



JANET T. MILLS
GOVERNOR

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION



MELANIE LOYZIM
COMMISSIONER

November 20, 2023

Elizabeth A. Boepple
Murray Plumb & Murray
eboepple@mpmlaw.com
via email

RE: Department response to September 29, 2023, letter regarding Thomas Pond Dam

Dear Ms. Boepple,

This serves as a response to your letter dated September 29, 2023, on behalf of Steven Kelsey Hazen, Robert Long Murch, and C. Dana Watkins who are littoral proprietors on Thomas Pond.

Thomas Pond Dam is located in South Casco, ME, and flows into Dingley Brook. The 69-foot-wide concrete dam is 7 feet high and has a 6-foot-wide sluiceway. Waterflow is controlled by stoplogs placed in slots in the sluiceway sides. The dam impounds Thomas Pond, which Department records show is 533 acres with a 5.5 square mile drainage basin.¹

Your letter alleges that the dam owner, the Thomas Pond Improvement Association (the TPIA), has failed to do the following: 1) implement safeguards to prevent other parties from changing water levels of the pond, 2) maintain a minimum flow of 2.4 cubic feet per second (cfs)² to Dingley Brook, 3) maintain regular records, 4) develop a "Water Level Management Plan," 5) maintain liability insurance for the dam, and 6) prevent water flow from exceeding 12 inches for 12 consecutive days in August.

Order #L-010896-37-A-N

Your letter specifically addresses Department Order #L-010896-37-A-N. Although the Department issued this Order under the since-repealed dam abandonment statutes, the Department will continue to enforce the conditions of the Order, as they form the basis for the award of ownership of the then-abandoned Thomas Pond Dam to the TPIA. 38 M.R.S. §§ 830, 835-37 (repealed 1993). The letter alleges that the TPIA has either failed to satisfy or comply with conditions 2, 3, 4, 5, 9, and 10 of the Order, which are listed below:

¹ Order #L-010896-37-A-N states that the dam impounds 496 acres with a 4.8 square mile drainage basin. The updated measurements according to Department Rule Chapter 587, adopted in 2009, are listed here.

² cubic feet per second are a unit to measure outflow. 1 cfs is approximately 7.5 gallons per second.

AUGUSTA
17 STATE HOUSE STATION
AUGUSTA, MAINE 04333-0017
(207) 287-7688 FAX: (207) 287-7826

BANGOR
106 HOGAN ROAD, SUITE 6
BANGOR, MAINE 04401
207-941-4570 FAX: (207) 941-4584

PORTLAND
312 CANCO ROAD
PORTLAND, MAINE 04103
(207) 822-6300 FAX: (207) 822-6303

PRESQUE ISLE
1235 CENTRAL DRIVE, SKYWAY PARK
PRESQUE ISLE, MAINE 04769
(207) 764-0477 FAX: (207) 760-3143

“2. The dam owner shall provide some device or control so that only a designated representative of the organization [TPIA] can change the level of water being maintained or released by the dam.

3. A minimum flow of water, 2.4 cfs (=A.B.F.) shall be maintained to Dingley Brook below the dam at all times.

4. The dam operator shall maintain a dated written record of lake levels, changes in the water control device, and by whom made. The record shall be maintained on a daily basis during times of rapid water level change and on a weekly basis at all other times.

5. The association shall 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 variety of likely water level/meteorological occurrences. The plan should be updated regularly as experience is gained in managing the water levels of Thomas Pond and Dingley Brook.”

“9. The owner of the dam shall maintain in effect liability insurance against personal injury incurred in the operation, repair, maintenance and rebuilding of the Thomas Pond Dam and any fence or barrier erected pursuant to this Order in a minimum amount of \$500,000 coverage.

10. Except as irreconcilably limited by inflow to the impoundment or other natural conditions beyond the dam owner’s control, for control of spring conditions 12 inches maximum will be allowed for flow over the dam.”

Alleged Violations

Each allegation in the letter dated September 29, 2023 is addressed in turn below.

“1. The TPIA has not implemented sufficient safeguards to prevent parties other than a designated [representative] of the TPIA from changing the water level of the Pond.”

Department Response: On a site visit conducted on November 3, 2023, Department staff observed a locked, chain link fence surrounding the dam. The TPIA are the only individuals with keyed access to the dam. Condition #2 of Order #L-010896-37-A-N requires that a device be maintained so that only a representative of the TPIA can have access to change the flows at the dam. The safeguards observed by Department staff satisfy this condition, and the TPIA is therefore in compliance with Condition #2 of Order #L-010896-37-A-N.

“2. The TPIA has failed to maintain a minimum flow of water of 2.4 cubic feet per second to Dingley Brook at all times.”

