

CHAPTER 31.

WATER POWERS, MILLS AND MILLDAMS.

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31.01 Definitions. Terms used in this chapter are defined as follows:

- (1) "Commission" means the public service commission of Wisconsin.
- (2) "Navigable waters" means all waters declared navigable by chapter 30 of these statutes.
- (3) "Permit" means legislative permission granted under section 31.06 to construct, operate and maintain a dam in or across navigable waters, or under section 31.08 to continue the operation and maintenance of any dam so situated which was constructed before such legislative permits were required.
- (4) "Grantee" means the person, firm, corporation or municipality to whom a permit is granted, and all subsequent owners of the grant.
- (5) "Corporation" means a private corporation organized under the laws of this state.
- (6) "Municipality" means any town, village, city or county in the state.

31.02 Powers of commission. (1) The commission, in the interest of public rights in navigable waters or to promote safety and protect life, health and property is empowered to regulate and control the level and flow of water in all navigable waters and may erect, or may order and require bench marks to be erected, upon which shall be designated the maximum level of water that may be impounded and the lowest level of water that may be maintained by any dam heretofore or hereafter constructed and maintained in navigable waters; and shall establish and maintain gauging stations upon the various navigable waters of the state and shall take other steps necessary to determine and record the characteristics of such waters.

(2) The commission is vested with authority and power to investigate and determine all reasonable methods of construction, operation, maintenance, and equipment for any dam so as to conserve and protect all public rights in navigable waters and so as to protect life, health and property; and the construction, operation, maintenance and equipment, or any or all thereof, of dams in navigable waters shall be subject to the supervision of the commission and to the orders and regulations of the commission made or promulgated under the provisions of this chapter of the statutes.

(3) The commission or any member or any agent or employe thereof shall at all times be accorded free access to any and all parts of any dam and appurtenances constructed or maintained in navigable waters.

(4) The commission may order and require any dam heretofore or hereafter constructed to be equipped and operated, in whole or part, as follows:

(a) With slides and chutes for the passage of logs and timber products.

(b) With a lock, boat hoist, marine railway or other device of a size and construction sufficient to accommodate navigation.

(c) With good and sufficient fishway or fishways, or in lieu thereof the owner may be permitted to enter into an agreement with the conservation commission to pay for or to supply to the state of Wisconsin annually such quantities of game fish for stocking pur-

poses as may be agreed upon by the owner and the conservation commission.

(d) With spillways or flood gates capable of permitting the passage through or over the same of freshets and floods during all seasons of the year.

(e) With booms, piers or other protection works ample to safeguard flood gates from trash or other floating material.

(5) Except as provided in subsection (6) the commission, whenever consistent with public rights, is authorized and empowered to make contracts for the removal of any material from the bed of any navigable lake, to fix and determine the compensation to be paid to the state of Wisconsin for materials so removed, except that when a contract is made with a municipality for material to be used for municipal purpose and not for resale, no compensation shall be paid for such material, and to enter into contracts, on behalf of the state of Wisconsin, for the lease or sale of such material, with such conditions as may be necessary for the protection of the public interest and the interests of the state of Wisconsin, provided that no such contract shall be made to continue for a longer period than 5 years.

(6) The public service commission, whenever consistent with the public rights, is authorized and empowered to make contracts on behalf of the state of Wisconsin for the removal of any material from the bed of any of the outlying waters, to fix and determine the compensation to be paid to the state of Wisconsin for materials so removed, except that when a contract is made with a municipality for material to be used for municipal purposes and not for resale, no compensation shall be paid for such material, and to enter into contracts, on behalf of the state of Wisconsin, for the lease or sale of such material, with such conditions as may be necessary for the protection of the public interests and the interests of the state of Wisconsin; provided that no such contract shall be made to continue for a longer period than 5 years. [1935 c. 198; 1939 c. 368; 1941 c. 219]

Note: Wisconsin has the same plenary power over its navigable waters as the thirteen original states had. The commission's power to control reservoirs must be exercised to accomplish both the purpose to maintain uniform flow and to accomplish the purpose of improving navigation for log driving under the provisions of chapter 640, Laws 1911. The court is not authorized to determine the quantity of water reasonably necessary for log driving, or the proper times for releasing water from the reservoirs. As against power owners, lumbermen are entitled to sufficient quantities of water to make the river navigable for driving logs, but this right should be exercised reasonably so as not to unnecessarily injure the power industry. *Flambeau River L. Co. v. Railroad Commission*, 204 W 524, 236 NW 671.

"Property," as used in 31.02, does not

include property that would be damaged by normal flowage resulting from ordinary operation of such dam, but means property that would be damaged by failure of such dam or by flooding of cities or villages. *New Lisbon v. Harebo*, 224 W 66, 271 NW 659.

Sunken logs cannot be purchased under (5), prior to notice given as required by 30.07. 24 Atty. Gen. 430.

Public service commission has power under this section to make order changing minimum water level to be maintained by reservoir storage dam at Rest Lake. 27 Atty. Gen. 424.

Public service commission has power under this section to establish higher minimum pond elevation for Big Eau Pleine water storage reservoir in order to preserve fish therein than minimum fixed by ch. 478, Laws 1933. 29 Atty. Gen. 472.

31.03 Public utilities law applicable. In exercising its powers and performing its duties under this chapter the commission shall be guided and controlled also by the powers with which it is invested by sections 196.01 to 197.10, so far as such sections are applicable.

31.04 Permits for dams. Permits to construct, operate and maintain dams may be granted to persons, corporations or municipalities under the provisions of this chapter.

31.05 Applications for permits to construct. Any person, firm, corporation or municipality desiring a permit to construct, operate and maintain a dam shall file with the commission a written application therefor, setting forth:

(1) The name of the navigable waters in or across which a dam is proposed to be constructed and a specific description of the site for the proposed dam.

