

LUPC Ch. 11 & DEP Ch.450 Redline

(Showing proposed changes as insertions and deletions)

**~~DEP 06-096 Chapter 450 &
04-061 Chapter 11: ADMINISTRATIVE REGULATIONS FOR HYDROPOWER PROJECTS~~**

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**06-096 Chapter 450 &
LUPC 0401-061-672 Chapter 11:**

ADMINISTRATIVE REGULATIONS FOR HYDROPOWER PROJECTS

SUMMARY:—The Department of Environmental Protection and the Land Use ~~Regulation~~ Planning Commission have adopted joint regulations for the processing of applications for hydropower projects under the Maine Waterway Development and Conservation Act and Maine Rivers Policy. The purpose of these regulations is to provide guidance on the administration of the Act, including guidance on how the ~~Board~~ Department and Commission will interpret the provisions of the Act and the Maine Rivers Policy, and how they will approach the judgments they must make under the criteria set forth in the Act and the Policy.

1. Applicability:

- A.** This chapter applies to construction, ~~reconstruction~~ or reconstruction of a hydropower project, and structural alteration of all a hydropower project in ways that change water levels or flows, s within the state of Maine, including tidal and wave energy projects.
- B.** Unless otherwise specified in this chapter, if the Department is the Administering Agency, the requirements of- the Department's *Rules Concerning the Processing of Applications and Other Administrative Matters*, 06-096 C.M.R. Chapter 2 (amended October 19, 2015 ~~August 25, 2013~~), apply to- applications for hydropower projects ~~applications~~. In the event of inconsistencies between this chapter and Chapter 2, applications for hydropower projects ~~applications~~ will be processed under the procedures set forth in this chapter.
- C.** Unless otherwise specified in this chapter, if the Commission is the Administering Agency, the requirements of the Commission's *Rules of Practice*, 01-672 C.M.R. Chapter 4, apply to applications for hydropower projects. In the event of inconsistencies between this chapter and Chapter 4, applications for hydropower projects will be processed under the procedures set forth in this chapter.

2. Administering Agency.

- A. Department of Environmental Protection.-** The Ddepartment of Environmental Protection shall administer the permit process for a hydropower project that:
 - (1) ~~is~~ located wholly or partly within an organized municipality not served by LUPC; or
 - (2) ~~U~~ses tidal or wave action as a source of electrical or mechanical power, regardless of the hydropower project's location.
- B. Maine Land Use Planning Commission.-** The Maine Land Use Planning Commission shall administer the permit process for a hydropower project that is located wholly within the State's unorganized and deorganized areas as defined by ~~Title-12 M.R.S.A. § -section~~ 682(1),

~~subsection 1 and that does not use tidal or wave action as a source of electrical or mechanical power.~~

~~**Authority.** These regulations are promulgated pursuant to the Administrative Procedure Act, 5 M.R.S.A., Chapter 375; 12 M.R.S.A., Chapter 206-A; and 38 M.R.S.A., Sec. 343-A to interpret the Maine Rivers Policy, 12 M.R.S.A., Sec. 401-405 and the Maine Waterway Development and Conservation Act, 38 M.R.S.A., Sec. 630-637.~~

~~**2. Purpose.** In adopting the Maine Waterway Development and Conservation Act, the Legislature established “that it is the policy of the State to support and encourage the development of hydropower projects by simplifying and clarifying requirements for permits, while assuring reasonable protection of natural resources and the public interest in use of waters of the State”.~~

~~—The purpose of these regulations is to further this policy by providing guidance on the administration of the Act, including guidance on how the Board and Commission will interpret the provisions of the Act and the Maine Rivers Policy and will approach the judgments they must make under the criteria set forth in the Act and the Policy.~~

~~**3. Definitions.**~~

~~**1.** The following terms, as used in these regulations, shall have the following meanings, unless the context indicates otherwise:~~

~~**A. Act.** “Act” means the Maine Waterway Development and Conservation Act, 38 M.R.S. §§ 630–637.~~

~~**B. Administering Agency.** “Administering Agency” means either the Department or the Commission as set forth in Section 2 of this Rule.~~

~~**A. Act.** “Act” means the Maine Waterway Development and Conservation Act, 38 M.R.S.A., Sec. §§ 630–637.~~

~~**B. Board.** “Board” means the Board of Environmental Protection.~~

~~**C. Commission.** “Commission” means the Land Use ~~Regulation Planning~~ Commission of the Maine Department of ~~Agriculture, Conservation, and Forestry~~.~~

~~**C.D. Cumulative adverse impacts.** “Cumulative adverse impacts” are harms to the environment that are additive in nature. Harms caused by a proposed project and harms caused by other existing development, facilities or uses must be considered together and evaluated to determine if a threshold of acceptability for total harm to the environment is exceeded~~means harms to the environment which add to the impacts of other existing, facilities or uses such that a threshold of acceptability for the total impact is exceeded.~~ For example, when viewed ~~in~~ isolation, ~~a particular project might be seen as having only a minor on-site impact on water quality, e.g., a slight reduction in dissolved oxygen or a slight reduction in a run of anadromous fish. However, even minor reductions in dissolved oxygen at the site to levels well above the minimum acceptable standard might cause downstream areas affected by other existing projects or discharges to violate water quality standards. Likewise, a seemingly small reduction in the~~~~

number of salmon (say 10 percent loss at the project in question) might, when combined with the effects of other existing dams projects, cause a run to fail because the number of fish needed to sustain a breeding population was not maintained.

