STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
17 STATE HOUSE STATION AUGUSTA, MAINE 04333-0017

DEPARTMENT ORDER

IN THE MATTER OF

BRANCH MILLS FLOUR AND GRAIN	)REGULATION OF WATER LEVELS
Palermo and China, Kennebec and Waldo Counties	) AND MINIMUM FLOWS
BRANCH POND	)
L-24447-36-A-N	)FINDINGS OF FACT AND ORDER

Pursuant to the provisions of 38 M.R.S. §§ 815-840, the Maine Department of Environmental Protection (Department) has considered the water level petition of Brandon H. Kulik *et al.* with the supportive data, agency review comments, pre-filed testimony, public comments, public hearing transcript, closing arguments, and other related materials on file and FINDS THE FOLLOWING FACTS:

1. PETITION:

On December 9, 2008, the Department received a water level petition from more than 25% of littoral property owners requesting that the Department establish a water level and minimum flow regime for Branch Pond, a great pond located in the towns of Palermo and China. Petitioners requested that the pond be restored to and sustained at historic levels. The petition was accepted as complete for processing by the Department on January 31, 2009. Pursuant to 38 M.R.S. § 840(1), the Department determined that the petitioners submitted the required number of signatures (62% of property owners on the shore of the pond signed the petition) from littoral or riparian proprietors to conduct an adjudicatory hearing for the purpose of establishing a water level regime and, if applicable, minimum flow requirements for Branch Pond. The water levels of Branch Pond are controlled by a dam (Branch Pond Dam) owned and operated by Branch Mills Flour and Grain (hereinafter referred to as "Branch Mills" or "owner of the dam"). Branch Mills purchased the dam in August 2003 from Donald and Thomas Dinsmore. According to the petition filed with the Department, the lake levels of Branch Pond were reported to be unsatisfactory beginning in March 2008. Complaints focused on low water levels associated with anticipated repairs to the dam. The petition further stated that members of the Branch Pond Association attempted to negotiate with the owner of the dam to establish a lake level, however a mutually acceptable water level was not reached. On March 16, 2009, the owner of the dam—after the Department sent correspondence indicating a water level petition had been filed with the Department—submitted to the Department a plan and schedule for repairs to the dam and mill. After reviewing the owner of the dam's plan, the Department determined, subject to timely completion of those repairs, it would take no action on the petition to hold a water level hearing through 2011, provided that water levels were maintained near the spillway level during the summer recreation season. Reports by the petitioners of dropping water levels at the start of the recreation season in 2011 resulted in further action by the Department to hold a water level hearing.

2. LEGAL AUTHORITY:

This Water Level Order (Order) is being issued upon completion of the proceedings required under 38 M.R.S. § 840. Section 840 requires that an adjudicatory proceeding be conducted and an Order issued regarding a water level regime upon the filing of a petition for a body of water impounded by a dam that is not operating under a permit or license that otherwise sets water levels.

Pursuant to the provisions outlined in 38 M.R.S. §§ 815-840, the Department is required to establish a water level regime and, if applicable, minimum flow requirements for bodies of water that are impounded by dams provided certain criteria are met. Section 840 applies to all dams that impound water except in instances where the statute explicitly exempts a dam from this process. In general, 38 M.R.S. § 840(1) excludes, that is, it does not regulate water level regimes for dams that are operating with a license or under an exemption issued by the Federal Energy Regulatory Commission (FERC), dams that are subject to a permit setting water levels issued under another state law, dams regulated by one or more municipalities by ordinance or interlocal agreement, or dams regulated by the International Joint Commission. Therefore, any dam that impounds water, including the Branch Pond Dam, that is not subject to a license or an exemption issued by FERC, or to a *water level regime* set under natural resource protection laws, sections 480-A to 480-S; the site location of development laws, sections 481 to 490; the small hydroelectric generating facilities laws, sections 631 to 636; the land use regulation laws, Title 12, sections 681 to 689; municipal ordinance or interlocal agreement; the International Joint Commission; or any other statute regulating the construction or operation of dams, including the Maine Mill Act, is subject to regulation under 38 M.R.S. §§ 815-840 (emphasis added). Branch Pond Dam is not licensed or exempted from licensing requirements by FERC, and is not subject to a water level regime set under another state statute. Therefore, the Branch Pond Dam is subject to regulation under 38 M.R.S. §§ 815-840.

3. PROCEEDINGS:

The Commissioner designated a Presiding Officer on May 16, 2013 to preside over the adjudicatory hearing, consistent with the Maine Administrative Procedure Act (MAPA), 5 M.R.S. §§ 9051-9064, and Chapter 3, *Rules Governing the Conduct of Licensing Hearings*, involving the Branch Pond water level petition. On May 31, 2013, the Presiding Officer issued a Notice to interested persons that they could submit Petitions for Leave to Intervene by June 12, 2013.

The Department held a pre-hearing conference on June 21, 2013 to discuss the adjudicatory procedures and processes as contained in the First Procedural Order.

The Department conducted an adjudicatory hearing on August 23, 2013 under 38 M.R.S. § 840, and that hearing was conducted in accordance with MAPA and the Department's regulations at Chapter 3, *Rules Governing the Conduct of Licensing Hearings*.

