~\$100~~ \$250 a day while
29 actually employed under section 823 or section 824,
30 together with his actual expenses, to be audited, al-
31 lowed and paid by the department.

32 Sec. 3. 38 MRSA §823, sub-§1, as enacted by PL
33 1983, c. 417, §6, is amended to read:

34 1. Formal inspection. At the direction of the
35 board or the commissioner, ~~the an~~ inspector of dams,
36 or his agent, shall personally inspect a dam to de-
37 termine if the dam is endangering the public safety.
38 The board may, at its discretion, conduct a hearing
39 to determine if the dam is endangering the public
40 safety.

1 Sec. 4. 38 MRSA §823, sub-§3, ¶C, as enacted by
2 PL 1983, c. 417, §6, is amended to read:

3 C. The officials described in section 822, sub-
4 section 1, paragraphs B C and E D.

5 Sec. 5. 38 MRSA §823, sub-§§5 and 7, as enacted
6 by PL 1983, c. 417, §6, are amended to read:

7 5. Enforcement. The board, the petitioners un-
8 der section 822, subsection 1, or any riparian or
9 littoral proprietor may commence an action to enjoin
10 the violation of any provision of this subarticle.
11 The board may enforce any order issued under subsec-
12 tion 4, by any other appropriate remedy, including,
13 but not limited to, entering the dam premises to car-
14 ry out the terms of the order.

15 The owners, lessees or persons in control of the dam
16 shall be jointly and severally liable for any costs
17 incurred by the department in enforcing any order is-
18 sued under subsection 4. If the owners, lessees or
19 persons in control of the dam refuse to comply or do
20 not fully comply with the board's order, the board
21 shall initiate a civil action against the owners,
22 lessees or other persons in control of the dam for
23 damages in the amount of the costs incurred by the
24 department in enforcing the board's order.

25 The violation of any order issued under subsection 4
26 shall be a civil violation punishable by a forfeiture
27 of not less than \$20 \$250 and not more than \$100
28 \$1,000. Each day of violation shall be considered a
29 separate offense.

30 7. Unregistered dam. In the event that a dam
31 sought to be inspected under this section or section
32 824 is unregistered under this ~~Article~~ article, the
33 provisions of section 830, subsection 4 5, shall be
34 implemented and any order of the commissioner issued
35 under section 823, subsection 4, shall apply to any
36 proceedings under subarticle 3.

37 Sec. 6. 38 MRSA §825, as enacted by PL 1983, c.
38 417, §6, is amended to read:

39 §825. Access and notification

1 The inspector of dams and the department staff
2 shall have full access to any dam site for the pur-
3 pose of conducting an inspection or enforcing an or-
4 der under section 823 or 824. The department staff
5 or the inspector shall make a good faith effort to
6 notify the owner, lessee or person in control of the
7 dam prior to making an inspection. In the event that
8 the owner, lessee or person in control of the dam re-
9 fuses to permit the inspector or department staff
10 full access to the dam for these purposes, the in-
11 inspector or department staff shall obtain an adminis-
12 trative warrant under the District Court Rules of
13 Civil Procedure, Rule 80E.

14 Sec. 7. 38 MRSA §830, sub-§§5 and 6, as enacted
15 by PL 1983, c. 417, §6, are amended to read:

16 5. Notice of failure to register. Notice of
17 failure to register a dam and of the consequences de-
18 scribed in this subsection shall be mailed by
19 ~~registered~~ certified mail after January 1st of the
20 registration year to the last known address of the
21 owner and any lessee or other person in control of
22 the dam. The department shall make a reasonable ef-
23 fort to determine the identity, where unknown, of an
24 owner, lessee or person in control of a dam by:

- 25 A. Consulting prior dam registration records;
- 26 B. Consulting the registry of deeds of the county
27 in which the dam is located;
- 28 C. Consulting the municipal tax list of the mu-
29 nicipality in which the dam is located; and
- 30 D. Consulting the tax list maintained by the
31 State Tax Assessor under Title 36, chapter 115
32 for a dam located in an unorganized territory.

33 If a dam is not registered within 90 days following
34 the mailing of the first notice of failure to regis-
35 ter, a 2nd notice of failure to register and of the
36 consequences described in this subsection shall be
37 mailed by registered mail within an additional 30
38 days to the person to whom the first notice was sent
39 and to any other person or persons whom the depart-
40 ment has reason to believe may be an owner, lessee or
41 person in control of the dam.

6. Abandonment. If a dam is not registered by December 31st of the registration year, title to the dam, including appurtenant easements, shall automatically vest in the State on the following day and the dam shall be subject to the procedures of subarticle 3.

Sec. 8. 38 MRSA §840, sub-§5, as enacted by PL 1983, c. 417, §6, is amended to read:

5. Order. Based on the evidence solicited at the hearing, the board shall, within 60 80 days after the hearing, make written findings and issue an order to the owner, lessee or person in control of the dam establishing a water level regime for the body of water impounded by the dam. The order shall, insofar as practical, require the maintenance of a stable water level, but shall include provision for variations in water level to permit sufficient draw down of the body to accommodate precipitation and run off of surface waters and to otherwise permit seasonal and other necessary fluctuations in the water level of the body of water in order to protect public health, safety and welfare and the public and private resources identified in subsection 4. The board shall cause a copy of the order to be delivered to the owner, lessee or person in control of the dam, the municipal officers of any municipality in which the dam or the body of water it impounds is located and each petitioner, if any, and shall cause a copy of the order to be filed in the registry of deeds in the county where the dam is located.