D.E. Commissioner. “Commissioner” means the Commissioner of the Department of Environmental Protection.

E.F. Department. “Department” means the Department of Environmental Protection.

G. Director. “Director” means the Executive Director of the Land Use Regulation Planning Commission.

F. Existing dam. “Existing dam” means any man-made barrier across a river segment identified in this chapter which impounds water and has not deteriorated or been breached or modified to the point where it no longer impounds water at 50% or more of its design level at normal flows.

G.H. Hydropower Pproject or Pproject. “Hydropower project,” or “project,” means any development ~~which that~~ utilizes the flow or other movement of water, including tidal or wave action, of water as a source of electrical or mechanical power, or ~~which that~~ regulates the flow of water for the purpose of generating electrical or mechanical power. A hydropower project ~~development~~ includes all powerhouses, dams, water conduits, turbines or other in-stream power devices, generators, transmission lines, water impoundments, roads and other appurtenant works and structures that are part of the development. ~~.(38 M.R.S.A., Sec. 632.3)~~

H.I. Mitigation. “Mitigation” means any action taken or not taken in order to avoid, minimize, rectify, reduce, eliminate, or compensate for actual or potential adverse environmental impacts. Such actions include, but are not limited to:

- (1) Avoiding-avoiding an impact altogether by not taking a certain action or part(s) of an action;
- (2) Minimizing-minimizing an impact by limiting the magnitude or duration of an activity or by controlling the timing of an activity;
- (3) Rectifying-rectifying an impact by repairing, rehabilitating, or restoring the affected environment;
- (4) Reducing-reducing or eliminating an impact over time through preservation and maintenance operations during the life of the project; and
- (5) Compensating-compensating for an impact by replacing affected resources or environments or providing substitute resources or environments.

J. Outstanding river segment. “Outstanding river segment” means a river or stream segment designated by the Legislature as meriting special protection and identified in 12 M.R.S.A. § 403.

2.4. Permit Requirements

A. **Prohibition**~~Prohibition~~. The Maine Waterway Development and Conservation Act (38 M.R.S.A., Sec. 633) states “No person one may initiate construction or reconstruction of a hydropower project, ~~or~~ structurally alter a hydropower project in a ways which that changes water levels or flows ~~above or below the dam~~, without first obtaining a permit from the ~~(Board~~Department or Commission~~Administering Agency)~~. Normal maintenance and repair of an existing and operating hydropower project ~~shall be is~~ exempt from ~~(the requirement for a permit.)~~ provided that:

~~(5)~~(1) ~~The the~~ activity does not involve any dredging or filling below the normal high-water line of any great pond, coastal wetland, river, stream or brook; and

~~(6)~~(2) ~~The the~~ activity does not involve any dredging or filling on the land adjacent to any great pond, coastal wetland, river, stream or brook such that any dredged spoil, fill or structure may fall or be washed into those waters.”

B. **Activities Requiring a Permit**. The following types of activities, ~~by way of example,~~ are subject to the requirement for a permit:

(1) ~~The the~~ construction of a new hydropower project, including a new water storage dam, or a new hydroelectric generating facility of any kind, whether utilizing a dam, a natural water feature, natural current velocities, or tidal action;

(2) ~~The the~~ reconstruction of a hydropower project;

~~(3)~~ Aany dredging or filling below the normal high- water line of a water body to facilitate maintenance and repair of an existing and operating hydropower project; and

~~(3)~~(4) ~~The the~~ structural alteration of a hydropower project in a ways which that changes water levels or flows above or below the dam, including, but not limited to:

(a) ~~The the~~ addition or alteration of flashboards; and

(b) ~~The the~~ installation of additional or enlarged turbines; ~~and~~

~~(4)~~ Any dredging or filling below the normal high-water line of a water body to facilitate maintenance and repair of an existing and operating hydropower project.