(2) The purpose or purposes for which the proposed dam is to be constructed, operated and maintained.

(3) In case the application is for a permit to construct, operate and maintain a dam for a private purpose or purposes, evidence that the described dam site is owned by the applicant.

(4) A general description of the proposed dam, of the material to be used in the construction thereof, and a general description of all booms, piers, and other protection works to be constructed in connection therewith.

(5) The approximate amount of hydraulic power that the proposed dam is capable of developing.

(6) The location of the nearest city or village and of the nearest existing dam above and below the site of the proposed dam.

(7) A map on the scale of not less than four inches to the mile showing the lands that may be affected by the construction, operation or maintenance of the proposed dam, or by any flowage that may be caused thereby and approximately the outline of such

flowage, which map shall indicate the ownership of each tract of land within the flowage.

(8) Such additional information of any nature that may be required by the commission.

Note: A river improvement company although having right of eminent domain and the right to maintain dams and reservoirs is liable for wrongful acts in exercising or in exceeding its authority. *Flambeau River L. Co. v. Chippewa & F. L. Co.*, 204 W 602, 236 NW 679.

One owning and operating a dam across a stream does not owe to riparian owners a duty to guard against floods of such unusual and extraordinary proportion as not to have been anticipated by a man of ordinary

prudence and experience. *Trout Brook Co. v. Willow River Power Co.*, 221 W 616, 267 NW 302.

City held required to obtain permit from public service commission to construct dam, as condition precedent to condemnation proceedings to acquire land for such dam, artificial lake and adjacent public park, so as to prove authorized public purpose of such condemnation. *New Lisbon v. Harebo*, 224 W 66, 271 NW 659.

31.06 Hearing. (1) Upon receipt of an application for a permit the commission shall fix a time, not more than eight weeks thereafter, and a convenient place, for a public hearing thereon; it shall also give notice of such time and place to the applicant who shall cause the same to be published once each week for three successive weeks before such hearing in at least one newspaper, designated by the commission, in each county in which riparian lands will be affected by the proposed dam.

(2) In addition to such publication the applicant, not less than twenty days prior to such hearing, shall mail to every person interested in any lands that will be affected by the proposed dam and whose post-office address can by due diligence be ascertained, notice of the time and place set for such hearing. This notice shall be accompanied by a general statement of the nature of the application and shall be forwarded to such persons by registered mail in a sealed and postpaid envelope properly addressed. Proof of such publication and notice shall be filed, with the commission.

(3) At such hearing or any adjournment thereof the commission shall consider the application, and shall take evidence offered by the applicant and other persons in support thereof or in opposition thereto, may require the amendment of the application, and if it shall appear that the construction, operation or maintenance of the proposed dam will not materially obstruct existing navigation or violate other public rights and will not endanger life, health or property, the commission shall so find and a permit is hereby granted to the applicant. The enjoyment of natural scenic beauty is declared to be a public right, and if the commission shall find that the construction, operation or maintenance of a proposed dam is contrary to the public interest, when the public right to the enjoyment of natural scenic beauty is considered, no permit shall issue.

31.07 Applications for permits to operate and maintain existing dams. Any person, firm, corporation or municipality desiring a permit to operate and maintain a dam constructed in or across navigable waters without legislative permission prior to the tenth day of July, 1915, shall file with the commission a written application therefor setting forth:

(1) The name of the navigable waters in or across which such dam was constructed and a specific description of the dam site.

(2) The year in which the construction of the dam was completed, and a detailed description of the dam and equipment, including the maximum height or head of water that may be maintained thereby and the kind and character of material of which the dam is constructed.

(3) The purpose for which the dam was theretofore operated and is operated at the time application hereunder is made, and the purpose for which it is proposed to operate and maintain the dam.

(4) The approximate amount of hydraulic power developed thereby.

(5) The location of the nearest city or village and of the nearest existing dam above and below the dam site.

(6) Such additional information of any nature whatsoever as may be required by the commission.

31.08 Hearing. Upon receipt of an application under section 31.07 procedure shall be had substantially as required by section 31.06, and if the commission shall find that such operation and maintenance does not materially obstruct existing navigation or violate other public rights and will not endanger life, health or property, a permit is hereby granted to the applicant.

31.09 Proposals to accompany applications. Each applicant for a permit to construct, operate and maintain a dam for the purpose of developing power or for the purpose of aiding in the development of power by other dams through the creation of reservoirs or otherwise, and each applicant for a permit to construct, operate and maintain a dam for any other purpose whatsoever, which is capable of developing fifty theoretical horse power or more available for fifty per cent of the time throughout the year, shall file

with his application for a permit, in addition to the requirements of section 31.05 or section 31.07, as the case may be, the following proposals:

(1) That the commission prior to the time the permit is granted shall value the dam site and all flowage rights and other property necessary for the purposes set forth in the application for the permit, whether the same or any part thereof are owned by the applicant or not.

(2) That the commission shall audit all outlays for property and for the construction of the dam, buildings, and other structures and works constructed, maintained, and operated and used and useful under the permit.

(3) That the permit, if granted, shall be granted and accepted subject to the express condition that the state of Wisconsin, if it shall have the constitutional power, or any municipality, on not less than one year's notice, at any time after the expiration of thirty years after the permit becomes effective, may acquire all of the property of the grantee, used and useful under the permit, by paying therefor, the cost of reproduction in their then existing condition of all dams, works, buildings, or other structures or equipment, used and useful under the permit, as determined by the commission, and by paying in addition thereto the value of the dam site and all flowage rights and other property as determined by the commission prior to the time the permit was granted, as provided in subsection (1), plus the amounts paid out for additional flowage rights, if any, acquired after the valuation made by the commission as provided in subsection (1); and that the applicant waives all right to any further compensation.

