

Dam Owner Liability in Vermont

Strict Liability, Negligence, or Other

Dam Ownership and Responsibility

Dam Ownership and Responsibility

The decision to acquire and own even a small dam is a major one that will result in long-term legal and financial obligations. A careful investigation of the costs and benefits is imperative so that the prospective owner can make a well-informed decision before acquiring a dam. The storage of large amounts of water is a hazardous activity and exposes the owner to liability. The owner's best defense is that the owner has done all that could be expected in terms of operation, maintenance, routine inspection, and hazard mitigation including emergency action planning.

Inspections conducted by the Dam Safety Program are not intended to relieve the owner of the dam of the owner's legal duties, obligations or liabilities incidental to the ownership, operation, maintenance, emergency preparedness or inspection of the dam. The owner should inspect or have the dam inspected on a frequent basis so that routine maintenance may be undertaken as needed and to monitor and/or identify any changes or conditions that could indicate problems with the dam. Should any such conditions or changes occur the owner should contact an engineer experienced with the design and investigation of dams. The engineer should evaluate the significance of the change or condition so that the engineer can advise the owner accordingly. Even if no changes are observed, the owner should have an experienced and qualified engineer inspect and evaluate the dam on an appropriate periodic basis, e.g., annually, biannually, etc. The inspections by the owner or owner's engineer are independent of any inspections that may be carried out by the Department.

Agency of Natural Resources Department of Environmental Conservation

<https://dec.vermont.gov/water-investment/dam-safety/dam-ownership-and-responsibility>

Before You Buy A Dam

It is important that the prospective dam owner gather as much information as possible about an existing dam before making a decision on acquiring it. The storage of large amounts of water is a hazardous activity. It exposes the owner to tort liability. The owner's best and only defense is that the owner has done all that could be expected in terms of operation, maintenance, routine inspection, and hazard mitigation including emergency action planning. Depending on the size of the dam and reservoir certain activities including reconstruction and lake level operations may be regulated by the State or Federal government. Legal, engineering, and other professional advice should be sought. The prospective dam owner should consider, among other things, the following:

1. **Project description:** Obtain basic information on the dam, e.g., where it is, what it is, and how big it is. Types of information should include: dimensions, storage, surface area of the impoundment, type of construction, location and age.
2. **Legal Advice:** Obtain competent legal advice on all aspects of acquiring and owning a dam. In general, the doctrine of **strict** liability is applied to dam owners.

Agency of Natural Resources Department of Environmental Conservation
<https://dec.vermont.gov/water-investment/dam-safety/dam-ownership-and-responsibility/before-you-buy>

VERMONT DAM SAFETY STATUTE

§ 1095. Unsafe dam; petition; hearing; emergency

(a) On receipt of a petition signed by no fewer than ten interested persons or the legislative body of a municipality, the State agency having jurisdiction shall, or upon its own motion it may, institute investigations by an engineer as described in section 1087 of this title regarding the safety of any existing nonfederal dam or portion of the dam of any size. The agency may fix a time and place for hearing and shall give notice in the manner it directs to all interested persons. The engineer shall present his or her findings and recommendations at the hearing. After the hearing, if the agency finds that the nonfederal dam or portion of the dam as maintained or operated is unsafe or is a menace to people or property above or below the dam, it shall issue an order directing reconstruction, repair, removal, breaching, draining, or other action it considers necessary to improve the safety of the dam sufficiently to protect life and property as required by the State agency having jurisdiction.

(b) If, upon the expiration of such date as may be ordered, the person owning legal title to such dam or the owner of the land on which the dam is located has not complied with the order directing the reconstruction, repair, breaching, removal, draining, or other action of such unsafe dam, the State agency having jurisdiction may petition the Superior Court in the county in which the dam is located to enforce its order or exercise the right of eminent domain to acquire the rights that may be necessary to effectuate a remedy as the public safety or public good may require. If the order has been appealed, the court may prohibit the exercise of eminent domain by the State agency having jurisdiction pending disposition of the appeal.

(c) If, upon completion of the investigation described in subsection (a) of this section, the State agency having jurisdiction considers the dam to present an imminent threat to human life or property, it shall take whatever action it considers necessary to protect life and property and subsequently shall conduct the hearing described in subsection (a) of this section.

