

H.590

An act relating to the safety and regulation of dams

It is hereby enacted by the General Assembly of the State of Vermont:

* * * Registration and Inspection of Dams * * *

Sec. 1. 10 V.S.A. chapter 43 is amended to read:

CHAPTER 43. DAMS

§ 1080. DEFINITIONS

As used in this chapter:

(1) "Department" means the ~~department of environmental conservation~~
Department of Environmental Conservation.

(2) "Person" means any individual; partnership; company; corporation; association; joint venture; trust; municipality; the ~~state~~ State of Vermont or any agency, department, or subdivision of the ~~state~~ State, any federal agency, or any other legal or commercial entity.

(3) "Person in interest" means, in relation to any dam, a person who has riparian rights affected by that dam, a substantial interest in economic or recreational activity affected by the dam, or whose safety would be endangered by a failure of the dam.

(4) "Engineer" means a professional engineer ~~registered~~ licensed under Title 26 who has experience in the design and investigation of dams.

(5) "Time" shall be reckoned in the manner prescribed by 1 V.S.A.

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(6) "Abandoned dam" means a dam that has no identifiable owner or a dam for which the owner fails to comply with the requirements of section 1104 of this title.

(7) "Dam" means any artificial barrier, impoundment, or structure and its appurtenant works that are, were, or will be capable of impounding water or other liquid after construction or alteration, except for:

(A) waste management systems constructed and operated according to the accepted agricultural practices as administered by the Agency of Agriculture, Food and Markets;

(B) barriers, impoundments, or structures created by beaver or any other wild animal as that term is defined in 10 V.S.A. § 4001;

(C) municipal underground or elevated tanks to store water; or

(D) any other structure identified by the Department in a duly-adopted rule.

(8) "Pond" means a natural body of water with a volume exceeding 500,000 cubic feet.

§ 1081. JURISDICTION OF DEPARTMENT AND PUBLIC SERVICE
BOARD

(a) Unless otherwise provided, the powers and duties authorized by this chapter shall be exercised by the ~~department, except that the public service board~~ Department, except that the Public Service Board shall exercise those powers and duties over dams and projects that relate to or are incident to the generation of electric energy for public use or as a part of a public utility system.

(b) Transfer of jurisdiction. Jurisdiction over a dam is transferred from the ~~department~~ Department to the ~~public service board~~ Public Service Board whenever the Federal Energy Regulatory Commission grants a license to generate electricity at the dam or whenever the ~~public service board~~ Public Service Board receives an application for a certificate of public good for electricity generation at that dam. Jurisdiction is transferred from the ~~public service board~~ Public Service Board to the ~~department~~ Department whenever such a federal license expires or is otherwise lost, whenever such a certificate of public good is revoked or otherwise lost, or whenever the ~~public service board~~ Public Service Board denies an application for a certificate of public good.

(c) Upon transfer of jurisdiction as set forth above and upon written request, the state agency having former jurisdiction shall transfer copies of all records pertaining to the dam to the agency acquiring jurisdiction.

§ 1082. AUTHORIZATION

(a) No person shall construct, enlarge, raise, lower, remodel, reconstruct, or otherwise alter any dam; or the natural outlet of a pond or impoundment or other structure which is or will be capable of impounding more than 500,000 cubic feet of water or other liquid after construction or alteration, or remove, breach, or otherwise lessen the capacity of an existing dam that is or was capable of impounding more than 500,000 cubic feet within or along the borders of this ~~state~~ State where land in this ~~state~~ State is proposed to be overflowed, or at the outlet of any body of water within this ~~state~~ State, unless authorized by the ~~state agency having jurisdiction so to do~~ Department or the Public Service Board. However, in the matter of flood control projects where cooperation with the federal government is provided for by the provisions of section 1100 of this title, that section shall control.

(b) For the purposes of this chapter, the volume a dam or other structure is capable of impounding is the volume of water or other liquid, including any accumulated sediments, controlled by the structure with the water or liquid level at the top of the nonoverflow part of the structure.

