

NEW YORK

Citation

New York's dam safety statutes are contained in the Environmental Conservation Law (ECL), Article 15, Title 5. Title 5 was last amended in July 1999. The Dam safety provisions derive from the Conservation Law of 1911.

Regulations are contained in Title 6 of the New York Code of Rules and Regulations (NYCRR) Part 608 and Part 673. Part 608, "Use and Protection of Waters", defines activities requiring permits and permitting standards. Part 673, "Dam Safety Regulations," defines the authority and procedures for the State's inspections and enforcement activity. The process to modify Part 608 and Part 673, to conform to the July 1999 statutory changes, is underway at time of printing.

Definitions/Dam Classification

Dam or impoundment structure means any artificial barrier, together with its appurtenant works, that impounds or will impound waters, and includes but is not limited to earth fills, with or without controllable outlet gates, and roads, bridges or fords that unduly impede the flow of water. Lagoons and storage facilities with impoundment structures used for waste storage, treatment, disposal or the containment of materials, other than water, are not subject to regulation pursuant to this Part. (6NYCRR 608) (permit regulations)

Dam means any artificial barrier, together with its appurtenant works, constructed for the purpose of impounding water. (6NYCRR 673) (Inspection and enforcement regulations)

Hazard classifications are defined in 6NYCRR 673 as follows:

- *Class "A" dams* are located in areas where failure will damage nothing more than isolated buildings, undeveloped lands, or town or country roads and/or will cause no significant economic loss or serious environmental damage.
- *Class "B" dams* are located in areas where failure may damage isolated homes, main highways, minor railroads, interrupt the use of relatively important public utilities, and/or will cause significant economic loss or serious environmental damage.
- *Class "C" dams* are located in areas where failure may cause loss of human life, serious damage to homes, industrial or commercial buildings, important public utilities, main highways or railroads, and/or will cause extensive economic loss.

Jurisdiction/Powers of Department

The New York State Department of Environmental Conservation is charged with implementation of the Environmental Conservation Law (ECL), which includes dam safety provisions.

ECL 15-0503 provides that "no dam shall be erected, constructed, reconstructed or repaired by any person or local public corporation without a permit issued pursuant to subdivision 2 of this section.

ECL 15-0503 states that the permit requirement applies to any dam "provided it has (1) a height equal to or greater than fifteen feet or (2) a maximum impoundment capacity equal to or greater than three million gallons; except that for purposes of this section a dam shall not include any structure which has (i) a height equal to or less than six feet regardless of the structure's impoundment capacity, or (ii) an impoundment capacity not exceeding one million gallons regardless of the structure's height."

ECL 15-0507 directs the Department to inspect and investigate dams whenever public safety requires. The statute gives the Department the power, after hearing, to order any person or local public corporation to remove or repair dams and impoundment structures. Upon violation of such an order, the Department has the power to enter property to remove or repair the structures and to take additional actions as needed to safeguard life, property, and natural resources. The statute provides for recovery of costs and expenses, incurred in such Department action, through the local real property taxing authority.

The Regulation that implements ECL 15-0507 is 6NYCRR Part 673. Part 673 is applicable to a dam if any of the following provisions apply:

- (a) its height is equal to or greater than 10 feet;
- (b) its maximum impoundment capacity is equal to or greater than 1,000,000 gallons (3.07 acre-feet);
- (c) its drainage area is equal to or greater than one square mile; or
- (d) it presents a threat to public health, safety, property or natural resources.

Part 608 defines "reconstruction or repair" to include breaching or removal of a dam.

Permit/Approval Process

Part 608 states that a dam permit application must include application forms, a location map, a site plan, a design report, construction plans, and other information that the Department deems necessary. The design, the preparation of plans and specifications, and the construction supervision must be done by a licensed professional engineer; or in the case of farm pond dams, by an engineer or conservationist employed by a government agency, cooperating with a soil conservation district.

Article 70 of the ECL and Part 621 of the NYCRR describe procedures and time frames for Department review of permit applications. Provisions for public notification and comment are elements of these procedures.

Part 608 states that the Department's review will consider such issues as (1) the environmental impacts of a proposal, (2) the adequacy of design and construction techniques, (3) operational and maintenance characteristics, (4) the safe use of water resources, (5) the water dependent nature of a use, (6) the safeguarding of life and property, and (7) natural resource management objectives and values.

The basis for permit issuance must be a determination that the proposed work (1) is reasonable and necessary and (2) will not endanger health, safety, or welfare and (3) will not cause unreasonable, uncontrolled, or unnecessary damage to natural resources. The Department may (1) grant a permit for the work as proposed or (2) grant a permit with conditions as necessary to protect health, safety, welfare, and national resources or (3) deny a permit.

