Regulation of Hydropower Development

STATE OF MAINE

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Hydro development is governed by an extensive regulatory scheme. This publication summarizes the federal and state regulations pertaining to hydro development. The applicability of various statutes, as well as permitting and licensing options and requirements, will vary for each project and are dependent upon the characteristics and scope of the proposed project. Potential developers are advised to contact the Office of Energy Resources and regulatory agencies directly at an early point to identify agency concerns and requirements. A list of agency contacts follows the body of the text.

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I. Federal Energy Regulatory Commission

FERC has broad jurisdiction over most privately developed hydro projects. FERC's involvement is premised on the Commerce clause of the Constitution which grants the federal government jurisdiction over projects on navigable waterways, or projects which effect interstate commerce. Thus, if a project sells power to an electric utility which in turn is connected to an interstate grid system, or if a project is located on, or will affect a navigable waterway, FERC will have jurisdiction. FERC also has jurisdiction over projects which utilize federal land or which use surplus water from government dams.

If a project is subject to federal jurisdiction, (a determination which FERC makes based upon a mandatory filing of declaration of intent by the applicant) a dam receives both the benefits and burdens of FERC regulation. FERC exercises its regulatory functions by acting as a lead agency in hydropower licensing, and by issuing permits and licenses. Detailed federal application procedures and forms for permits and licenses may be obtained by contacting OER or the Federal Energy Regulatory Commission directly.

A. Preliminary Permit

The preliminary permit does not authorize construction, it merely grants the permittee priority of application for a license. The permit is not a prerequisite for a license, but it prevents other entities from developing a site while the permittee conducts feasibility studies and collects data required for a final FERC license application. Municipalities and state power authorities receive preference over competing private applicants in the award of preliminary permits as long as the application of the political subdivision is "best adopted to develop, utilize and conserve in the public interest the regions water resources." Permit information requirements include an introductory statement by the applicant, the location and description of proposed project including civil and mechanical structures, average power production, a description of studies to be conducted, projected costs, and expected sources of funding. Permits may be issued for a period up to 36 months.

B. Licenses

The FERC may issue licenses for up to 50 years. The license assures the owner that FERC will not license

another dam which may destroy the efficiency of the earlier dam. The license may also grant the licensee the power of eminent domain to assemble land and other interests for the project. FERC has the power to impose conditions on licenses which may differ from state law; state regulatory measures must yield to the federal licensing scheme which is designed to ensure the comprehensive development of the waterways. As with permits, political subdivisions receive preference if license applications are otherwise equal.

Developers may proceed with federal and state licensing simultaneously, although the developer should note that FERC license applications require evidence of an applicant's compliance with state licensing procedures. Thus, although all state permits need not be obtained prior to the submission of a FERC license application, FERC does require developers to meet with state agencies and to indicate their correspondence and concerns in the application Since FERC has not been tolerant of inadequately prepared applications, developers are advised to contact FERC if they have any questions, rather than submit deficent applications.

Pursuant to the Public Utilities Regulatory Policies Act of 1978, FERC has simplified and streamlined the licensing process. Its regulations now distinguish between large and small projects, existing and non-existing dams, and enable exemptions from FERC licensing.

1) Minor Water Projects and Major Water Projects 5 MW or Less. All minor water projects (projects less than 1.5 MW whether constructed or to be constructed), and major water projects 1.5 to 5 MW utilize a "short form" application. Information requirements include an introductory statement providing basic information, a description of the project and mode of operation (exhibit A), general design drawings (exhibit F), and a map of the project. Also required is an environmental report on the resources of the project, and impacts of the project on those resources (exhibit E).

   Environmental reports must be prepared in consultation with environmental agencies, and must contain a description of the steps taken by the applicant in consulting with federal, state and local resource agencies as well as copies of any letters containing comments of those agencies. A copy of a 401 water quality certificate (or agency certification that such

certification is waived) or a copy of a dated letter from the applicant to the appropriate agency requesting such certification, must be attached.