§ 1083. APPLICATION

(a) Any person who proposes to undertake an action subject to regulation pursuant to section 1082 of this title shall apply in writing to the ~~state agency having jurisdiction,~~ Department or the Public Service Board and shall give notice thereof to the governing body of the municipality or municipalities in which the dam or any part of the dam is to be located. The application shall set forth:

- (1) the location, the height, length and other dimensions, and any proposed changes to any existing dam;
- (2) the approximate area to be overflowed and the approximate number of, or any change in the number of cubic feet of water to be impounded;
- (3) the plans and specifications to be followed in the construction, remodeling, reconstruction, altering, lowering, raising, removal, breaching, or adding to;
- (4) any change in operation and maintenance procedures; and
- (5) other information that the ~~state agency having jurisdiction~~ Department or the Public Service Board considers necessary to properly review the application.

(b) The plans and specifications shall be prepared under the supervision of an engineer.

§ 1083a. ~~AGRICULTURAL DAMS~~

~~(a) Notwithstanding the provisions of sections 1082, 1083, 1084, and 1086 of this title, the owners of an agricultural enterprise who propose, as an integral and exclusive part of the enterprise, to construct or alter any dam, pond or impoundment or other structure requiring a permit under section 1083 shall apply to the natural resources conservation district in which his land is located. The natural resources conservation districts created under the provisions of chapter 31 of this title shall be the state agency having jurisdiction and shall review and approve the applications in the same manner as would the department. The districts may request the assistance of the department for any investigatory work necessary for a determination of public good and for any review of plans and specifications as provided in section 1086.~~

~~(b) As used in this section, “agricultural enterprise” means any farm, including stock, dairy, poultry, forage crop and truck farms, plantations, ranches and orchards, which does not fall within the definition of “activities not engaged in for a profit” as defined in Section 183 of the Internal Revenue Code and regulations relating thereto. The growing of timber does not in itself constitute farming.~~

~~(c) Notwithstanding the provisions of this section, jurisdiction shall revert to the department when there is a change in use or when there is a change in ownership which affects use. In those cases the department may, on its own~~

~~motion, hold meetings in order to determine the effect on the public good and public safety. The department may issue an order modifying the terms and conditions of approval.~~

~~(d) The natural resources conservation districts may adopt any rules necessary to administer this chapter. The districts shall adhere to the requirements of chapter 25 of Title 3 in the adoption of those rules.~~

~~(e) Notwithstanding the provisions of chapter 7 of Title 3, the attorney general shall counsel the districts in any case where a suit has been instituted against the districts for any decision made under the provisions of this chapter.~~

[Repealed.]

§ 1084. DEPARTMENT OF FISH AND WILDLIFE; INVESTIGATION

~~The commissioner of fish and wildlife~~ Commissioner of Fish and Wildlife shall investigate the potential effects on fish and wildlife habitats of any proposal subject to section 1082 of this title and shall certify the results to the ~~state agency having jurisdiction~~ Department or the Public Service Board prior to any hearing or meeting relating to the determination of public good and public safety.

§ 1085. NOTICE OF APPLICATION

Upon receipt of the application required by section 1082 of this title, the ~~state agency having jurisdiction~~ Department or the Public Service Board shall give notice to all persons interested.

~~(1) For any project subject to its jurisdiction under this chapter, on~~ On
the petition of 25 or more persons, ~~the department~~ Department or the Public
Service Board shall, or on its own motion it may, hold a public information
meeting in a municipality in the vicinity of the proposed project to hear
comments on whether the proposed project serves the public good and
provides adequately for the public safety. Public notice shall be given by
posting in the municipal offices of the towns in which the project will be
completed and by publishing in a local newspaper at least 10 days before the
meeting.

