

The Honorable Melanie Loyzim, Commissioner
Department of Environmental Protection
17 State House Station
32 Blossom Lane
Augusta, Maine 04333-0017

May 8, 2023

VIA CERTIFIED MAIL; RETURN RECEIPT REQUESTED

re: Thomas Pond Dam (aka Dingley Brook Dam)
Written Questions in Lieu of Meeting, with FOAA Demand

Dear Commissioner Loyzim:

On April 12, 2023, the undersigned sent a letter to Ms. Laura Paye, as Hydropower Specialist of the Department's Bureau of Land Resources (hereinafter, the "Meeting Request Letter", a copy of which is enclosed). Both that letter and this one are prompted by anomalies between the operation of the Thomas Pond Dam (the "Dam") and the Department's Order as both terms are defined in the Meeting Request Letter. Both letters serve to alert you of such irregularities.

This letter constitutes a series of requests to the Department itself rather than to any individual employed by it, which is why we are not addressing it to Ms. Paye. Moreover, certain of those requests require production of public records pursuant to the Maine Freedom of Access Act (Maine Revised Statutes Title 1, Chapter 13, subchapter 1; herein, "FOAA"). The latter are covered by the 5 working-day rule of acknowledgment set forth in FOAA §408-A.

The purposes of the Meeting Request Letter were to schedule a meeting with Ms. Paye (or others in the Department she might indicate) and to outline facts raising questions about that certain Order of the Department dated April 25, 1990 (the "Order") and/or related materials including a Quitclaim Deed dated July 2, 1990 assigning all of the Department's rights in and to the Dam to the Thomas Pond Improvement Association (the "TPIA") for operation of the Dam by the TPIA pursuant to the terms of the Order.

On April 26, 2023 Ms. Paye contacted one of the undersigned (Robert Murch) by telephone and thereafter sent the following email message:

From: Paye, Laura <laura.paye@maine.gov>
To: Steven K. Hazen <skhazen@sbcglobal.net>; danawatkins@mac.com <danawatkins@mac.com>
Sent: Wednesday, April 26, 2023 at 06:12:51 AM PDT
Subject: RE: Thomas Pond Dam (aka Dingley Brook Dam)

Good Morning Steve and Dana,

I just spoke with Bob Murch on the phone and let him know about this, but it seems the best route for you to determine water levels for Thomas Pond is through the water level petition process under 38 M.R.S. § 840.

I will attach the water level petition form here, please let me know if you have any questions.
<https://www.maine.gov/dep/land/dams-hydro/index.html>
This is also the link to our website which provides some more information.

[snip]

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Although the email message from Ms. Paye did not explicitly reject the request for a meeting, that was the immutable effect. Nothing in the Meeting Request Letter could reasonably be understood as indicating that the authors of it were seeking to determine water levels for Thomas Pond. Review of the letter demonstrates that the issues are (1) water flow over the Dam, and (2) non-compliance with such water flow and other unambiguous requirements set out in the Order.

In that context, we request that you respond in writing to the following questions that could have been more effectively covered in a meeting had it been possible to schedule:

No.	<i>QUESTION(S) / REQUESTS</i>
1	The Order recites that the TPIA submitted a petition requesting that ownership and operation of the Dam be assigned to it and that a public hearing was held on that basis. When and where was that hearing held? Who attended it? Was a written record of the hearing kept? Was an audio recording of the hearing made? Please provide a copy of the referenced petition of the TPIA and the notice of hearing by the Department. If a written record of the hearing was made and/or an audio recording of it made, please provide a copy of each in accordance with the provisions of the FOAA.
2	Does the Commission have in its files any evidence that it ever took any action to assure that any one or more of the conditions set forth in the Order had been or was being met?
3	Please provide copies of any such evidence specified in #2 and copies of correspondence received by the Department raising questions about the operation of the Dam and/or calling into question whether the conditions set forth in the Order have been met.
4	The Order specifies that a "minimum flow of water" of 2.4 cubic feet per second ("cfs") was to be maintained to Dingley Brook below the Dam "at all times." See, condition 3. Is it the position of the Department that any other provision of the Order or any other provision of law supersedes that requirement or authorizes an exercise of discretion by any private party (e.g., the TPIA) to allow less than 2.4 cfs in water flow from the Dam to the brook downstream of the Dam?
5	When was the maintenance work on the Dam specified in the Order completed? Was that work subject to any building or similar permit? If so, by what governmental entity? Did the Department ever receive a copy of it? Please provide copies of all documents in the files of the Department touching upon those questions.
6	Is the Department aware that the conditions specified in the Order regarding minimum water flow (#3), record-keeping (#4), the Water Level Management Plan, and liability insurance (#9) are in default?
7	When was the enclosure around the Dam specified in the Order completed? Was erection of it subject to any building or similar permit? If so, by what governmental entity? And did the Department ever receive a copy of it? Please provide copies of all documents in the files of the Department touching upon those questions.
8	Attached to the Order (or to another document referenced in the Order, the page numbering is unclear) is a document labeled as the "Thomas Pond Dam Management Plan" (the "Management Plan"). Separate from that, condition 5 of the Order required the TPIA to "develop a written Water Level Management Plan designating who is responsible for operating the Dam and describing how the Dam is to be operated under a