VERMONT DAM SAFETY STATUTE

§ 1106. Unsafe Dam Revolving Loan Fund

(a) There is hereby established a special fund to be known as the Vermont Unsafe Dam Revolving Loan Fund that shall be used to provide grants and loans to municipalities, nonprofit entities, and private individuals, pursuant to rules adopted by the Agency of Natural Resources, for the reconstruction, repair, removal, breaching, draining, or other action necessary to reduce the threat of a dam or portion of a dam determined to be unsafe pursuant to section 1095 of this chapter.

(c) The Secretary may bring an action under this subsection or other available State and federal laws against the owner of the dam to seek reimbursement to the Fund for all loans made from the Fund pursuant to this section.

VERMONT DAM SAFETY RULE

§37-106 Dam Owner Obligation and Responsibility

1. A dam owner is responsible for the safe management and operation of their dam, and compliance with Vermont Title 10, Chapter 43 and this rule.
2. The owner is solely responsible for the significant financial undertaking required of dam ownership. This includes costs associated with operation, maintenance, inspection, registration, compliance with standards, engineering study and design, risk assessment, permitting, Emergency Action Planning, repairs, reconstruction, and removal. Inability to meet the financial obligations associated with maintaining a dam in safe condition may result in the Department requiring the impoundment to be drained.

Perkins v. Vermont Hydro-Electric Corp

Post 1927 Dam Failure

The law governing the determination of the issues presented by this exception is well settled. Where damages suffered are due, directly and exclusively, to natural causes, without human intervention, which could not have been prevented by any amount of foresight, pains, and care reasonably to be expected, there is no liability because it is an act of God. But, if the damages are not due exclusively to such natural causes, in other words, if the negligence of the one sought to be charged mingles with the operation of the natural causes, the injury is not, in a legal sense, the act of God. So if the injury which the flood occasioned might have been avoided or prevented by human prudence, foresight, pains, and care reasonably to be expected from the defendant, but not exercised, there is liability. . . The negligence of the defendant must, however, be an active and cooperating cause of the damage."... "The mere existence of negligence which is not a producing cause of the injury produces no liability." . . . It must not be "a merely fanciful or speculative or microscopic negligence which may not have been in the least degree the cause of the injury." . . . So, if the act of God is so overwhelming as of its own force to produce the injury independently of the negligence of the defendant, the latter cannot be held responsible.

Smells Like Negligence

10 Sec. 14. 10 V.S.A. § 1091 is added to read:

11 § 1091. LIABILITY FOR DAM BREACH

12 Any person who owns legal title to a dam or the owner of land on which a
13 dam is located shall be held strictly, jointly, and severally liable for harm
14 caused by the breach of a dam, provided:

15 (1) a dam has been classified as a significant or high hazard potential
16 dam by the Department; or

17 (2) the person who owns legal title to a dam or the owner of land on
18 which a dam is located is not in full compliance with any Department rules
19 related to dam safety, including rules that set standards for dam design,
20 construction, and maintenance to protect public safety.

Is S.213
Strict or
Not?

It Is What You Make of It

Massachusetts 302 CMR 10.13

(1) The owner shall be responsible and liable for damage to property of others or injury to persons, including but not limited to, loss of life resulting from the operation, failure of or mis-operation of a dam.

(2) 302 CMR 10.00 shall not relieve from or lessen the responsibility of any person owning, or operating a dam from any damages to persons or property caused by defects, nor shall the Commissioner be held liable by reason of any inspections, technical documents or permits issued.

Montana Code 85-15-305

85-15-305. Liability of owners for damage. (1) Except as provided in subsections (2) and (3), nothing in this chapter relieves an owner of a dam or reservoir of any legal duty, obligation, or liability incident to its ownership or operation, including any damages resulting from leakage or overflow of water or floods caused by the failure of the dam or reservoir.

(2) The owner of a dam or reservoir that has been permitted by the department in accordance with this chapter or that was designed and constructed under the supervision of an engineer and properly maintained is, in the absence of negligence, not liable for damages to persons or property resulting from flows of water from failure of the dam or reservoir.

(3) In addition, the owner of any dam or reservoir that has been permitted by the department in accordance with this chapter or that was designed and constructed under the supervision of an engineer and properly maintained may, without incurring liability, allow passage through the reservoir of inflows without diminution.