31.095 Water power permits, condition precedent. (1) Except where the stream to be improved forms a boundary line between this and another state, no permit shall be granted or transferred in accordance with the provisions of this chapter until the applicant shall have filed with the commission, in addition to all other things required by law to be filed, an agreement setting forth:

(a) That, in the event any electric energy generated under said permit shall be transmitted or conveyed beyond the confines of this state to be there sold, the applicant will furnish to any resident of this state or any corporation domiciled therein electric energy at reasonable rates to be determined by the commission, provided that the commission after public hearing shall find that public convenience and necessity require such service.

(b) That the rate as determined by the commission shall in no event exceed the rate charged by applicant for similar service supplied under like conditions for the energy so transmitted outside the state.

(2) The commission is vested with power and jurisdiction to hold hearings, fix rates and to do all things necessary and convenient to carry out the purposes of subsection (1) of this section.

31.10 Permit not to be valued. Each and every permit is granted, and shall be conclusively deemed to be accepted, subject to the condition that no element of value whatever shall ever attach to or be allowed for such permit in and of itself in the sale or acquisition of the property used and useful under such permit or otherwise.

31.11 Certificate of terms and forfeiture of permits. The commission shall issue to every grantee of a permit a certificate evidencing a grant of the permit allowed by law. Every permit, and every franchise heretofore granted by the legislature, to construct, maintain and operate a dam shall become null and void, unless the dam thereby authorized be completed within five years from the time when the permit or the franchise was granted; but the commission, for good cause, may extend such time for a period not exceeding two years.

31.12 Map, profile and plans. (1) The grantee of a permit under section 31.06, to construct, maintain and operate a dam, before commencing any work of construction authorized by the permit, shall submit to the commission a complete map and profile on the scale of not less than one inch per thousand feet showing the land that may be affected by the construction and maintenance of the dam, or by any flowage that may be caused thereby, and the outline of the flowage, and such other hydrographic and topographic data as the commission may prescribe, and shall also file complete detailed plans and specifications for the proposed dam, including all booms, piers, or other protection works.

(2) The commission shall examine the map, profile, plans and specifications; shall hear the grantee thereon and may reject the same or any part thereof, if unsatisfactory or incomplete, or may suggest and require modifications thereof. If the map, profile and plans and specifications are satisfactory and complete, or, if the same shall be modified as suggested and required, the commission shall so find and approve the same, and thereupon the grantee shall have authority to construct the proposed dam in accordance therewith, but the commission may, at any time during the construction of any dam and in the interest of the public safety, or of any public rights in navigable waters, authorize, order or require such changes in the plans and specifications and the construction of the dam as shall be necessary.

(3) If the commission, in the case of an application for a permit to construct a dam with a capacity of less than two hundred fifty hydraulic horse power at ordinary stage of water, shall find that the information and data furnished in the original or amended application is sufficient, the applicant shall not be required to furnish the additional or more detailed information or data specified in subsections (1) and (2) of this section. The commission may, however, at any time during the construction of any such dam authorize, order or require changes in the construction or the method or plan of construction thereof, as provided in subsection (2) of this section.

(4) Within ten days after the completion of any dam the grantee shall file with the commission a verified statement that the same was constructed in accordance with the plans and specifications approved by the commission; or in case no plans and specifications were required to be filed, then that the dam was constructed in accordance with the description contained in the application.

31.13 Raising or enlarging existing dams. (1) If the owner of any existing dam wishes to raise or enlarge the same, he may apply to the commission for permission so to do, but the permission granted under this section shall be in amendment of any existing franchise, license, or permit previously granted authorizing the construction or maintenance of such dam only to the extent of giving the right so to raise or enlarge such dam, and shall in no way enlarge, alter, abridge or nullify property rights, privileges or obligations as to such dam, or the maintenance or operation thereof theretofore acquired or incurred. In addition to the requirements of subsections (1), (6) and (7) of section 31.05, his application shall state:

(a) The year in which his dam was completed.

(b) If constructed by legislative permission, a statement of the act of the legislature authorizing the same.

(c) A detailed description of the dam, including the maximum height or head of water that may be maintained thereby and the kind and character of material of which the same is constructed.

(d) The purpose for which such dam has been and is now used and the purpose for which it is proposed to use the same.

(e) The approximate amount of hydraulic power developed thereby.

(f) Such additional information of any nature whatsoever as the commission may require.

(2) Upon receipt of an application under this section procedure shall be had substantially as required by section 31.06; and if the commission shall find that the dam, raised or enlarged or rebuilt, or rebuilt, enlarged and raised in accordance with the application, will not materially obstruct existing navigation or violate other public rights, and will not endanger life, health or property, permission is hereby granted to raise or enlarge or rebuild, or rebuild, enlarge and raise the same in accordance with the application.

31.14 Diversion of surplus waters. (1) It shall be lawful to temporarily divert the surplus water of any stream for the purpose of bringing back or maintaining the normal level of any navigable lake or for maintaining the normal flow of water in any navigable stream, regardless of whether such navigable lake or stream is located within the watershed of the stream from which the surplus water is diverted, and water other than surplus water may be diverted with the consent of riparian owners damaged thereby for the purpose of agriculture or irrigation but no water shall be so diverted to the injury of public rights in the stream or to the injury of any riparians located on the stream, unless such riparians shall consent thereto.

(2) Surplus water as used in this section means any water of a stream which is not being beneficially used.

(3) The public service commission may determine how much of the flowing water at any point in a stream is surplus water.

(4) Before any water may be diverted for the purposes set forth in subsection (1), the applicant shall file an application with the public service commission setting forth the name and post-office address of the applicant, the name of the stream, the point in the same from which it is proposed to divert the surplus water, the name of the navigable lake or navigable stream or lands to which such water is to be diverted, the location and description of the canal, tunnel or pipes and other works through which the water is to be diverted, the amount of water to be diverted, the periods of time when it is proposed to divert such water, and the time required for the completion of the canal and other structures necessary for the completed project, which shall not be greater than two years from the filing of the application.