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	variety of likely water level/meteorological occurrences.” Is it the understanding of the Department that the Water Management plan and such “Water Level Management Plan” (the “WLM Plan”) are one and the same thing? Or is the WLM Plan intended to set forth operating procedures to be followed by authorized personnel of the TPIA in implementing the requirements of the Order (including water flow requirements also specified in the Management Plan)? If the two defined terms are interchangeable (as suggested by the President of the TPIA in an email identified in item 15 below), is it the contention of the Department that the additional direction in condition 5 that “the Plan should be updated regularly as experience is gained in managing the water levels of Thomas Pond and Dingley Brook” provides the TPIA the authority to modify those portions of the conditions to the Order and/or otherwise contained in the Management Plan? If so, does the Department contest that would give the TPIA the ability to modify the provisions of the Order itself without input from, or approval by, the Department or other signatories to the documents referenced in the Order? For the record, the undersigned do not waive their rights to assert that it would be invalid for any official action of the Department to be susceptible to modification, rescission, revision, suspension or the like by any private party.
9	Did the TPIA ever develop a WLM Plan or, if so, ever modify it? Were copies of any such WLM Plan and/or subsequent modification to it submitted to the Department by the TPIA? If so, is it the understanding of the Department that any such WLM Plan or modification to it would require the approval of the Department? Please provide copies of any and all documents in the files of the Department touching upon those questions.
10	At the Annual Meeting of Members of the TPIA held in Raymond, Maine on August 20, 2022, one or more Members of the TPIA pointed out that there was at that time no water at all passing over the Dam. During the course of the meeting, the President of the TPIA asserted that the Department had modified the requirements under the Order such that the TPIA could operate the Dam in a way that resulted in less than 2.4 cfs of water passing over or through the Dam into the portion of the Dingley Brook downstream of it. When challenged as to the authority of that assertion, the President read aloud from what was purported to be a written communication from an employee of the Department to the President of the TPIA. The President agreed in that meeting to provide copies of each document to Members of the TPIA in attendance. The President of the TPIA subsequently produced an unsigned document (not appearing on Department letterhead or on any other official stationery) dated September 18, 2002, purportedly from one “Dana Paul Murch” identified as “Dams and Hydro Supervisor.” He also produced a document purporting to be an email message from one “Paul Newkirk” identified as “Senior Environmental Engineer” ostensibly dated September 12, 2012 but bearing no evidence of provenance tracing back to the Department. Copies of both documents are attached hereto. Does the Department have credible evidence as to the legitimacy of either such document? If not, does the Department contest the authoritativeness of those documents? Does the Department have any other evidence in its files of <u>any</u> action taken by the Department modifying the provisions of the Order and/or the Management