~~(2) For any project subject to its jurisdiction under this chapter, the
public service board shall hold a hearing on the application. The purpose of
the hearing shall be to determine whether the project serves the public good as
defined in section 1086 of this title and provides adequately for the public
safety. The hearing shall be held in a municipality in the vicinity of the
proposed project and may be consolidated with other hearings, including
hearings under 30 V.S.A. § 248 concerning the same project. Notice shall be
given at least 10 days before the hearing to interested persons by posting in the
municipal offices of the towns in which the project will be completed and by
publishing in a local newspaper.~~

§ 1086. DETERMINATION OF PUBLIC GOOD; CERTIFICATES

(a) “Public good” means the greatest benefit of the people of the State. In determining whether the public good is served, the ~~state agency having jurisdiction~~ Department or the Public Service Board shall give due consideration to, among other things, ~~to~~ the effect the proposed project will have on:

(1) the quantity, kind, and extent of cultivated agricultural land that may be rendered unfit for use by or enhanced by the project, including both the immediate and ~~long-range~~ long-range agricultural land use impacts;

(2) scenic and recreational values;

(3) fish and wildlife;

(4) forests and forest programs;

(5) the need for a minimum water discharge flow rate schedule to protect the natural rate of flow and the water quality of the affected waters;

(6) the existing uses of the waters by the public for boating, fishing, swimming, and other recreational uses;

(7) the creation of any hazard to navigation, fishing, swimming, or other public uses;

(8) the need for cutting clean and removal of all timber or tree growth from all or part of the flowage area;

(9) the creation of any public benefits;

- (10) consistency with the Vermont water quality standards and the classification, if any, of the affected waters under chapter 47 of this title;
- (11) any applicable ~~state~~ State, regional, or municipal plans;
- (12) municipal grand lists and revenues;
- (13) public safety; and
- (14) in the case of proposed removal of a dam that formerly related to or was incident to the generation of electric energy, but which was not subject to a memorandum of understanding dated prior to January 1, 2006 relating to its removal, the potential for and value of future power production.

(b) If the ~~State agency having jurisdiction~~ Department or the Public Service Board finds that the proposed project will serve the public good, and, in case of any waters designated by the Secretary as outstanding resource waters, will preserve or enhance the values and activities sought to be protected by designation, the ~~agency~~ Department or the Public Service Board shall issue its order approving the application. The order shall include conditions for minimum stream flow to protect fish and instream aquatic life, as determined by the Agency of Natural Resources, and such other conditions as the ~~agency having jurisdiction~~ Department or the Public Service Board considers necessary to protect any element of the public good listed above. Otherwise it shall issue its order disapproving the application.

(c) The ~~agency~~ Department or the Public Service Board shall provide the applicant and interested parties with copies of its order.

(d) ~~In the case of a proposed removal of a dam that is under the jurisdiction of the department and that formerly related to or was incident to the generation of electric energy but that was not subject to a memorandum of understanding dated before January 1, 2006 relating to its removal, the department shall consult with the department of public service regarding the potential for and value of future power production at the site. [Repealed.]~~

§ 1087. REVIEW OF PLANS AND SPECIFICATIONS

Upon receipt of an application, the ~~state agency having jurisdiction~~ Department or the Public Service Board shall employ a ~~registered~~ licensed engineer experienced in the design and investigation of dams to investigate the property, review the plans and specifications, and make additional investigations as it considers necessary to ensure that the project adequately provides for the public safety. The engineer shall report his or her findings to the ~~agency~~ Department or the Public Service Board.

§ 1089. EMPLOYMENT OF HYDRAULIC ENGINEER

With the approval of the ~~governor~~ Governor, the ~~state agency having jurisdiction~~ Department or the Public Service Board may employ a competent hydraulic engineer to investigate the property, review the plans and specifications, and make such additional investigation as ~~such agency~~ the

Department or the Public Service Board shall deem necessary, and such engineer shall report to the ~~agency~~ Department or the Public Service Board his or her findings in respect thereto.