The Policy Makers: Dreamers of Dreams

Colorado Revised Statutes 37-87-104

(1) Any provision of law to the contrary notwithstanding, no entity or person who owns, controls, or operates a water storage reservoir shall be held liable for any personal injury or property damage resulting from water escaping from that reservoir by overflow or as a result of the failure or partial failure of the structure or structures forming that reservoir unless such failure or partial failure has been proximately caused by the negligence of that entity or person. No entity or person shall be required to pay punitive or exemplary damages for such negligence in excess of that provided by law. Any previous rule of law imposing absolute or strict liability on such an entity or person is hereby repealed.

Utah Code 73-5a-103

3-5a-103. Liability of owner or operator.

(1) Nothing in this chapter shall be construed to relieve an owner or operator of a dam or reservoir of the legal duties, obligations, or liabilities incident to the ownership or operation of the dam or reservoir.

(2) The owner or operator of a dam or reservoir may not be held to be strictly liable for any act or omission incident to the construction, ownership, or operation of the dam or reservoir.

Sometimes Wherever You Go It Is All the Same



- DAM OWNERSHIP - Responsibility and Liability

"Common law holds that the storage of water is a hazardous activity."

INTRODUCTION

Dams are owned and operated by individuals, private and public organizations, and the government. The responsibility for maintaining a safe dam rests with the owner. A dam failure resulting in an uncontrolled release of the reservoir can have a devastating effect on persons and property downstream. Tens of thousands of public and private dam owners in the United States have exposure to liability for the water stored behind their dams. For many owners, the proper operation and maintenance of a dam is only one aspect of their organization's activities. But, safely maintaining a dam is a key element in preventing a failure and limiting the liability that an owner could face.

DAM FAILURE AND OWNER LIABILITY

The failure of a dam has the potential for catastrophic impact on communities, private property and public works downstream. The record of dam performance suggests that there are approximately 10 to 20 failures per year involving uncontrolled release of the reservoir. Experience reveals that the failure of even small dams can result in serious injuries, fatalities and extensive property damage.

LOSS FROM FAILURE

The cost of dam failure is difficult to assess because flooding can affect large areas. The dam owner loses a valuable asset, and faces reconstruction costs and possible liability for downstream damages. Local communities may be directly impacted due to building damage, injuries, fatalities, lost water supply, damaged transportation systems and infrastructure, and lost recreational assets.

COMPLIANCE

Compliance with government or professional standards does not absolve an owner from liability, but it does establish a minimum standard of care to be used by owners. The extent of liability in any situation depends on the facts of the case and how those facts are interpreted by a judge or jury.

Consequently, actions that result in owner liability in one state may not result in liability in different states. In general, a dam owner is required to use "reasonable care" in the operation and maintenance of a dam and reservoir.



STRICT LIABILITY AND NEGLIGENCE

The extent of an owner's liability will vary from state to state, depending on the statutes and case law precedents. The concept of strict liability imposes liability on a dam owner for damages that occur regardless of the cause of failure. The alternative theory of negligence considers the degree of care employed by the owner in constructing, operating and maintaining a dam. Historically, courts have sought to compensate those injured by a dam failure. When assessing liability, the standard of care exercised by an owner will be closely examined. The standard of care should be in proportion to the downstream hazards involved. Where the risk is great, owners must be especially cautious. In many cases, a dam regulated by the federal government or a state dam safety program must be designed to withstand an unprecedented flood or earthquake.

RISK MANAGEMENT

"In today's litigious society it is safe to assume that in the case of catastrophic dam failure, extensive litigation will ensue. Any competent lawyer, representing the victims, will sue all possible wrong doers in seeking redress...including...the owners and operators of the facility, and...architects, engineers, contractors, sub-contractors, and consultants involved in the original construction and any subsequent modifications..."

- Denis Binder, Professor of Law, Chapman University

An essential and logical part of an organization's management program is the control of potential losses that may arise. To manage risks, an owner can utilize a combination of standard operating procedures, employee training, regular maintenance, emergency preparedness and liability insurance.

A dam owner can take several actions to protect against financial loss. Technical guidance and information is available from your state's Dam Safety office.