C. **Activities Not Requiring a Permit**. The following types of normal maintenance and repair activities at existing and operating hydropower projects, ~~by way of example,~~ are specifically exempt from the requirement for a permit, provided that the activity does not diminish water quality below applicable standards:

(1) ~~The the~~ resurfacing or repair of dams, canals, powerhouses, retaining walls, or other structures where no earthen cofferdam, dredging, filling, or permanent water level alteration is involved;

(2) ~~The the~~ repair, removal or replacement of flashboards, stop logs, gates, or intake racks where no earthen cofferdam, dredging, filling, or permanent water level alteration is involved;

- (3) ~~Removal-removal~~ of materials collected on trash racks;
- (4) ~~Removal-removal~~ of ~~debris~~ woody debris and other accumulated materials where no significant disturbance of soils or ~~pond bottom lake~~ or river bottom materials is involved;
- (5) ~~Installing-installing~~ or removing booms;
- (6) ~~Placement-placement~~ and removal of non-earthen cofferdams temporarily installed immediately adjacent to an existing structure for the purpose of inspecting and/or repairing the structure;
- (7) ~~Removal-removal~~ of sediment and debris from gated canals, tunnels and penstocks from which the water has been removed; and
- (8) ~~Sealing-sealing~~ of leaks in gates, stop logs and flashboards.

D. Special Protection for Outstanding River and Stream Segments.

- (1) No license or permit may be issued for a new dam on an outstanding river segment identified in 12 M.R.S. § 403, or for the construction of any water diversion project which would constitute a hydropower project pursuant to M.R.S. 38 § 632, and which would bypass all or part of the natural course of an outstanding river segment, unless where:
 - (a) the Legislature specifically authorizes the Administering Agency Department or Commission to consider such a permit; -and
 - (b) the Administering Agency Department Board or Commission then finds that the project meets the criteria of 38 M.R.S.A., § Sec. 636, as outlined in subsection 5 below.
- (2) -A license or permit permit may be issued for the additional development or redevelopment of an existing dam on an outstanding river segment only when:
 - (a) the Administering Agency Department or Commission finds that the project does not diminish the significant resource values of the outstanding river segment, which are identified by the 1982 Maine Rivers Study as provided in 12 M.R.S. § 403; and
 - (b) -the Administering Agency further finds that the project meets the criteria of 38 M.R.S. § 636, as outlined in subsection 5 below.

In determining whether or not significant resource values identified by the Maine Rivers Study will be diminished, the Administering Agency shall not consider measures proposed to replace or substitute for losses.

For the purposes of this rule, an “existing dam on an outstanding river segment” shall mean a man-made barrier across any outstanding river segment identified in 12 M.R.S. § 403, which impounds water, and which, as of September 23, 1983, had not been breached, deteriorated,

or modified to the point where it no longer impounded water at or near its design level at normal flows.

For the purposes of this rule, “additional development or redevelopment of an existing dam on an outstanding river segment” shall mean any activities associated with the installation, reinstallation, or expansion of any hydroelectric or hydromechanical generating capacity at an existing dam on an outstanding river segment as defined above, that does not result in any increase in water levels above the dam or any dewatering of the outstanding river segment below the dam except during construction.

~~—the Department or Commission further finds that the project meets the criteria of 38 M.R.S.A. §, Sec. 636, as outlined in subsection A above.~~

~~—**Jurisdiction.** The Board Department or Commission acquires jurisdiction under the Maine Waterway Development and Conservation Act when a person either files an application to construct, reconstruct, or structurally alter a hydropower project, or initiates the unapproved construction, reconstruction, or structural alteration of a hydropower project, as defined by 38 M.R.S.A., Sec. 632.3 and Sec. 633 and these regulations.~~

~~D.~~ Standard of Review

~~**5. A. Maine Waterway Development and Conservation Act.** The Maine Waterway Development and Conservation Act, 38 M.R.S.A., Sec. 636, states that the Board Administering Agency Department or Commission shall approve a project when it finds that the applicant has demonstrated that the following seven criteria have been met, as set forth in 38 M.R.S. § 636. ~~The criteria are as follows:~~~~

~~**A. (1) Financial and technical capability.** The applicant has the financial capability and technical ability to undertake the project. In the event that the applicant is unable to demonstrate financial capability, the ~~(Board Department or Commission)~~ may grant the permit contingent upon the applicant’s demonstration of financial capability prior to commencement of any permitted activities ~~permitted.~~ ~~(38 M.R.S.A., Sec. 636.1)~~~~

~~**B. (2) Safety.** The applicant has made adequate provisions for protection of public safety. ~~(38 M.R.S.A., Sec. 636.2)~~~~

~~—**(3) Public benefits.** The project will result in significant economic benefits to the public, including, but not limited to, creation of employment opportunities for ~~workers of the State in~~ Maine. ~~(38 M.R.S.A., Sec. 636.3)~~ ~~The Administering Agency Department or Commission shall identify and measure economic benefits and costs using generally accepted methods and procedures, such as those published by the United States Water Resources Council. -In accordance with these methods and procedures, economic benefits may include, but are not limited to: -increases in the income or purchasing power of Maine citizens, energy security from reducing dependence upon fossil fuels, and creation of employment opportunities for workers of the State. Economic costs may include, but are not limited to: -decreases in the income or purchasing power of Maine citizens, the value of other hydroelectric generating opportunities diminished or eliminated by a project, and the elimination of employment opportunities for workers of the State in Maine. -To meet this criterion, the applicant must demonstrate that:~~~~

