

APPENDIX C

Lincoln Lakes Water Level Ordinance

**REGULAR TOWN COUNCIL MEETING
AGENDA
September 14, 2020
7:00 PM**

22. Adopt Ordinance as amended- Lake Level Ordinance (0100)

Motion made by Stephen Clay and seconded by John Trask to adopt the Lincoln Lakes Water Level Ordinance as amended due to a DEP wording change.

**VOTE: 6-0
Councilor Gifford absent.**

A true copy attest:  9/14/2020
Ann Morrison- Town Clerk

LINCOLN LAKES WATER LEVELS AND MINIMUM FLOW ORDINANCE

Section I. Title

This ordinance shall be known and may be cited as the “Lincoln Lakes Water Levels and Minimum Flow Ordinance” (hereinafter referred to as the “Ordinance”). A listing of all of the Lakes or Ponds making up the various lake systems subject to this Ordinance is attached hereto as Exhibit A (hereinafter generally referred to as the “Lincoln Lakes” or “Lake Systems”). Lincoln Lakes shall hereinafter refer to any one, lake system grouping of, or all of the Lakes or Ponds set forth in any of the lake systems identified in Exhibits A and B.

Section II. Authority

In accordance with 30-A M.R.S. §§ 4454-4457, 38 M.R.S. §§ 815-818, and 38 M.R.S. § 843, the Town of Lincoln (hereinafter referred to as “Town”) hereby ordains that the Town shall, upon approval of the Maine DEP, have authority to regulate water levels and minimum flows for the Lincoln Lakes in the Town of Lincoln and, in conjunction therewith, to enter upon that property necessary for the purpose of maintaining, repairing, reconstructing, and operating existing dams. Specifically, the Town or authorized contractors, together with personnel and equipment, may enter onto property under the authority of any enforcement order or easement secured for the purpose of maintenance and repair (and other authorized activities) of any dam located on the impounded Streams and Ponds identified in any of the lake systems set forth on Exhibit A, or any other future dams that affect the water levels or minimum flow of the Lincoln Lakes in the Town of Lincoln.

Section III. Findings and Purpose

The Lincoln Lakes are high value watersheds and recreational areas in the Town of Lincoln. It has been determined that disrepair, discontinuance or a breach of any of the dams on the Lincoln Lakes would result in both ecological and economic impacts to the Lincoln Lakes, to Lakefront owners and their properties, the Town of Lincoln, and the State of Maine. It is critical for the Town to have the ability to maintain water levels in the Lincoln Lakes and in conjunction therewith, to monitor and maintain the dams.

Title 30-A M.R.S. § 4455 provides that any municipal ordinance to regulate water levels and flows must include (1) all substantive provisions of 38 M.R.S., Ch. 5, Subchapter 1, Article 3-A, under which the DEP establishes water level regimes and minimum flow requirements; and (2) provisions allowing the Commissioner of Environmental Protection and any municipality downstream of the impoundment to petition for a water level hearing.

This Ordinance only applies to dams without a minimum flow regime or water level order determined by Federal Energy Regulation Commission, or by a permit setting

water levels issued under the Natural Resources Protection Act, Site Location of Development Law, Maine Waterway Development and Conservation Act, land use regulation laws or any other state statute regulating the construction or operation of dams. The Town has confirmed with the Maine Department of Environmental Protection (MDEP) and the Federal Energy Regulatory Commission (FERC) listing of regulated dams that the dams listed in Exhibits A - B are not regulated dams subject to those authorities.

Because some of the lake and pond systems are interconnected as identified as the three Lake Systems on Exhibit A, there are variable impoundment elevations specific to each lake system. The impoundment elevations are set forth on Exhibit B based upon the specific lake system.

Section IV. Substantive Law Provisions relating to Water Levels and Flow Requirements Adopted by Reference.