The Department issued several Procedural Orders before and after the August 23rd adjudicatory hearing. The First Procedural Order, dated June 13, 2013, established procedures related to Petitions for Leave to Intervene and set the date for a pre-hearing conference. In the Second Procedural Order, dated June 28, 2013, Michael J. Wozniak, Rich and Mimi Roughgarden (collectively referred to as the "Roughgardens") and Thomas Dinsmore were granted intervenor status in these proceedings. The Second Procedural Order also set forth the roles and responsibilities of the parties, the Presiding Officer, and Department staff; the order of presentation of evidence at the hearing; filing requirements; statutory and regulatory framework and relevant review criteria; and deadlines and schedules. In the Third Procedural Order, dated August 20, 2013, Thomas Dinsmore's withdrawal as an intervenor was recognized; an agenda for the public hearing was established; and objections to pre-filed testimony were addressed. The Fourth Procedural Order, dated September 19, 2013, provided parties with a transcript of the August 23rd Water Level Hearing, and the opportunity to submit final closing arguments. The Fifth Procedural Order, dated October 28, 2013, provided the parties an opportunity to submit written questions or comments on the methods and results of an elevation survey to determine the Normal High Water Line (NHWL) for Branch Pond.

The Department issued a draft Water Level Order via electronic mail (email) on Monday, April 28, 2014 and re-issued it on Tuesday, April 29, 2014 due to an email address error. A comment period was established, and that period was subsequently extended until May 21, 2014. The Department received eighteen comments expressing support and one comment expressing opposition to the draft Order. All the concerns were noted and considered to the extent they addressed the provisions of 38 M.R.S. §§ 817-840 and were within the scope of the Department's review of the petition. The Department reviewed and considered all of the comments received and incorporated all submitted information into the administrative record. Minor revisions were made to the text of this document in response to some comments, to the extent they addressed the provisions of 38 M.R.S. §§ 817-840.

4. BACKGROUND/EVIDENCE PRESENTED:

A. EVIDENCE PRESENTED BY PETITIONERS, OWNER OF THE DAM, AND INTERVENORS:

Per the Second Procedural Order, the parties provided pre-filed direct and rebuttal testimony, exhibits, and objections to pre-filed testimony and witnesses to the Department prior to the adjudicatory hearing. At the August 23, 2013 adjudicatory hearing, the parties summarized their direct testimony and had an opportunity to cross-examine witnesses. Members of the public were also provided an opportunity to testify on August 23rd at an evening portion of the public hearing. The Department received and accepted written public comments until September 6, 2013. Per the Fourth and Fifth Procedural Orders, the parties submitted closing arguments and had an opportunity to submit written questions or comments to the Department regarding the Department's elevation survey to determine the NHWL for Branch Pond.

Branch Mills presented testimony related to the historic nature of the mill structure, and a long-term plan to restore the mill and the hydromechanical power mechanism

to establish a historic gristmill museum. The directors and/or owners of Branch Mills, Stephen and Christine Coombs (hereinafter collectively referred to as "the Coombs"), described the repairs needed for both safety and function at the dam and mill structure; the anticipated schedule to make those repairs during 2008, 2009 and 2011, and the nature of the repair work which necessitated lowering the water level in Branch Pond for those repair periods. The Coombs testified that normal water levels were maintained during all but 2008, and portions of 2009 and 2011 including periods of time during which the Department, in an April 21, 2009 letter, agreed to take no further action in the pending water level action. The Coombs testified that water sufficient for aquatic resources has always been released downstream. Testimony from the owner of the dam was pre-filed and provided to the parties and to the Department.

The petitioners presented testimony and evidence describing the physical characteristics of Branch Pond, the aquatic resources therein, and other fauna dependent on those aquatic resources; historical water levels and water levels during the period the lake was drawn down, and the effects of those water levels on aquatic and littoral resources, including a loss of hundreds of mussels along the newly exposed shoreline; and the effect of water levels recommended by the Department's Division of Environmental Assessment (DEA) staff in an April 12, 2012 memo to licensing staff. The petitioners' testimony included supporting testimony attesting to the impact of low water levels on fish and recreational fishing opportunities, water levels necessary to access Branch Pond via a common area boat launch, and an opinion of the structure and function of the Branch Pond Dam, past and present. The petitioners' testimony and exhibits were pre-filed and provided to the parties and to the Department. The petitioners' data supporting the bathymetric map of Branch Pond that was pre-filed by the petitioners was provided to the parties and to the Department following the water level hearing.

Intervenors Wozniak and Roughgarden presented testimony including photographic evidence of the impact of low water conditions on property and water access around the lake, including a need for some riparian owners to extend seasonal water supply lines, and observations related to impact on biota and wetlands, including erosion impacts.

At the August 23rd hearing, staff from the Department's DEA described the method used by the Department to establish water levels and flows necessary to sustain aquatic life in impoundments and in outlet streams of dam-controlled great ponds in Maine, based on the Department's regulations at Chapter 587, *In-stream Flows and Lake and Pond Water Levels*.

B. RESOURCE DESCRIPTION PRESENTED BY PETITIONERS:

Branch Pond is a relatively shallow pond with good water quality, approximately 330 acres in size. At normal high water most of the pond is approximately five to six feet deep, with a deeper basin. Branch Pond is the headwaters of the West Branch Sheepscot River, with an approximately eight-square mile drainage area. There are extensive wetlands associated with Branch Pond, with over twenty-two acres mapped as wading bird habitat. The shoreline is heavily forested except for some seasonal camps and homes. Branch Pond includes a high-quality warm-water fishery including a fast-action largemouth bass fishery. Other warm water species include pickerel, yellow perch, sunfish, and hornpout. The pond and its aquatic resources also support bald eagles, loons, ospreys and blue heron, and provides habitat for aquatic dependent fauna such as leopard frog, musk turtles, snapping turtles, painted turtles, bullfrogs, and mussels. Branch Pond is a recreational resource used for fishing, boating, kayaking and swimming.