§ 1090. CONSTRUCTION SUPERVISION

The construction, alteration, or other action authorized in section 1086 of this title shall be supervised by a ~~registered~~ licensed engineer employed by the applicant. Upon completion of the authorized project, the engineer shall certify to the ~~agency having jurisdiction~~ Department or the Public Service Board that the project has been completed in conformance with the approved plans and specifications.

§ 1095. UNSAFE DAM; PETITION; HEARING; EMERGENCY

(a) On receipt of a petition signed by ~~not less~~ no fewer than ten persons in interest or the legislative body of a municipality, the ~~agency having jurisdiction~~ Department or the Public Service Board 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 dam or portion of a dam, of any size. The ~~agency~~ Department or the Public Service Board may fix a time and place for hearing and shall give notice in the manner it directs to all parties interested. The engineer shall present his or her findings and recommendations at the hearing. After the hearing, if the ~~agency~~ Department or the Public Service Board finds that the 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 make the dam safe.

(b) If, upon the expiration of such date as may be ordered, the owner of such dam 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~~ Department or the Public Service Board may petition the ~~superior court~~ Superior Court in the county in which the dam is located to enforce its order or exercise the right of eminent domain to acquire such rights as may be necessary to effectuate a remedy as the public safety or public good may require. If the order has been appealed, the ~~court~~ Court may prohibit the exercise pending disposition of the appeal.

(c) If, upon completion of the investigation described in subsection (a) of this section, the ~~state agency having jurisdiction~~ Department or the Public Service Board 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 conduct the hearing described in subsection (a).

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§ 1098. REMOVAL OF OBSTRUCTIONS; APPROPRIATION

The ~~department~~ Department may contract for the removal of sandbars, debris, or other obstructions from streams which the ~~department~~ Department

finds that while so obstructed may be a menace in time of flood, or endanger property or life below, or the property of riparian owners. The expense of investigation and removal of the obstruction shall be paid by the ~~state~~ State from funds provided for that purpose.

§ 1099. APPEALS

(a) Appeals of any act or decision of the ~~department~~ Department under this chapter shall be made in accordance with chapter 220 of this title.

(b) Appeals from actions or orders of the ~~public service board~~ Public Service Board may be taken in the ~~supreme court~~ Supreme Court in accord with 30 V.S.A. § 12.

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§ 1104. DAM REGISTRATION

(a) Application of section. The requirements of this section shall apply to all dams in the State within the jurisdiction of the Department regardless of whether the dam is permitted or approved under this chapter. The rules of the Public Service Board shall control the regulation and inspection of dams and projects over which the Public Service Board has jurisdiction.

(b) Dam registration.

(1) On or before January 1, 2015, the person owning legal title to a dam shall, on a form provided by the Department, register the dam with the Department.

(2) Beginning one year from the date of dam registration, a dam registered under subdivision (1) shall be subject to an annual dam safety program operation fee.

(3) If no person owns legal title to a dam, the person owning the property on which the dam is located shall submit the registration required under subdivisions (1) and (2) of this subsection.

(c) Department identification of dam.

(1) The Department shall post the location and hazard potential classification of every dam in the State on the Agency of Natural Resources' website.

(2) The standards for hazard classification shall be equivalent to the standards for low, significant, and high hazard dams under the U.S. Army Corps of Engineers Hazard Potential Classification of Dams, under 33 C.F.R. § 222.6. The Department may designate a dam as an unknown hazard dam when it lacks information sufficient to classify it as a low, significant, or high hazard dam.

(d) Failure to submit registration. If the Department identifies the owner of an unregistered dam, the Department shall notify the owner of the requirement to register the dam under this section. The owner of a dam who receives notice of required registration under this subsection shall have 60 days from the date

of the Department's notice to submit a complete dam registration form to the Department.

(e) Dam safety inspection. Fees collected under 3 V.S.A. § 2822(j)(12)(B) shall be deposited into the Environmental Permit Fund under 3 V.S.A. § 2805 and shall be used to implement the requirements of this chapter.