C. — ~~To meet this criterion, the applicant must demonstrate that~~

~~(1) the benefits claimed from the proposed project are real, in that these benefits would not result but for the project.; Further, the applicant must demonstrate that~~

~~(2) the project's economic benefits are greater than its economic costs, and that the resulting net benefit is significant; when compared to the economic conditions likely to exist without the project; and~~

~~“Benefit” is a term which requires a comparison between at least two conditions. Further, this section of the law calls for the Board and Commission to judge if the benefits are ‘significant’. This too is a comparative term which can only be reasonably evaluated in light of other courses of action which might reasonably be pursued. Therefore, in order to accurately evaluate the existence and extent of the economic benefits that may result from a proposed hydropower project, it is necessary to compare two alternative futures: the economic conditions likely to exist if the project is built versus those likely to exist without the project.~~

~~NOTE: Experience has shown that the vast majority of projects have resulted in significant public economic benefits. This is because these relatively small projects at existing dams have lacked any substantial public economic costs, and the most likely alternative has been continued oil fired generation. However, a small number of projects have required a more thorough analysis of what was likely to happen if these projects were not built. Experience has also shown that these have been new dams which would have resulted in substantial public economic costs.~~

~~(3) — In cases involving new dams which would result in substantial economic costs, the consideration of alternatives is not limited to continued oil fired generation; therefore, a demonstration that this criterion has been met must include comparing the benefits claimed from the project have been compared weighed against the economic conditions that would otherwise result from any alternative source(s) of energy generation or conservation that might reasonably be pursued in the event that the project is not built, in cases involving new dams which would result in substantial economic costs.~~

~~Economic benefits and costs will be identified and measured using generally accepted methods and procedures, such as those published by the United States Water Resources Council. In accordance with these methods and procedures, economic benefits may include, but are not limited to, increases in the income or purchasing power of Maine citizens, energy security from reducing dependence upon fossil fuels, and creation of employment opportunities for workers of the State.~~

~~Similarly, in accordance with these methods and procedures, economic costs may include, but are not limited to, decreases in the income or purchasing power of Maine citizens, the value of other hydroelectric generating opportunities diminished or eliminated by a project, and the elimination of employment opportunities for workers of the State.~~

D. ~~(4)~~ Traffic movement. The applicant has made adequate provision for traffic movement of all types including but not limited to land-based and water-based vehicles and pedestrians out of or into the project development area.

E. Maine Land Use Planning Commission. Within the jurisdiction of the Commission, the project is an allowed use within the subdistricts in which it is proposed and the project complies with the Commission's land use standards. This criterion does not apply to any project that uses tidal or wave action as a source of electrical or mechanical power. (38 M.R.S.A., Sec. 636.4)

~~(5) Maine Land Use Regulation Planning Commission.~~ ~~Within the jurisdiction of the Maine Land Use Regulation Planning Commission, the project is consistent with zoning adopted by the Commission. This criterion does not apply to any project that uses tidal or wave action as a source of electrical or mechanical power. (38 M.R.S.A., Sec. 636.5)~~

~~———— A proposal is consistent with such zoning if the proposed hydropower project, or portions of that project, as occur within the Commission's jurisdiction, are not prohibited uses under the zoning designation and standards in effect at the time of consideration as set forth in Chapter 10 of the Commission's Rules regarding and Regulations. Land Use Districts and Standards for Areas within the Jurisdiction of the Maine Land Use Planning Commission, 01-672 CMR 10 (amended August 15, 2013).~~

~~———— In those instances where the project, or portions of that project, are prohibited uses under the zoning designation and standards in effect at the time of consideration, the applicant must file and obtain favorable action from the Commission on a rezoning petition or must amend the project to avoid conflicts with the Commission's zoning in order to satisfy this criterion.~~

F. ~~(6)~~ Environmental mitigation. The applicant has made reasonable provisions to realize the environmental benefits of the project, if any, and to mitigate its adverse environmental impacts. (38 M.R.S.A., Sec. 636.6)

~~———— Mitigation is not necessarily limited to the replacement of affected resources or environments (*i.e.*, in-kind or on-site mitigation), but may involve the provision of substitute resources or environments (*i.e.*, out-of-kind or off-site mitigation). In-kind or on-site mitigation measures are will be preferred. Off-site or out-of-kind measures may be acceptable where the Administering Agency finds that in-kind or on-site measures are ~~demonstrated~~ not ~~to be~~ feasible or are not desirable.~~

~~———— Whether an applicant's provisions to realize environmental benefits or to mitigate adverse environmental impacts are reasonable depends in part upon the significance of the resource(s) affected.~~

G. Environmental and energy considerations. The advantages of the project are greater than the direct and cumulative adverse impacts over the life of the project based upon the considerations below.