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	Plan? Please provide copies of any and all documents evidencing that.
11	Does the Department have any reason to believe that the provisions of the Order are unenforceable by the Department or unenforceable by any other party? If so, please provide copies of any and all documents or other evidence indicating such lack of enforceability.
12	Has the Department sought legal advice from the Office of the Attorney General or from any other attorney licensed to practice law in Maine? If so, has any employee, agent or representative of the Department communicated the substance of such advice to any person not qualifying as an authorized representative or agent of the Department or of the State of Maine? If so, please identify each recipient. If such advice by the Office of the Attorney General has been communicated to any such person outside of the Department,¹ has such advice (or any summarization of it) been conveyed to any such employee, agent or representative of the Department in written form? If such advice has been so communicated, please provide either a copy of all such documents or a written opinion from the Office of the Attorney General that such advice is covered by attorney-client privilege and thus is exempt from compulsive process. If any such advice of summary of it has been provided to any private party, any such privilege may have been waived.²
13	If the Department takes that position that the Order is not enforceable, does the Department contest that the Quitclaim Deed issued to the TPIA on the authority of the Order is itself without authority?
14	If the Quitclaim Deed is invalid, does the Department contest that ownership of the Dam is at the very least uncertain and potentially for that reason remains vested in whomever owned the Dam prior to the Order? Does the Department contest that ownership of the Dam prior to the Order may be controlled by the applicable laws of Maine regarding adverse possession or the like, even though the Dam was never registered?
15	On April 28, 2023, the President of the TPIA sent an email message to one of the Members that, among other things, indicates that the TPIA "is currently seeking guidance from DEP" as to what he asserts is a conflict between the mandatory minimum water flow requirement of condition #3 of the Order ³ and the water level ranges set forth ONLY in the Management Plan, which means those levels apply <u>only</u> if the minimum water flow is maintained. Some Members of TPIA who attended that meeting have identified evidence indicating that the statements in the President's recent email are incorrect or misleading and have taken reasonable steps to be sure the record is corrected.

¹ As noted above, Ms. Paye has held various telephonic communications with Mr. Robert Murch (one of the undersigned) with respect to matters set forth in this letter, including communications between her office and the offices of the Attorney General.

² Certain statements made by Ms. Paye in discussions held by her with Mr. Robert Murch may well have waived that privilege. The undersigned reserve the right to assert that any such communications with representatives of the Maine Attorney General's office by one or more representatives of the DEP have thus been waived, potentially even to the extent of subject matter waiver.

³ "A minimum flow of water, 2.4 cfs *** shall be maintained to Dingley Brook at all times." (emphasis supplied)

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	Given the assertions by the President of the TPIA that it is having communications with the Department and knowing that characterizations by him as to actions taken by the Members are incorrect or misleading, we must hereby explicitly demand under FOAA that copies of all written communications between the Department and the TPIA be provided to the undersigned, along with copies of any and all notes taken or recorded by any employee, agent, or representative of the Department, even if taken or recorded as to communications that did occur in writing. We further request that there be no <i>ex parte</i> communications between directors/officers/agents of or attorneys for the TPIA or agents of it and any employees, officers, agents, or representatives of the Department (including legal counsel to either).
16	Do the records held by the Department (whether directly or through an intermediary) show either that the TPIA had represented to the Department that the TPIA did not know who owned the Dam prior to 1990 or show that the TPIA had claimed that the Dam had been abandoned without disclosing exculpatory data to the contrary? Please provide the undersigned copies of all documents held by the Department evidencing what was disclosed or represented to it as to ownership of the Dam.
17	Does the Department decline to take actions otherwise mandated to it under administrative requirements applicable to Maine agencies?
18	If the undersigned elect to pursue a petition to the Department regarding water flow and/or compliance with the Order, does the Department acknowledge that completion of the petition form regarding ownership of the Dam will not be considered a waiver by the undersigned of their rights to contest ownership of the Dam by the TPIA, whether such ownership is asserted by the Department or by any third-party?
19	If the undersigned do elect to pursue a petition to set water levels/minimum flows as Ms. Paye has suggested, and has implied is the only avenue of recourse available to the undersigned, does the Department acknowledge that the applicable provisions of Maine law give the Department full authority to initiate proceedings <i>on its own motion</i> that could result in modification of the Order, including as such modification might alter the existing requirements of the Order specifying minimum water flow or the existing provisions of the Management Plan regarding water levels? Please include in your response to this letter any basis the Department believes inhibits its ability to initiate such proceedings without waiting for a petition that it do so.