C. DAM CHARACTERISTICS PRESENTED BY PETITIONERS AND OWNER OF THE DAM:

The Branch Pond Dam was originally built to direct water through a hydromechanical wheel to power the mill at Branch Pond. The dam sits on bedrock and is constructed of large field stones, with an eight-foot wide concrete section housing the gates. The dam is constructed with three spillways: a five-foot wide east spillway and two spillways on the west side, one larger (five feet wide) and one smaller (three feet wide). The spillways are controlled with boards, or stoplogs; each spillway holds three twelve-inch boards. There are also three gates of two sizes, two large gates and one small gate, all of which slide up and down within the concrete. The gates are composed of stacked wooden planks in a metal frame. Planks in the large gates are pulled up and pushed down individually via rods bolted to the tops of the frames. A hydraulic system that powers the gates is accessed through the mill building, which rests on top of the dam. The gates, planks and rods were designed to be individually replaceable, however the gates are now faced with protective trash racks that limit any replacement option. Replacing the gates would require lowering the water level and removing the trash racks prior to replacement work. The large gates are used to manage water during high flow periods, such as in the spring or during heavy rain events, and spillway boards are used to fine tune the water levels.

Neither the petitioners nor the owner of the dam submitted elevation data for the dam. Petitioners submitted an elevation of 347 feet mean sea level (MSL) as "Normal High Water", referenced from United States Geological Survey mapping and reportedly ground-truthed by the petitioners' spokesperson, Brandon Kulik, using a level-loop survey technique.

Both the petitioners and the owner of the dam state that the dam is currently in disrepair, and requires repair and maintenance. Branch Mills stated it intends to make repairs to the Branch Mills Dam upon settlement of the water level issue,

however there is neither a specific schedule nor a general timeline stated in which to initiate or complete the repairs.[1]

5. DEPARTMENT ANALYSIS & FINDINGS:

A. RESOURCE DESCRIPTION:

Branch Pond is an inland body of water with a surface area in excess of thirty acres, meeting the definition of a great pond pursuant to 38 M.R.S. § 480-B(5). Branch Pond has a surface area between 306.4 and 322 acres in size, depending on the pond elevation. The Maine Information Display and Analysis System (MIDAS), a land use and land cover database, identifies the lake as MIDAS #5754. Branch Pond has a volume between 1815 and 1912.2 acre-feet depending on pond elevation, and an 8.25 square mile watershed, as reported in the Voluntary Lakes Monitoring (VLMP) report. The lake has a maximum depth of thirty-eight feet and a mean depth of eight feet.

Two wetland areas are contained within the shoreline of Branch Pond, totaling seventy-nine acres of moderate value Inland Waterfowl and Wading Bird Habitat (IWWH). These wetlands contain a variety of wetland types interspersed with emergent wetlands to create a near hemi-marsh condition. In addition, a Deer Wintering Area is adjacent to Branch Pond's east shore.

Branch Pond provides habitat for a warm water fishery, supporting native populations of largemouth bass, white perch, and chain pickerel. The pond provides reproductive habitat for adult sea-run alewives, stocked annually by the Maine Department of Marine Resources; young alewives summer in Branch Pond, out-migrating in the fall of the year.

Branch Pond forms the headwaters of the West Branch Sheepscot River, which is known to be used by the endangered Atlantic salmon (*Salmo salar*). The West Branch Sheepscot River was designated as critical habitat for the Gulf of Maine Distinct Population Segment of Atlantic Salmon on June 19, 2009, pursuant to section 4(b)(2) of the Endangered Species Act.

Currently, there is no written management plan for the control of water levels at Branch Pond.

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[1] In its written comments dated May 19, 2014, Branch Mills indicates that this statement "Branch Mills stated it intends to make repairs to the Branch Mills Dam upon settlement of the water level issue" is false. *See* pg. 3, Specific Draft Errors, *Branch Mills Objections to the DEP Water Level Order Draft for Branch Pond of April 28, 2014*. During the August 23, 2013 adjudicatory hearing, Department staff asked the Coombs several questions relating to repairs of the Branch Mills Dam, including "do you have any long-term plans to complete those repairs?" *See* pg. 103/lines 23-24 of the Transcript, *In Re: Petition to Establish a Water Level Regime for Branch Pond MEDEP #124447-36-a-n.* The Coombs replied, "We do. The other gates are in the mill waiting to be put in." *See id.* pg. 103/line 25 and pg. 104/line 1. To which Department staff responded, "And so you have plans to but at the present time there's not a timetable associated with those plans?" and the Coombs replied, "Not right now". *See id.* pgs. 104/lines 3-6.

B. DAM CHARACTERISTICS:

The Branch Pond Dam meets the definition of a dam set forth in 38 M.R.S. § 817(3).

For the purposes of this Order, the Department determined the elevation of the Branch Pond Dam to be 347.56 feet MSL through a survey by a DEA engineer and corrected to MSL from a temporary benchmark at the Branch Mills Road Maine Department of Transportation (DOT) bridge.

The Branch Pond Dam, also known as the Dinsmore Dam and associated with the Dinsmore Grain Company Mill, was built in 1817. The dam is approximately 190 feet long and twenty-two feet high, consisting of a masonry non-overflow structure containing a gated spillway and sluiceways flanked with earthen dikes. A mill building, constructed in 1914, is constructed over the dam and is supported by the dam masonry on the upstream side. The masonry non-overflow is a gravity type structure, approximately eighty-five feet long and six feet wide at the top, built of dry-laid stones with mortared joints. The upstream face of the structure is battered at a slope of about 1H:6V and covered with a twenty-two inch thick concrete overlay. The downstream face of the dam is near vertical and accessed from the mill building. The gated spillway is located at the middle of the non-overflow structure between the east and west sections of the dam. The spillway is approximately fifteen feet long and consists of three, gate-equipped bays. The east and central gate openings are twenty six inches wide and the west opening is one-foot wide. The height of the openings is about four feet above the concrete gate sill which is fourteen feet below the top of the dam. The gates are operated manually from the floor of the mill building. The gated spillway on the upstream side contains a trashrack structure accessible from the top of the non-overflow structure. The non-overflow structure contains three sluiceways encased in concrete and each includes slots for installation of stoplogs. The east sluiceway is four feet wide and the two west sluiceways are five feet wide and three feet wide, respectively. All sluiceway openings are three feet, seven inches high. The eastern sluiceway is accessible from the top of the non-overflow structure and the two western sluiceways can be reached from the mill building floor. The east and west earthen dikes are shallow structures, five to six feet high, and approximately fifty and forty feet long, respectively. The upstream slopes of the dikes are armored with stones or riprap. The downstream sides of the dikes are flat, earth-filled, and grassed. Downstream flows from the dam supply water to the West Branch Sheepscot River. There are no fish passage facilities associated with the Branch Pond Dam.

