

1 H.554

2 Introduced by Representative Deen of Westminster

3 Referred to Committee on

4 Date:

5 Subject: Conservation and development; water resources; dam registration

6 Statement of purpose of bill as introduced: This bill proposes to amend

7 requirements for the regulation of nonfederal dams in the State, including

8 requirements related to inspection, hazard potential classification, and

9 rulemaking.

10 An act relating to the regulation of dams

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

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

13 CHAPTER 43. DAMS

14 § 1079. PURPOSE

15 It is the purpose of this chapter to protect public safety through the

16 inventory, inspection, and evaluation of dams in the State.

17 § 1080. DEFINITIONS

18 As used in this chapter:

19 (1) "Department" means the ~~department of environmental conservation~~

20 Department of Environmental Conservation.

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

5 (3) ~~“Person in interest”~~ “Interested person” means, in relation to any
6 dam, a person; ~~who has riparian rights affected by that dam;~~ who has a
7 substantial interest in economic or recreational activity affected by the dam, ~~or;~~
8 whose safety would be endangered by a failure of the dam; or who notifies the
9 Department of interest in the dam.

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

12 (5) “Time” shall be reckoned in the manner prescribed by 1 V.S.A.
13 § 138.

14 (6)(A) “Dam” means any artificial barrier, including its appurtenant
15 works, that is capable of impounding water, other liquids, or accumulated
16 sediments.

17 (B) “Dam” includes an artificial barrier that:

18 (i) previously was capable of impounding water, other liquids, or
19 accumulated sediments;

20 (ii) was partially breached; and

21 (iii) has not been properly removed or mitigated.

- 1 (C) “Dam” shall not mean:
- 2 (i) barriers or structures created by beaver or any other wild
3 animal as that term is defined in section 4001 of this title;
- 4 (ii) a highway culvert;
- 5 (iii) an artificial barrier at a stormwater management structure that
6 is regulated by the Agency of Natural Resources under chapter 47 of this title;
- 7 (iv) an underground or elevated tank to store water otherwise
8 regulated by the Agency of Natural Resources;
- 9 (v) an agricultural waste storage facility regulated by the Agency
10 of Agriculture, Food and Markets under 6 V.S.A. chapter 215; or
- 11 (vi) any other structure identified by the Department by rule.

12 (7) “Pond” means a natural body of standing water.

13 § 1081. JURISDICTION OF DEPARTMENT AND PUBLIC UTILITY

14 COMMISSION

15 (a) Powers and duties. Unless otherwise provided, the powers and duties
16 authorized by this chapter shall be exercised by the Department, except that the
17 Public Utility Commission shall exercise those powers and duties over dams
18 and projects that relate to or are incident to the generation of electric energy for
19 public use or as a part of a public utility system.

20 (b) Transfer of jurisdiction. Jurisdiction over a dam is transferred from the
21 Department to the Public Utility Commission whenever the Federal Energy

1 Regulatory Commission grants a license to generate electricity at the dam or
2 whenever the Public Utility Commission receives an application for a
3 certificate of public good for electricity generation at that dam. Jurisdiction is
4 transferred from the Public Utility Commission to the Department whenever
5 such a federal license expires or is otherwise lost, whenever such a certificate
6 of public good is revoked or otherwise lost, or whenever the Public Utility
7 Commission denies an application for a certificate of public good.

8 (c) Transfer of records. Upon transfer of jurisdiction as set forth in
9 subsection (b) of this section and upon written request, the State agency having
10 former jurisdiction over a dam shall transfer copies of all records pertaining to
11 the dam to the agency acquiring jurisdiction.

12 § 1082. AUTHORIZATION

13 (a) No person shall construct, enlarge, raise, lower, remodel, reconstruct, or
14 otherwise alter any dam, pond, or impoundment or other structure ~~which~~ that is
15 or will be capable of impounding more than 500,000 cubic feet of water or
16 other liquid after construction or alteration, or remove, breach, or otherwise
17 lessen the capacity of an existing dam that is or was capable of impounding
18 more than 500,000 cubic feet within or along the borders of this ~~state~~ State
19 where land in this ~~state~~ State is proposed to be overflowed, or at the outlet of
20 any body of water within this ~~state~~ State, unless authorized by the ~~state~~ State
21 agency having jurisdiction so to do. However, in the matter of flood control

1 projects where cooperation with the federal government is provided for by the
2 provisions of section 1100 of this title, that section shall control.