(5) A map shall accompany the application on a scale of not less than four inches to the mile, showing the land topography and the course of the proposed diversion canal and other works, and the ownership of all lands upon which will be located the canal and all other works for the completed project.

(6) Plans in duplicate showing cross sections and profiles for the canal, showing all tunnels, pipes or other diversion works, the dam and control works at the point of diversion and at the point of discharge, must accompany the application. The commission may also require such other additional information as may be pertinent.

(7) On receipt of the application, the commission shall set the application for a public hearing, notice of which shall be given by publication and by mailing a copy of the notice, as provided in section 31.06, to every person upon whose land any part of the canal or other structures will be located.

(8) At the conclusion of the hearing, if it shall appear that the water to be diverted is surplus water, or if not surplus water the riparians injured by such diversion have consented thereto, the commission shall so find and a permit for the diversion of such water shall issue. The commission shall determine and fix the quantity of water to be diverted and the time or times when such water may be diverted.

(9) The quantity of water to be taken and the time or times when it may be taken shall be under the control of the commission, to the end that only surplus water be diverted from its natural channel, and that when any water in a stream ceases to be surplus water, the diversion of such water shall cease except that the commission may permit the diversion of other than surplus water with the consent of the riparian owners damaged thereby.

(10) No work shall be commenced on the canal, headworks or other structures necessary for the project until the plans for the same shall have been approved by the commission.

(11) Any person having received a permit to divert water under the provisions of this section may construct upon the land of another the canal and other works authorized by the permit after the damage which will be sustained by the owner or owners of such land has been satisfied, or has been determined in the manner provided for in chapter 32, and after the final sum so determined and all costs have been paid to the person or persons entitled thereto or to the clerk of the circuit court on their account.

(12) After the application under the provisions of this section has been filed with the public service commission the applicant may enter any land through which it is proposed to divert the water for the purposes of making any surveys required for drafting the plans for the project.

(13) When, after due examination and investigation, the conservation commission shall determine it to be necessary for conservation purposes that water elevations in any navigable stream or lake shall be raised, the commission may, whenever it has funds available from any source other than license fees, file an application for a permit under this chapter with the public service commission, which commission shall grant such permit, and shall determine and fix the elevations to which the water may be raised or maintained, but such water elevation shall in no case be fixed below the normal elevation without the consent of the conservation commission. If any lands are damaged by the raising of the water levels above normal, pursuant to the permit, and the conservation commission cannot acquire the right to flow such lands by agreement with the owner, it may acquire such lands or the right to flow the same by condemnation under chapter 32.

(14) The provisions for judicial review of any order or determination made by the public service commission shall be as prescribed in chapter 227. [1935 c. 287; 1943 c. 375 s. 5]

31.15 Acquisition of existing dams. (1) Every domestic corporation lawfully engaged in the business of producing, transmitting, delivering or furnishing heat, light, water, power, or street or interurban electric railway service to or for the public may, for the purpose of developing power and generating energy for public use in and about such business, acquire any dam in or across any navigable waters of this state and all flowage and other rights and property necessary to the maintenance thereof, or any undeveloped water power or dam site upon any such waters within this state, except as provided otherwise in subsection (2).

(2) No award in any condemnation proceedings authorized by subsection (1) shall be effective, and no corporation shall purchase or otherwise acquire any such property until it shall have obtained from the commission a certificate that public convenience and necessity require the acquisition of the same, at the amount fixed by such award or agreed upon with the owner thereof.

31.16 Certificate of convenience and necessity; notice of hearing. (1) Any such corporation desiring to purchase or acquire any property pursuant to section 31.15 shall apply to the commission for a certificate of public convenience and necessity. Such application shall state the name of the owner or owners of the property sought to be ac-

quired; the business in connection with which it is desired to utilize said property; the specific public purpose or purposes for which it is proposed to use the same; the compensation or price to be paid therefor, and such other information as the commission may require; and shall contain a statement to the effect that the said corporation agrees to cancel all contracts for the sale of hydroelectric power outside this state, which shall at any time be found by the commission to interfere with adequate service and reasonable rates to the people of this state.

(2) Upon receipt of such application the commission shall fix a convenient time and place for a public hearing thereon, which time shall not be more than eight weeks from the date of filing such application. Notice of the time and place so fixed shall be given to the applicant, who shall cause the same to be published at least once each week for three successive weeks preceding such hearing in a newspaper designated by the commission, and the applicant shall also, not less than twenty days prior to said date, serve notice thereof upon the owners of such property personally, or by registered mail, if the post-office address of such owners, can by due diligence be ascertained. Proof of such publication and service of such notice shall be filed with the commission.

31.17 Hearing and determination. (1) At such hearing or any adjournment thereof, the commission shall consider such application and shall receive the evidence offered by the applicant and others, in person or by agent, in support thereof and in opposition thereto.

(2) If the commission shall find that the acquisition and use of such property in connection with the business of the applicant for the purpose or purposes and at the price or compensation set forth in the application would be a public convenience; that the applicant possesses the financial ability to utilize the property for such purpose or purposes, and that a public necessity requires such acquisition and use, the commission shall grant and issue a certificate that public convenience and necessity require the utilization of such property as proposed by the applicant.

(3) The provisions of section 31.15 shall not apply to the acquisition of flowage rights necessary for the improvement or development of dams or dam sites previously acquired.