FOAA REQUESTS

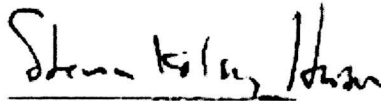
For the avoidance of doubt, the Questions listed in the following items shown in the table above constitute both requests for information and requests/demands for production of documents under FOAA: 1, 2, 3, 5, 7, 9, 10, 11, 12, 15, and 16. If there is a fee for such production, please specify what that is in writing. Whether or not there is such fee, the undersigned authorize you to deliver those copies to the undersigned in care of the law firm of Bernstein Shur Sawyer & Nelson, PA. The copy of this letter provided to Mr. Kevin Martin is provided to record formal satisfaction of the delivery requirements under FOAA. References herein to "files of the Department" include those held directly by the Department or held in bailment by a third party.

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The acknowledgement required by FOAA §408-A should be sent to our attention c/o Rachel Becker McEntee, Esq. at Bernstein Shur Sawyer & Nelson, P.A., whose address is shown below. If the Department elects to communicate through its legal counsel and ours (the Bernstein Shur firm), such communications may be conducted by email on all matters not constituting legally-cognizable notice.

Sincerely,



Steven Kelsey Hazen
149 Barrington Avenue
#245
Los Angeles, CA 90049-3310



Robert Long Murch
c/o Combined Management, Inc.
520 Main Street
Lewiston, Maine 04240



Dana Watkins
P.O. Box 6
South Casco, ME 04077

Attachments (copy of Meeting Request Letter; copy of purported letter dated September 18, 2002 from one Dana Paul Murch; copy of purported email message dated September 12, 2012 from one Paul Newkirk; email message dated April 28, 2023 from the President of the TPIA to a Member of it, asserting communications with the Department and characterizing actions taken at the 2022 Annual Meeting in a way not supported either by the draft minutes circulated by him or of revisions to them identified by two Members of the TPIA who attended the Annual Meeting and circulated corrections to all Members in attendance)

cc: Ms. Laura Paye
Hydropower Specialist
Bureau of Land Resources
Department of
Environmental Protection
17 State House Station
32 Blossom Lane
Augusta, Maine 04333-0017

Mr. Seth Garrison
General Manager
Portland Water District
225 Douglass Street
PO Box 3553
Portland, Me 04104-3553

Ms. Judy A. Camuso
Commissioner
Maine Department of Inland
Fisheries and Wildlife
42 State House Station
Augusta, ME 04333-0041

Ms. Kyla Hastie
Acting Regional Director
Northeast Region
U.S. Department of
Fish and Wildlife
300 Westgate Center Drive
Hadley, MA 01035

Mr. Kevin Martin
Designated FOAA Contact
Department of Environmental
Protection
17 State House Station
28 Tyson Drive
Augusta, ME 04333

✓ All TPIA Officers and
Directors

Katherine A. Joyce, Esq.
Rachel Becker McEntee, Esq.
J. Colby Wallace, Esq.
Bernstein Shur Sawyer Nelson, P.A.
100 Middle Street
P.O. Box 9729
Portland, ME 04104-5029

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September 18, 2002

Jack Quirk
Thomas Pond Improvement Association
79 Thomas Pond Terrace
Raymond, ME 04071

RE: Thomas Pond Dam and Flow Releases

Dear Jack:

I understand that the Thomas Pond Improvement Association is still attempting to pass the required 2.4 cfs out of Thomas Pond but that you are receiving complaints about low water levels on the pond. You have asked me for any information on the derivation of the 2.4 cfs flow number.

According to my records, 2.4 cfs is the Aquatic Base Flow for Dingley Brook based on US Fish & Wildlife Service guidance. Let me provide some information about this flow:

- Aquatic Base Flow (or ABF, for short) is defined as the median unregulated August flow in a stream. This flow is intended to preserve the natural aquatic ecosystem. In the absence of actual stream flow records, ABF is calculated as the flow equal to 0.5 cubic feet per second per square mile of drainage area. So, for Dingley Brook, with a drainage area of 4.8 square miles, the calculated ABF is 2.4 cfs.
- Please note that, by definition (median being the mid-point of all flows), flows are naturally lower than ABF 50% of the time in August (August is used because this is generally the lowest-flow month of the year). Therefore, maintaining a flow of at least ABF all the time from any dam will result in more water being released from the dam than is flowing into the dam during dry seasons. As a result, pond levels will drop, even beyond the drop that would naturally occur due to evaporation.