~~3. (7) — Environmental and energy considerations. The advantages of the project are greater than the direct and cumulative adverse impacts over the life of the project based upon the following considerations below.:~~

The Department or Commission Administering Agency shall make a written finding of fact with respect to the nature and magnitude of the impact of the project on each of the considerations under this sub-section, and a written explanation of the use of these findings in reaching a decision. The Administering Agency shall consider:

~~— NOTE: Significant cumulative adverse impacts are harms to the environment which add to the impacts of other existing facilities or uses such that a threshold of acceptability for the total impact is exceeded. For example, when viewed in isolation, a particular project might be seen as having only a minor on-site impact on water quality, e.g., a slight reduction in dissolved oxygen or a slight reduction in a run of anadromous fish. However, even minor reductions in dissolved oxygen at the site to levels well above the minimum acceptable standard might cause downstream areas affected by other existing projects or discharges to violate water quality standards. Likewise, a seemingly small reduction in the number of salmon (say 10 percent loss at the project in question) might, when combined with the effects of other existing dams, cause a run to fail because the number of fish needed to sustain a breeding population was not maintained.~~

~~(1) (a) — Whether the project will result in significant benefit or harm to soil stability, coastal and inland wetlands, or the natural environment of any surface waters and their shorelands;~~

~~(2) (b) — Whether the project will result in significant benefit or harm to fish and wildlife resources. In making its determination, the (Board Department or Commission Administering Agency) shall consider other existing uses of the watershed, and fisheries management plans adopted by the Department of Inland Fisheries and Wildlife, and/or the Department of Marine Resources, and the Atlantic Sea Run Salmon Commission;~~

~~(3) (c) — Whether the project will result in significant benefit or harm to historic and archaeological resources;~~

~~(4) (d) — Whether the project will result in significant benefit or harm to the public rights of access to and use of the surface waters of the State for navigation, fishing, fowling, recreation and other lawful public uses;~~

~~(5) (e) — Whether the project will result in significant flood control benefits or flood hazards; and~~

~~(6) (f) — Whether the project will result in significant hydroelectric energy benefits, including the increase in generating capacity and annual energy output resulting from the project, and the amount of nonrenewable fuels it would replace; and~~

Water Quality.

~~H. F~~ There is reasonable assurance that the project will not violate applicable state water quality standards, including the provisions of 38 M.R.S.A. § 464(4)(F). This finding is required for ~~both the proposed impoundment and for any affected classified water bodies downstream of the proposed impoundment. The Department shall reclassify the waters of the proposed impoundment to Class GPA if the Department finds:~~

~~(a) There is a reasonable likelihood that the proposed impoundment will thermally stratify;~~

~~(b) The proposed impoundment will exceed 30 acres in surface area;~~

~~(c) The proposed impoundment will not have any upstream direct discharges except cooling water; and~~

~~(d) The proposed impoundment will not violate 38 M.R.S.A. § 464(4)(F).;~~

~~— **Additional Information Requirements.** The Department or Commission Administering Agency may require applicants for hydropower projects to submit additional information as deemed necessary to demonstrate that the criteria in Section 5 of this chapter have been met.~~

~~(g) For an application filed after July 16, 1986, whether there is reasonable assurance that the project will not violate applicable water quality standards, as required for water quality certification under the United States Water Pollution Control Act, Section 401.~~

~~— The (Board or Commission) shall make a written finding of fact with respect to the nature and magnitude of the impact of the project on each of the considerations under this (criterion), and a written explanation of their use of these findings in reaching their decision. (38 M.R.S.A., Sec. 636.7)~~

~~— The benefits of a project need not be greater than its harms for each of the specified environmental and energy considerations in order for this overall criterion to be satisfied. Therefore, this criterion has been met if, in the Board's or Commission's judgment, the applicant has demonstrated that the weight of the advantages of the project is greater than the weight of the direct and cumulative adverse impacts over the life of the project based upon the specified environmental and energy considerations.~~

~~— Determining whether the advantages of the project are greater than its adverse impacts requires attaching value or weight to the project's various benefits and harms.~~

I. NOTE:

~~— Experience has shown that this weighing has not been difficult for the vast majority of projects as no substantial adverse environmental impacts would have occurred to be balanced against the energy benefits of these projects. However, a small number of projects have required a more thorough analysis. Experience has also shown that these have been new dams with substantial adverse impacts.~~

~~In cases involving new dams which would result in substantial adverse impacts, the consideration of alternatives is not limited to continued oil fired generation; therefore, a demonstration that this criterion has been met must include a description of the environmental and energy benefits and harms of the proposed project in comparison with the benefits and harms that would result from any alternative source(s) of energy generation or conservation that might reasonably be pursued in the event that the project is not built.~~

~~**B. The Maine Rivers Policy: Special Protection for Outstanding River Segments.** 12 M.R.S.A., Sec. 403, declares that certain river and stream segments, designated as outstanding rivers, are to be accorded special protection, by virtue of their unparalleled natural and recreational values. This special protection takes the following form:~~