The Branch Pond Dam was first registered with the Department on January 23, 1993 and was given a State identification number of #4220. The dam's original purpose was to supply hydromechanical power to the Dinsmore Grain Company Mill. The Branch Pond Dam is currently used as a water control structure.

The Branch Pond Dam is located at 142 Branch Mills Road, 44°24'32" North Latitude, 69°28'29" West Longitude (also Town of China's Property Tax Map 40, Lot 52), on a 0.44 acre parcel of land in the town of China, Maine.

C. TITLE, RIGHT, OR INTEREST:

The Branch Pond Dam is owned and operated by Branch Mills, a Maine corporation that is in good standing with the Maine Department of the Secretary of State. As set forth above, the Coombs are the directors and/or owners of Branch Mills. The warranty deed recorded in the Kennebec County Registry of Deeds (Book 7559, Page 204) conveying the Branch Pond Dam to Branch Mills states Branch Mills owns "...the water power and mill privileges upon the west branch of the Sheepscot River, the Mill and all rights, privileges, machinery and equipment located upon and used in connection with the premises...". This language reveals that flowage rights exist with the Branch Pond Dam. The Department finds the water flowage rights reside with the land on which the Branch Pond Dam stands, now and with any future conveyance.

Pursuant to 38 M.R.S. § 840(4)(A)-(H), the Department must analyze eight criteria before setting a water level regime and minimum flow requirements for Branch Pond. The Department's analysis of each criterion is set forth below:

D. PUBLIC ACCESS AND USE:

Public access to Branch Pond is available via a hand-carry or small-trailered boat launch site located behind the Palermo Grange Hall.

Department staff visited the boat launch site on October 3, 2013. Department staff surveyed the water level to be 345.59 feet MSL on that day, an elevation that appeared sufficient to launch boats.

Testimony and photographic evidence presented at the Water Level Hearing indicated that access to Branch Pond from private property ranges from limited to extremely limited during the periods of drawdown in 2008, 2009 and 2011 as described in Section 4. A., depending on the shore slope, and access was only possible using boards to cross the exposed muddy lake bottom. Property owners were unable to access water for swimming or boating from private docks, and some boats were stranded on the lake bottom.

E. SAFETY OF LITTORAL AND RIPARIAN PROPRIETORS AND PUBLIC:

The Department asked the Maine Emergency Management Agency (MEMA) for comments regarding the dam's safety classification. In comments dated July 11, 2013, MEMA staff stated that the Branch Pond Dam is a significant potential hazard dam, confirming a 2002 MEMA Condition and Hazard Report. A significant potential hazard dam is one that is located in a predominantly rural or agricultural area where failure may cause serious damage to isolated homes, secondary highways, or minor railroads; cause interruption of use or service of relatively important public utilities; or cause some incremental flooding of structures with possible danger to human life. Hazard Classification does not indicate the structural integrity of the dam itself, but rather the effects if a failure should occur. MEMA staff also stated that the dam was last inspected on October 10, 2011. MEMA noted that a dam breach would impact a

small shop located immediately downstream, a low-lying house downstream, as well as the DOT bridge directly downstream of the dam.

F. FISH AND WILDLIFE HABITAT AND WATER QUALITY:

Fish. Based on its review of the petition and its expertise, Maine Department of Inland Fisheries and Wildlife (MDIFW) fisheries staff commented on August 1, 2013, that Branch Pond supports populations of warm water sport fish and serves as a popular angling destination. Branch Pond is one of only five Maine ponds to be classified as "Fast Action" for largemouth bass, meaning that anglers can expect to catch more than twenty 6"-12" bass per day. Largemouth bass rely on habitat located in the shallow littoral zone located near-shore, utilizing gravel-sand substrates to spawn; the same near-shore habitat functions as nursery habitat for developing bass as well as provides forage and refuge for juvenile fish. The MDIFW stated that fluctuating water levels can cause disruption of spawning activities, nest abandonment or failure, and increased predation of young. For this reason, MDIFW fisheries staff recommended that the water level in Branch Pond be held as close to full as possible, from spring refill to August 1, to protect spawning bass, their nests and emergent fry, and allow juveniles to forage and grow to suitable size. Late summer and fall water levels can be held at a lower level, with drawdown suitable to protect the dam from winter ice damage.

Wildlife. According to the State's Geographic Information System (GIS) mapping database, there are two mapped moderate value IWWH, associated with Branch Pond as well as an indeterminate value Deer Wintering Area. MDIFW recommends a high and consistent level of water be present in order for these wetlands to perform the functions and values associated with emergent wetland types which are important to waterfowl and wading birds.

MDIFW wildlife staff commented that water-dependent wildlife benefit from more seasonally consistent water levels and that extreme fluctuations in water levels are deleterious to nesting waterfowl and other water-dependent wildlife.

