

# MAINE STATE LEGISLATURE

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# 124th MAINE LEGISLATURE

## SECOND REGULAR SESSION-2010

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Legislative Document

No. 1577

H.P. 1115

House of Representatives, December 22, 2009

### An Act Concerning the Establishment of Water Levels

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Submitted by the Department of Environmental Protection pursuant to Joint Rule 204.  
Received by the Clerk of the House on December 18, 2009. Referred to the Committee on  
Natural Resources pursuant to Joint Rule 308.2 and ordered printed pursuant to Joint Rule 401.

*Millicent M. MacFarland*  
MILLICENT M. MacFARLAND  
Clerk

Presented by Representative CLARK of Millinocket.  
Cosponsored by Representatives: CAMPBELL of Newfield, FITTS of Pittsfield, FLEMINGS  
of Bar Harbor, KNAPP of Gorham, PERCY of Phippsburg, Senator: GOODALL of  
Sagadahoc.

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

2 **Sec. 1. 38 MRSA §341-D, sub-§2**, as amended by PL 2007, c. 661, Pt. B, §1, is  
3 further amended to read:

4 **2. Permit and license applications.** Except as otherwise provided in this  
5 subsection, the board shall decide each application for approval of permits and licenses  
6 that in its judgment:

- 7 A. Involves a policy, rule or law that the board has not previously interpreted;
- 8 B. Involves important policy questions that the board has not resolved;
- 9 C. Involves important policy questions or interpretations of a rule or law that  
10 require reexamination; or
- 11 D. Has generated substantial public interest.

12 The board shall assume jurisdiction over applications referred to it under section 344,  
13 subsection 2-A, when it finds that the criteria of this subsection have been met.

14 The board may vote to assume jurisdiction of an application if it finds that one or more of  
15 the criteria in this subsection have been met.

16 Any interested party may request the board to assume jurisdiction of an application.

17 The board may not assume jurisdiction over an application for an expedited wind energy  
18 development as defined in Title 35-A, section 3451, subsection 4 or for a certification  
19 pursuant to Title 35-A, section 3456.

20 The board may not assume jurisdiction over a request or petition for the establishment of  
21 water levels pursuant to section 840.

22 **Sec. 2. 38 MRSA §344, sub-§2-A, ¶A**, as amended by PL 2007, c. 661, Pt. B,  
23 §5, is further amended to read:

24 A. Except as otherwise provided in this paragraph, the commissioner shall decide as  
25 expeditiously as possible if an application meets one or more of the criteria set forth  
26 in section 341-D, subsection 2 and shall request that the board assume jurisdiction of  
27 that application. If at any subsequent time during the review of an application the  
28 commissioner decides that the application falls under section 341-D, subsection 2, the  
29 commissioner shall request that the board assume jurisdiction of the application.

30 (1) The commissioner may not request the board to assume jurisdiction of an  
31 application for any permit or other approval required for an expedited wind  
32 energy development, as defined in Title 35-A, section 3451, subsection 4, or a  
33 certification pursuant to Title 35-A, section 3456. Except as provided in  
34 subparagraph (2), the commissioner shall issue a decision on an application for  
35 an expedited wind energy development within 185 days of the date on which the  
36 department accepts the application as complete pursuant to this section or within  
37 270 days of the department's acceptance of the application if the commissioner  
38 holds a hearing on the application pursuant to section 345-A, subsection 1-A.

1 (2) The expedited review periods of 185 days and 270 days specified in  
2 subparagraph (1) do not apply to the associated facilities, as defined in Title  
3 35-A, section 3451, subsection 1, of the development if the commissioner  
4 determines that an expedited review time is unreasonable due to the size,  
5 location, potential impacts, multiple agency jurisdiction or complexity of that  
6 portion of the development. If an expedited review period does not apply, a  
7 review period specified pursuant to section 344-B applies.

8 (3) The commissioner may not request the board to assume jurisdiction of a  
9 request or petition for the establishment of water levels pursuant to section 840.

10 The commissioner may stop the processing time with the consent of the applicant for  
11 a period of time agreeable to the commissioner and the applicant.

