

Proposed Version of LUPC Ch. 11 & DEP Ch.450

(To Replace the Current Version)

**DEP 06-096 Chapter 450 &
LUPC 01-672 Chapter 11:**

ADMINISTRATIVE REGULATIONS FOR HYDROPOWER PROJECTS

SUMMARY: The Department of Environmental Protection and the Land Use 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 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 or reconstruction of a hydropower project, or structural alteration of a hydropower project in ways that change water levels or flows, 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), apply to applications for hydropower projects. In the event of inconsistencies between this chapter and Chapter 2, applications for hydropower projects 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 Department 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) uses 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 12 M.R.S. § 682(1), and that does not use tidal or wave action as a source of electrical or mechanical power.

3. Definitions

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.
- C. Commission.** “Commission” means the Land Use Planning Commission of the Maine Department of Agriculture, Conservation, and Forestry.
- 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. For example, when viewed in isolation, a 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 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 projects, cause a run to fail because the number of fish needed to sustain a breeding population was not maintained.
- E. Commissioner.** “Commissioner” means the Commissioner of the Department of Environmental Protection.
- F. Department.** “Department” means the Department of Environmental Protection.
- G. Director.** “Director” means the Executive Director of the Land Use Planning Commission.
- H. Hydropower project or project.** “Hydropower project” or “project,” means any development that utilizes the flow or other movement of water, including tidal or wave action, as a source of electrical or mechanical power, or that regulates the flow of water for the purpose of generating electrical or mechanical power. A hydropower project 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.
- 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 an impact altogether by not taking a certain action or part(s) of an action;
 - (2) minimizing an impact by limiting the magnitude or duration of an activity or by controlling the timing of an activity;

- (3) rectifying an impact by repairing, rehabilitating, or restoring the affected environment;
- (4) reducing or eliminating an impact over time through preservation and maintenance operations during the life of the project; and
- (5) 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. § 403.

4. Permit Requirements

A. Prohibition. No one may initiate construction or reconstruction of a hydropower project, or structurally alter a hydropower project in a way that changes water levels or flows, without first obtaining a permit from the Administering Agency. Normal maintenance and repair of an existing and operating hydropower project is exempt from the requirement for a permit, provided that:

- (1) 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
- (2) 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 are subject to the requirement for a permit:

- (1) 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 reconstruction of a hydropower project;
- (3) 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; and
- (4) the structural alteration of a hydropower project in a way that changes water levels or flows above or below the dam, including, but not limited to:
 - (a) the addition or alteration of flashboards; and
 - (b) the installation of additional or enlarged turbines.

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

- (1) 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 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 of materials collected on trash racks;
- (4) removal of woody debris and other accumulated materials where no significant disturbance of soils or pond bottom or river bottom materials is involved;
- (5) installing or removing booms;
- (6) 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 of sediment and debris from gated canals, tunnels and penstocks from which the water has been removed; and
- (8) sealing of leaks in gates, stop logs and flashboards.

D. Special Protection for Outstanding River 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:
 - (a) the Legislature specifically authorizes the Administering Agency to consider such a permit; and
 - (b) the Administering Agency finds that the project meets the criteria of 38 M.R.S. § 636, as outlined in subsection 5 below.
- (2) A license or 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 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.

5. Standard of Review. The Administering Agency shall approve a project when it finds that the applicant has demonstrated that the following criteria have been met, as set forth in 38 M.R.S. § 636.

A. 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 Department or Commission may grant the permit contingent upon the applicant’s demonstration of financial capability prior to commencement of any permitted activities.

B. Safety. The applicant has made adequate provisions for protection of public safety.

C. Public benefits. The project will result in significant economic benefits to the public, including, but not limited to, creation of employment opportunities for in Maine. The Administering Agency 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 in Maine. To meet this criterion, the applicant must demonstrate that:

- (1) the benefits claimed from the proposed project are real, in that the benefits would not result but for the project;
- (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

(3) the benefits claimed from the project have been 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.

D. 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 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.

F. 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.

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 preferred. Off-site or out-of-kind measures may be acceptable where the Administering Agency finds that in-kind or on-site measures are not 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.

The 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 its use of these findings in reaching a decision. The Administering Agency shall consider:

- (1) 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) whether the project will result in significant benefit or harm to fish and wildlife resources. In making its determination, the 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;

- (3) whether the project will result in significant benefit or harm to historic and archaeological resources;
- (4) 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) whether the project will result in significant flood control benefits or flood hazards;
- (6) 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

H. Water Quality. There is reasonable assurance that the project will not violate applicable state water quality standards, including the provisions of 38 M.R.S. § 464(4)(F). This finding is required for 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. § 464(4)(F).

I. Additional Information Requirements. The 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.

6. Process and Time Limits for Decisions.

A. Administering Agency Action. Once an application has been accepted as complete for processing, the 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 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 5 M.R.S. §§

9051–9064. After any hearing is held under this subsection, the Administering Agency shall make findings of fact and issue an order approving or disapproving the proposed project.

B. Water Quality Certification. The Administering Agency shall issue or deny water quality certification at the same time it approves or disapproves the proposed project.

7. Terms and Conditions of Approval

A. Authority. The 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 with hydroelectric energy. These terms and conditions may include, but are not limited to:

- (1) establishment of a water level range for the body of water impounded by a hydropower project;
- (2) establishment of instantaneous minimum flows for the body of water affected by a hydropower project; and
- (3) 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 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.

B. Nature of Terms and Conditions. Such case-specific terms and conditions placed by the Administering Agency on its approval of a proposed project 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 Administering Agency that each of the standards of the Act has been met.

C. Standard Conditions of Approval. Unless otherwise specifically stated in the approval, all Administering Agency, Commissioner, and Director approvals are subject to the following standard conditions:

- (1) **Limits of Approval.** 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 Administering Agency prior to implementation.
- (2) **Noncompliance.** Should the project be found, at any time, not to be in compliance with any of the conditions of approval, or should the permittee construct or operate the project in any way other than as specified in the application or supporting documents, as modified by the conditions of approval, then the terms of approval 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 Administering Agency or the Attorney General 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 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 permit, the approval will lapse, unless a request for an extension of these deadlines has been approved by the Administering Agency.
 - (6) Construction Schedule. Prior to the start of construction, the permittee shall submit a final construction schedule for the project to the Administering Agency.
 - (7) Approval Included in Contract Bids. A copy of the project's approval must be included in or attached to contract bid specifications for the project.
 - (8) Approval Provided to Contractor. Work done by a contractor pursuant to the project's approval may not begin before a copy of the approval has been 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. An approval issued under these Rules expires upon the assignment or transfer of the property covered by the approval unless written consent to transfer the approval is obtained from the Administering Agency. Pending Administering Agency determination on the application for a transfer or assignment of ownership of an existing approval, the person(s) to whom such property is assigned or transferred shall abide by all of the terms and conditions of that approval. To obtain the Administering Agency'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 the approval and (2) satisfy all other applicable statutory criteria.
- 8. Access to the Site.** The filing of an application for approval of a hydropower project pursuant to 38 M.R.S. § 633 constitutes the granting of permission by the applicant to allow Administering Agency members and their staff, and others authorized by the Administering Agency to access the site of the proposed project in order to facilitate review of such application.
- 9. Severability.** The provisions of this chapter are severable. If a section, sentence, clause, or phrase of this 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 chapter.

AUTHORITY: 5 M.R.S. §§ 8001-10008, Maine Administrative Procedures Act.
12 M.R.S. §§ 401-409, Maine's Rivers, and §§ 681-689, Use Regulations.
38 M.R.S. §§ 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. § 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.

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