For this reason, MDIFW wildlife staff recommended that immediately following ice-out, Branch Pond should be fully impounded. Wildlife staff recommended that steps should be taken to capture the high water that occurs in the early spring in order to maximize the brood cover that is beneficial to waterfowl production and survival and for bass production and survival. The water level should be maintained through the month of July. During late summer and early fall, lower water levels may be maintained in order to reduce ice action against the dam's outlet. However, water levels should be stabilized prior to winter in order to protect over-wintering furbearers and largemouth bass.

Water Quality. The VLMP has collected water quality monitoring data for Branch Pond since 1980. The VLMP typically collects lake data to evaluate a lake's current water quality, track algal blooms, and determine water quality trends.

According to VLMP data, the water quality of Branch Pond is considered slightly below average, based on measures of Secchi disk transparency, total phosphorus,

and Chlorophyll-a. The potential for algal blooms on Branch Pond is moderate. Branch Pond is a slightly colored lake with an average transparency of 13.8 feet. The range of water column Total Phosphorus for Branch Pond is eleven to thirteen parts per billion (ppb), with an average of twelve ppb. Chlorophyll-a ranges from 1.5-6.1 ppb with an average of 3.9 ppb. Dissolved oxygen profiles show moderate to high dissolved oxygen depletion in deep areas of the pond. The potential for phosphorus to leave the bottom sediments and become available to algae in the water column (internal loading) is moderate to high. Oxygen levels below five parts per million (ppm) stress certain cold water fish and a persistent loss of oxygen may eliminate or reduce habitat for sensitive cold water species.

The flushing rate (the amount of time required for the lake water to be renewed each year) for Branch Pond is 5.5 flushes per year; the average flushing rate for Maine lakes is 1-1.5 flushes per year.

G. EROSION:

Department staff observed erosion impacts related to varying water levels at the Palermo Grange Hall boat launch during the October 3, 2013 site visit. Intervenor Roughgarden testified to observing evidence of erosion when the water level was low.

H. PRECIPITATION AND RUNOFF:

Generally, one inch of rain results in a four-inch rise in the level of a lake, depending on the current water level at the time of the precipitation event, the existing surface area of the lake, and the degree of saturation of the ground. The direct drainage watershed of Branch Pond is 8.25 square miles. The owner of the dam testified that significant rains cause water levels in Branch Pond to rise rapidly.

I. PUBLIC AND PRIVATE WATER SUPPLIES:

Petitioners and Intervenor Wozniak testified that Branch Pond serves as a private water supply to some camps and that low water levels necessitated lengthening water lines.

Intervenor Wozniak and the owner of the dam testified that Branch Pond serves as a source of water for fire protection. Branch Mills testified that it relocated a hydrant on the Branch Mills property, for ease of use by local fire departments. Both Palermo and China Fire Departments can use Branch Pond as a water supply for fire protection at residences and businesses in the vicinity of Branch Mills.

J. HYDROPOWER GENERATION:

The Branch Pond Dam was historically used for hydromechanical purposes. Under prior ownership, the dam provided flows to the Dinsmore Grain Company Mill on Branch Pond, however it is not believed to have been operated in several decades. Power generated at the site during its operation was supplied to two gristmills, a

shingle mill, a sawmill and electric power was supplied to a local area of South China. There is no indication that a generating unit located in the mill is now or was ever connected to the electrical power grid. The Branch Pond Dam is not currently in use for generating hydroelectric or hydromechanical power, however the owner of the dam and Maine Historic Preservation Commission indicate that hydromechanical equipment is present within the mill building and the owner of the dam testified to a desire to restore the mill and its hydromechanical capacity.

K. WATER LEVELS AND DOWNSTREAM FLOWS:

The Maine Department of Marine Resources (DMR) reviewed the petition and submitted comments dated April 2, 2012. DMR staff reviewed the April 2012 comments on July 19 and 29, 2013, and indicated they were accurate and DMR had nothing further to add. DMR commented that the outlet stream of Branch Pond forms the West Branch Sheepscot River, a designated habitat for endangered Atlantic salmon. Branch Pond is within the historical spawning range of alewife and DMR has stocked 42,646 alewives into the lake over a twenty-three-year period to maintain the alewife run. DMR requested water levels and minimum flows be established for Branch Pond that are necessary to maintain fish and wildlife habitat and water quality within the pond and outlet stream, and establish water levels necessary to provide flows from the dam to maintain fish propagation and fish passage facilities if constructed in the future. The United States Fish and Wildlife Service (USFWS) reviewed the petition and submitted comments dated July 25, 2013. The National Marine Fisheries Service (NOAA NMFS) reviewed the petition and submitted comments dated July 22, 2013. Both Federal agencies concurred with comments submitted by DMR.

On October 3, 2013, Department staff determined the NHWL to be 346.72 feet MSL, following standard practice and normal survey methods.

Applying site specific bathymetric data collected by the MDIFW, the Department's DEA staff calculated site specific water levels and applied published USGS methods (Scientific Investigations Report 2004-5026 -*Estimating Monthly, Annual, and Low 7-Day, 10-Year Streamflows for Ungaged Rivers in Maine*) to determine minimum downstream flows in accordance with the Department's regulations at Chapter 587, *In-stream Flows and Lake and Pond Water Levels.*

The DEA recommends that water levels in Branch Pond be maintained within a range of water level fluctuations, not to exceed 1.7 feet. A water level reduction of 1.7 feet below normal high water would result in an approximately 25% reduction in total pond volume and an 18% reduction in total pond surface area. Therefore, the DEA recommends that the water level in Branch Pond be maintained between elevation 346.7 feet MSL and 345.7 feet MSL from April 1 until July 31 and between 346.7 feet MSL and 345.0 feet MSL from August 1 until March 31, allowing for a one-foot fluctuation between April 1 and July 31 and up to 1.7 feet of water fluctuation between August 1 and March 31. The water level is to be kept as close as practicable to 346.7 feet MSL from ice-out until August 1, allowing for a one-foot variability to accommodate heavy precipitation events.