Jack Quirk
September 18, 2002
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- Research in Maine since the US Fish & Wildlife Service adopted their ABF definition in 1982 has revealed that the 0.5 cubic feet per second per square mile of drainage area overstates the natural median August flow in Maine and other states in the northeast. This is especially true in streams with small drainage areas, like Dingley Brook. The more accurate calculation is 0.33 cubic feet per second per square mile of drainage area. For Dingley Brook, this would be 1.6 cfs.
- Finally, stream flows in Maine during much of the last two summers have been as low as they have ever been. 2001 was the driest year on record in Maine (we have records for the last 107 years). This year, we had the driest August on record, so inflow to ponds and streams was low to non-existent. In addition, groundwater levels continue to drop in much of the state, so there is less groundwater getting to ponds and streams (this is what people often refer to as "springs" in a pond or stream). As a result, streams flows are even lower than normal—in fact, over the last two years, DEP has observed perennial streams that either had no flowing water (only standing pools) or were completely dry (which only happens once every 50 or 100 years).

I have no doubt that, under natural conditions and with no dam at the outlet of Thomas Pond, Dingley Brook would have been completely dry this summer.

The DEP does not object to a flow of less than 2.4 cfs being released from Thomas Pond during drought conditions. The DEP has agreed to reduce the required flows from many dams in the State over the past two summers in an attempt to keep water in our lakes and ponds. In many cases, we cut the flow in half (the equivalent of 0.25 cfs per square mile of drainage area). For Dingley Brook, this would be equal to a flow of 1.2 cfs.

I hope this information is helpful. I am taking the liberty of copying this letter to Alan Cohen. Please call me at 287-7784 if you have any questions.

Sincerely,

Dana Paul Murch
Dams & Hydro Supervisor

\\thomas pond 9-18-2002

cc: Alan Cohen

From original email dated: 12 September 2012 to Bob Chapin

I got the pictures and the management plan. As per our phone conversation yesterday, attached find; a copy of a 2002 letter to Jack Quirk from Dana Murch, the Chapter 587 Rule, and my recalculation of Thomas Pond Flow Criteria.

First of all, for non-hydro dams, the DEP has never specified a numeric criterion nor an approved methodology to calculate what the downstream flow rate should be from a Great Pond. It has always been that flow to the downstream channel must maintain water quality standards. Given the great variability of watersheds, natural and channel and outlet conditions it better we don't - every site is different. In 2009 we did adopted the Chapter 587. The specific language in that rule that applies to Thomas Pond is in section 6. A (3).

Class GPA waters where the water level is controlled by a dam and is not used for hydropower storage or generation. Water levels must be maintained to meet all applicable water quality standards, including all designated uses and characteristics of Class GPA waters, and flow must be provided for downstream waters that will protect all water quality standards applicable to those downstream waters.

I suggest you read through the first couple of sections of the rule in order to understand our intent.

Of course the next question from lake associations that want to responsibly manage their dam would be, "What flow do you recommend?" Here, as detailed in Murch's letter the Aquatic Base Flow (ABF) was presented and USF&W equation used as the best available technology of the time - it is a reasonable estimate. Apparently that caused an issue on the lake that is still brewing. Murch gave guidance to Quirk in revising that number down to 1.6 cfs and then allowing 1.2 cfs during drought conditions. Still reasonable

I can only assume that the management plan was written by a consultant, and after review, the only value that I would dispute is the 2.4 cfs in item 4 of the Objectives. Everything else seems reasonable, including the proper equation used for the stop log flows. I would note that our records show that the pond is 533 acres and not 500, but that has effect on the final values presented. Since 2002 the USGS has developed regression equations for determining monthly

median flows which are more accurate than the USF&W equation - this is referenced in section 3 of Chapter 587. I ran the numbers for your watershed (attached). The minimum I came up with for the August Median Flow i.e. lowest seasonal ABF is 1.05 cfs. That is pretty close to the lowest value given by Murch. So given current technology, I have calculated a summer ABF for Thomas Pond to be 1.1 cfs (rounded up) and recommend that that be the minimum discharge through the spillway. I ran the weir equation for 1.1 cfs and applying whole inch thicknesses of the stop logs, you can discharge 1.5 cfs at $H = 2$ inches - you could change the first line of the table.

