

MAINE STATE LEGISLATURE

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114th MAINE LEGISLATURE

FIRST REGULAR SESSION - 1989

Legislative Document

No. 507

H.P. 376

House of Representatives, March 1, 1989

Submitted by the Department of Environmental Protection pursuant to Joint Rule 24.

Reference to the Committee on Energy and Natural Resources suggested and ordered printed.

A handwritten signature in cursive script that reads 'Ed Pert'.

EDWIN H. PERT, Clerk

Presented by Representative MICHAUD of East Millinocket.

Cosponsored by Representative ANDERSON of Woodland, Representative JACQUES of Waterville and Senator KANY of Kennebec.

STATE OF MAINE

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

An Act to Conform Maine Water Quality Law with Federal Requirements.



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

3 Sec. 1. 38 MRSA §363-C, as enacted by PL 1985, c. 772, §1, is
5 repealed.

7 Sec. 2. 38 MRSA §464, sub-§4, ¶F, as enacted by PL 1985, c.
9 698, §15, is amended to read:

11 F. The anti-degradation antidegradation policy of the State
13 shall be governed by the following provisions.

15 (1) Existing in-stream water uses and the level of
17 water quality necessary to protect those existing uses
19 shall be maintained and protected. ~~As--used--in--this
21 paragraph,---"existing--in--stream--water--uses"---means
23 significant,--well-established-uses--that--have--actually
25 occurred--on--a--water--body--on--or--after--November--28,
1975.~~ Factual determinations of what constitutes an
existing in-stream water use on a particular water body
and the extent of allowable impact on the existing use
shall be made on a case-by-case basis by the board.
When making a determination, the board shall consider
the history and significance of the use through an
examination of the following factors:

27 (a) The length of time a use has occurred on or
29 in a water body and the continuity of the use over
that period of time;

31 (b) In the case of human uses, the number of
33 occurrences of the use and the number of people
participating in the use; and

35 (c) Any other factors which illustrate the
natural or social significance of the use.

37 (2) Where high quality waters of the State constitute
39 an outstanding national resource, that water quality
41 shall be maintained and protected. For purposes of
43 this paragraph, the term "high quality waters" means
those water bodies in national and state parks and
wildlife refuges, public reserved lands and those river
segments listed in Title 12, section 403.

45 (3) The board may only issue a discharge license
47 pursuant to section 414-A or approve water quality
49 certification pursuant to the United States Clean Water
51 Act, Section 401, Public Law 92-500, as amended, if the
standards of classification of the water body and the
requirements of this paragraph will be met.

1 (4) Where the actual quality of any classified water
3 exceeds the minimum standards of the next highest
5 classification, that higher water quality shall be
7 maintained and protected. The board shall recommend to
9 the Legislature that that water be reclassified in the
11 next higher classification.

13 (5) The board may only issue a discharge license
15 pursuant to section 414-A or approve water quality
17 certification pursuant to the United State States Clean
19 Water Act, Section 401, Public Law 92-500, as amended,
which would result in lowering the existing quality of
any water body after making a finding, following
opportunity for public participation, that the action
is necessary to achieve important economic or social
benefits to the State and when the action is in
conformance with subparagraph 3. That finding must be
made following procedures established by rule of the
board.

21 **Sec. 3. 38 MRSA §634, sub-§1**, as amended by PL 1985, c. 772,
23 §2, is repealed and the following enacted in its place:

25 1. Coordinated permit review. Permits required under the
27 following laws shall not be required by any state agency for
29 projects reviewed or exempted from review under this subarticle:
31 stream alteration laws, great ponds laws and alteration of
33 coastal wetlands laws, sections 480-B to 480-F and 480-P to
35 480-R; site location of development laws, sections 481 to 490;
37 and land use regulation laws, Title 12, sections 681 to 685-C and
39 689. Notwithstanding section 654, the board may attach
41 reasonable conditions consistent with this Act concerning the
43 operation of hydropower projects. The board shall give written
45 notice to the Commissioner of Inland Fisheries and Wildlife and
47 the Commissioner of Marine Resources of the intent of any
49 applicant for a permit to construct a dam.