FERC recognizes that major projects (1.5 MW or more) that have no previously constructed dam or impoundment or which entail significant construction or operation changes will have more impacts than minor projects or major projects less than 5 MW at existing dams. For this reason, the environmental report requirements for major unconstructed or modified projects 1.5 to 5 MW differs from minor projects, requires detail commensurate with the size and scope of the project.

2) Major Unconstructed Projects, Major Modified Projects, and Major Projects at Existing Dams Greater Than 5 MW. Major projects greater than 5 MW at existing dams, projects or unconstructed dams or projects that would change the state of an existing project works so as to significantly increase the surface area of elevation of an impoundment, or which would otherwise produce a significant environmental impact must file a more detailed application than that required for minor project or for major projects less than 5 MW. Information requirements include an initial introductory statement, a description of the physical structures and features of the project (exhibit A), a statement of the project's operation and resource utilization (exhibit B), a proposed construction schedule (exhibit C), a statement of costs and financing, (exhibit D), general design drawings, (exhibit F), and a map of the project (exhibit G). Also, required is a detailed environmental report (exhibit E) on the resources of the project impacts of the project, proposed measures to mitigate those impacts, and an environmental assessment of alternative sites, facility designs, and energy options. More detail in the environmental report is required for new and modified dams than for existing dams. As in the short form application, consultation with agencies must take place and be documented.

C. Exemptions

1) Exemptions for projects less than 5MW. FERC may exempt projects on a case by case basis from its regulation. To be eligible for an exemption, the proposed installed capacity may not exceed 5MW, and must utilize the water power of an existing dam or must be a diversion structure which does not impound water. Additionally, the developer must have real property interests in the lands necessary to develop

and operate the project, or an option to obtain those interests. Once a developer receives an exemption, the developer is still subject to the conditions and requirements of other applicable federal, state and local laws. Applications must contain an introductory statement, description of the project, estimates of installed capacity, annual generation, and hydraulic capacity of the turbines, a flow duration curve, location map of the project, expected environmental impacts, letters of documentation showing that the applicant consulted with relevent agencies, and drawings of the proposed structures and equipment.

2) Conduit Exemptions. Those exemptions apply to man-made facilities which are not an integral part of the dam (irrigation canals, and watermains which have an installed capacity of 15MW or less. The application includes a brief statement identifying the project, and four exhibits including an environmental report.

3) Categorical exemptions for two categories of projects. FERC recently has established a procedure for categorical exemptions for two categories of projects: (1) proposed developments greater than 100 kw and less than 5 MW, and (2) 100 kw or less. In the first category, to be eligible for an exemption, projects must utilize the water power of an existing dam, must not entail an increase in the maximum surface elevation of an impoundment, must not entail a change in the prevailing storage and release regime, must not divert water for more than 300 feet, must utilize a dam when there is not a significant population of migratory fish, and must not adversely affect water quality, historic places, or endangered species. In the second category, to be eligible for categorical exemptions, projects must utilize the water power of an existing dam, must utilize a dam where there is not a significant population of migratory fish, does not divert water more than 300 feet, and must not adversely affect endangered species. As in the case by case exemption, the developer must own, or have an option to obtain the necessary property interests to develop and operate the project.

Once a qualified exemption applicant has submitted an application, he/she is automatically exempted from licensing 30 days after the notice of exemption if

the following provisions are met: (a) the developer has submitted notices of exemptions to appropriate state and federal agencies outlined above, and (b) has obtained certification from these agencies that the project meets conditions outlined above for both types of exemptions. The contents of the application include an introductory statement, a description of the physical structures and features of the project, average streamflow, and agency certifications. Once an exemption is obtained, the developer is still subject to all other applicable federal, state, and local laws.

Figures One and Two are graphic presentations of licensing options.