Addressing objective 1 of maintaining a level between 17 -20 inches, which may be an issue on the pond. That has to do with the ability of the spillway structure to pass a storm flow through the notch - you have to have the space. I did not look at those flows, but I defer to whomever wrote the original plan.

Finally, I do have a call into Francis Brautigam, IF&W biologist for his opinion of the needs of Dingley Brook. He is an excellent resource for you. Oh, also I did scan in your plan for my records and included the PDF for your records.

If you have any further questions or need clarification, don't hesitate to contact me at any time.

Peter

Peter Newkirk, P.E.
Senior Environmental Engineer
Maine DEP Bureau of Land and Water Quality
Division of Environmental Assessment
State House Station 17
Augusta, ME 04333-0017
207.592.1804
peter.newkirk@maine.gov

Re: Thomas Pond Water Levels

From: ROBERT CHAPIN (chapin780@aol.com)

To: lauriepolland@icloud.com

Cc: skhazen@sbcglobal.net; danawatkins@mac.com; frank.jaffe@morsecure.com; smarcha1@maine.rr.com

Date: Thursday, May 4, 2023 at 02:26 PM PDT

Laurie, I am in Texas until Saturday but I can assure that our Vice President, Steve Marchant and Frank Jaffe, our technical advisor, are on top of it. As we were 4 inch s low before the rain came and right at the minimum flow over the dam we anticipated the rainfall as we have always done. Once the rain started boards were added to raise the lake level and prevent greater than 12 inches over the top. Now that the rain has stopped and there is no more in the forecast for the next 8 days, the guys will be modulating the boards to get us back to 17 inches of pond level while keeping the flow between 4 and 12 inches over the top board just as we always have. Thanks for your note. Bob C

Sent from my

Bob,

With all the heavy rain we have been experiencing and the run-off, I would expect that you are adjusting with regularity (removing boards at the dam) as needed to avoid flooding of properties.

Laurie

On Apr 28, 2023, at 3:54 PM, ROBERT CHAPIN <chapin780@aol.com> wrote:

Laurie, good to hear from you. I suspect that you are writing due to the exceptional drawdown of the lake last Fall. That was directed by the membership at the Annual TPIA August meeting last year as an experiment and to let shoreline property owners make adjustments to their waterfront. As the dam keeper I do not intend to let it go so low this coming Fall. We are now at 25 inches below the top of the dam and we should be at 17-20 by the beginning of the boating season. The Association is currently seeking guidance from DEP regarding which directions contained within the document that transferred the dam to TPIA and the Water Level Management Plan as to which takes precedence, the requirement to maintain the flow through/over the dam at 2.4 cfs or to maintain the pond level at 17-20 inches. Experience tells us that at certain times of the year the two measures appear to be incompatible. Both DEP documents plus a couple of explanatory letters from DEP may have conflicting guidance.

In the past, we did not have an efficient nor economical way to alert all property owners of an anticipated short term notice change in pond levels or any other condition change. We now do in the form of a web page, thomaspond.org. In the future we will be announcing any anticipated water level changes in a timely manner on the web site for all to see. Additionally, we installed a "Dam Cam", a camera that records the exact pond level and water flow over the dam. These readings are recorded and will be available on the web site so anyone can determine them from wherever they are with a cell phone, tablet, or computer.

Finally, you seem to believe that some how TPIA has been deliberately keeping the water level *high*. I can assure you that that is not the case. As the dam keeper for the past 12 years or so I can say without a doubt that I keep the pond level neither high nor low. As you know, I have a DEP-approved dam management plan that tells me during specific months of the year exactly where to keep the water level and, during the summer months when most shoreline property owners use their waterfront, that is the 17-20 inch range. As we are an outflow-only water control device, I can only reduce the water level in the pond, I cannot raise it, only Mother Nature can do that. Over the next couple of months I will be striving to raise the pond level to be within the specified 17-20 inches by June and will be pulling boards as needed after that based upon rainfall, but only when we get there.

You have lived on the pond long enough to know that in the Fall we will be lowering the pond below 24 inches in anticipation of snow melt off and Spring rains. That starts on 15 October and that would be a good time to plan your PBR repairs. Hope this helps. Bob Chapin 571 217-1700