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

7 § 1083. APPLICATION

8 (a) Any person who proposes to undertake an action subject to regulation
9 pursuant to section 1082 of this title shall apply in writing to the State agency
10 having jurisdiction. The application shall set forth:

11 (1) the location; the height, length, and other dimensions; and any
12 proposed changes to any existing dam;

13 (2) the approximate area to be overflowed and the approximate number
14 of, or any change in the number of cubic feet of water to be impounded;

15 (3) the plans and specifications to be followed in the construction,
16 remodeling, reconstruction, altering, lowering, raising, removal, breaching, or
17 adding to;

18 (4) any change in operation and maintenance procedures; and

19 (5) other information that the ~~state~~ State agency having jurisdiction
20 considers necessary to ~~properly~~ review the application.

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

3 § 1083a. ~~AGRICULTURAL DAMS~~

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

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

1 ~~(c) Notwithstanding the provisions of this section, jurisdiction shall revert~~
2 ~~to the department when there is a change in use or when there is a change in~~
3 ~~ownership which affects use. In those cases the department may, on its own~~
4 ~~motion, hold meetings in order to determine the effect on the public good and~~
5 ~~public safety. The department may issue an order modifying the terms and~~
6 ~~conditions of approval.~~

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

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

13 [Repealed.]

14 § 1084. DEPARTMENT OF FISH AND WILDLIFE; INVESTIGATION

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

1 § 1085. NOTICE OF APPLICATION

2 Upon receipt of the application required by section 1082 of this title, the
3 State agency having jurisdiction shall give notice to the legislative body of
4 each municipality in which the dam is ~~allocated~~ located and to all ~~persons~~
5 interested persons.

6 (1) The Department shall proceed in accordance with chapter 170 of this
7 title.

8 (2) For any project subject to its jurisdiction under this chapter, the
9 Public ~~Utilities~~ Utility Commission shall hold a hearing on the application.

10 The purpose of the hearing shall be to determine whether the project serves the
11 public good as defined in section 1086 of this title and provides adequately for
12 the public safety. The hearing shall be held in a municipality in the vicinity of
13 the proposed project and may be consolidated with other hearings, including
14 hearings under 30 V.S.A. § 248 concerning the same project. Notice shall be
15 given at least 10 days before the hearing to interested persons by posting in the
16 municipal offices of the towns in which the project will be completed and by
17 publishing in a local newspaper.

18 § 1086. DETERMINATION OF PUBLIC GOOD; CERTIFICATES

19 (a) "Public good" means the greatest benefit of the people of the State. In
20 determining whether the public good is served, the State agency having

1 jurisdiction shall give due consideration to, among other things, ~~to~~ the effect
2 the proposed project will have on:

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

6 (2) scenic and recreational values;

7 (3) fish and wildlife;

8 (4) forests and forest programs;

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

11 [Repealed.]

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

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

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

18 (9) the creation of any public benefits;

19 (10) ~~the classification, if any, of the affected waters under chapter 47 of~~
20 ~~this title~~ consistency with the Vermont water quality standards;

21 (11) any applicable State, regional, or municipal plans;

1 (12) municipal grand lists and revenues;

2 (13) public safety; and

3 (14) in the case of the proposed removal of a dam that formerly related
4 to or was incident to the generation of electric energy, but ~~which~~ that was not
5 subject to a memorandum of understanding dated prior to January 1, 2006
6 relating to its removal, the potential for and value of future power production.

7 (b) If the State agency having jurisdiction finds that the proposed project
8 will serve the public good, and, in case of any waters designated by the
9 Secretary as outstanding resource waters, will preserve or enhance the values
10 and activities sought to be protected by designation, the agency shall issue its
11 order approving the application. The order shall include conditions for
12 ~~minimum stream flow to protect fish and instream aquatic life~~ maintenance of
13 water quality standards, as determined by the Agency of Natural Resources,
14 and such other conditions as the agency having jurisdiction considers
15 necessary to protect any element of the public good listed in subsection (a) of
16 this section. Otherwise it shall issue its order disapproving the application.