31.18 Obligations of owners of bridges and dams. (1) The grantee of any permit, the owner of any dam constructed before permits were required by law, and the owner of any bridge at the city of Portage or at any point above that city, over the Wisconsin river, shall maintain and operate all such dams, slides, chutes, piers, booms, guide booms, weirs, tunnels, races, flumes, sluices, pits, fishways, locks, boat hoists, marine railways and all other equipment required by the commission for the protection of public rights in such waters, and for the preservation of life, health and property, in good repair and condition, and shall not wilfully, or otherwise, injure, remove or destroy the same, or any part thereof, unless the commission shall have approved such removal or destruction in writing.

(2) The owner of any such dam shall open such slide or chute for the passage of any craft or material lawfully navigating the stream, whenever requested so to do by the person in charge of such navigation, without charge or toll therefor. But such owner shall be under no obligation to otherwise aid passage through the slide or chute.

(3) Except when emergency shall require the same for the protection of life, health or property, no substantial alteration or addition shall be made to any dam heretofore or hereafter constructed without obtaining an order therefor from the commission, which order may be issued only after an investigation and upon a finding that the proposed alterations or additions will not impair the sufficiency of such dam or any existing public rights in such waters.

(4) The public service commission shall in the interest of public rights in navigable waters, or to promote safety and protect life, health and property, require the grantee of any permit, under this chapter, or of any permit or authorization heretofore provided for by legislative enactment, prior to flowing any lands by the construction of a dam thereunder, to remove from such lands all or any portion, of the standing and fallen timber and all or any portion of the brush.

31.19 Complaint of insufficiency of dam; inspection. The public service commission shall examine at least once in each year each dam having a theoretical horse power capacity of seven hundred fifty horse power or more and which is maintained or operated in or across navigable waters, and in addition thereto and upon complaint in writing from the mayor of any city, supervisor of any town, or the president or trustee of any village, that any dam maintained or operated in or across any waters whether navigable or non-navigable, or any reservoir is in an unsafe condition, or from any person that his property or any property under his control is endangered by a dam or reservoir, the commission shall investigate or cause an investigation to be made of such complaint, or the commission

may, upon its own motion, examine any dam or reservoir, and, in any case, if it shall find that any dam or reservoir is not sufficiently strong, or is unsafe, and dangerous to life or property, it shall determine what alterations, additions or repairs are necessary to be made and shall order the owner, or person having control of such dam or reservoir to cause such alterations or repairs to be made within a time to be limited by the order; and the commission may cause to be drawn off, in whole or in part, the water in said reservoir or impounded by said dam, when it shall determine that such action is necessary to prevent impending danger to persons or property.

31.20 Inspection fee. Every owner, excepting municipalities, of a dam heretofore or hereafter constructed in or across navigable waters shall pay to the commission annually, on or before the first day of February, for the purpose of defraying the actual expenses of the commission incurred in inspecting and supervising the construction or maintenance, or both, of such dam and equipment, an inspection fee of not to exceed ten cents per theoretical horse power capacity of such dam at an ordinary stage of water, said fee however, not to be less than twenty-five dollars in any case, if such actual expenses of the commission shall equal that amount. The amount of such fee shall be determined annually by the commission, and notice of the amount due shall be forwarded by mail to each such owner, or the agent thereof, not later than December first of each year. Inspection fees received by the commission shall be paid into the state treasury.

31.21 Transfer of permit. (1) No transfer or assignment of any permit granted under section 31.06 or section 31.08 shall be valid or of any effect whatsoever unless the same shall be in writing and a certified copy thereof shall, within ten days after the execution thereof, be filed with the commission and unless such transfer or assignment is approved in writing by the commission; and no such transfer or assignment shall be approved by the commission except after an investigation and a finding that the transfer or assignment is not made or intended to be made for a purpose or to create a condition prohibited by section 31.22. No permit shall be transferred or assigned to a foreign corporation, nor shall any permit granted to a municipality be assigned or transferred to any person, firm, or corporation, otherwise than as security for a loan made in good faith and concurrently with and as consideration for such transfer or assignment, and no foreign corporation shall have power to acquire title to any such permit, nor shall any person, firm or corporation have power to acquire title to a permit granted to or acquired by a municipality, otherwise than in the enforcement of such security, and in no case shall any such foreign corporation hold title to or operate under any such permit for a period longer than three years.

(2) No municipality shall make or execute any lease or other contract with any person, firm, or corporation for the sale or use of hydraulic or hydroelectric power developed or generated by such municipality under a permit granted under section 31.06 or section 31.08 for a period longer than ten years, unless the same shall be first approved by the commission, after investigation and upon a finding that such lease or contract will not impair or interfere with the purpose or uses for which such dam was acquired or constructed by the municipality.

31.22 Unlawful combinations, trusts. If any dam maintained under a permit,

(1) Shall be owned, leased, trusteeed, possessed or controlled in any manner whatsoever that makes it form a part of or in any way effect an unlawful combination;

(2) Or shall be in any wise controlled by any combination in the form of an unlawful trust;

(3) Or forms the subject of any contract or conspiracy to limit the output of any hydraulic or hydroelectric power derived therefrom, or to restrain unlawfully trade in the generation, sale or distribution of hydraulic or hydroelectric power derived therefrom.

The state may take possession thereof by proceedings instituted by the commission, as in cases of receivership, and in such proceedings the members of the commission shall be appointed to act as receivers during such period as the court may determine.

31.23 Forfeitures; private bridges. (1) Every person or corporation that shall obstruct any navigable waters and thereby impair the free navigation thereof, or shall place therein or in any tributary thereof any substance whatever that may float into and obstruct any such waters or impede their free navigation, or shall construct or maintain, or aid in the construction or maintenance therein of any bridge, boom or dam not authorized by law, shall forfeit for each such offense, and for each day that the free navigation of such stream shall be obstructed by such bridge, boom, dam or other obstruction, a sum not exceeding fifty dollars. But the floating or movement of logs or timber in navigable waters, or the necessary use of temporary booms in the course of such floating or movement

or the cutting of weeds in such waters with the consent of the conservation commission shall not incur such forfeiture.