Each dam should have:

- A state dam safety permit (if applicable)
- An operation plan, documented regular maintenance plan and emergency action plan
- Documented periodic inspections
- Warning signs and controlled access

MORE INFORMATION

For information on state dam safety statutes and administrative rules, contact:

- State Dam Safety Office
- Association of State Dam Safety Officials
- State Attorney General's Office

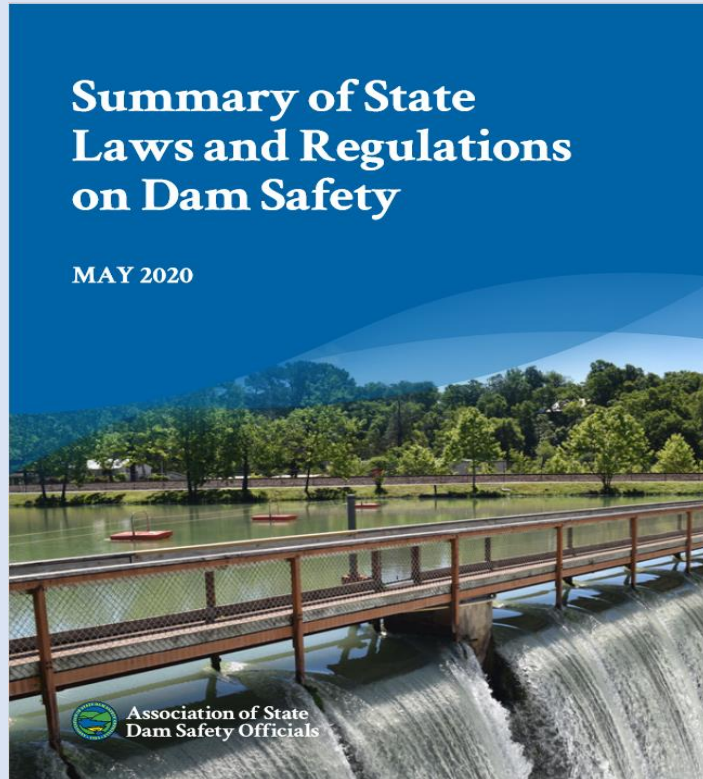
Additional information and technical assistance can be obtained from the following federal, state and local agencies:

- Office of Emergency Services
 - U.S. Army Corps of Engineers
 - U.S. Department of the Interior, Bureau of Reclamation
 - U.S. Department of Agriculture- Natural Resources Conservation Service
- ASDSO's Web site - Tools and downloadable guidelines are available. www.damsafety.org



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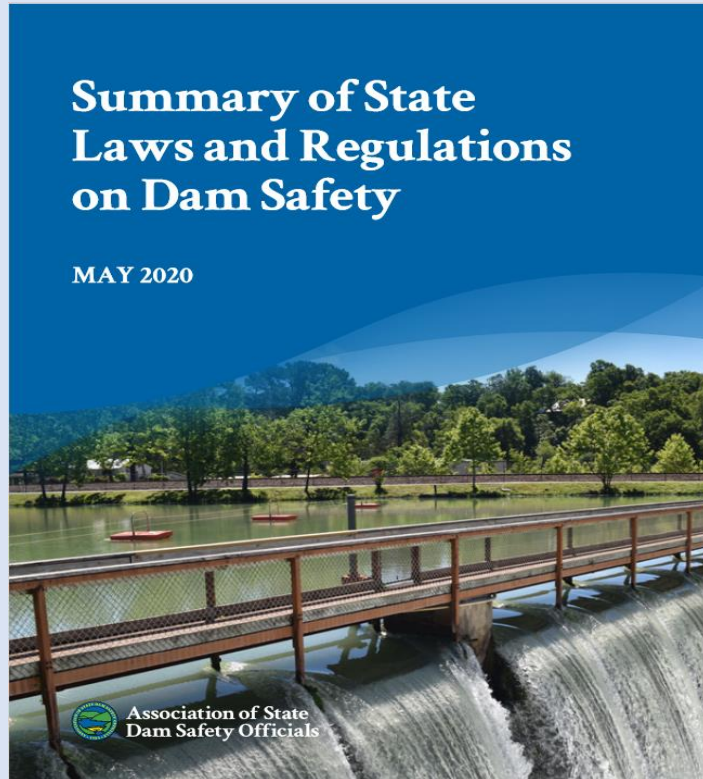
The Most Common Denominator



Nothing in this part shall be construed to relieve an owner or operator of a dam or reservoir of the legal duties, obligations, or liabilities incident to the ownership or operation of the dam or reservoir.

Cal. Water Code 6029

As Previously Stated



Vermont Liability

The dam safety statutes do not contain specific language in immunity from liability on the part of the dam safety program, or any other language regarding liability in the case of a dam emergency, failure, or other incident.

Never, Never Doubt What Nobody is Sure About