Based upon results of modeled lake watershed flow criteria, DEA staff determined that minimum outlet flows from Branch Pond should be maintained at not less than the following seasonal flows or inflow, whichever is less, to maintain water quality:

9.1 cfs between January 1 and March 15
32.1 cfs between March 16 and May 15
7.8 cfs between May 16 and June 30
1.8 cfs between July 1 and September 15 (Aquatic Base Flow)
3.2 cfs between September 16 and November 15
13.4 cfs between November 16 and December 31

L. HISTORICAL CONSIDERATIONS:

Although not a criteria of 38 M.R.S. § 840(4)(A)-(H), the Department requested that the Maine Historic Preservation Commission (MHPC) provide comments regarding the historical status of the Branch Pond Dam. MHPC finds the Dinsmore Grain Company Mill on Branch Pond to be in exceptionally good condition as an example of a water-powered industrial facility. The dam and mill works lie directly beneath the building and consist of a turbine which powers both a gristmill and sawmill, all in working order. The Dinsmore Grain Company Mill is a remarkable survival and is a model for small businesses that may in the future seek to return to water power as a relatively inexpensive and reliable source of energy. Loss of the dam or the impoundment would diminish the historic integrity of the Dinsmore Grain Company Mill. MHPC recommends the retention of both the mill and the dam.

MHPC staff did not identify any other concerns regarding prehistoric or historic archaeological resources.

THEREFORE, the Department ORDERS that a water level and minimum flow regime be established for Branch Pond in the towns of China and Palermo, Kennebec and Waldo Counties, Maine and that all necessary actions be undertaken by BRANCH MILLS FLOUR AND GRAIN, owner of the BRANCH POND DAM, to ensure compliance with this water level and minimum flow regime as follows, and SUBJECT TO THE FOLLOWING STANDARD AND SPECIAL CONDITIONS and all applicable standards and regulations:

1. Standard Conditions for Water Level Orders, a copy attached.

2. The invalidity or unenforceability of any provision, or part thereof, of this Order shall not affect the remainder of the provision or any other provisions. This Order shall be construed and enforced in all respects as if such invalid or unenforceable provision or part thereof had been omitted.

3. Effective upon the date of this Order, the Branch Pond Dam must be operated under normal conditions in a manner to maintain water levels in accordance with the Department's regulations at Chapter 587, *In-stream Flows and Lake and Pond Water Levels* and as described in Special Condition #4, and to maintain minimum

flows in accordance with the Department's regulations at Chapter 587, *In-stream Flows and Lake and Pond Water Levels* and as described in Special Condition #7.

4. Pursuant to the Department's regulations at Chapter 587, *In-stream Flows and Lake and Pond Water Levels*, the water level in Branch Pond must be maintained within a range of fluctuations, not to extend more than 1.7 feet below the established normal high water line (NHWL), to the extent practicable, as follows:

   A. Immediately following ice-out conditions and until July 31 of any given year, the water level of Branch Pond must be gradually raised, as near as practicable, to 346.7 feet MSL and then held between elevation 346.7 feet MSL and 345.7 feet MSL, to provide a reasonable amount of water access for the recreational launch of boats and use, to capture high water in order to maximize wildlife brood cover, to ensure waterfowl production and survival, to safeguard spawning activities, to provide essential habitat, cover, and protection for fry, and to provide adequate feeding locations for juvenile fish for as long as possible.

   B. From August 1 and until ice-out conditions of any given year, the Branch Pond Dam must be managed to prevent seasonal flooding and ice action against the dam's outlet by maintaining a reasonably stable water level between elevation 346.7 and 345.0 feet MSL, with sufficient in-lake capacity to accommodate winter and spring runoff and heavy precipitation events.

5. As abnormal weather conditions require, water levels may be reduced to accommodate sudden and large influxes of water to Branch Pond resulting from heavy precipitation events. However, following such heavy precipitation events, the water level must be allowed to recover such that the water level does not extend more than 1.0 feet below the NHWL from April 1 until July 31, nor more than 1.7 feet below the established NHWL from August 1 until March 30, to the extent practicable.

6. The water level may be drawn down further than 1.7 feet below the NHWL for limited periods to accommodate repair and maintenance activities, with written permission from the Department. Written permission to reduce water levels may be obtained by submission of a written request to the Department that includes a work plan and schedule.

7. Minimum downstream flows from Branch Pond must be maintained at not less than the following seasonal flows, or inflow, whichever is less:

9.1 cfs between January 1 and March 15
32.1 cfs between March 16 and May 15
7.8 cfs between May 16 and June 30
1.8 cfs between July 1 and September 15 (Aquatic Base Flow)
3.2 cfs between September 16 and November 15
13.4 cfs between November 16 and December 31

THIS ORDER DOES NOT CONSTITUTE OR SUBSTITUTE FOR ANY OTHER REQUIRED STATE, FEDERAL OR LOCAL APPROVALS NOR DOES IT VERIFY COMPLIANCE WITH ANY APPLICABLE SHORELAND ZONING ORDINANCES.

DONE AND DATED IN AUGUSTA, MAINE, THIS 6th DAY OF June, 2014.

DEPARTMENT OF ENVIRONMENTAL PROTECTION

BY: Patricia W. Aho
Patricia W. Aho, Commissioner

Filed
JUN 06 2014
State of Maine
Board of Environmental Protection

PLEASE NOTE THE ATTACHED SHEET FOR GUIDANCE ON APPEAL PROCEDURES…

KH/L24447AN/ATS#69229

Appendix A
DEFINITIONS

The following definitions are to be used in conjunction with Department Order #L-24447-36-A-N.

