

August 16, 2017

From: David Pond Water Level, Executive Committee

To: Commissioner Paul Mercer,
Maine Department of Environmental Protection

Issue: David Pond Water Level - DEP Investigation

Background: The pond has a very long and unbroken history of impoundments at the outlet. The earliest known manmade impoundment was built by Allen Wing in 1805 to provide water power for his saw and grist mill. Wing's mill was sold to Benjamin and Daniel Bachelder sometime in the 1850's and remained active well into the early 1900's. Later impoundments included beaver dams and the naturally occurring and manmade collections of rocks, logs, brush, and other debris.

In the fall of 2015, beavers constructed a dam over an impoundment that had been in place for decades. A full time David Pond resident that favors low water, was captured on film destroying the beaver dam and again a second time after they rebuilt it. **The individual then proceeded to tear down the impoundment.**

Officer MacCabe (Maine Warden Service) contacted the individual and issued a warning to stop the illegal destructive acts to the beaver dam, but the damage had already been done. The beavers had disappeared and residents immediately noticed the dramatic loss of water. Shocked at the sight of a 6' x 2' gaping hole at the outlet, the impoundment was repaired with natural items from the site to save the remaining water in the pond.

In May/June 2017, the DEP was informed about an impoundment at the outlet, supposedly because of concerns the normal spring high water levels were putting the nesting loons at risk. Based on public testimony by the Fayette/Chesterville CEO, we know Mr. Dorr (DEP), the investigating staffer, came into contact with and undoubtedly took testimony about the "new" structure from the same person who destroyed the beaver dams and the historical impoundment.

That person's testimony and a site visit by Mr. Dorr generated a July 7 letter notifying the Town of Fayette that the existing impoundment was a violation of the Natural Resources Protection Act (NRPA) 1988. This required either the complete removal of the structure "allowing the area to revert to its

natural condition” or the need to apply for a new engineered dam to include expensive application fees, environmental studies, and engineering analysis.

To the best of our knowledge, no other active or long-term property owner on the pond was contacted or interviewed by the DEP prior to the letter being written. Additionally, with the exception of the abutting land owners, no other active or long-term property owner has been contacted to provide testimony for the DEP’s follow on investigation.

Interestingly before the beaver dams were destroyed, the water diversion and erosion issues cited in the DEP letter were almost completely mitigated by those same dams.

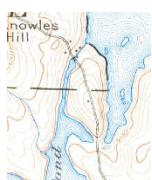
As a side note, 98% of the David Pond shoreline lies in Fayette / 2% in Chesterville. The Chesterville shoreline however encompasses the outlet of the pond, the current, and all historical impoundments.

*** Both Chesterville land owners that abut the land of the current impoundment support keeping the impoundment in place. ***

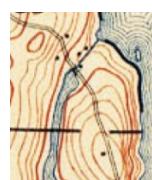
[DEP Letter Dustin Dorr 7/7/2017](#)
[David Neck landowners’ letter](#)

Impoundment Documentation / History on the Pond: As previously stated, the Wing/Bachelder impoundments existed from 1805-1900’s. From the earliest USGS topographic map published in 1910 thru the last published map in 1986, every USGS topographic map indicates an existing impoundment. Note, there were five more topographic maps published (1951, 1956, 1961, 1962, 1969) but the scale of these maps does not allow us to obtain any useful information from them.

USGS link: <https://ngmdb.usgs.gov/topoview/viewer/#4/40.01/-100.06>



[1910](#)



[1912](#)



[1941](#)



[1966](#)



[1986](#)

Since 1986 till present, David Pond landowners can provide dozens of personal testimonials noting the continuing existence of an impoundment on the pond. **The last map published in 1986 indicating an existing impoundment, is two years before the passing of the Natural Resources Protection Act (1988) cited as the enforcing document in Mr. Dorr's letter.** With over 210 years of documented impoundments, it's obvious that "impoundments are the natural condition on David Pond."

Water Level Documentation / History on the Pond: The USGS topographic maps cited above also provide water level documentation by measuring mean altitude above sea level (MSL). Over the last seventy-five years the pond's water elevation was:

1910	393' MSL
1912	393' MSL
1941	393' MSL
1966	391' MSL
1986	119m = 390.4' MSL

On July 29, 2017, a Fayette resident and experienced surveyor, used a trig level loop measurement off a USGS benchmark located by Sandy River Road to determine the current water level on the pond. His calculations indicated the pond was at 391.1' MSL.

This demonstrates that for over 107 years the pond's water level has been extremely consistent, fortifying the facts that an impoundment has existed and is a normal and critical part of this resource. If the "complete removal of the structure" was enforced per Mr. Dorr's letter, water levels at the pond would fall by at least 3'. With over 107 years of documented consistent water levels on the pond, it's obvious that "impoundments are the natural condition on David Pond."

State Regulations/Legislative Procedure: Maine's Natural Resources Protection Act (NRPA), (<http://www.maine.gov/dep/land/nrpa/ip-nrpa.html>) **became law in August 1988**, is administered by the [Maine Department of Environmental Protection](#) (DEP) and is the cited document in Mr. Dorr's letter to remove the impoundment or to begin the expensive process of ultimately building a dam.

The 210+ years of impoundment history and 107 years of consistent water level history on the pond is without question. It is also common knowledge by those in senior positions within state government that the Maine Attorney General routinely warns Department Commissioners that **"new state statutes passed are not retroactive and that previously existing situations/conditions are not reversed, but tend to be considered as a "grandfathered" situation and remain status quo going forward."** It is also common knowledge that the Maine legislature routinely operates under the identical doctrine. Accordingly, the state has no standing in regards to the current David Pond impoundment per the 1988 NRPA.