17 (c) The ~~Agency~~ State agency having jurisdiction shall provide the applicant
18 and interested ~~parties~~ persons with copies of its order.

19 (d) In the case of a proposed removal of a dam that is under the jurisdiction
20 of the Department and that formerly related to or was incident to the generation
21 of electric energy but that was not subject to a memorandum of understanding

1 dated before January 1, 2006 relating to its removal, the Department shall
2 consult with the Department of Public Service regarding the potential for and
3 value of future power production at the site.

4 § 1087. REVIEW OF PLANS AND SPECIFICATIONS

5 ~~Upon receipt of an application, the state~~ For any proposal subject to
6 authorization under section 1082, the State agency having jurisdiction shall
7 employ ~~a registered~~ an engineer ~~experienced in the design and investigation of~~
8 ~~dams~~ to investigate the property, review the plans and specifications, and make
9 additional investigations as ~~it~~ the State agency having jurisdiction considers
10 necessary to ensure that the project adequately provides for the public safety.
11 The engineer shall report his or her findings to the ~~agency~~ State agency having
12 jurisdiction.

13 § 1089. EMPLOYMENT OF ~~HYDRAULIC~~ ENGINEER

14 With the approval of the ~~governor~~ Governor, the ~~state~~ State agency having
15 jurisdiction may employ ~~a competent hydraulic~~ an engineer to investigate the
16 property, review the plans and specifications, and make such additional
17 investigation as ~~such~~ the State agency shall deem necessary, and such engineer
18 shall report to the State agency his or her findings in respect thereto.

19 § 1090. CONSTRUCTION SUPERVISION

20 The construction, alteration, or other action authorized in section 1086 of
21 this title shall be supervised by ~~a registered~~ an engineer employed by the

1 applicant. Upon completion of the authorized project, the engineer shall
2 certify to the agency having jurisdiction that the project has been completed in
3 conformance with the approved plans and specifications.

4 § 1095. UNSAFE DAM; PETITION; HEARING; EMERGENCY

5 (a) On receipt of a petition signed by ~~not less~~ no fewer than ten ~~persons in~~
6 ~~interest~~ interested persons or the legislative body of a municipality, the State
7 agency having jurisdiction shall, or upon its own motion it may, institute
8 investigations by an engineer as described in section 1087 of this title
9 regarding the safety of any existing dam or portion of a dam, of any size. The
10 agency may fix a time and place for hearing and shall give notice in the
11 manner it directs to all parties interested. The engineer shall present his or her
12 findings and recommendations at the hearing. After the hearing, if the agency
13 finds that the dam or portion of the dam as maintained or operated is unsafe or
14 is a menace to people or property above or below the dam, it shall issue an
15 order directing reconstruction, repair, removal, breaching, draining, or other
16 action it considers necessary to ~~make the dam safe~~ improve the safety of the
17 dam.

18 (b) If, upon the expiration of such date as may be ordered, the ~~owner of~~
19 person owning legal title to such dam has not complied with the order directing
20 the reconstruction, repair, breaching, removal, draining, or other action of such
21 unsafe dam, the ~~state~~ State agency having jurisdiction may petition the ~~superior~~

1 ~~court~~ Superior Court in the county in which the dam is located to enforce its
2 order or exercise the right of eminent domain to acquire ~~such~~ the rights as that
3 may be necessary to effectuate a remedy as the public safety or public good
4 may require. If the order has been appealed, the court may prohibit the
5 exercise of eminent domain by the State agency having jurisdiction pending
6 disposition of the appeal.