(2) Every person or corporation violating any of the provisions of this chapter, other than those mentioned in subsection (1) of this section, or violating any order made by the commission pursuant to any provision of this chapter, shall forfeit for each such violation not more than one thousand dollars.

(3) (a) There shall be no forfeiture under the provisions of this section in any case where a bridge is built by a private citizen across any navigable waters having a width of 35 feet or more, providing such bridge does not impair the rights of the public for purposes of navigation or fishing.

(b) No such bridge shall be maintained unless its construction shall first be approved by the public service commission after public hearing and on not less than 10 days' written notice to the applicant and to the county and town clerks of the county and town wherein all or a portion of the proposed bridge is to be located.

(c) Each applicant who shall apply to the public service commission for a permit to construct any such bridge shall state in his application the proposed location of the bridge, the depth of the water to be spanned, the materials to be used in the construction of the bridge, the plans of the proposed bridge, together with such other facts as the commission may require.

(d) Every such bridge used by the public shall at all times be maintained in a safe condition by the owners of the land abutting the approaches of the bridge, and the owners shall make such repairs as are reasonably necessary therefor. The town shall not become liable for any damages resulting from the insufficiency or want of repairs of such bridge. If the public service commission upon inspection finds that such bridge is in need of repairs, it shall notify the owners responsible for the repairs thereof, and also send a copy of such notice to the town board, to make all repairs as are reasonably necessary therefor. If such repair work as ordered by the public service commission is not commenced within 60 days after receipt of such notice, the public service commission may close such bridge until it is so repaired. Whenever any owner responsible for such bridge shall fail to repair or maintain the bridge in a good and safe condition, after having been notified so to do by the public service commission for 60 days after such notification, such town board upon its own initiative may make such required repairs on such bridge, and the cost thereof shall be paid by the owners responsible therefor, and the town clerk shall enter such amount of the cost of repairs upon the next tax roll of the town. [1931 c. 313; 1941 c. 331]

Note: See note to 30.01, citing *S. S. Kresge Co. v. Railroad Commission*, 204 W 479, 235 NW 4, 236 NW 667.

Under this section, on appeal, issues as to

defects in title, or claims adverse to the title set out in the petition, are to be determined by the court, not by the jury. *Perszyk v. Milwaukee E. R. & L. Co.*, 215 W 233, 254 NW 753.

31.24 Enforcement of forfeitures. (1) It shall be the duty of the commission to report to the governor every forfeiture incurred under subsection (1) of section 31.23 and every nuisance committed in violation of section 31.25 and the governor shall thereupon cause the attorney-general, or some other person duly authorized by the governor to act instead of the attorney-general, to institute proceedings to recover such forfeiture or abate such nuisance.

(2) It shall be the duty of the attorney-general, when so requested by the governor, and otherwise the duty of the district attorney of the proper county, to institute proceedings to recover any forfeiture incurred under this chapter other than those specified in subsection (1) of section 31.23.

(3) All such forfeiture shall be recovered by civil action as provided by chapter 288 of the statutes and when collected shall be paid directly into the state treasury.

31.25 Nuisances, abatement. Every dam, bridge or other obstruction constructed or maintained in or over any navigable waters of this state in violation of the provisions of this chapter, and every dam not furnished with a slide, chute or other equipment prescribed by the commission, is hereby declared to be a public nuisance, and the construction thereof may be enjoined and the maintenance thereof may be abated by action at the suit of the state or any citizen thereof.

Note: The right of a riparian owner to erect structures in a navigable stream is subordinate to the state's right to improve the stream in aid of navigation. *S. S. Kresge Co. v. Railroad Commission*, 204 W 479, 235 NW 4, 236 NW 667.

The fact that 31.25 declares any violation

of 31.34 to be a public nuisance does not necessarily make it such, since the legislature has no right arbitrarily to declare that to be a nuisance which in fact is not such. *State ex rel. Priegel v. Northern States Power Co.*, 242 W 343, 8 NW (2d) 350.

31.26 Civil liabilities. (1) The owner of any dam or of any privately owned bridge across the Wisconsin river or the Black river or any of their tributaries shall be liable for all damages occasioned to property by a failure to provide such dam or bridge

with slides, booms and chutes as required by subsection (1) of section 31.18. The person or party suffering any such damage shall have a lien upon the dam and all mills, machinery and appurtenances of such owner erected thereon, or served with water thereby, and on the lands adjoining, not exceeding forty acres; or, as the case may be, a lien upon such bridge and its approaches.

(2) The claimant of such lien shall file a notice thereof in writing in the office of the clerk of the circuit court of the county in which the dam or bridge is located within sixty days after sustaining such damages and shall commence an action to enforce the lien within six months after filing such notice. Such lien shall accrue upon the filing of such notice and failure to file the same or to commence such action within the times specified therefor respectively shall operate as a waiver of the lien. Judgment for the plaintiff for the recovery of damages and declaring such lien may be enforced by an execution sale of the property affected as in ordinary actions at law, and upon such sale all rights to maintain such dam or bridge shall pass to the purchaser.

(3) In case of any personal injury by reason of any such neglect or failure the damages sustained thereby may be recovered and a lien and judgment enforced in like manner; and if death results an action may be maintained by the representatives of the deceased in the manner provided in other cases of death resulting from negligence or wrong.

(4) No common law liability, and no statutory liability provided elsewhere in these statutes, for damage resulting from or growing out of the construction, maintenance or operation of any dam is released, superseded, or in any manner affected by the provisions of this chapter; and this chapter creates no liability on the part of the state for any such damages.

