

STATUTORY REQUIREMENTS

1. Michigan Water Law

Michigan follows the riparian theory of water law, which applies primarily in the eastern United States. The riparian doctrine stipulates that the right of the use of water is dependent upon the ownership of the land which is contiguous or riparian to the watercourse. All riparian owners have an equal right to reasonable use of the water.

The issue of what constitutes reasonable use has often raised difficult questions which have led to interpretation by the courts. A riparian owner is entitled to use water for consumptive and domestic purposes in a reasonable manner. Public bodies owning riparian lands are entitled to the same reasonable use of water as private riparians. The reasonable use doctrine has permitted public riparian owners to divert and use stream flow for beneficial public purposes. The diversion of stream flow for the generation of hydropower has been determined to be a reasonable use.

It is important to note that unexercised water rights are not forfeited. The interruption or lack of use by the riparian owner does not result in the forfeiture of the right to use water in the future.

The riparian doctrine has been modified by legislative intervention to protect public health, safety, and welfare. These statutory modifications have related primarily to the protection of water quality rather than the regulation of stream flow. Michigan's resource agencies recognize the benefits of stream flow regulation for the protection of fish habitat, water supply, and for prevention of floods. In Michigan the regulation of stream flow has been largely confined to the regulation of new structures placed in a lake or stream. Relevant State legislation is discussed in the following section.

2. State Legislation

a) State of Michigan Constitution

Article VII, Section 25, of the State of Michigan's Constitution states:

No city or village shall acquire any public utility furnishing light, heat or power or grant any public utility franchise which is not subject to revocation at the will of the city or village, unless the proposition shall first have been approved by three-fifths of the electors voting thereon (emphasis added)."

Whether installation of generating equipment at a City-owned dam constitutes "acquisition of a utility" is an ambiguous area under the law. Lawyers have provided differing interpretations of whether a referendum is necessary. However, several communities proposing hydro projects at existing dams have chosen to hold a referendum to ensure compliance with the law.

b. State Statutes

A number of State statutes have direct or indirect applicability to hydroelectric projects. These are summarized in Figures E-1 and E-2. Those with potential implications to the proposed hydroelectric project are discussed in the following paragraphs.

The Inland Lakes and Streams Act, Act 346, PA 1972 requires that a permit be obtained from the Michigan Department of Natural Resources to dredge, fill, construct structures, or undertake other activities below the ordinary high water mark of an inland lake or stream. An Act 346 permit may be required to refurbish a hydroelectric facility.

Any dredging or filling associated with the proposed projects is likely to require a permit from the U.S. Army Corps of Engineers in accordance with Section 404 of PL 92-500, the Federal Water Pollution Control Act of 1972, as amended. These "404" permit applications are processed in conjunction with Act 346 applications. It is, therefore, unnecessary to file two separate applications.

Water Quality Certification is required for all projects which require a Federal license or permit pursuant to Section 401 of PL 92-500, the Federal Water Pollution Control Act of 1972 as amended. The U.S. EPA has delegated the responsibility for administering this program to the Michigan Department of Natural Resources. The water quality certification states that a project is in compliance with State water quality standards. The DNR may establish the minimum flows which must be maintained downstream of a dam or diversion structure to ensure compliance with these standards.

Figure E-1
State Statutes Directly Applicable to Hydropower Projects

Statute	Administering Agency	Type of Program	Notes
Act 346, PA 1972 - Inland Lakes and Streams	MDNR - Division of Land Resource Programs	Permit	Same application for this and Section 404 permit program
Section 401 - Water Quality Certification (pursuant to PL 92-500)	MDNR - Water Quality Division	Certification	Federal statute administered by State. Minimum flow require- ment established.
Act 123, PA 1929 - Passage of Fish Over Dams	MDNR	Mandate	Waiver may be obtained from Natural Resources Commission
Act 347 - PA 1972 - Soil Erosion & Sedimentation Control Act	Local Enforcement Agency	Permit	Local program may or may not be applicable

Figure E-2

State Statutes with Indirect Applicability to Hydropower Projects

Statute	Applicability
Act 146, PA 1961 Inland Lake Level Act	A court may establish a legal lake level which must be maintained at all times. Not applicable at Corunna Dam.
Act 203, PA 1980 - Protection of Wetlands	Permit may be required if construction in a wetland is proposed. Not likely to be applicable to Corunna.
Act 167, PA 1968 - Floodway Encroachment Act	Permit may be required if project is in floodway and may influence discharge or stage characteristics of river.
Act 203, PA 1974 - Endangered Species Act	MDNR Director's permission required if an endangered species on the State or Federal list is in the project area. May be applicable at Corunna.
Act 231, PA 1970 - Natural Rivers Act	Land use along designated streams is regulated by zoning. Shiawassee River not designated.
Act 341, PA 1972 - Wilderness and Natural Areas Act	No utility project permitted in designated areas. No designated areas are located near the proposed project.
Act 127, PA 1970 - Michigan Environmental Protection Act	Provides legal standing for anyone to bring action in district court against developer to protect the environment.
Act 20 - PA 1964 - Surplus Waters Act	Dormant act which may be applicable if county requests that MDNR establish optimum flow of rivers with surplus waters.

Minimum flow determinations are site specific and often established by trial and error.