~~“No license or permit under Title 38, Sections 630 to 636, may be issued for the construction of new dams on the river and stream segments subject to this special protection without the specific authorization of the Legislature, or for additional development or redevelopment of existing dams on the river or stream segments subject to this special protection where the additional development or redevelopment diminishes the significant resource values of these river and stream segments.”~~

~~The outstanding river segments are identified in 12 M.R.S.A., Sec. 403. The significant resource values of the special protection rivers are those identified by the 1982 Maine Rivers Study, as provided in 12 M.R.S.A., Sec. 403.~~

~~Based on this special protection, the Board or Commission can only approve a permit pursuant to the Act for a new dam on an outstanding river segment where (1) the Legislature specifically authorizes the Board or Commission to consider such a permit and (2) the Board or Commission then finds that the project meets the criteria of 38 M.R.S.A., Sec. 636, as outlined in subsection A above.~~

~~Similarly, the Board or Commission can only approve a permit pursuant to the Act for the additional development or redevelopment of an existing dam on an outstanding river segment where (1) the Board or Commission finds that the project does not diminish the significant resource values of the outstanding river segment, and (2) the Board or Commission further finds that the project meets the criteria of 38 M.R.S.A., Sec. 636, as outlined in subsection A above.~~

~~In determining whether or not significant resource values identified by the Maine Rivers Study will be diminished, the Board or Commission will not consider measures proposed to replace or substitute for losses.~~

~~For the purposes of 12 M.R.S.A., Sec. 403, “existing dams on the river or stream segments subject to special protection” shall mean man-made barriers across the outstanding river segments identified in 12 M.R.S.A., Sec. 403, which impound water and which, as of June 17, 1983, had not been breached, deteriorated, or modified to the point where they no longer impounded water at or near their design level at normal flows.~~

~~For the purposes of 12 M.R.S.A., Sec. 403, “additional development or redevelopment of existing dams on a river or stream segment subject to special protection” shall mean any activities associated with the installation, reinstallation or expansion of hydroelectric or hydromechanical generating capacity at existing dams, as defined above, that do not result in any increase in water levels above these dams or any dewatering of river segments below these dams except during construction.~~

~~_____~~
~~_____~~ Dams located at the outlet of lakes or ponds specifically identified in 12 M.R.S.A., Sec. 403 shall not be considered to be on the outstanding river segments.
~~_____~~

~~_____~~ **7. Information Requirements.** To receive a permit, every applicant must demonstrate that the criteria of 38 M.R.S.A., Sec. 636 have been met. In all cases, such information shall be required as is deemed necessary by the Board, Commission or their staffs to describe the proposed project and its impacts in sufficient detail to enable the Board, Commission or their staffs to make an informed judgment on a particular project.

~~_____~~ Where information required by the Board, Commission, or their staffs is contained in an Application for License or Exemption or an Application for Amendment of License or Exemption for a hydropower project that has been or is being filed with the Federal Energy Regulatory Commission (FERC), that information may be submitted as complete or partial fulfillment of these information requirements.

~~_____~~ Because of the differing nature of every project proposed for approval, an applicant is advised to consult with staff of the Commission or Department (whichever is applicable) prior to submitting an application.

6. 8. Process and Time Limits for Decisions.

~~_____~~ **A. Commissioner or Director Action.** For those applications delegated* to the Commissioner of the Department of Environmental Protection or the Director of the Land Use Regulation Commission, the Commissioner or Director shall make a decision as expeditiously as possible, and shall within 60 working days of receipt of a properly completed application, either:

- ~~(1) Approve the proposed project upon such terms and conditions as are appropriate and reasonable to protect and preserve the environment and the public's health, safety and general welfare, including the public interest in replacing oil with hydroelectric energy; (38 M.R.S.A., Sec. 635); or~~
- ~~(2) Disapprove the proposed project, setting forth in writing the reasons for the disapproval; (38 M.R.S.A., Sec. 635); or~~
- ~~(3) Refer the proposed project to the Board or Commission, as appropriate, in which case the Board's or Commission's decision shall be reached within 105 working days of the agency's receipt of the completed application.~~

~~NOTE: Delegation of authority to the Commissioner of the Department of Environmental Protection to make decisions pursuant to the Act is provided for in Chapter I of the Department's Regulations. Delegation of authority to the Director of the Land Use Regulation Commission to make certain decisions pursuant to the Act is provided for by Commission action.~~

~~**A. B. Board/Department or Commission/Administering Agency Action.** Once an application has been accepted as complete for processing/Upon receipt of a properly completed application, the Board/Department or Commission/Administering Agency shall either:~~

(1) Approve the proposed project upon such terms and conditions as are appropriate and reasonable to protect and preserve the environment and the public's health, safety and general welfare, including the public interest in replacing fossil fuel-derived energy ~~oil~~ with hydroelectric energy;

(2) Disapprove the proposed project, setting forth in writing the reasons for the disapproval; or