1. **Dam**. "Dam" means any man-made artificial barrier, including appurtenant works, the site on which it is located and appurtenant rights of flowage and access, which impounds or diverts a river, stream or great pond and which is 2 feet or more in height and has an impounding capacity at maximum water storage elevation of 15 acre-feet or more. Any such artificial barrier constructed solely for the purpose of impounding water to allow timber to be floated downstream in a logging operation shall not be considered a dam for the purposes of this article, unless it has been repaired, modified or maintained by or with the knowledge of the owner, lessee or person in control since the discontinuance of its use in connection with logging operations. Any adjacent property, easements, roads, bridges or works not necessary for the operation or maintenance of a dam or access to the dam shall not be included under the provisions of this article. *38 M.R.S. § 817(3)*

2. **Great Ponds**. "Great ponds" means any inland bodies of water which in a natural state have a surface area in excess of 10 acres and any inland bodies of water artificially formed or increased which have a surface area in excess of 30 acres. *38 M.R.S. § 480-B(5)*

3. **Normal High Water Line**. "Normal high water line" means that line along the shore of a great pond, river, stream, brook or other nontidal body of water which is apparent from visible markings, changes in the character of soils due to prolonged action of the water or from changes in vegetation and which distinguishes between predominantly aquatic and predominantly terrestrial land. *38 M.R.S. § 480-B(6)*

4. **Normal Repair and Maintenance.** The following are types of normal maintenance, by way of example:

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

(b) The repair, removal or replacement of flashboards, stop logs, gates, or intake racks where no cofferdam, dredging, filing, or permanent water level alteration is involved;

(c) Removal of materials collected on trash racks;

(d) Removal of dri-ki and other accumulated materials where no significant disturbance of soils or lake or river bottom materials is involved;

(e) Installing or removing booms;

(f) Placement and removal of non-earthen cofferdams temporarily installed immediately adjacent to an existing structure for the purpose of inspecting or repairing the structure;

(g) Removal of sediment and debris from gated canals, tunnels and penstocks from which the water has been removed; and

(h) Sealing of leaks in gates, stop logs and flashboards. *Chapter 450, Administrative Regulations for Hydropower Projects*

STANDARD CONDITIONS FOR WATER LEVEL ORDERS

THE FOLLOWING STANDARD CONDITIONS SHALL APPLY TO ALL WATER LEVEL ORDERS ISSUED UNDER THE ESTABLISHMENT OF WATER LEVELS STATUTE, TITLE 38 M.R.S. SECTION 840, UNLESS OTHERWISE SPECIFICALLY STATED IN THE ORDER.

1. Noncompliance. Should the dam be found, at any time, not to be in compliance with any of the conditions of this Order, or should the owner or its designee operate this dam in any way other than specified by the conditions of this Order, then the terms of this Order shall be considered to have been violated.

2. Compliance with all Applicable Laws. The owner of the dam shall secure and appropriately comply with all applicable federal, state and local licenses, permits, authorizations, conditions, agreements, and orders prior to or during operation.

3. Inspection and Compliance. Authorized representatives of the Board, Department or the Attorney General shall be granted access to the premises by the owner of the dam at any reasonable time for the purpose of inspecting the operation of the project and assuring compliance by the owner of the dam with the conditions of this Order.

4. Severability. The invalidity or unenforceability of any provision, or part thereof, of this Order shall not affect the remainder of the provision or any other provisions. This Order shall be construed and enforced in all respects as if such invalid or unenforceable provision or part thereof had been omitted.

5. Transfer. Unless otherwise provided in the Order, the owner of the dam may not sell, lease, assign, or otherwise transfer the dam or any portion thereof without submitting written notification to the Department for review and approval where the purpose or consequence of the transfer is to transfer any of the obligations of the owner of the dam as incorporated in this Water Level Order. Prior to any transfer of property subject to this Order, the Department shall be notified of the new owner of the dam and be provided with a signed letter from the new owner of the dam agreeing to comply with the terms of the Water Level Order. In addition to the requirements outlined in the Department's Chapter 2: Rules Concerning the Processing Applications and Other Administrative Matters, the owner of the dam shall provide the Department with evidence that public notice of the transfer of ownership has been sent to all littoral and riparian landowners (Section 21(C)), and provide sufficient evidence of title, right or interest (Section 11(D)).

DEP INFORMATION SHEET

Appealing a Department Licensing Decision

Dated: March 2012 **Contact: (207) 287-2811**

SUMMARY

There are two methods available to an aggrieved person seeking to appeal a licensing decision made by the Department of Environmental Protection's ("DEP") Commissioner: (1) in an administrative process before the Board of Environmental Protection ("Board"); or (2) in a judicial process before Maine's Superior Court. An aggrieved person seeking review of a licensing decision over which the Board had original jurisdiction may seek judicial review in Maine's Superior Court.

A judicial appeal of final action by the Commissioner or the Board regarding an application for an expedited wind energy development (35-A M.R.S.A. § 3451(4)) or a general permit for an offshore wind energy demonstration project (38 M.R.S.A. § 480-HH(1)) or a general permit for a tidal energy demonstration project (38 M.R.S.A. § 636-A) must be taken to the Supreme Judicial Court sitting as the Law Court.

This INFORMATION SHEET, in conjunction with a review of the statutory and regulatory provisions referred to herein, can help a person to understand his or her rights and obligations in filing an administrative or judicial appeal.

I. ADMINISTRATIVE APPEALS TO THE BOARD

LEGAL REFERENCES

The laws concerning the DEP's *Organization and Powers*, 38 M.R.S.A. §§ 341-D(4) & 346, the *Maine Administrative Procedure Act*, 5 M.R.S.A. § 11001, and the DEP's *Rules Concerning the Processing of Applications and Other Administrative Matters* ("Chapter 2"), 06-096 CMR 2 (April 1, 2003).

