



COMMON SENSE SOLUTIONS
FOR A CHANGING VERMONT

H.37 Dam Inspection Testimony Addendum April 10, 2015

Issue: ANR workload will increase by requiring inspections of smaller dams that currently are not regularly inspected.

Comment: This is true, but a comprehensive inspection program that utilizes State and private expertise is the key to increase public safety. It's especially important to increase oversight of the smaller structures that still pose a risk to public safety – especially those whose hazard category and condition is currently unknown. The bill calls for both additional resources (dedicated funding for ANR staff) and rulemaking authority, so the Agency should be able to structure a program that is effective and accommodates the additional workload.

Issue: Instead of a comprehensive, statewide approach, how about a pilot project on a watershed or subwatershed?

Comment: It is unclear what a pilot project would accomplish, and it does nothing to increase public safety and reduce the risk of dam failures. Because of differences among watersheds regarding the number of dams and what is known about them (including who owns them), information derived from a pilot study of one or a few watersheds would be difficult, perhaps meaningless, to extrapolate to a statewide basis. The same decision about how to expand the inspection program will need to be made at the end of the study. The study would delay the investigation into the state of known (i.e. inventoried) dams and decisions about how to address those that pose the highest risk to public safety. ANR has testified that it has good information on the location, condition and ownership of the 437 jurisdictional dams currently in the inventory. The remaining 319 nonjurisdictional dams will require additional research, and ANR can expect other organizations like watershed groups to help locate both the dams and their owners. Rather than putting off a decision on whether to improve public safety, the legislature could provide ANR with specific dates that provide a the additional time ANR feels is necessary to identify owners and get the registration/inspection program for these smaller structures up and running on a statewide basis.

Issue: There could be a lot of time and expense involved in designating a dam as abandoned. What kind of liability would the State assume? Would the State end up owning a lot of dams it doesn't want?

Comment: ANR is not required to take over the control of an abandoned dam – it is discretionary. The Agency would have the ability to make a decision to move

forward with a particular dam based on the risk to public safety, impact on water quality or aquatic habitat and other factors. The assumption is that the State will only designate a dam as abandoned once it has determined that there is a significant public safety or environmental issue that must be addressed and has a plan to address the problem. The bill's language could be amended so that owners of unwanted dams cannot walk away and "dump" the dam on the State. We expect this to be a rare issue.

Issue: The use of perennial stream is problematic because that determination would have to be made by the Rivers Program since Dam Safety lacks the necessary expertise.

Comment: Perennial stream is already defined in the stream alteration rule as: "a watercourse or portion, segment, or reach of a watercourse, generally exceeding 0.5 square miles in watershed size, in which surface flows are not frequently or consistently interrupted during normal seasonal low flow periods. Perennial streams that begin flowing subsurface during low flow periods, due to natural geologic conditions, remain defined as perennial. All other streams, or stream segments of significant length, shall be termed intermittent. A perennial stream shall not include the standing waters in wetlands, lakes, and ponds."

For many – perhaps most - structures, it's obvious if the stream fits this definition and the determination could easily be made by one of the dam safety engineers. In those cases where it's less obvious, they could call on the Rivers Program for assistance, as many other regulatory programs do currently.

Issue: The lack of a definition for "properly removed or mitigated" is unclear.

Comment: This term needs further clarity. Given that the bill involves ANR rulemaking, perhaps including this as one of the charges under that process would help to define it.

Issue: The term "adequate discharge capacity" is unclear. It needs further refinement.

Comment: Agreed. New Hampshire statute, includes the following in its definition of dam: "A roadway culvert shall not be considered a dam if its invert is at the natural bed of the water course, it has adequate discharge capacity, and it does not impound water under normal circumstances." Guidance documents from NH could be easily modified to provide information in those instances (which are not likely to be frequent) where this question arises.

Issue: There could be legal disputes if ANR tries to assess fees on the owner of the adjacent property if title to the dam cannot be determined.

Comment: That may be true, but one of the goals of this legislation is to clear up confusion surrounding the identity of dam owners. Disputes of this nature are likely to be rare, but language could be added that the owner of the adjacent property is liable for the fees only after receiving notification by ANR.

Issue: It should be clear that it is the landowner's responsibility to file an inspection report prepared by DEC, not the dam safety program.

Comment: Agreed. Language could change to a "person owning a dam who is required..." or similar.

Issue: Rules are not needed for design and operation and could be counterproductive. A lot of guidelines for design are already available.

Comment: While the process might be clear to ANR, it is not clear to the practitioners outside of state government, those who are required to implement the requirements. Additional clarity is warranted so that everyone is clear about what is required – and when. Rulemaking is the best way to ensure the involvement of interested parties who can help to provide this clarity.

Issue: Without an "innocent landowner" provision in the bill, a bank may assume the liability of a dam if it fails and may be liable for the fees or registrations.

Comment: It should be determined whether a bank currently assumes liability for the consequences of dam failure when they foreclose on a property with a dam. There is no reason that dam liability should be treated any differently from other liabilities inherent in property ownership. Public safety would not be served adding on or removing liability based on who controls the dam. Banks should be held responsible for these liabilities like everyone else and they should factor them into their business decisions. Finally, the number of properties with dams that are likely to be subject to foreclosure is likely to be very small.