12 **Sec. 3. 38 MRSA §840, sub-§1**, as amended by PL 1999, c. 243, §20, is further  
13 amended to read:

14 **1. Power.** The commissioner may on the commissioner's own motion and shall, at  
15 the request of the owner, lessee or person in control of a dam, the Commissioner of  
16 Inland Fisheries and Wildlife or the Commissioner of Marine Resources, or upon receipt  
17 of petitions from the lesser of at least 25% or 50 of the littoral or riparian proprietors or  
18 from a water utility having the right to withdraw water from the body of water for which  
19 the water level regime is sought, ~~conduct an adjudicatory hearing~~ hold a public meeting  
20 pursuant to section 345-A, subsection 5 for the purpose of establishing a water level  
21 regime and, if applicable, minimum flow requirements for the body of water impounded  
22 by any dam that is not:

23 A. Operating with a license or exemption issued by the Federal Energy Regulatory  
24 Commission or determined by the Federal Energy Regulatory Commission to be  
25 subject to the jurisdiction of that commission;

26  
27  
28 D. Operating with a permit setting water levels issued under the ~~protection of natural~~  
29 ~~resources laws, sections 480-A to 480-S~~ Natural Resources Protection Act; the site  
30 location of development laws, sections 481 to 490; the ~~small hydroelectric generating~~  
31 ~~facilities laws, sections 631 to 636~~ Maine Waterway Development and Conservation  
32 Act; the land use regulation laws, Title 12, sections 681 to 689; or any other statute  
33 regulating the construction or operation of dams;

34 E. A dam regulated by one or more municipalities by ordinance or interlocal  
35 agreement pursuant to Title 30-A, chapter 187, subchapter ~~VI~~ 6; or

36 F. Regulated by the International Joint Commission.

37 Notwithstanding the provisions of this subsection, after an order establishing a water  
38 level regime or minimum flow requirement has been issued pursuant to this section or  
39 former Title 12, section 304, the commissioner is not required to hold a ~~hearing~~ public  
40 meeting pursuant to section 345-A, subsection 5 to establish a new water level regime or  
41 minimum flow requirement for the same body of water in response to a petition from  
42 littoral or riparian proprietors unless the commissioner determines that there has been a

1 substantial change in conditions or other circumstances materially affecting the impact of  
2 water levels and minimum flows on the public and private resources identified in  
3 subsection 4 since the order was issued.

4 The commissioner may dismiss without prejudice any petition from littoral or riparian  
5 proprietors that does not contain evidence of mediation or other substantial good faith  
6 efforts to resolve any disputes regarding current water level management practices or  
7 minimum flow requirements for a body of water impounded by a dam with the owner,  
8 lessee or person in control of the dam.

9 The commissioner may dismiss without prejudice any petition from littoral or riparian  
10 proprietors that is not supported by substantial evidence that current water level  
11 management practices or, if applicable, minimum flow requirements for a body of water  
12 impounded by a dam are materially affecting one or more of the resources, interests or  
13 goals listed in subsection 4.

14 **Sec. 4. 38 MRSA §840, sub-§2**, as affected by PL 1989, c. 890, Pt. A, §40 and  
15 amended by Pt. B, §198, is further amended to read:

16 **2. Notice.** The commissioner shall provide written notice of any hearing public  
17 meeting held pursuant to this section to the owner, lessee or person in control, if known,  
18 of any dam on the body of water and to any petitioner who has petitioned for a hearing  
19 public meeting with respect to the body of water. The commissioner shall give public  
20 notice to the public of the hearing under Title 5, section 9052 public meeting by  
21 publication at least twice in a newspaper of general circulation in the area of the State  
22 affected and shall also file notice of the hearing public meeting in the municipal office of  
23 any municipality and in the clerk's office of any county in which the body of water is  
24 located.

25 **Sec. 5. 38 MRSA §840, sub-§3**, as enacted by PL 1983, c. 417, §6, is amended to  
26 read:

27 **3. Conduct of public meeting.** The hearing public meeting held pursuant to this  
28 section shall follow the procedures for an adjudicatory hearing under Title 5, chapter 375,  
29 subchapter IV and the procedures specified in section 345-A, subsection 5 and in this  
30 section.