Upon receipt of an application, FERC will determine if it is complete and in accordance with FERC regulations. If the application is deficient, the applicant is notified. If it is adequate, FERC will then determine if an environmental impact statement (EIS) is required pursuant to the National Environmental Policy Act (NEPA). NEPA provides that for every recommendation or major federal action significantly effecting the quality of the environment, a detailed statement be made on the environmental impact of the proposed action. The statement includes adverse and unavoidable impacts, alternatives, and any irreversible commitment of resources which would occur if the proposed action is implemented. Thus, if the issuance of a license is a major federal action effecting the environment, FERC must prepare an Environmental Impact Statement. The EIS must be circulated for review and comment: this may significantly increase the time and cost for license application and review. If FERC finds the project is best adapted to the comprehensive development of the waterway after reviewing technical, environmental and legal recommendations, a license is issued.

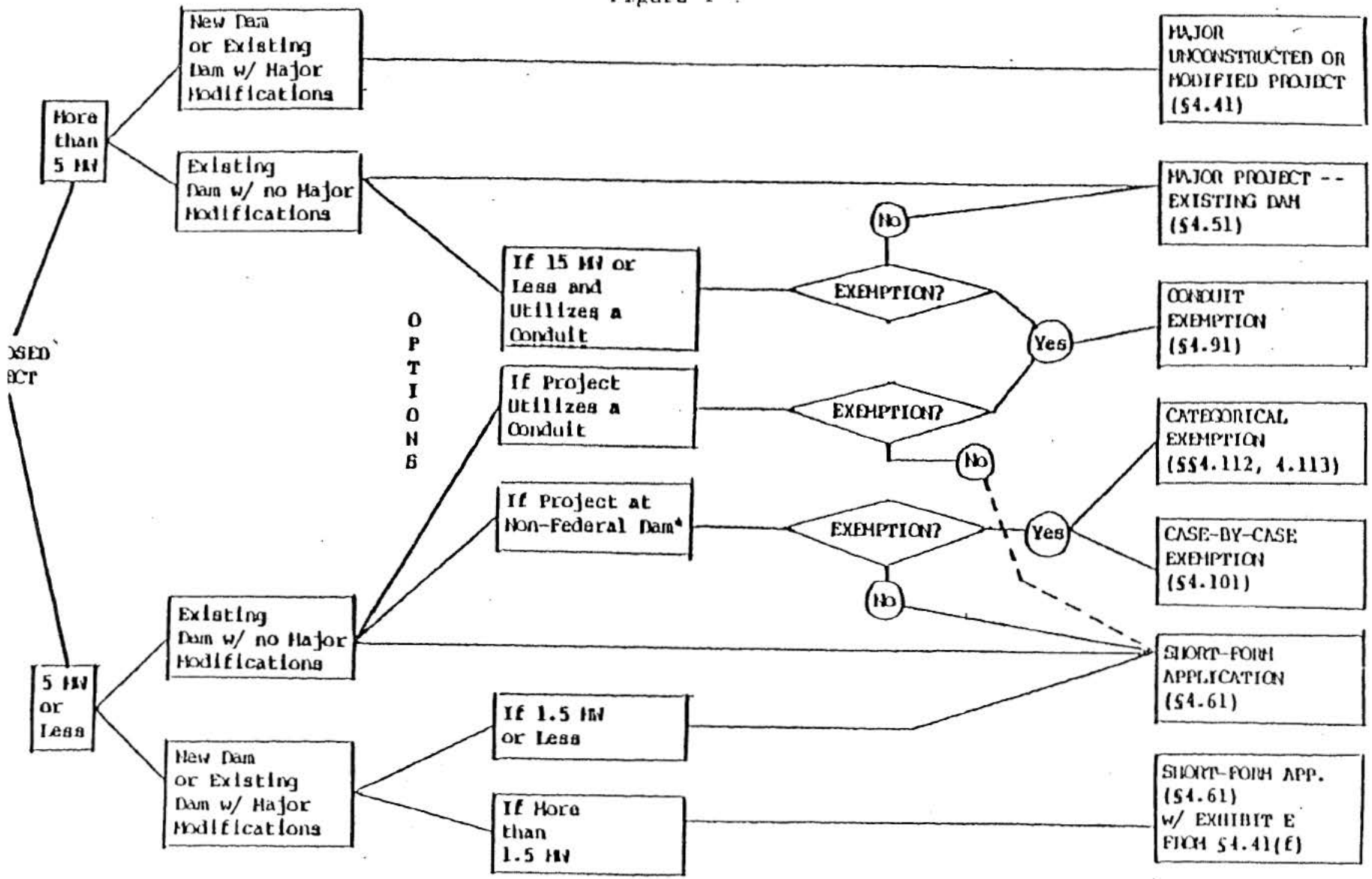
II. US Fish and Wildlife.