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

12 § 1097. ~~SURVEY OF EXISTING DAMS; ORDERS FOR PROTECTION OF~~
13 ~~SALMON~~

14 ~~The Fish and Wildlife Board shall forthwith make a survey of all dams~~
15 ~~within the state which impound more than three hundred thousand cubic feet of~~
16 ~~water and determine if the operation of such dams adversely affects the~~
17 ~~propagation and preservation of salmon, or materially diminishes the amount~~
18 ~~of flow in portions of a stream likely to be used for such preservation and~~
19 ~~propagation of salmon. If the Board determines that the operation of an~~
20 ~~existing dam does adversely affect the propagation and preservation of salmon~~
21 ~~or materially diminishes the flow of water over portions of stream likely to be~~

1 ~~used therefor, it shall order such changes in operation for such length of time~~
2 ~~or times as are reasonably necessary in its judgment to fully protect such~~
3 ~~preservation and propagation of salmon. Any order of the board made under~~
4 ~~this section shall be based upon facts found and stated. Appeal from an order~~
5 ~~of the board may be taken in the manner prescribed for appeals from the Public~~
6 ~~Utility Commission as provided in 30 V.S.A. chapter 1. [Repealed.]~~

7 § 1098. REMOVAL OF OBSTRUCTIONS; APPROPRIATION

8 The ~~department~~ Department may contract for the removal of sandbars,
9 debris, or other obstructions from streams ~~which~~ that the ~~department~~
10 Department finds that while so obstructed may be a menace in time of flood, or
11 endanger property or life below, or endanger the property of riparian owners.
12 The expense of investigation and removal of the obstruction shall be paid by
13 the ~~state~~ State from funds provided for that purpose.

14 * * *

15 § 1105. INSPECTION OF DAMS

16 (a) Inspection; schedule. All nonfederal dams in the State shall be
17 inspected according to a schedule adopted by rule by the State agency having
18 jurisdiction over the dam.

19 (b) Dam inspection. A nonfederal dam in the State shall be inspected under
20 one or both of the following methods:

1 (1) The State agency having jurisdiction ~~shall~~ over a dam may employ
2 an engineer to make periodic inspections of nonfederal dams in the State to
3 determine their condition and the extent, if any, to which they pose a ~~potential~~
4 possible or actual probable threat to life and property; ~~or,~~

5 (2) The State agency having jurisdiction shall adopt rules pursuant to
6 3 V.S.A. chapter 25 to require an adequate level of inspection by an
7 independent ~~registered engineer experienced in the design and investigation of~~
8 dams. ~~The agency shall provide the owner with the findings of the inspection~~
9 and any recommendations.

10 (c) Dam safety reports. If a dam inspection report is completed by the
11 State agency having jurisdiction, the agency shall provide the person owning
12 legal title to the dam or the owner of the land on which the dam is located with
13 a copy of the inspection report.

14 (d) Lien on property on which dam is situated. When the State agency
15 having jurisdiction over a dam takes action under this section to inspect a dam
16 or when the agency takes any action under this chapter to alleviate or address a
17 risk to life or property from a nonfederal dam, the State agency having
18 jurisdiction may file a lien in favor of the State on the property on which the
19 dam is located and on the buildings and structures located on that property in
20 order to secure repayment to the State of the costs of the inspection or other
21 action. The lien shall arise at the time demand is made by the State agency

1 having jurisdiction and shall continue until the liability for such sum with
2 interest and costs is satisfied or becomes unenforceable. A lien under this
3 section shall be subordinate to a primary mortgage on the property. The State
4 agency having jurisdiction shall record notice of a lien under this section in the
5 land records of the town in which the property is located.

6 * * *

7 § 1107. HAZARD POTENTIAL CLASSIFICATIONS

8 (a) The State agency having jurisdiction over a dam listed in the Vermont
9 Dam Inventory shall assess the hazard potential classification of the dam based
10 on the potential loss of human life, property damage, and economic loss that
11 would occur in the event of the failure of the dam. There shall be four hazard
12 potential classifications: high, significant, low, and negligible. The
13 Department shall adopt by rule the criteria for each hazard potential
14 classification.

15 (b) The State agency having jurisdiction over a dam on the Vermont Dam
16 Inventory may assess or reassess the hazard potential classification of a dam at
17 any time in order to ensure public safety.

18 § 1108. DAM INVENTORY; REGISTRATION

19 (a) Dam inventory. The Department of Environmental Conservation shall
20 maintain a current inventory of all known dams in the State of Vermont. The
21 Department of Environmental Conservation shall update and publish the

1 Vermont Dam Inventory annually and shall include information collected in
2 the Inventory as part of the Agency of Natural Resources' Natural Resources
3 Atlas.