31 **Sec. 6. 38 MRSA §840, sub-§4**, as amended by PL 1989, c. 323, §2 and affected  
32 by c. 890, Pt. A, §40 and amended by Pt. B, §199, is further amended to read:

33 **4. Evidence.** At the hearing public meeting held pursuant to this section, the  
34 commissioner shall solicit and receive testimony, as provided by Title 5, section 9057,  
35 receive comments for the purpose of establishing a water level regime and, if applicable,  
36 minimum flow requirements for the body of water. The testimony is limited to:

37 A. The water levels necessary to maintain the public rights of access to and use of  
38 the water for navigation, fishing, fowling, recreation and other lawful public uses;

39 B. The water levels necessary to protect the safety of the littoral or riparian  
40 proprietors and the public;

- 1 C. The water levels and minimum flow requirements necessary for the maintenance
- 2 of fish and wildlife habitat and water quality;
- 3 D. The water levels necessary to prevent the excessive erosion of shorelines;
- 4 E. The water levels necessary to accommodate precipitation and ~~run-off~~ runoff of
- 5 waters;
- 6 F. The water levels necessary to maintain public and private water supplies;
- 7 G. The water levels and flows necessary for any ongoing use of the dam to generate
- 8 or to enhance the downstream generation of hydroelectric or hydromechanical power;
- 9 and
- 10 H. The water levels necessary to provide flows from any dam on the body of water
- 11 to maintain public access and use, fish propagation and fish passage facilities, fish
- 12 and wildlife habitat and water quality downstream of the body of water.

13 **Sec. 7. 38 MRSA §840, sub-§5**, as amended by PL 1989, c. 323, §3 and affected  
14 by c. 890, Pt. A, §40 and amended by Pt. B, §200, is further amended to read:

15 **5. Order.** Based on the ~~evidence solicited at the hearing~~ comments received at the  
16 public meeting held pursuant to this section, written comments received from state  
17 resource agencies and members of the public and other related information on file, the  
18 commissioner shall make written findings and issue an order to the owner, lessee or  
19 person in control of the dam establishing a water level regime for the body of water  
20 impounded by the dam and, if applicable, minimum flow requirements for the dam. The  
21 order must, insofar as practical, require the maintenance of a stable water level, but must  
22 include provision for variations in water level to permit sufficient drawdown of the body  
23 of water to accommodate precipitation and runoff of surface waters, minimum flow  
24 requirements and to otherwise permit seasonal and other necessary fluctuations in the  
25 water level of the body of water in order to protect public health, safety and welfare and  
26 the public and private resources identified in subsection 4. The commissioner shall  
27 deliver a copy of the order to the owner, lessee or person in control of the dam, the  
28 municipal officers of any municipality in which the dam or the body of water it impounds  
29 is located and each petitioner, if any, and shall file a copy of the order in the registry of  
30 deeds in the county where the dam is located.

31 **Sec. 8. Application.** This Act applies to a request or petition for the establishment  
32 of water levels pursuant to the Maine Revised Statutes, Title 38, section 840 pending as  
33 of the effective date of this Act or received by the Department of Environmental  
34 Protection after the effective date of this Act.

35 **SUMMARY**

36 This bill amends the water level laws in the Maine Revised Statutes, Title 38 to  
37 replace the requirement for an adjudicatory hearing by the Commissioner of  
38 Environmental Protection or the Board of Environmental Protection on a request or  
39 petition for a water level regime or, if applicable, a minimum flow requirement, with a  
40 requirement for a public meeting by the commissioner. This bill also amends the water  
41 level laws to authorize the commissioner to dismiss without prejudice any petition that

1 does not contain evidence of mediation or other substantial good faith efforts to resolve  
2 any disputes regarding current water level management practices or minimum flow  
3 requirements for a body of water impounded by a dam with the owner, lessee or person in  
4 control of the dam. The bill further amends the water level laws to authorize the  
5 commissioner to dismiss without prejudice any petition that is not supported by  
6 substantial evidence that current water level management practices or minimum flow  
7 requirements are materially affecting the resources, interests or goals specified in Title  
8 38, section 840, subsection 4.