31.27 Adequate service; reasonable rates. Upon complaint by any party affected, setting forth that any grantee of a permit to develop hydraulic power and generate hydroelectric energy for sale or service to the public is not furnishing citizens of this state with adequate service at a reasonable rate in consequence of sales of such energy outside of the state, the commission shall have power to declare any or all contracts entered into by said grantee for such sales null and void in so far as they interfere with such service or rate. Such declaration shall be made only after a hearing and investigation and a recorded finding that convenience and necessity require the sale of a specified part or all such energy within this state.

Note: That a dam was constructed on a navigable stream for the purpose of generating power does not of itself make the producer of such power a public utility, so as to be immune from local taxation under chapter 76. *Ford Hydro-Electric Co. v. Aurora*, 206 W 489, 240 NW 418.

31.28 Court review of commission orders. Orders of the commission shall be subject to review in the manner provided in chapter 227. [1943 c. 375 s. 6]

31.29 May employ hydraulic engineer and assistants. The commission is authorized to employ and fix the salaries of a competent hydraulic engineer and other assistants necessary to carry out the provisions of this chapter.

31.30 Dams on Brule river. It is declared to be the policy of the state to prohibit forever the building or maintaining of any dam or dams across the Brule river or any of its tributaries in Douglas county, except that a dam with an adequate fishway may be constructed across said Brule river at each of the three sites hereinafter described, or at such other site or sites as may be selected jointly by the conservation commission and the public service commission in place of either or all of the sites hereinafter mentioned, the purpose of which shall be to provide a method whereby fish declared to be undesirable for said stream by the conservation commission may be eliminated or prevented from ascending the stream, and to permit said stream to be developed for trout in different stretches thereof as may be determined by the conservation commission: site No. 1 known as Clevedon site in the southeast quarter of the northwest quarter of section 10, township 49 north, range 10 west; site No. 2 known as the Old Mill site in the northwest quarter of the southeast quarter, section 11, township 47 north, range 10 west; and site No. 3, known as the Upper or Rock dam site in the northeast quarter of the southeast quarter of section 22, township 47 north, range 10 west; and all rights, privileges, and franchises granted prior to June 26, 1905, to any person or corporation to improve said Brule river or any of its tributaries in said county for any purpose whatever, are repealed and annulled. No domestic corporation organized subsequent to the date aforesaid shall exercise any of the powers or privileges authorized or conferred by sections 180.15 to 180.18, inclusive, [Stats. 1925] in, across or along said river or any of its tributaries in the county of Douglas. [1935 c. 85, 502]

31.31 Dams on nonnavigable streams. Any person may erect and maintain upon his own land, and, with the consent of the owner, upon the land of another, a water mill and a dam to raise water for working it upon and across any stream that is not navigable in fact for any purpose whatsoever upon the terms and conditions and subject to the regu-

lations hereinafter expressed; and every municipality may exercise the same rights upon and across such streams that they may exercise upon or across streams navigable for any purpose whatsoever.

Note: The public service commission, in connection with approving plans for a dam under the milldam law, secs. 31.31 to 31.33, had jurisdiction to make a finding that the stream in question was not navigable, and neither the commission's order of approval nor the finding supporting it (in the absence of any claim that the approval was fraudulently given or procured) was subject to collateral attack, to show that the dam was an unlawful structure. *Wausaukee v. Lauerman*, 240 W 320, 3 (2d) NW 362.

31.32 Dams not to injure other dams or sites. No such dam shall be erected to the injury of any mill lawfully existing, either above or below it on the same stream; nor to the injury of any mill site on the same stream on which a mill or milldam shall have been lawfully erected and used or is in the process of erection, unless the right to maintain a mill on such last-mentioned site shall have been lost or defeated by abandonment or otherwise; nor to the injury of any such mill site which has been occupied as such by the owner thereof, if such owner, within a reasonable time after commencing such occupation, completes and puts in operation a mill for the working of which the water of such stream shall be applied.

31.33 Jurisdiction of commission. (1) **ALL HERETOFORE OR HEREAFTER CONSTRUCTED; ACTION FOR DAMAGES.** All mills and milldams lawfully erected or constructed, on streams not navigable at the time, under and pursuant to the provisions of chapter No. 48 of the territorial laws of 1840, chapter 62, laws of 1857, chapter 56, R. S. 1858, chapter 146, R. S. 1878, chapter 146, R. S. 1898, chapter 146, Wisconsin Statutes of 1911, 1913 or 1915 or under and pursuant to any special, private or local act, or under any other act whatsoever, which are not now abandoned but are still in existence and use, and all mills and milldams heretofore or hereafter erected or constructed on streams not navigable in fact for any purpose whatsoever, shall be subject to and regulated and controlled by the provisions, so far as applicable, of sections 31.02, 31.03, 31.12, 31.18, 31.19, 31.20, 31.22, 31.25, 31.26 and 31.28 of the statutes, except that the provisions of said sections shall not prevent the owner of any land flooded or otherwise injured by any such milldam from recovering, by action at law, full compensation for all damages resulting to him in times past and that will result to him in the future in consequence of such flooding and injury; provided that no damages suffered more than three years before the commencement of such action shall be recovered. The amount recovered shall constitute a first lien upon the milldam and upon the mill, if any, and such lien may be enforced by execution sale of the property affected. In every such action the amount paid or secured to be paid under prior laws as damages shall be considered and proper allowance made therefor. The authority hereby granted to bring such action shall not be construed as precluding the owner from proceeding under the provisions of chapter 32. Such owner may not exercise his option to bring such action after condemnation proceedings have been commenced against his property under the provisions of said chapter 32.

(2) **LICENSE.** A license is hereby granted to each owner of any such milldam now in existence and use, and to each owner of any such milldam hereafter constructed, to maintain and use the same to operate mills or machinery, or for any other lawful private or public purpose, but subject, however, to the supervision of the commission acting under the sections of the statutes enumerated in subsection (1). The right created by such license shall follow the title to the milldam and a conveyance of the latter shall transfer such right to the grantee.