(3) Schedule a hearing on the proposed project. Any hearing held under this subsection shall follow the notice requirements and procedures for an adjudicatory hearing under ~~Title 5 M.R.S.A. §§ 9051–9064, Chapter 375, subchapter IV~~. After any hearing is held under this subsection, the ~~Board~~Department ~~(or Commission)~~Administering Agency shall make findings of facts and issue an order approving or disapproving the proposed project, ~~as provided in subsections 1 and 2.~~

~~(38 M.R.S.A., Sec. 63~~

~~**Time Limits.**~~

~~—Whenever the commissioner receives a properly completed application, the Ddepartment shall make a decision as expeditiously as possible.~~

~~—When the proposed project lies within the jurisdiction of the Maine Land Use Planning Commission, decisions shall be made within 105 working days except that decisions delegated to the director shall be made within 60 working days. Following one extension of up to 45 working days, the director may waive the time limit requirements of this section only at the request of the applicant.~~

~~—The Board or Commission shall make its decision as expeditiously as possible but in no case will the decision be later than 105 working days after acceptance of the application, except as provided in subsection C.~~

~~—C. Waiver of Time Limits. The Act provides that, fFollowing one extension of up to 45 working days, the time limit requirement for decisions may be waived by the Commissioner or Director only at the request of the applicant.~~

~~—**Water Quality Certification.** The Administering Agency Ddepartment shall issue or deny water quality certification at the same time it approves or disapproves the proposed project. D. Action on Water Quality Certification~~

~~— [DEP NOTE: The provisions of this sub-section have been superceded by P.L. 1989 Chapter 309, which revised 38 M.R.S.A. Sec. 634.1, repealed 38 M.R.S.A. Sec. 363-C, and enacted 38 M.R.S.A. Sec. 635-B.]~~

~~—As provided by 38 M.R.S.A., Sec. 634.1, the issuance of a water quality certificate, as required under the United States Water Pollution Control Act, Sec. 401, shall be mandatory in every case where the Board or Commission approves an application for a hydropower project permit under the Act, except in those cases where the Board or Commission has found that the applicant has not demonstrated that the project will not result in significant harm to water quality or will not violate applicable water quality standards.~~

~~The Commissioner or Director, as appropriate, shall act to issue or deny water quality certification within 5 working days following the decision by the Board or Commission to approve or disapprove a proposed project pursuant to 38 M.R.S.A., Sec. 636. Such action shall be based solely on the finding of the Board or Commission pursuant to 38 M.R.S.A., Sec. 636.7(G), as to whether there is a reasonable assurance that the project will not violate applicable water quality standards.~~

~~As provided by 38 M.R.S.A., Sec. 363-C, the waters of a new or proposed hydroelectric impoundment shall be deemed to be Class GP-A, if the Commissioner finds that it is reasonably likely that the impoundment would: (1) thermally stratify; (2) exceed 30 acres in surface area; and (3) not have any upstream direct discharges except cooling water. The Commissioner shall notify the Board or Commission, as appropriate, of any classification determination made pursuant to this statutory provision as soon as sufficient information is available to make such a determination.~~

B.

7. 9. Terms and Conditions of Approval

A. Authority. The ~~Act provides that the Board~~Department or Commission~~Administering Agency~~ may approve “the proposed project upon such terms and conditions as are appropriate and reasonable to protect and preserve the environment and the public’s health, safety and general welfare, including the public interest in replacing ~~fossil fuel-derived energy oil~~ with hydroelectric energy. These terms and conditions may include, but are not limited to:

- (~~A1~~) ~~Establishment~~establishment of a water level range for the body of water impounded by a hydropower project;
- (~~B2~~) ~~Establishment~~establishment of instantaneous minimum flows for the body of water affected by a hydropower project; and
- (~~C3~~) ~~Provisions~~provisions for the construction and maintenance of fish passage facilities.

In those cases where the proposed project involves maintenance, reconstruction or structural alteration at an existing hydropower project and where the proposed project will not alter historic water levels or flows after its completion, the (~~Board~~Department or Commission~~Administering Agency~~) may impose temporary terms and conditions of approval relating to paragraph A or paragraph B of this subsection but shall not impose permanent terms and conditions that alter historic water levels or flows. (~~38 M.R.S.A., Sec. 635.1~~)

B. Nature of Terms and Conditions. Such case-specific terms and conditions ~~as may be~~ placed by the ~~Board~~Department or Commission~~Administering Agency~~ on its approval of a proposed project ~~shall~~will specify particular means of satisfying minor or easily corrected problems, or both, relating to compliance with the Act and shall not substitute for or reduce the burden of proof of the applicant to demonstrate to the ~~Board~~Administering Agency~~Department or Commission~~ that each of the standards of the Act has been met.