The DEP would be violating its own regulations/state law by forcing the removal of the existing impoundment. As quoted from the NRPA:

"...The NRPA recognizes the State significance of these natural resources in terms of their **recreational, historical, and environmental value to present and future generations. **The Act's intent is to prevent any unreasonable impact to, degradation of or destruction of the resources and to encourage their protection or enhancement...**"**

"...Permits are required for certain activities that occur in, on, or over any protected natural resource area or on land adjacent to any great pond,...and some freshwater wetlands. Activities requiring a permit include:

- dredging, removing, or displacing soil, sand, vegetation, or other materials;
- draining or otherwise dewatering;..."

"...To receive an NRPA permit, the applicant must demonstrate **that the proposed activity will NOT:**

- unreasonably interfere with existing scenic, aesthetic, recreational, or navigational uses

- cause unreasonable erosion of soil or sediment, or prevent naturally occurring erosion
- unreasonably harm any significant wildlife, fisheries or aquatic habitat
- unreasonably interfere with the natural flow of any surface or subsurface waters
- lower water quality...”

The removal of the impoundment **WILL HAVE a direct NEGATIVE impact on all five exclusionary items listed for denying a permit.**

Protecting the Resource: Removal of the existing impoundment would lower the pond by 3' with water levels being significantly lower than witnessed during the 2016 drought. That dramatic lowering of this relatively shallow resource would have the following consequences:

- **The 4 environmental and wildlife sensitive National Resource Protection areas the DEP established on the pond would be lost** as these historically very shallow areas would revert to mud.
- **The 7 environmental and wildlife sensitive U.S. Fish and Wildlife designated Wetland Areas on the pond would be lost** as these historically very shallow areas would revert to mud.
 - To document the loss of these critical areas, a water depth survey of most of the protected areas was completed on Aug 13th. Assumptions were 3' of water will be lost with removal of the impoundment, the pond is currently down 1' due to natural runoff and summer rainfall amounts.
 - We identified the current 24" water level which would equate to the new shoreline with the impoundment removal. We then measured the distance from that spot to the shoreline to determine how many feet of mud would replace the current littoral zone of these highly protected areas.
 - Results:
 - Pt A: NRPA & USFW Wetland, 25-65' of shoreline loss
 - Pt B: NRPA & USFW Wetland, 30' of shoreline loss
 - Pt C: USFW Wetland, 50' of shoreline loss
 - Pt D: NRPA, 60' of shoreline loss
 - Pt E: USFW Wetland, 150-200' of shoreline loss
 - Pt F: NRPA, 30' of shoreline loss
 - Pt G: USFW Wetland, 50-60' of shoreline loss

[Survey Locations & Pictures](#)

[US Fish & Wildlife National Wetlands Inventory](#)

[Resource Protection Areas David Pond](#)

- Based on observations from last year's drought, we can predict with certainty that **the historical shoreline of the pond would retreat by 20-150'**. This would create huge mud flats around almost the entire circumference of the pond, resulting in a dramatic loss of littoral zone habitat.
- Water temperatures would increase, further reducing dissolved oxygen levels, negatively impacting the oxygen thermocline - **resulting in a decrease in acreage on the pond capable of carrying enough oxygen to support aquatic and invertebrate life.**
- As sunlight reaches further into the water table, algae blooms and plants would increase dramatically, again **with negative consequences to aquatic life, oxygen levels, water clarity, and water quality.**
- Pictures below show a 30' loss of shoreline from the 2016 drought with water levels only 2' below normal.
- Removal of the impoundment would lower water levels by at least 3'



Fiscal Costs: We all understand that the primary argument is to do what is right for the resource. But there are also significant landowner considerations including the loss of recreational opportunities, loss of water supply for many residents, and most importantly the very steep financial costs associated with the DEP's guidance. The financial impact of those

costs will not only be felt by David Pond residents, but will also be shared by every Fayette citizen if the current impoundment is not allowed to stand.

Non-waterfront properties with lake access will suffer significant property devaluation but lakefront property owners will take the brunt of the property devaluation losses. The current assessed value of lakefront property on David is \$18.6M. **A 15% drop in property values brought on by lowering the water level would equate to \$2.79M in losses to your constituents. Losses based on actual property versus assessed values would be much higher!**

Re-assessment of those properties will put over \$288K of annual property taxes at risk to the town of Fayette. **The burden of this loss to the tax base will fall to the other town residents.**

[David Pond Tax Spreadsheet](#)

Finally, consider the very significant costs of engineering / environmental studies, application fees, and the cost to design and build a permanent dam. Every Fayette and perhaps every Chesterville resident would feel the pain of these fees.

Incredibly all this consternation, potential loss of property value, and the huge financial costs associated with building a dam would be initiated if the DEP fails to recognize 210+ years of impoundment history, legal precedence to a 1988 statute, **impacts due to recent and repeated acts of impoundment vandalism**, and of a pile of rocks measuring 6' x 2'.



Resolutions:

We are requesting that the state/DEP:

- Grandfather the approval of the current impoundment as it relates to the 1988 passing of the Natural Resource Protection Act
- Allow the impoundment to be fortified to increase water levels on the pond toward the historical 393' MSL benchmark
- Designate the Fayette/Chesterville Code Enforcement Officer as the local onsite authority to allow on an “as needed basis” regular maintenance and/or required fortification maintenance so the impoundment will not be damaged by natural events including ice and excessive water runoff.
- DEP’s approval of the current impoundment must include language that makes it a criminal offense to destroy or improve the structure without the DEP’s and CEO’s approval. DEP must also designate which Maine department would be charged with investigating and prosecuting offenders.

We are available at your convenience should you require any clarification or additional information. We look forward to working with you to find a logical, common sense solution.

Respectfully submitted,

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David Pond Water Level, Executive Committee Member