4 (b) Dam registration. If a dam is listed on the Vermont Dam Inventory, the
5 person owning legal title to a dam or the person owning the land shall, upon
6 request of the Department of Environmental Conservation, submit information
7 to the Department regarding the dam, including the condition of the dam,
8 whether and when the dam has been inspected, and any other information that
9 the Department may require to ensure public safety. A person who fails to
10 comply with the request of the Department under this section shall be subject
11 to a civil penalty under chapter 201 of this title in an amount not to exceed
12 \$1,000.00.

13 (c) Rulemaking. The Department of Environmental Conservation may
14 adopt rules regarding the information collection requirements of this section,
15 including the mechanism for registration, the frequency of registration, the
16 type of information to be collected, and whether the location of a dam on a
17 property must be recorded in the land records of the municipality in which it
18 is located.

19 § 1109. MARKETABILITY OF TITLE

20 The failure of the person owning legal title to a dam to record a dam
21 registration or a dam inspection report when required under this chapter or

1 rules adopted under this chapter shall not create an encumbrance on record title
2 or an effect on marketability of title for the real estate property or properties on
3 which the dam is located, except when the Department files a lien on property
4 under section 1108 of this title.

5 § 1110. RULEMAKING

6 The Commissioner of Environmental Conservation shall adopt rules to
7 implement the requirements of this chapter. The rules shall include:

8 (1) a standard or regulatory threshold under which a dam is exempt from
9 the registration or inspection requirements of this chapter;

10 (2) standards for:

11 (A) the siting, design, construction, reconstruction, enlargement,
12 modification, or alteration of a dam;

13 (B) operation and maintenance of a dam;

14 (C) inspection, monitoring, record keeping, and reporting; and

15 (D) repair, breach, or removal of a dam;

16 (3) requirements for the development of an emergency action plan for a
17 dam, including guidance on how to develop an emergency action plan, the
18 content of a plan, and when and how an emergency action plan should be
19 updated;

20 (4) criteria for the hazard potential classification of nonfederal dams in
21 the State;

1 (5) a process by which person a person owning legal title to a dam or a
2 person owning the land shall register a dam under the jurisdiction of the
3 Department; and

4 (6) requirements for the person owning legal title to a dam or the person
5 owning the land to conduct inspections of dams under the jurisdiction of the
6 Department.

7 § 1111. NATURAL RESOURCES ATLAS; DAM STATUS

8 Annually on or before January 1, the Public Utility Commission and the
9 Secretary of Agriculture, Food and Markets shall submit to the Department the
10 presence, location, and hazard potential classification of any dam previously
11 within its jurisdiction learned of within the previous calendar year.

12 Sec. 2. DAM REGISTRATION PROGRAM REPORT

13 On or before January 1, 2022, the Department of Environmental
14 Conservation shall submit a report to the House Committees on Natural
15 Resources, Fish and Wildlife and on Ways and Means and the Senate
16 Committees on Natural Resources and Energy and on Finance. The report
17 shall contain:

18 (1) an evaluation of the dam registration program under 10 V.S.A.
19 chapter 43;

20 (2) a recommendation on whether to modify the fee structure of the dam
21 registration program;

1 (3) a summary of the dams registered under the program, organized by
2 amount of water impounded and hazard potential classification; and

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

5 Sec. 3. ADOPTION OF RULES

6 The Secretary of Natural Resources shall adopt the rules required under
7 10 V.S.A. § 1110 as follows:

8 (1) the rules required under 10 V.S.A. § 1110(1) (exemptions),
9 § 1110(3) (emergency action plan), § 1110(4) (hazard potential classification),
10 § 1110(5) (dam registration), and § 1110(6) (dam inspection) shall be adopted
11 on or before July 1, 2020; and

12 (2) the rules required under 10 V.S.A. § 1110(2) (dam design standards)
13 shall be adopted on or before July 1, 2021.

14 Sec. 4. EFFECTIVE DATE

15 This act shall take effect on July 1, 2018.