Department Response: On a site visit conducted on November 3, 2023, Department staff observed an outflow of 3.9 cfs to Dingley Brook. Previous Department guidance to the TPIA related to this condition from Order #L-010896-37-A-N (Condition #3) advised that the annual base flow be used in operation of the dam. The Department’s methods for calculating annual base flow have changed since the order was issued. Department Rule Chapter 587, adopted in 2009, states, “[s]easonal aquatic base flow is determined using flow records where adequate flow records are available for a specific waterbody. ‘Adequate flow records’ means a minimum of 10 years of U.S. Geological Survey gauging records. . .” 06-096 C.M.R. Ch.

587 § 3(A). Current calculations using the United States Geological Survey's (USGS) StreamStats tool show an Aquatic Base Flow of 1.17 cfs (attached). Condition #3 of Order #L-010896-37-A-N refers to the minimum flow as the "A.B.F" or aquatic base flow. According to logs, and confirmed at the site visit, the TPIA maintains a flow above the aquatic base flow. The TPIA is therefore in compliance with Condition #3 of Order #L-010896-37-A-N.

"3. The TPIA has not maintained regular, reliable records of the operation and maintenance of the Dam, which are essential for the Department to assess compliance with the Criteria during the period of TPIA's ownership of the Dam."

Department Response: On Monday July 10, 2023, the TPIA shared with Department staff the detailed logs they maintain on their website³ of water levels, flows, stoplog changes, and other observations at the Dam. Condition #4 of Order #L-010896-37-A-N requires the dam owner to maintain a written record of lake levels, changes made and by whom. The TPIA has maintained regular records in accordance with this condition on their website. The TPIA is therefore in compliance of Condition #4 of Order #L-010896-37-A-N.

"4. The TPIA has never developed a written "Water Level Management Plan" governing the operation of the Dam and the setting of water levels for the Pond."

Department Response: The Department has a "Thomas Pond Management Plan" on file (attached). Condition #5 of Order #L-010896-37-A-N does not require Department approval of a management plan, only that one should be in place. During a site visit on November 3, 2023, a representative of the TPIA verbally confirmed that they are developing a new management plan and the new plan will be presented to property owners for comment this spring. The TPIA is therefore in compliance of Condition #5 of Order #L-010896-37-A-N.

"5. The TPIA has not maintained a liability insurance policy for the Dam."

Department Response: Department records show an insurance plan in place from July 7, 1990. At the site visit on November 3, 2023, Representatives of the TPIA informed Department staff that as of 2014, there was no liability insurance for the dam. Department staff will follow up with the dam owners regarding compliance with Condition #9 of Order #L-010896-37-A-N.

"6. The TPIA has failed to prevent the water flow over the Dam from exceeding 12 inches for 12 consecutive days in August, even though the TPIA could have avoided that by proactively increasing flow over the Dam in excess of 2.4 cubic feet per second but well less than the 12 inch maximum set forth in an attachment to the Order bearing an attestation from the Bureau of Land Quality Control and identified as a "Thomas Pond Dam Management Plan".

Department Response: At the site visit conducted on November 3, 2023, Department staff observed 4 inches of water flowing over the dam. Department staff will follow up with the dam owners regarding August flows over the dam and compliance with Condition #10 of Order #L-010896-37-A-N.

³ The TPIA's detailed dam logs are available at the following website:
<https://thomaspond.org/detailed-dam-logs>

Information on the Water Level Petition Process

As noted above, the dam abandonment statutes were repealed in 1993. 38 M.R.S. §§ 830, 835-37 (repealed 1993). The current water level laws, 38 M.R.S. § 840-41, provide a process for establishing water levels and flows at certain dams, such as Thomas Pond Dam. The Department establishes water levels through a process that can be initiated by an application from the owner, lessee or person in control of a dam; the Commissioner of Inland Fisheries and Wildlife or the Commissioner of Marine Resources; or upon receipt of petitions from the lesser of at least 25% or 50 of the littoral or riparian proprietors;⁴ or from a water utility having the right to withdraw water from the body of water for which the water level regime is sought. Information about the Water Level Petition process, including application forms, are available on the Department's website.⁵

If you have any questions about this matter, please contact me at laura.paye@maine.gov or (207) 219-9563.

Sincerely,



Laura Paye
Hydropower Specialist
Maine Department of Environmental Protection

CC: Sean R. Turley, Fulton S. Rice, Frank Jaffe, Robert Chapin

Attachments: 1990 Order, 2002 Letter, 2012 Letter, Thomas Pond Management Plan, StreamStats Report for Thomas Pond

⁴ Property owners along a body of water such as a pond, lake, or stream.

⁵ [Petition to Set Water Levels/Minimum Flows on DEP's website](#)