The Town Council of the Town of Lincoln hereby adopts the following requirements consistent with the requirements of 38 M.R.S., Ch. 5, Subchapter 1, Article 3-A:

1. Power. The Town Council may on the Council's own motion and shall, at the request of the owner, lessee or person in control of a dam on the Lincoln Lakes, the Commissioner of Inland Fisheries and Wildlife, the Commissioner of Environmental Protection, any municipality downstream of the Lincoln Lakes, or upon receipt of petitions from the lesser of at least 25% or 50 of the littoral or riparian proprietors of the Lincoln Lakes, conduct a public hearing for the purpose of establishing a water level regime and, if applicable, minimum flow requirements for any of the Lincoln Lakes.

Notwithstanding the provisions of this subsection, after an order establishing a water level regime or minimum flow requirement has been issued pursuant to this subsection, the Town Council is not required to hold a hearing to establish a new water level regime or minimum flow requirement for any of the Lincoln Lakes in response to a petition from littoral or riparian proprietors unless the Town Council determines that there has been a substantial change in conditions or other circumstances materially affecting the impact of water levels and minimum flows on the public and private resources identified in subsection 4 since the order was issued.

2. Notice. The Town Council shall provide written notice of any hearing held pursuant to this section to the owner, lessee or person in control, if known, of any dam on or affecting the Lincoln Lakes and to any petitioner who has petitioned for a hearing with respect to this body of water or lake system. The Town Council shall give public notice of the hearing under Title 5, section 9052 and shall also file notice of the hearing in the Lincoln municipal office and in the county clerk's office of Penobscot County.

3. Conduct of hearing. The hearing shall follow the procedures for a public hearing specified in the Lincoln Charter, any applicable Lincoln Ordinance, and applicable Maine law, as well as the procedures specified in this section. The hearing shall be adjudicatory in nature.

4. Evidence. At the hearing, the Town Council shall solicit and receive testimony for the purpose of establishing a water level regime and, if applicable, minimum flow requirements for the Lincoln Lakes. The testimony is limited to:

A. The water levels necessary to maintain the public rights of access to and use of the water for navigation, fishing, fowling, recreation and other lawful public uses;

B. The water levels necessary to protect the safety of the littoral or riparian proprietors and the public;

C. The water levels and minimum flow requirements necessary for the maintenance of fish and wildlife habitat and water quality;

D. The water levels necessary to prevent the excessive erosion of shorelines;

E. The water levels necessary to accommodate precipitation and run off of waters;

F. The water levels necessary to maintain public and private water supplies;

G. The water levels and flows necessary for any ongoing use of the dam to generate or to enhance the downstream generation of hydroelectric or hydromechanical power; and

H. The water levels necessary to provide flows from any dam on the Lincoln Lakes to maintain public access and use, fish propagation and fish passage facilities, fish and wildlife habitat and water quality downstream of the body of water.

5. Order. Based on the evidence solicited at the hearing, the Town Council shall make written findings and issue an order to the owner, lessee or person in control of a dam establishing a water level regime for the Lincoln Lakes and, if applicable, minimum flow requirements for such dam. The order must, insofar as practical, require the maintenance of a stable water level, but must include provision for variations in water level to permit sufficient drawdown of the body to accommodate precipitation and runoff of surface waters, minimum flow requirements and to otherwise permit seasonal and other necessary fluctuations in the water level of the Lake, Pond or Lake System in order to protect public

health, safety and welfare and the public and private resources identified in subsection 4. The Town Council shall deliver a copy of the order to the owner, lessee or person in control of the dam, if known, the municipal office of the Town of Lincoln, and each petitioner, if any, and shall also file a copy of the order in the Penobscot Registry of Deeds.

6. Appeal. The Town Council's order may only be appealed within thirty (30) days of the issuance of the Council's written Order to the Maine Superior Court pursuant to Rule 80B of the Maine Rules of Civil Procedure.

Section V. Maintenance of the Dam after Order Issued.