The Fish and Wildlife Service of the Department of Interior may consult and comment whenever the waters of any stream or bog are to be impounded or diverted. Fish and Wildlife may require construction of fish ladders to facilitate anadromous fish passage.

III. United States Corps of Engineers (USCE)

The Corps may require a dredge and fill permit for the construction of a dam in the navigable waters of the U. S. pursuant to Section 404 of the Clean Water Act. However, as of October 1982, permanent and temporary fills associated with hydro projects at existing dams or at new or existing

Figure 1



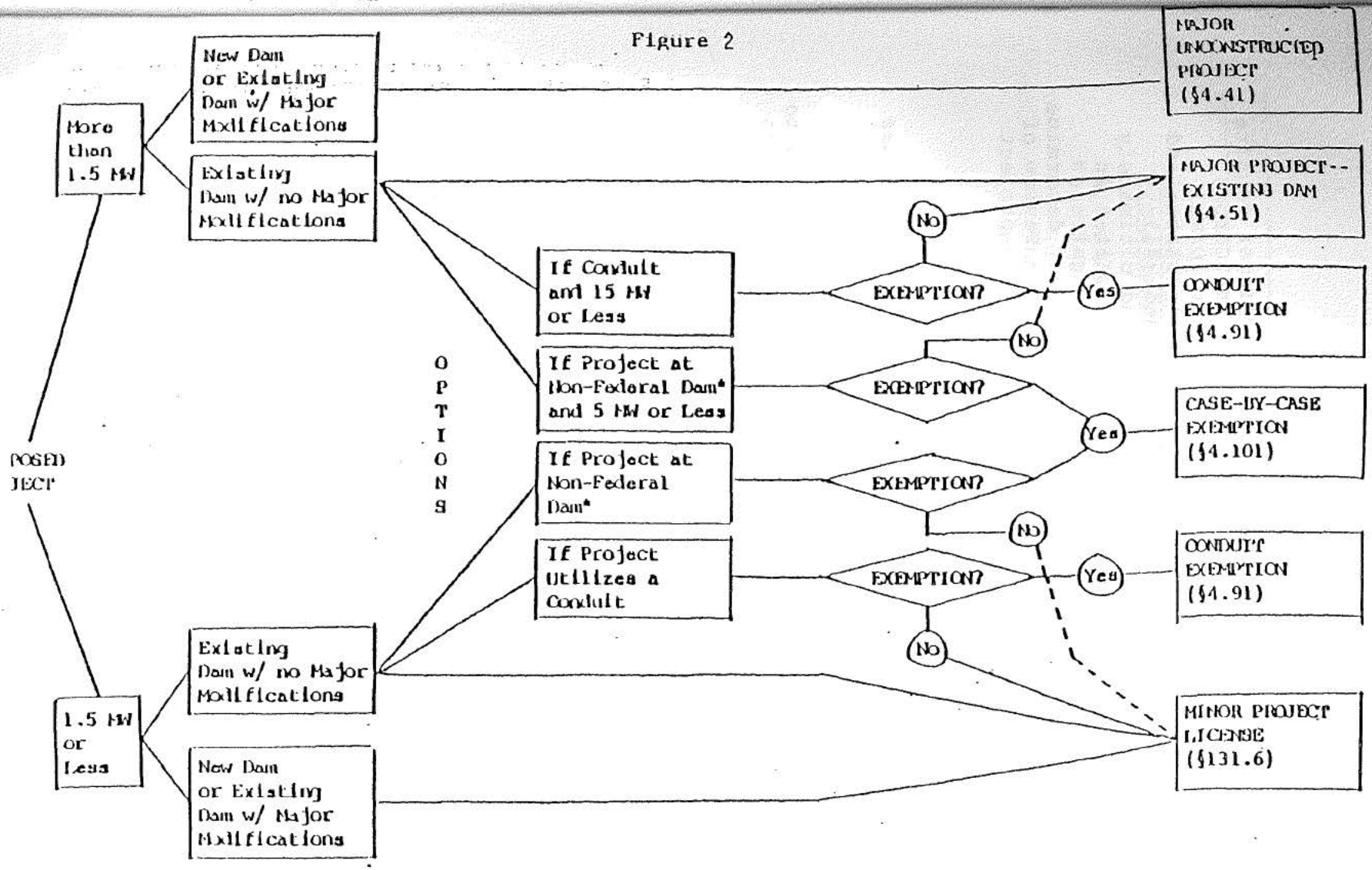
LICENSING OPTIONS UNDER THE COMMISSION'S REGULATIONS UNDER OCTOBER 1981 REVISIONS