(f) Designation of dam as abandoned. If an owner of a dam classified as an unknown hazard fails to submit to the Department the dam registration form required by this section, the dam may be designated an abandoned dam subject to the provisions of section 1104a of this title.

(g) Failure to file dam evaluation report. If an owner of a dam fails to submit the dam registration form as required under subsection (b) of this section, the Department may inspect, or retain a licensed professional engineer to inspect, the dam. The cost to the Department of the inspection shall be assessed against the owner of the dam.

§ 1104a. ABANDONED DAMS

(a) Designation of dam as abandoned. The Department may designate a dam as abandoned if the Department:

(1) has identified an owner of the dam, but the owner fails to comply with the requirements of section 1104 of this title or the owner fails to comply with an action or order required under this chapter; or

(2) cannot identify an owner of the dam; and

(3) publishes notice of a pending determination of abandonment of the dam in a newspaper of general circulation in the county in which the dam is located; and after 45 days from the date of publication of pending determination of abandonment, no person has asserted ownership or control of the dam.

(b) Inspection of abandoned dam. Upon designation of a dam as abandoned, the Department shall conduct an inspection of the dam according to its inspection authority under section 1105 of this title.

(c) Lien on property on which dam is situated. When the Department takes action under this section to inspect an abandoned dam or when the Department takes any action under this chapter to alleviate or address a risk to life or property from an abandoned dam, the costs of the action shall be a lien in favor of the State on the property on which the dam is located and on the buildings and structures located on that property in order to secure repayment of the State of inspection or other action. The lien shall arise at the time demand is made by the Secretary and shall continue until the liability for such sum with interest and costs is satisfied or becomes unenforceable. A lien under this section shall be subordinate to a primary mortgage on the property. Notice of a lien under this section shall be recorded in the land records of the town in which the property is located.

(d) Assumption of ownership of an abandoned dam. A person may assume ownership of a dam designated by the Department as abandoned by:

(1) notifying the Department, where applicable, of the intent to assume ownership;

(2) submission of the dam registration form required under section 1104 of this title;

(3) payment of costs or liabilities due the Department; and

(4) submission of indicia of ownership of the dam.

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* * * Disclosure of Dam at Conveyance * * *

Sec. 2. 27 V.S.A. § 617 is added to read:

§ 617. DISCLOSURE OF DAM ON PROPERTY AT CONVEYANCE

(a) Definitions. As used in this section, “dam” shall have the same meaning as provided for in 10 V.S.A. § 1080(7).

(b) Seller; disclosure of dam on property. A seller of real property on which a dam is located shall:

(1) prior to the execution of a contract for the conveyance of real property:

(A) disclose to the buyer the presence and location of the dam on the property; and

(B) provide the buyer with an inspection report for the dam that accurately reflects the current condition of the dam by an independent licensed engineer experienced in the design and investigation of dams; and

(2) submit to the Department a notice of property transfer of the dam no later than 15 days from execution of the contract for the conveyance of the real property.

(c) Buyer; registration with Department. No later than 15 days from execution of a contract for the conveyance of real property on which a dam is located, the buyer of the real property shall, on a form provided by the Department, notify the Department and the municipality or municipalities in which the dam is located of the property transfer. The notification form shall include:

(1) a copy of the current dam safety inspection report provided by the seller prior to execution of the contract for the conveyance; and

(2) the name, mailing address, and telephone number of the buyer.

(d) Marketability of title. Noncompliance with the requirements of this section shall not affect the marketability of title of a property.

(e) Penalty; liability. Liability for failure to provide the informational materials required by this section shall be limited to a civil penalty, imposed by the Agency of Natural Resources under 10 V.S.A. chapter 201, of no less than \$100.00 and no more than \$250.00 for each day in violation.