1. Prohibition. After issuance of an order under Section IV, subsection 5, establishing a water level regime for the Lake Systems, no owner, lessee or person in control of the dam impounding any Pond or Lake included in a Lake System, nor any subsequent transferee, may operate or maintain the dam or cause or permit the dam to be operated or maintained in any manner that will cause the level of water to be higher or lower than that permitted by order of the Town Council or to otherwise violate the terms of the order of the Town Council.

2. Exception. An owner, lessee or person in control of a dam on the Ponds or Lakes included in a Lake System may not be in violation of subsection 1 when the water level fluctuation not permitted by the order was caused by unforeseeable and unpredictable meteorological or other natural conditions or operating failures of such dam or any associated equipment or by valid order of federal, state or local authorities, including an order issued pursuant to Title 37-B, section 1114, subsection 2, and when the person could not have avoided the fluctuation by promptly undertaking all reasonably available steps to regulate water flow through or over any dam under the person's control. The burden of proof is on the owner, lessee or person in control of the dam to demonstrate the applicability of this subsection.

3. Enforcement. The Town or any littoral or riparian proprietor may commence an action to enjoin the violation of any provision of this Section V. The Town may enforce any order issued under Section IV by any other appropriate remedy, including, but not limited to, entering the dam premises to carry out the terms of the order, and shall be entitled to all costs incurred by the Town for the purposes of carrying out the terms of such order.

The violation of any order issued under Section IV, is punishable by a forfeiture of not less than \$100 and not more than \$10,000. Each day of violation is considered a separate offense.

5. Appeal. Any person aggrieved by an order of the Town Council under Section V may appeal to the Superior Court under Rule 80B of the Maine Rules of Civil Procedure.

Section VI. Monitoring of Water Levels and Oversight of the Dam(s)

The monitoring of Lakes or Ponds water levels above Dams, and associated minimum flows below dams, as well as oversight of operation of dams (and any other future dam on the Pond or Lake included in a Lake System) shall be accomplished in the following manner by the Town of Lincoln in consultation with the Lakefront Owners:

Dam Steward: As a designee of the Town Council, a Steward shall be appointed by the Town Council annually in the month of January for each year following the adoption of this Ordinance. The Steward's responsibility shall include monitoring the Ponds and Lakes water levels and minimum flows for the Pond and Lake included in a Lake System, and dam conditions and maintenance issues. The Steward will work in cooperation with the Maine Department of Inland Fisheries and Wildlife and the Maine Emergency Management Agency to maintain water levels that are safe and desirable to maintain the fish and wildlife species using the Pond or Lake. The Town will provide notification by posting notice on their Town website as well as posting notice at the Town Office of any events promptly.

Section VII. Additional Dam Maintenance Procedures

Applicability. This section shall apply to dam maintenance and repair activities conducted by the Town that are not performed pursuant to an enforcement order in accordance with Section VI of this Ordinance.

Notification. Notification by the Steward of any required repairs will be given to the Town. The Town shall post a copy of the Notice in the Lincoln municipal office.

Authorization to repair. The Town Council, upon notice of required maintenance or repair work, will be the sole authorizing body.

Scope of repairs. The scope of repairs, design specifications, and permit requirements shall be itemized and developed as a bid specification by a qualified engineer.

Approval of repairs. Repairs that will not be conducted by a Town Department shall be awarded through any bid process required by the municipal charter.

Section VIII. Funding of repairs

TIF or Reserve Funds. The Town's costs to carry out activities pursuant to this Ordinance shall be funded through approved TIF Funds, Economic Development Reserve Funds, Unappropriated Fund Balance, or a combination of these sources, as approved by the Town Council.

Section IX. Required Reviews of Dam Repairs

The Town Manager, Public Works Director, and Economic Development Director shall review and verify that all dam repairs have been done in accordance with acceptable engineering standards and workmanship. In doing so, the Town may consult with the Lakefront Owners, Maine Emergency Management Agency, Maine Department of Inland Fisheries & Wildlife, the Maine Department of Environmental Protection, and any other governmental agency or third party consultant/engineer.