* NOTE: This includes natural water feature projects that utilize diversion structures. For the purposes of exemption, such structures are not necessarily classified as "dams"

Source: Federal Energy Regulatory Commission, Docket RM 81-10

Figure 2

Figure 2



LICENSING OPTIONS UNDER THE COMMISSION'S REGULATIONS PRIOR TO OCTOBER 1981 REVISIONS

*NOTE: This includes natural water feature projects that utilize diversion structures. For the purposes of exemption, such structures are not necessarily classified as "dams".

Source: Federal Energy Regulatory Commission, Docket RM 81-10.

run-of-river projects in New England will no longer require an application to, or specific approval from the Corps, provided that the project receives a license or formal exemption from FERC. All other required local, state, and federal permits/licenses must still be obtained. All temporary fills must be properly stabilized and ultimately removed in their entirety. No fills may be deposited in wetlands. The Corps retains the authority to require an application on a case-by-case option whenever they determine, from information received by others or from their review of FERC notices, that the potential consequences of a project warrant such action.

IV. Heritage Conservation and Recreation Service

The Heritage Conservation and Recreation Service determines whether adequate consideration has been given to the preservation of natural, scenic or recreation resources, pursuant to the Wild and Scenic Rivers Act. The Heritage Conservation and Recreation Service also conducts surveys to determine the historic nature of the site. They may object to or approve of the project, or act to preserve the site.

V. National Marine Fishery Services

The National Marine Fisheries Service of the Department of Commerce may consult and comment whenever anadromous fisheries subject to the agency's jurisdiction are to be affected.

STATE REGULATION OF HYDROPOWER DEVELOPMENT

I. Regulation by the Department of Environmental Protection (DEP)

A. Small Hydroelectric Generating Facility Act - 38 MRSA Sections 621-626.

The DEP administers a simplified permitting process which allows developers to file a single permit application if a proposed project is located at an existing dam, has an installed capacity of less than 1500 kw, did not receive a FERC operating license prior to January 1, 1980 and is a facility which would normally require one or more of the following permits prior to the operation or construction of the project:

1) Site Location of Development Permit;
2) Alteration of Wetlands Permit;
3) Stream Alteration Permit;
4) Great Ponds Permit.

Projects which do not meet the criteria for the one-stop permitting process are still required to obtain all applicable federal, state, or local permits and licenses.

When using the single application process, the developer files an application with DEP on forms provided by the DEP. Information required by the DEP includes project size, location, environmental impact, service area, construction costs, etc. Additionally, DEP requires evidence of an applicant's right, title, or interest in a dam and all flowed lands as part of the application. A FERC preliminary permit has been determined to be sufficient demonstration of interest.

Prior to the construction or alteration of small hydropower projects eligible for the single application process, the Board of Environmental Protection (BEP) must approve the application. Factors considered by BEP in its decision making process include total energy and capacity the facility will provide, fossil fuel displacement, minimum flow requirements, flood control considerations effects on fish, wildlife, recreation, navigation, and general environmental impacts.