51 **Sec. 4. 38 MRSA §635-B** is enacted to read:

§635-B. Procedures for water quality certification

1 1. Board determination. Notwithstanding section 464,
2 subsection 2, the board, after public hearing, shall reclassify
3 the waters of the proposed impoundment to Class GPA if the board
4 finds:

5 A. There is a reasonable likelihood that the proposed
6 impoundment will thermally stratify;

7 B. The proposed impoundment will exceed 30 acres in surface
8 area and will not have any upstream direct discharges except
9 cooling water; and

1
3 C. The proposed impoundment will not violate section 464, subsection 4, paragraph F.

5 2. Board issuance of certification. Issuance of a water
7 quality certificate required under the United States Water
9 Pollution Control Act, Section 401, shall be coordinated for the
11 applicant under this subarticle by the Department of
13 Environmental Protection. The issuance of a water quality
15 certificate shall be mandatory in every case where the board
17 approves an application under this subarticle. The board shall
19 issue or deny certification at the same time it approves or
disapproves the proposed project. If issued, the certification
shall state that there is a reasonable assurance that the project
will not violate applicable water quality standards. The
coordination function of the department with respect to water
quality certification shall not include any proceedings or
substantive criteria in addition to those otherwise required by
this subarticle.

21 **Sec. 5. 38 MRSA §636, sub-§7, ¶A,** as enacted by PL 1983, c.
23 458, §18, is amended to read:

25 A. Whether the project will result in significant benefit
27 or harm to soil stability, ~~water-quality,~~ coastal and inland
wetlands or the natural environment of any surface waters
and their shorelands;

29 **Sec. 6. 38 MRSA §636, sub-§7, ¶¶E and F,** as amended by PL 1985,
31 c. 772, §3, are further amended to read:

33 E. Whether the project will result in significant flood
control benefits or flood hazards; and

35 F. Whether the project will result in significant
37 hydroelectric energy benefits, including the increase in
generating capacity and annual energy output resulting from
39 the project, and the amount of nonrenewable fuels it would
~~replace;--and.~~

41 **Sec. 7. 38 MRSA §636, sub-§7, ¶G,** as enacted by PL 1985, c.
43 772, §4, is repealed.

45 **Sec. 8. 38 MRSA §636, sub-§8** is enacted to read:

47 8. Water quality certification. There is reasonable
49 assurance that the project will not violate applicable state
51 water quality standards, including the provisions of section 464,
subsection 4, paragraph F, as required for water quality
certification under the United States Water Pollution Control
Act, Section 401.

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STATEMENT OF FACT

5 The purpose of this bill is twofold. First, it removes
7 language offensive to the United States Environmental Protection
9 Agency, or EPA, in the antidegradation provisions of the Maine
11 water quality law. Second, it revises the hydrolicensing law to
13 meet EPA objections regarding procedures for hydroprojects which
15 may result in thermally stratified impoundments.

17 The changes to the antidegradation provision remove the
19 phrase defining existing uses as significant and
21 well-established. Instead, criteria are added to provide guidance
23 to the Board of Environmental Protection in making its
25 case-by-case determinations of existing uses that require
27 protection under federal and state laws. The proposed criteria
29 allow more flexibility while retaining a clearer legislative
31 intent than the simple federal injunction to protect "existing
33 in-stream water uses and the level of water quality necessary to
35 protect existing uses" [CFR 131.12(a)(1)]. It is the intent of
this change that Maine's antidegradation provisions regarding the
protection of existing use be interpreted consistently with
federal interpretations and requirements.

 The changes to the hydrolicensing procedure accomplish 2
27 purposes. The first purpose is to integrate the hydrolicensing
29 considerations and water quality considerations into a single set
31 of substantive proceedings. The 2nd purpose is to provide for
33 public input into the reclassification of any proposed
35 hydroimpoundment that is expected to stratify thermally. The
proposed changes result in a single "up or down" state decision
on any given hydroproject rather than the current process which
may result in the approval of a project on the overall
hydrocriteria, but its denial on water quality grounds.