C. Standard Conditions of Approval. Unless otherwise specifically stated in the approval, all ~~BoardAdministering AgencyDepartment~~, Commissioner, ~~Commission~~, and Director approvals ~~shall beare~~ subject to the following standard conditions:

- (1) Limits of Approval. ~~This-Project~~ approval is limited to and includes the proposals and plans contained in the application and supporting documents submitted and affirmed to by the applicant. All variances from the plans and proposals contained in said documents are subject to the review and approval of the ~~BoardAdministering AgencyDepartment or Commission~~ prior to implementation.
- (2) Noncompliance. Should the project be found, at any time, not to be in compliance with any of the conditions of ~~this~~ approval, or should the permittee construct or operate ~~this-the~~ project in any way other than ~~as~~ specified in the application or supporting documents, as modified by the conditions of ~~this~~ approval, then the terms of ~~this~~ approval ~~shall-will~~ be considered to have been violated.
- (3) Compliance with all Applicable Laws. The permittee shall secure and appropriately comply with all applicable federal, state and local licenses, permits, authorizations, conditions, agreements, and orders prior to or during construction and operation of the permitted project.
- (4) Inspection and Compliance. Authorized representatives of the ~~BoardAdministering AgencyDepartment, Commission~~ or the Attorney General ~~shall-must~~ be granted access to the premises of the permittee at any reasonable time for the purpose of inspecting the construction or operation of the project and assuring compliance by the permittee with the conditions of ~~this~~ approval.
- (5) Initiation and Completion of Construction. If construction is not commenced within 3 years and completed within 7 years from the date of issuance of the Authorizing Agency's this permit, ~~this-the~~ approval ~~shall-mustwill~~ lapse, unless a request for an extension of these deadlines has been approved by the ~~BoardAdministering AgencyDepartment or Commission~~.
- (6) Construction Schedule. Prior to the start of construction, the permittee shall submit a final construction schedule for the project to the ~~Administering AgencyCommissioner or Director~~.
- (7) Approval Included in Contract Bids. A copy of ~~this-the project's~~ approval must be included in or attached to contract bid specifications for the project.
- (8) Approval ~~Shown-Provided~~ to Contractor. Work done by a contractor pursuant to ~~this-the project's~~ approval ~~shall-may~~ not begin before a copy of ~~this-the~~ approval has been ~~shown provided~~ to the contractor by the permittee.
- (9) Notification of Project Operation. The permittee shall notify the Commissioner or Director of the commencement of commercial operation of the project within 10 days prior to such commencement.
- (10) ~~-~~Assignment or Transfer of Approval. ~~This-An~~ approval issued under these Rules shall expire upon the assignment or transfer of the property covered by ~~this-the~~ approval unless written consent to transfer ~~this-the~~ approval is obtained from the ~~BoardAdministering~~

~~Agency Department or Commission. To obtain approval of transfer, the permittee shall notify the Board or Commission 30 days prior to assignment or transfer of property which is subject to this approval. Pending Board Administering Agency Department or Commission~~ determination on the application for a transfer or assignment of ownership of ~~this an existing~~ approval, the person(s) to whom such property is assigned or transferred shall abide by all of the terms and conditions of ~~this that~~ approval. To obtain the ~~Board Administering Agency Department's or Commission's~~ approval of transfer, the proposed assignee or transferee must demonstrate the financial capability and technical ability to (1) comply with all terms and conditions of ~~this the~~ approval and (2) satisfy all other applicable statutory criteria.

~~A "transfer" is defined as the sale or lease of property which is the subject of this approval, or the sale of 50 percent or more of the stock of or interest in a corporation or a change in a general partner of a partnership which owns the property subject to this approval.~~

8. ~~10.~~ Access to the Site. The filing of an application for approval of a ~~development hydropower project~~ pursuant to 38 M.R.S.A., ~~Sec. § 633~~; constitutes the granting of permission by the applicant to allow ~~Board Administering Agency Department or Commission~~ members and their staffs, and others authorized by the ~~Board Administering Agency Department or Commission~~ to access ~~to~~ the site of the proposed ~~development project~~ in order to facilitate review of such application.

9. ~~11.~~ Severability. The provisions of this ~~C~~chapter are severable. If a section, sentence, clause, or phrase of this ~~C~~chapter is adjudged by a court of competent jurisdiction to be invalid, such decision shall not affect the validity of the remaining portions of this ~~C~~chapter.

AUTHORITY:

~~5 M.R.S.A., Chapter 375 §§ 8001-10008, Maine Administrative Procedures Act.
12 M.R.S.A., Chapters 200 and 206-A §§ 401-409, Maine's Rivers, and §§ 681-689, Use Regulations.
38 M.R.S.A., Sec. 343-A and Sec. §§ 630-637, Maine Waterway Development and Conservation Act.~~

EFFECTIVE DATE:

September 28, 1987 (91 days after the adjournment of the First Regular Session of the 113th Maine Legislature, as provided by 38 M.R.S.A., ~~Sec. § 637~~.)

EFFECTIVE DATE (ELECTRONIC CONVERSION): May 4, 1996

CORRECTION:

January 13, 2000 - removed Section 5(A)(8) as never formally adopted; restored 5(A)(7)(g) from original paper adoption.