B. Site Location
38 MRSA S 481-490

The Site Law requires that hydropower developers obtain a permit if their project would result in the following:

1) A structure which is a building or buildings on a single parcel is constructed or erected with a fixed location on or in the ground or attached in excess of 60,000 square feet, or

2) Parking lots, roads, paved areas, wharves or areas to be stripped or graded or flooded and not to be revegetated which which causes a total project, including any buildings to occupy a ground area in excess or 3 acres, or

3) A transmission line conveying power from the hydro-electric generating site which has the capacity of carrying 100 kilovolts or larger.

The Site Law standards, relative to hydropower development, focus on maintenance of natural drainageways, control of erosion and sedimentation, preservation of historic sites, protection of wildlife and fisheries, preservation of unusual natural areas, protection of water quality, and effect on scenic character of the area surrounding a project and no adverse effect on existing uses. The DEP Bureau of Water Quality Control's issuance of a 401 water quality certificate is coordinated with the Site Law review.

C. The Alteration of Coastal Wetlands Act 38 MRSA 7776-7780

A developer must obtain a permit from the DEP if he/she intends to dredge, drain, or fill any coastal wetland or erect a permanent structure in or over any coastal wet-land, or add or displace sand from any coastal sand dune. A permit will be granted if the proposed activity does not unreasonably interfere with existing recreational and navigational uses does not cause undue soil erosion, nor interfere with the natural flow of the waters nor harm wildlife or fisheries, nor lower water quality. The DEP Bureau of Water Quality Control's issuance of a 401 water quality certificate may be coordinated with the Site Law Review.

D. The Great Ponds Act 38 MRSA S 392

The Act requires that a developer obtain a permit from the Board prior to engaging in any dredging or filling in, or placement or repair of a permanent structure, in a great pond. For statutory purposes, a great pond is any inland body of water which in its natural state has a surface area in excess of 10 acres or any body of water artificially formed which has a surface area in excess of 30 acres, the shore of which is owned by two or more legal entities. The Act prohibits dredging and filling below the normal high water mark and bulldozing land in such a manner as to cause material to wash into a pond without a permit from the Board. The DEP Bureau of Water Quality Control's issuance of a 401 water quality certificate may be coordinated with the Site Law Review.

II. Regulation by the Department of Inland Fisheries and Wildlife

A. Stream Alteration Permit

12 MRSA Sec.7776-7780

A developer must obtain a permit from the Commissioner of Inland Fisheries and Wildlife prior to any dredging, filling, or construction in or adacent to any river, stream or brook above the head of the tide (that area of a watercourse not susceptable to the ebb and flow of the tide). Projects located in the unorganized territories are required to file applications directly to the Land Use Regulation Commission.

The Act provides exemptions for the purposes of dam building or construction of a crossing only for:

1. Public works projects if not more than a total of 300 feet of stream bank alteration (both banks included) occurs in any mile of stream.

2. Private projects if not more than 100 ft. of stream bank alteration (both banks included) occurs in any mile of stream.

To obtain a permit, the applicant must demonstate that the project will not unreasonably interfere with existing recreational and navigational uses, will not cause undue soil erosion, unreasonably harm any wildlife habitat or unreasonably interfere with the natural flow of quality of the waters.

B. Notification of Intent to Build a Dam
12 MRSA Section 7702

No person shall build any dam or other obstruction in any river, stream, or brook without first filing written notice with the Commissioner of the Department of Inland Fisheries and Wildlife.

C. Fishways

12 MRSA Section 7701

The Commissioner of the Department of Inland Fisheries and Wildlife may require fish ladders to be provided, erected, maintained, or repaired or altered by the owners or occupants of any dam in any inland waters frequented by salmon, shad, alewives, or migratory fish. The Commissioner may be petitioned to hold a hearing to determine if there is a need for a fishway at an existing dam.