(3) **INTERPRETATION.** Whenever the sections of the statutes so enumerated are applied to mills or milldams specified in subsection (1) every reference in any of them to a "permit" or to a "grantee" of a permit shall be regarded as referring respectively to a license granted by this section and to the owner of such a mill or milldam.

(4) **HEIGHT.** The height to which water may be raised by any such milldam and the length or period of time for which it may be kept up each year, may be restricted and regulated by the orders of the commission.

(5) **VIOLATION OF ORDERS, PENALTIES.** Every person, firm or corporation violating any of the orders respecting any such mill or milldam made by the commission shall forfeit for each such violation a sum not exceeding five hundred dollars which may be recovered by civil action as provided by chapter 288.

31.34 Flow of water regulated. Each person, firm or corporation maintaining a dam on any navigable stream shall pass at all times at least twenty-five per cent of the natural low flow of water of such stream, except as otherwise provided by law. This section, however, shall not apply to a plant or dam where the water is discharged directly into a lake, mill pond, storage pond or cranberry marsh, nor shall it apply to cases where in the opinion of the public service commission such minimum discharge is not necessary for the protection of fish life. Any person, firm or corporation violating any of the pro-

visions of this section shall be subject to a fine of not less than fifty dollars nor more than one thousand dollars. [1933 c. 151]

Note: The primary purpose of 31.34, requiring that a dam on any navigable stream shall be so maintained as to pass at all times a prescribed minimum of the natural flow of water of such stream, but exempting therefrom a plant or dam where the water is discharged directly into a storage pond, is to protect the rights of lower riparian owners to a reasonably adequate natural flowage of the stream against upper owners cutting off such flowage. As used in 31.34, the term "dam" is not limited to the structure directly across the regular river bed, but includes

the millrace or canal carrying the impounded water to the powerhouse, and hence, to bring into operation the exemption of discharge of water directly into a storage pond from the requirement as to minimum natural flow of the stream the discharge need not necessarily be from the floodgates, but may be from the tailrace of the powerhouse, thence back to the regular river bed, and thence directly into the storage pond. State ex rel. Priegel v. Northern States Power Co., 242 W 345, 8 NW (2d) 350.

31.35 Dams in areas leased by county; restrictions; control by county judge; when.

(1) Dams controlling the water elevations in areas covered by leases made under section 59.01 shall be operated in such manner as not to divert waters or withhold from any cranberry reservoir to the damage of any cranberry marsh now served or dependent upon such water supply or to any crops or works therein.

(2) The county judge of the county wherein said leased lands are located shall, upon petition and proof that any cranberry marsh or crops or works thereon are endangered or likely to be damaged by the operation of any dam or water control, make a summary order for the release, impounding or control of the waters affected by such dam or dams, to be and remain in force until dissolved by due notice and hearing. [1935 c. 212, 486]

31.36 Water regulatory board. (1) There is created a board to be known as the "water regulatory board" consisting of three members, whose duty shall be to supervise the operation, repair and maintenance of the dams and dykes constructed across drainage ditches and streams in drainage districts for drainage control, water conservation, irrigation, conservation, pisciculture, and to provide areas suitable for the nesting and breeding of aquatic wild bird life and the propagation of fur bearing animals, except dams used for cranberry culture.

(2) The water regulatory board shall consist of three members, namely a member of the staff of the college of agriculture of the university of Wisconsin to be designated by the college of agriculture, a member of the staff of the conservation commission to be designated by the conservation commission, and a member of the staff of the public service commission to be designated by the public service commission.

(3) The water regulatory board shall appoint a registered professional engineer experienced in civil engineering and hydraulic work to be the secretary and executive officer and administrative agent of the board who shall perform such services as may be required of him by the board.

(4) A member of the water regulatory board shall receive no salary for any services performed by him pursuant to this section. He shall, however, be reimbursed for traveling and other necessary expenses incurred while in the performance of his duties as a member of the board.

(5) The executive officer shall receive a salary of three thousand dollars per year, together with traveling and other necessary expenses incurred while in the performance of his duties.

(6) The board shall have power to supervise the operation, repair and maintenance of the dams, dykes and other works referred to in this section, in the interest of drainage control, water conservation, irrigation, conservation, pisciculture and to provide areas suitable for the nesting and breeding of aquatic wild bird life and the propagation of fur bearing animals.

(7) In the exercise of its powers and jurisdiction, the board shall consider the problems and needs of the several drainage districts as a unit and within the limits of its appropriation solve the problems arising in a manner which will be for the best interests of the districts as a whole.

(8) The board shall confer with the drainage commissioners in each drainage district on the formation of policies for the operation and maintenance of the dams; in districts having no commissioners, the board shall confer in like manner with the committee appointed by the county board, if any, to represent either such drainage district, or in the event that the drainage district is dissolved, to represent the interests of the county in all matters whatsoever pertaining to water conservation and control within the area which theretofore constituted such drainage district.

(9) The board shall give careful consideration to the suggestions of the drainage commissioners or committee of the county board, but the final decision in all matters under consideration shall rest with the board.

(10) The board shall employ such persons and may purchase or rent such vehicles

and machinery and purchase such materials, stationery and other equipment as is necessary to carry out the provisions of this section.

(11) So far as seems practicable, the board may employ the drainage commissioners of any drainage district, or the committee of the county board, above referred to, to operate the dams in such district or area formerly comprising a drainage district, as the case may be, or to perform services in the repair and maintenance of the dams, dykes and other works.

(12) The board may elect a chairman and adopt general or special rules and regulations governing the operation, maintenance and repair of the dams, dykes and other works.

(13) The board shall meet regularly in March each year. Special meetings may be held at any time and place as may be agreed upon by the board or upon call of the chairman or any two members of the board.

(14) This section does not modify or repeal section 31.35. [1937 c. 379]