Sec. 9. 38 MRSA §841, sub-§§3 and 4, as enacted by PL 1983, c. 417, §6, are amended to read:

3. Enforcement. The board or any littoral or riparian proprietor may commence an action to enjoin the violation of any provision of this subarticle. The board may enforce any order issued under section 840, subsection 5 by any other appropriate remedy, including, but not limited to, entering the dam premises to carry out the terms of the order.

The violation of any order issued under section 840, subsection 5, shall be punishable by a forfeiture of not less than \$20 \$250 and not more than \$100 \$1,000.

1 Each day of violation shall be considered a separate
2 offense.

3 4. Unregistered dam. In the event that a dam
4 impounding a body of water for which a water level
5 regime is sought to be established under section 840
6 is unregistered under this ~~Article~~ article, the pro-
7 visions of section 830, subsection 4 5, shall be im-
8 plemented, and any order of the board issued under
9 section 840, subsection 5 shall apply to any proceed-
10 ings under subarticle 3.

11 STATEMENT OF FACT

12 Aside from correcting a typographical error, sec-
13 tion 1 does 2 things. First, it clarifies an exclu-
14 sion that originally was intended to protect the pa-
15 per companies from being required to register and
16 maintain old dams no longer used since log driving
17 was ended in 1975. An old log-driving dam now being
18 used and maintained by its owner for a new purpose,
19 such as maintaining water levels for camps, should be
20 a registrable dam since it meets the intent expressed
21 in the "legislative findings and purpose" statement.

22 Secondly, it permits the access of construction
23 equipment for maintenance purposes. This makes ex-
24 plicit the intent of the law to have owners who will
25 maintain dams. If maintenance is prevented, eventu-
26 ally operation is prevented.

27 There is a shortage of professional engineers
28 with dam experience interested in the appointment.
29 Some hydrologists with dam experience have been
30 available, but the department couldn't consider them.
31 Section 2 enlarges the pool of potential applicants.

32 In the late 1980's, to ask a professional engi-
33 neer or hydrologist to work for \$100 a day is not
34 reasonable. Most will not. It is unreasonable to
35 ask a professional to inspect a dam and to state
36 whether it is safe or not, do this without construc-
37 tion plans and be financially responsible for the de-
38 termination. Obviously, liability insurance is very
39 expensive to cover such work and \$250 a day is just
40 an average fee.

1 Sections 3, 4 and 5 correct several errors and
2 raise the penalty for a violation of an order of the
3 board to a level at which enforcement can be reason-
4 ably effective. Penalty schedules were carried over
5 to the Department of Environmental Protection from
6 the Department of Agriculture, Food and Rural Re-
7 sources without change when the Department of Envi-
8 ronmental Protection took over the dams program.
9 Penalties should conform with other penalties which
10 can be applied under other departmental laws. Also,
11 unsafe dams can threaten many people with damage to
12 their property or loss of life. The ability to apply
13 a large fine can be used to encourage prompt and full
14 compliance with the board's order.

15 Section 6 amends the Maine Revised Statutes, Ti-
16 tle 38, section 825, to make it clear that the de-
17 partment staff may make preliminary assessments and
18 may participate in dam inspections.

19 Section 7 makes 2 changes. The first change con-
20 cerns mail. Certified mail is less expensive than
21 registered mail, so it is routinely used by the De-
22 partment of Environmental Protection. Title 1, sec-
23 tion 72, reads: "18. Registered mail. The words
24 'registered mail' when used in connection with any
25 requirement for notice by mail shall mean either reg-
26 istered or certified mail." Why not simply say Cer-
27 tified?

28 The 2nd change was recommended by the Attorney
29 General's office, which said the phrase would best be
30 eliminated because its only significance now is to
31 imply that appurtenant works and flowage rights, al-
32 ready mentioned in section 817, subsection 3, are not
33 automatically transferred to the State upon abandon-
34 ment of the dam. This, of course, is totally con-
35 trary to what the bill seeks to accomplish.

36 Section 8 makes 2 changes. The first addressed a
37 logistical problem which the department has experi-
38 enced.

39 Staff depends on use of the hearing transcript to
40 prepare the draft order. Usually the transcript is
41 not delivered until 3 or 4 weeks after the hearing.
42 Then the draft order must be available 17 working

1 days before the day the board meets to make its deci-
2 sion. Sixty days just doesn't allow enough time to
3 prepare a well thought out order.

4 The 2nd change assures that local officials will
5 be informed about department decisions. It corrects
6 what was probably an oversight during the original
7 drafting of the law, since municipalities have a
8 strong need to know that a water level regime has
9 been set for an impoundment within their boundaries
10 controlled by a dam. And they need to know the de-
11 tails, dates and conditions.

12 Aside from correcting a technical error, section
13 9 raises the penalties for violating an order of the
14 board. Like the change in section 3, this is neces-
15 sary to assure that the law is taken seriously. Some
16 dam owners have been careless, even disdainful, about
17 compliance when faced by the prospect of the current
18 fines. Apparently, the low level of fines has caused
19 the Attorney General's office to be rather unwilling
20 to enforce the current law. Just as an unsafe dam
21 can endanger the public safety, improper water levels
22 can be a nuisance or can cause property damage and
23 even loss of life. A larger range of available pen-
24 alties permits assessing a large fine when appropri-
25 ate.

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