III. Regulation By the Department of Marine Resources
Title 12 MRSA, Section 6121 and 6122

Where a dam is to be constructed in any of the State's tidewater areas, written notice of intent to build a dam must be filed with the Commissioner of Marine Resources, and must include plans for the construction, the location, and the time frame for its development. If the Commissioner determines the development may negatively effect the conserving, developing and restoring of anadromous fish resources, fishways may be required.

IV. Public Utility Regulation

The Public Utilities Commission (PUC) oversees and regulates public utilities in the State of Maine. Regulatory functions of the PUC include authorizing utilities to build generation and transmission projects through a Certificate of Public Convenience and Necessity, rate setting, and authorizing the issuance of stocks, bonds and notes by public utilities.

The Small Power Production Facilities Act encourages small power facilities which use renewable resources, by exempting qualifying small scale power producers which do not retail electricity from PUC regulation or control. A qualifying small scale power producer is any municipality, person or corporation owning or operating a facility which does not exceed 80 MW of installation capacity and which depends on renewable resources for its primary source of energy.

This Act also provides for power purchase contracts. In sales of electricity to a public utility, the rate paid by the public utility shall be determined by the small power producer and the public utility. If the two cannot agree on a price, the PUC shall order the utility to purchase the power and shall determine the price using such criteria as term of contract, cost of energy to the utility if purchased from a different source, and availability and reliability of power. Standard rates are set for units under 1 MW that do not have a contract with the utility.

V. Regulation By the Department of Conservation

A. Land Use Regulation Commission

LURC acts as a planning, and zoning board for unorganized townships and plantations in the state. No permanent structure may be erected, changed, converted, altered, or enlarged, other than normal maintenance, without first obtaining a permit from LURC. A hydropower project is considered a permanent structure. To apply for a permit, a plan of proposed development must be submitted to LURC. Criteria considered by LURC to determine if a project meets land use standards includes adequate technical and financial expertise and protection of the natural environment and the public's health, safety and welfare. Where appropriate, LURC's review process is coordinated with DEP's Site Location law review process and Inland Fisheries and Wildlife under the DEP simplified permitting system.

B. Bureau of Public Lands

The Bureau requires leases for using state-owned submerged lands which extend to the head of the tide, or the beds of Great Ponds.

VI. Maine Water Law

A. Riparian Rights

A riparian owner is one whose-land abuts upon a stream of water. The priviledges stemming from ownership of the shoreline and the normal bed include the right to use the flowing water. It must not be assumed that water rights were transferred with land rights. The rights of riparian owners are not absolute, but are defined by the reasonable use theory. Reasonable use theory is the right of enjoyment of the stream as it flows through the land, taking into consideration a like reasonable use by all other riparians above and below the user.

B. Mill Dam Act

The erecting and maintaining of a dam upon or across a non-navigable stream is permitted by the Mill Act. All rivers when the tide ebbs and flows are navigable rivers by state law. Case law pertaining to the Mill Act has permitted construction of dams on rivers that are navigable in fact (non-tidal), but not on rivers that are navigable by law (tidal).

The Act permits upstream lands to be flowed, but the owner of the land may obtain compensation. However, flowage rights do not give the downstream owner title to the land but rather an easement appurtenant to the downstream estate.

C. Regulation by the Department of Agriculture

1. Neglected Dams Act
12 MRSA 301-306

The Neglected Dams Act requires that all dams be registered annually. A dam not registered is deemed "abandoned." An owner must notify the Commissioner of Agriculture if ownership is transferred, or if the use of the dam is to be changed or discontinued. The Act provides for the Commissioner to order maintenance of a normal water level upon petition of 25% of littoral proprieters of dams which have no beneficial uses.

Water levels set by the Commissioner are likely to reflect recreational and aesthetic concerns. If a dam is being operated for a beneficial use (beneficial use includes hydro), the Commissioner does not have the authority to establish water levels.

2. The Abandoned Dams Act
12 MRSA 251-254

Any person may petition the Commissioner of the Department of Agriculture to award ownership of an abandoned dam. The Department then issues a notice of this petition to identify a rightful owner. A public hearing may also be held. If a claim of ownership emerges the process is suspended until a court can make a declaratory judgement on the claim.