The Department publication Guidelines for Design of Dams (1985, last revised 1989) contains more specific guidance for design engineers. The publication describes Department policy regarding hazard classification, hydrologic analysis, spillway capacity requirements, stability criteria, geotechnical investigations, construction inspection, outlet works, flashboards, cofferdams, emergency action plans, and other technical issues.

Inspection Process

Neither the law nor the regulations mandate a frequency of inspections by Department forces. As a matter of policy, high-hazard (class "C") dams are inspected every two years; major-size (federal-size) intermediate -hazard (class "B") dams are inspected every four years. Other dam inspections are conducted as needed.

Part 673 authorizes the Department to inspect and investigate dams, and to assign one of the following condition ratings: (1) "Unsafe", (2) "Unsound", (3) "Deficiently maintained", (4) "No deficiencies noted". If a dam is classified as unsafe or unsound, the Department will notify the owner of the hazard classification and condition rating of the dam and of the results of any investigation, and recommend action as the Department deems appropriate to correct the deficiencies. An owner can request a review of the dam's assigned hazard class; the Department can require the owner to provide documentation (dam-break analysis, inundation mapping) for such a request.

Part 673 authorizes the Department to serve a hearing notice on the owner anytime after an investigation. (Hearing procedures are contained in 6NYCRR Part 622.) After hearing, the Commissioner can issue an order directing the owner to repair or remove the dam.

Owner Non-Compliance/Violations/Penalties

Enforcement of Article 15 is provided for in ECL Article 71 Title 11.

A violation of ECL 15-0503 (dam permit requirement) is a misdemeanor punishable by fine of up to \$10,000 or imprisonment of up to one year, or both, in addition to a civil penalty of up to \$5,000. (ECL 71-1107) Additionally, ECL 15-0511 gives the Commissioner the power, after hearing to issue an order directing removal, replacement, or correction of an illegal excavation, fill, or dam in or on the waters of the state. Penalties and other remedies for violation of such an order are analogous to those for violation of an order issued pursuant to ECL 15-0507, as described immediately below.

Violation of an order issued pursuant to ECL 15-0507 and 6NYCRR Part 673 (order to repair or remove) is punishable by fine of up to \$5,000 for each offense; in case of a continuing violation every day's continuance is a distinct offense. (ECL 71-1109). Additionally, Part 673 authorizes the Department to enter the property upon which the dam is situated for the purpose of executing the order; the cost may be charged against the owner in accordance with ECL 15-0507.

Emergencies

ECL 70-0116 and 6NYCRR Part 608 provide that the Department may issue an emergency authorization for work which requires a dam permit, when such action is immediately necessary to respond to circumstances which present an immediate threat to life, health, property, or natural resources.

ECL 71-0301 and 6NYCRR Part 620 authorize the Commissioner to order summary abatement, prior to hearing, of a condition or activity which presents an imminent danger to the health or welfare of the people of the State, or is causing or will cause irreversible or irreparable damage to natural resources. Failure to comply with such an order is punishable by civil penalty of up to \$2500 per violation plus up to \$500 per day for continuing violations.

The Department of Environmental Conservation Policies and Procedures Manual, Title 1800 (Emergency Operations), Chapter 1855 (Dam Failure Emergencies) sets forth the emergency operating procedure to be followed in the case of dam failure. This chapter outlines the responsibilities of state and local government authorities and the dam owners, notification procedures and channels, and the forms and logs to be maintained.

Liability

Section 17 of the Public Officers Law provides for defense and indemnification of state employees in a civil proceeding arising from activities within the scope of the employee's public employment.

Section 19 of the Public Officers law provides for reimbursement of defense costs incurred by or on behalf of state employees in a criminal proceeding arising out of any act which occurred while the employee was acting within the scope of his public employment upon his acquittal or upon dismissal of the criminal charges.

Oversight

ECL 15-0515 provides that the issuance, modification or denial of a permit, pursuant to ECL 15-0503 (dam permit) shall be subject to review pursuant to Article 78 of the New York Civil Practice Law and Rules (CPLR).

ECL 15-0905 provides for review of a Department decision (e.g. Commissioner's order to repair or remove) under the provisions of Article 78 of the CPLR.

Article 78 of the CPLR provides for judicial review, of Department final action, on questions such as performance of duty, jurisdiction, violation of lawful procedure, error of law, abuse of discretion, or evidentiary support.