Section X. Severability

Should any section or provision of this Ordinance be declared by a court of competent jurisdiction to be invalid, such decision shall not invalidate or affect the enforcement of any other section or provision of this Ordinance.

Section XI. Definitions

As used in this Ordinance, unless the context indicates otherwise, the following terms have the following meanings:

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.

Height. “Height” means, in reference to a dam, the vertical distance in feet from the natural bed of the stream or watercourse measured at the downstream toe of the barrier, or from the lowest elevation of the outside limit of the barrier, if it is not across a stream channel or watercourse, to the maximum capable water storage elevation.

Littoral Proprietor. “Littoral Proprietor” means an owner or lessee of property on the shore of a lake impounded by a particular dam.

Person. “Person” means any individual, firm, association, partnership, corporation, trust, municipality, quasi-municipal corporation, state agency, federal agency or other legal entity.

Riparian proprietor. "Riparian proprietor" means an owner or lessee of property on the bank of a river or stream or shore of a pond or other small body of water impounded by a particular dam.

EXHIBIT A

WATERSHEDS AND CONTROLLING DAMS

THE MATTANAWCOOK LAKE WATERSHED:

- 1) Upper Pond, 2) Folsom Pond, 3) Crooked Pond, 4) Mattanawcook Pond are all impounded by three dams. One on Upper, One on Folsom and One on Mattanawcook. These flow into the mill pond, which flows into the Penobscot River.

THE UPPER COLD STREAM POND LAKE WATERSHED:

- 5) Upper Cold Stream Ponds (Big and Little Narrows), 6) Little Round Pond and 7) Cold Stream Pond all are impounded. The first dam on Little Round leads into Little Narrows with a flow through culvert to Big Narrows to a privately owned dam that flows into a stream that flows into Cold Stream Pond. Cold Stream Pond has a dam in Enfield, this also flows into the Penobscot River.

THE CAMBOLASSEE POND LAKE WATERSHED:

- 8) Caribou, 9) Egg, and 10) Long Pond are all connected and a dam exist on Long. The outflow of that dam flows into 11) Cambolassee Stream that then flows into 12) Cambolassee Pond that also is controlled by a dam. The outflow of that dam flows into 13) Stump or Snag Pond which also has a dam that flows into the former Haskell Lumber Company site. This site also has a dam that controls flow into the Penobscot River.

EXHIBIT B

WATER SHED	IMPOUNDED BY DAMS	WATER LEVELS
<p>MATTANAWCOOK LAKE SHED:</p> <p>Upper Pond, Folsom Pond, Crooked Pond, Mattanawcook Pond are all impounded by three dams.</p>	<p>Dam on Upper, Folsom and Mattanawcook. These flow into the mill pond, which flows into the Penobscot River.</p>	<p>TBD</p>
<p>UPPER COLD STREAM PONDS WATERSHED:</p> <p>Upper Cold Stream Ponds (Big and Little Narrows), Little Round Pond and Upper Cold Stream Ponds all are impounded.</p>	<p>The first dam on Little Round leads into Little Narrows with a flow through culvert to Big Narrows to a privately owned dam that flows into a stream that flows into Cold Stream Pond.</p>	<p>TBD</p>
<p>CAMBOLASSEE POND WATER SHED:</p> <p>Caribou, Egg, and Long Pond are all connected and a dam exists on Long. Cambolassee Stream flows into Cambolassee Pond which flows into Stump or Snag Pond.</p>	<p>A dam exists on Long Pond that flows into Cambolassee Stream which flows into Cambolassee Pond that also has a dam. The outflow of that dam flows into Stump or Snag Pond which also has a dam that flows into the former Haskell Lumber Company site. This site also has a dam that controls flow into the Penobscot River.</p>	<p>TBD</p>