* * * Dam Registration Fees * * *

Sec. 3. 3 V.S.A. § 2805 is amended to read:

§ 2805. ENVIRONMENTAL PERMIT FUND

(a) There is hereby established a special fund to be known as the Environmental Permit Fund. Within the Fund, there shall be two accounts: the Environmental Permit Account and the Air Pollution Control Account. Unless otherwise specified, fees collected in accordance with subsections 2822(i) and (j) of this title, and 10 V.S.A. § 2625 and gifts and appropriations shall be deposited in the Environmental Permit Account. Fees collected in accordance with subsections 2822(j)(1), (k), (l), and (m) of this title shall be deposited in the Air Pollution Control Account. The Environmental Permit Fund shall be used to implement the programs specified under section 2822 of this title. The Secretary of Natural Resources shall be responsible for the fund and shall account for the revenues and expenditures of the Agency of Natural Resources. The Environmental Permit Fund shall be subject to the provisions of 32 V.S.A. chapter 7, subchapter 5. The Environmental Permit Fund shall be used to cover a portion of the costs of administering the Environmental Division established under 4 V.S.A. chapter 27. The amount of \$143,000.00 per fiscal year shall be disbursed for this purpose.

(b) Any fee required to be collected under subdivision 2822(j)(1) of this title shall be utilized solely to cover all reasonable (direct or indirect) costs

required to support the operating permit program authorized under 10 V.S.A. chapter 23. Any fee required to be collected under subsection 2822(k), (l), or (m) of this title for air pollution control permits or registrations or motor vehicle registrations shall be utilized solely to cover all reasonable (direct or indirect) costs required to support the programs authorized under 10 V.S.A. chapter 23. Fees collected pursuant to subsections 2822(k), (l), and (m) of this title shall be used by the Secretary to fund activities related to the Secretary's hazardous or toxic contaminant monitoring programs and motor vehicle-related programs.

(c) Any fee required to be collected under subdivision 2822(j)(12) of this title for dam registrations shall be used solely to cover all direct or indirect costs required to support the programs authorized under 10 V.S.A. chapter 43. When the fees collected under subdivision 2822(j)(12) of this title exceed the annual funding needs of 10 V.S.A. chapter 43, the excess funds shall be deposited into the Unsafe Dam Revolving Loan Fund under 10 V.S.A. § 1106.

Sec. 4. 3 V.S.A. § 2822(j)(12) is amended to read:

(12)(A) For dam permits issued under 10 V.S.A. chapter 43: 0.525 percent of construction costs, minimum fee of \$200.00.

(B) For the dam registration under 10 V.S.A. § 1104(b)(1), a person registering a dam shall pay a registration fee based on the hazard classification of the dam as follows:

<u>(i) Low hazard dam</u>	<u>\$200.00;</u>
<u>(ii) Significant hazard dam</u>	<u>\$350.00;</u>
<u>(iii) High hazard dam</u>	<u>\$1,000.00.</u>

(C) The annual dam safety program operation fee submitted under 10 V.S.A. § 1104(b)(2) shall be based on the hazard classification of the dam as follows:

<u>(i) Low hazard dam</u>	<u>\$200.00;</u>
<u>(ii) Significant hazard dam</u>	<u>\$350.00;</u>
<u>(iii) High hazard dam</u>	<u>\$1,000.00.</u>

* * * Dam Registration Report * * *

Sec. 5. DAM REGISTRATION PROGRAM REPORT

On or before January 1, 2016, the Department of Environmental Conservation shall submit a report to the House Committee on Fish, Wildlife and Water Resources, the House Committee on Ways and Means, the Senate Committee on Natural Resources and Energy, and the Senate Committee on Finance. The report shall contain:

- (1) an evaluation of the dam registration program under 10 V.S.A. chapter 43, including whether impoundments of water with less than one acre of surface area should continue to be exempt from the definition of dam;
- (2) a recommendation on whether to modify the fee structure of the dam registration program;

(3) a summary of the dams registered under the program, organized by amount of water impounded; and

(4) an evaluation of any other hydrologic concerns related to dam registration.

* * * Effective Date * * *

Sec. 6. EFFECTIVE DATE

This act shall take effect on July 1, 2014.