HOW LONG YOU HAVE TO SUBMIT AN APPEAL TO THE BOARD

The Board must receive a written appeal within 30 days of the date on which the Commissioner's decision was filed with the Board. Appeals filed after 30 calendar days of the date on which the Commissioner's decision was filed with the Board will be rejected.

HOW TO SUBMIT AN APPEAL TO THE BOARD

Signed original appeal documents must be sent to: Chair, Board of Environmental Protection, c/o Department of Environmental Protection, 17 State House Station, Augusta, ME 04333-0017; faxes are acceptable for purposes of meeting the deadline when followed by the Board's receipt of mailed original documents within five (5) working days. Receipt on a particular day must be by 5:00 PM at DEP's offices in Augusta; materials received after 5:00 PM are not considered received until the following day. The person appealing a licensing decision must also send the DEP's Commissioner a copy of the appeal documents and if the person appealing is not the applicant in the license proceeding at issue the applicant must also be sent a copy of the appeal documents. All of the information listed in the next section must be submitted at the time the appeal is filed. Only the extraordinary circumstances described at the end of that section will justify evidence not in the DEP's record at the time of decision being added to the record for consideration by the Board as part of an appeal.

WHAT YOUR APPEAL PAPERWORK MUST CONTAIN

Appeal materials must contain the following information at the time submitted:

1. *Aggrieved Status.* The appeal must explain how the person filing the appeal has standing to maintain an appeal. This requires an explanation of how the person filing the appeal may suffer a particularized injury as a result of the Commissioner's decision.
2. *The findings, conclusions or conditions objected to or believed to be in error.* Specific references and facts regarding the appellant's issues with the decision must be provided in the notice of appeal.
3. *The basis of the objections or challenge.* If possible, specific regulations, statutes or other facts should be referenced. This may include citing omissions of relevant requirements, and errors believed to have been made in interpretations, conclusions, and relevant requirements.
4. *The remedy sought.* This can range from reversal of the Commissioner's decision on the license or permit to changes in specific permit conditions.
5. *All the matters to be contested.* The Board will limit its consideration to those arguments specifically raised in the written notice of appeal.
6. *Request for hearing.* The Board will hear presentations on appeals at its regularly scheduled meetings, unless a public hearing on the appeal is requested and granted. A request for public hearing on an appeal must be filed as part of the notice of appeal.
7. *New or additional evidence to be offered.* The Board may allow new or additional evidence, referred to as supplemental evidence, to be considered by the Board in an appeal only when the evidence is relevant and material and that the person seeking to add information to the record can show due diligence in bringing the evidence to the DEP's attention at the earliest possible time in the licensing process or that the evidence itself is newly discovered and could not have been presented earlier in the process. Specific requirements for additional evidence are found in Chapter 2.

OTHER CONSIDERATIONS IN APPEALING A DECISION TO THE BOARD

1. *Be familiar with all relevant material in the DEP record.* A license application file is public information, subject to any applicable statutory exceptions, made easily accessible by DEP. Upon request, the DEP will make the material available during normal working hours, provide space to review the file, and provide opportunity for photocopying materials. There is a charge for copies or copying services.
2. *Be familiar with the regulations and laws under which the application was processed, and the procedural rules governing your appeal.* DEP staff will provide this information on request and answer questions regarding applicable requirements.
3. *The filing of an appeal does not operate as a stay to any decision.* If a license has been granted and it has been appealed the license normally remains in effect pending the processing of the appeal. A license holder may proceed with a project pending the outcome of an appeal but the license holder runs the risk of the decision being reversed or modified as a result of the appeal.

WHAT TO EXPECT ONCE YOU FILE A TIMELY APPEAL WITH THE BOARD

The Board will formally acknowledge receipt of an appeal, including the name of the DEP project manager assigned to the specific appeal. The notice of appeal, any materials accepted by the Board Chair as supplementary evidence, and any materials submitted in response to the appeal will be sent to Board members with a recommendation from DEP staff. Persons filing appeals and interested persons are notified in advance of the date set for Board consideration of an appeal or request for public hearing. With or without holding a public hearing, the Board may affirm, amend, or reverse a Commissioner decision or remand the matter to the Commissioner for further proceedings. The Board will notify the appellant, a license holder, and interested persons of its decision.

II. JUDICIAL APPEALS

Maine law generally allows aggrieved persons to appeal final Commissioner or Board licensing decisions to Maine's Superior Court, see 38 M.R.S.A. § 346(1); 06-096 CMR 2; 5 M.R.S.A. § 11001; & M.R. Civ. P 80C. A party's appeal must be filed with the Superior Court within 30 days of receipt of notice of the Board's or the Commissioner's decision. For any other person, an appeal must be filed within 40 days of the date the decision was rendered. Failure to file a timely appeal will result in the Board's or the Commissioner's decision becoming final.

An appeal to court of a license decision regarding an expedited wind energy development, a general permit for an offshore wind energy demonstration project, or a general permit for a tidal energy demonstration project may only be taken directly to the Maine Supreme Judicial Court. See 38 M.R.S.A. § 346(4).

Maine's Administrative Procedure Act, DEP statutes governing a particular matter, and the Maine Rules of Civil Procedure must be consulted for the substantive and procedural details applicable to judicial appeals.

ADDITIONAL INFORMATION

If you have questions or need additional information on the appeal process, for administrative appeals contact the Board's Executive Analyst at (207) 287-2452 or for judicial appeals contact the court clerk's office in which your appeal will be filed.

Note: The DEP provides this INFORMATION SHEET for general guidance only; it is not intended for use as a legal reference. Maine law governs an appellant's rights.