The Passage of Fish Over Dams Act, Act 123, PA 1929 requires that fish passage be provided over new or existing dams. In some instances, a waiver may be obtained from the Natural Resources Commission. In the past this Act has not been enforced consistently or to the maximum extent practicable. At the present time, a special committee on implementation of small-scale hydropower in the Michigan State Legislature has requested that the intention of this Act be clarified and that Administrative Rules be promulgated subsequently. Action on these requests is expected in the near future. Until that time, application for a waiver must be made to the Natural Resources Commission or a fish ladder installed at new or existing dams.

The Soil Erosion and Sedimentation Control Act, Act 347, PA 1972 states a construction permit may be required if the proposed project would disturb one or more acres of land or move earth within 500 feet of a lake or stream. This Act is administered by a local enforcement agency. It is not likely that a 347 permit would be required for the Corunna hydro project.

3. Federal Energy Regulatory Commission (FERC)

Under the Federal Power Act of 1920, FERC has the authority to regulate and issue licenses to non-federal dams which: occupy Federal land; are located on a navigable waterway; affect interstate commerce; or use surplus power from Federal government dams. Court cases have resulted in a liberal interpretation of the term "navigable"; thus, virtually all waterways fall under FERC jurisdiction.

In 1978, the Public Utilities Regulatory Policies Act (PURPA) was passed. PURPA provided that loans be made available for hydroelectric feasibility studies at existing dams. Shortened application procedures for power licenses for "minor" projects (less than 1.5 mW), and "major" projects at existing dams were also mandated. Subsequently, Order No. 11, entitled "Simplified Procedures for Certain Water Power Licenses," dated September 1978, and Order No. 54, entitled "Application for Preliminary Permit or License: General Provisions," dated October, 1979, were issued to provide guidelines for simplified application procedures. The Corunna Dam can be classified as a minor project. Even the simplified FERC requirements are both lengthy and complex. Processing is complicated by the fact that the FERC licensing process directly or

indirectly involves review for compliance with a number of Federal laws.

These laws are summarized in Figures E-3 and E-4. Review of the license application by various agencies responsible for administering these laws occurs during the processing of the license application.

Processing of license applications usually takes six to nine months, but may take a year or more, depending on the adequacy of the application and nature of comments it generates. Coordination with various State and Federal agencies may result in numerous requests for additional information and clarification. Contacting these agencies during the preparation of the license application and resolution of problems may reduce later delays in processing.

In December, 1980, FERC regulations were issued which provide an alternative to licensing. Order No. 106 describes procedures by which an exemption from licensing requirements may be obtained. To be eligible, a proposed project must have an installed capacity of 5 mW or less, and the major real property interests and water rights must be owned by the applicant. The Corunna hydro projects would be eligible for exemption from licensing requirements.

The exemption offers a developer the opportunity to save a considerable amount of time and effort. The exemption application procedure is less involved than licensing, and an exemption must be issued within 120 days after the application is accepted for filing. However, because this is a new ruling, it is difficult to anticipate the magnitude of the problems and delays associated with exemption applications.

The MDNR presently is in opposition to exemption applications, which may produce delays in their review and processing. Several exemption applications are presently pending in Michigan, and the experience of those developers will determine whether it is more desirable to obtain a license or an exemption.

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Figure E-3
Federal Statutes with Direct Applicability
to Hydroelectric Projects

Federal Statutes with <u>Direct</u> Applicability	Proposed Actions			Administrative Agency and Type of Jurisdictional Authority
	Refurbish Existing Dam	Dredge Impoundment	Construct New Dam	
Federal Power Act of 1920	X		X	Power license must be obtained from Federal Energy Regulatory Commission (FERC)
Public Utilities Regulatory and Policies Act (PURPA) of 1978	X			DOE administers Feasibility Study Loan Program; FERC adopted simplified licensing procedures for existing dams
Rivers and Harbors Act of 1899 - Section 10		X		Permit issued concurrently with 404 permit
PL 95-127 - Clean Water Act:				
Sec. 401 - Water Quality Certification	X		X	EPA delegated authority to MDNR
Sec. 404 - Dredge or Fill Permit		X	X	EPA delegated authority to U.S. Army Corps of Engineers; permit processed in conjunction with State Act 346 permit
PL 85-624 - Fish Wildlife Coordination Act	X		X	U.S. Fish and Wildlife Service (FWS) reviews FERC application
PL 93-205 - Endangered Species Act	X		X	U.S. FWS reviews FERC application
PL 89-665 - National Historic Preservation Act	X		X	Heritage Conservation and Recreation Service reviews FERC application in conjunction with State Historic Officer

Figure E-4
Federal Statutes with Indirect Applicability
to Hydroelectric Projects

Federal Statutes with <u>Indirect</u> Applicability	When Applicable. . .
PL 91-190 - National Environmental Protection Act (NEPA)	Environmental impact statement required for major hydro projects
Executive Order 11988 - Flood Plain Management	Proposed project reviewed for compliance
Executive Order 11990 - Protection of Wetlands	Proposed project review for compliance
PL 90-542 - Wild and Scenic Rivers Act	Designation or potential listing of river prohibits issuance of a FERC license
PL 88-577 - Wilderness Preservation Act	Dam in wilderness area may be operated or built with President's approval
National Trails System	No influence in hydro facilities
Coastal Zone Management Act	Must comply with CZM plan if located in coastal zone
PL 94-579 - Federal Land Policy and Management Act	Applicable to projects on Federal lands administered by U.S. Dept. of Interior or U.S. Forest Service

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