3. Inspection of Dams & Reservoirs
38 MRSA 811-814

The Commissioner of Agriculture appoints an inspector of dams who may inspect a dam not licensed by the federal government for safety or insufficiency. If the dam is unsafe, the inspector may order mitigation of the condition.

VII. Indirect State Regulation

A. Atlantic Sea Run Salmon Commission

The Commission's purpose is to coordinate efforts to restore and conserve salmon runs in Maine rivers. The Commission may adopt a management plan or other policy and adopt or amend regulations and may possibly require a hydropower developer to construct a fishway.

B. Parks and Recreation Bureau

The Bureau of Parks and Recreation has jurisdiction, custody and control in, over and upon all state managed and controlled parks (except Baxter). The Bureau is also responsible for the management of a considerable area of the Allagash Wilderness Waterway and restricts land and water uses within the Allagash Waterway.

C. Saco River Corridor Commission

The Saco River Corridor Commission may adopt regulations and ordinances and limit the facilities and uses along the Saco River. If a potential hydropower project is located on the Saco River Corridor at an existing dam site, a permit is necessary prior to extending, expending, or enlarging an existing structure for non-conforming use.

D. Critical Areas Program

Critical areas within Maine are those containing or potentially containing plant and animal life or geological features worthy of preservation in their natural condition, or with natural features of significant scenic or scientific value. The State Planning Office is establishing an inventory of critical areas with the advice and approval of the Critical Area Advisory Board. While the Planning Office's recommendations have no legal effect, they they may effect hydro development through recommendations to regulatory agencies.

E. Endangered Species

The Commissioner of Inland Fisheries and Wildlife has the power to identify and designated endangered species. If a project were to interrupt an endangered species, the Commissions could take action to prohibit development.

F. Historic Preservation Commission

The Maine Historic Preservation Commission, in conjunction with the National Historic Preservation Act, operates to preserve the architectural, historic, and environmental heritage. The Commission is non-regulatory, but a hydro developer at a potential historic site would be encouraged to preserve the historical significance of the property.

VIII. Executive Department

A. Executive Orders 1 FY 82/83 - Maine Rivers Study

This Executive Order declared that the following river stretches should merit special protection:

Allagash: Gerald Brook to Telos Lake;
Aroostook: Sheridan Dam to Millinocket Lake;
Dead: Kennebec River to Flagstaff Lake;
Denny: Hinkley Point to headwaters of Meddybemps Lake;
East Machias: Newcomb Point to Pocomoonshine Lake, including Maine River;
Kennebec: Bay Point to Edwards Dam, Augusta; The Forks to Harris Dam;
Narraguagus: Fickett Point to headwaters;
Machias: Fort O'Brien Point to Fifth Machias Lake, including Fourth and Fifth Lake Streams;
Moose: Attean Pond to Canadian Border;
Penobscot: Main Stem from Sandy Point to Veazie Dam, including Eastern Channel; East Branch from Medway to Grand Lake Matagamon; West Branch from Ambajejus Lake to western boundary of T-3, R-10; and from Chesuncook Lake to Seboomook Lake;
Pleasant: Seavey Point to Pleasant River Lake;
West Branch Pleasant: Main Stem to Fourth West Branch Pond;
Saco: East Limington to New Hampshire border;
St. Croix: Oak Point to Spednik Lake;
St. John: One mile above the foot of Big Rapids to Baker Branch;
Sheepscot: Wiscasset to headwaters

Special protection was also extended to certain tributaries identified by the Department of Conservation. These include tributaries of the Allagash, Aroostook, Machias, East Branch Penobscot, and the St. John.

To protect these stretches of rivers, the Executive Order also declared that it shall be the policy of the state that no new dam shall be constructed on these stretches, and that additional development or redevelopment of existing dams on these stretches shall be designed and executed in a manner that either enhances the significant resource values of these stretches, or does not diminish them.

REGULATORY AGENCY CONTACTS

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