

VIRGINIA ACTS OF ASSEMBLY -- 2006 SESSION

CHAPTER 30

An Act to amend and reenact §§ 10.1-604, 10.1-606.1, 10.1-609, and 10.1-613 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 10.1-605.1, 10.1-607.1, 10.1-609.2, 10.1-610.1, and 10.1-612.1 and in Article 2 of Chapter 6 of Title 10.1 sections numbered 10.1-613.1 through 10.1-613.5, relating to dam safety; penalties.

[H 597]

Approved March 1, 2006

Be it enacted by the General Assembly of Virginia:

1. That §§ 10.1-604, 10.1-606.1, 10.1-609, and 10.1-613 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 10.1-605.1, 10.1-607.1, 10.1-609.2, 10.1-610.1, and 10.1-612.1 and in Article 2 of Chapter 6 of Title 10.1 sections numbered 10.1-613.1 through 10.1-613.5 as follows:

§ 10.1-604. Definitions.

As used in this article, unless the context requires a different meaning:

"Alteration" means changes to an impounding structure that could alter or affect its structural integrity. Alterations include, but are not limited to, changing the height or otherwise enlarging the dam, increasing normal pool or principal spillway elevation or physical dimensions, changing the elevation or physical dimensions of the emergency spillway, conducting necessary repairs or structural maintenance, or removing the impounding structure.

"Board" means the Soil and Water Conservation Board.

"Construction" means the construction of a new impounding structure.

"Dam break inundation zone" means the area downstream of a dam that would be inundated or otherwise directly affected by the failure of a dam.

"Height" means the structural height of a dam which is defined as the vertical distance from the natural bed of the stream or watercourse measured at the downstream toe of the dam to the top of the dam.

"Impounding structure" means a man-made ~~device~~ structure, whether a dam across a watercourse or other structure outside a watercourse, used or to be used to retain or store waters or other materials. The term includes: (i) all dams that are twenty-five feet or greater in height and that create an impoundment capacity of fifteen acre-feet or greater, and (ii) all dams that are six feet or greater in height and that create an impoundment capacity of fifty acre-feet or greater. The term "impounding structure" shall not include: (a) dams licensed by the State Corporation Commission that are subject to a safety inspection program; (b) dams owned or licensed by the United States government; (c) dams ~~constructed, maintained or~~ operated primarily for agricultural purposes which are less than twenty-five feet in height or which create a maximum impoundment capacity smaller than 100 acre-feet; (d) water or silt retaining dams approved pursuant to § 45.1-222 or § 45.1-225.1; or (e) obstructions in a canal used to raise or lower water.

"Owner" means the owner of the land on which a dam is situated, the holder of an easement permitting the construction of a dam and any person or entity agreeing to maintain a dam.

"Watercourse" means a natural channel having a well-defined bed and banks and in which water normally flows.

§ 10.1-605.1. Delegation of powers and duties.

The Board may delegate to the Director or his designee any of the powers and duties vested in the Board by this article, except the adoption and promulgation of regulations or the issuance of certificates. Delegation shall not remove from the Board authority to enforce the provisions of this article.

§ 10.1-606.1. Authority for localities to map dam break inundation zones.

A. Any county, city, or town may map *dam break* inundation zones and is encouraged to incorporate such information into its zoning and subdivision ordinances. Such localities may regulate or limit future development in these areas. However, in no event shall this section be interpreted to supersede or conflict with the authority granted to the Department of Mines, Minerals and Energy for the regulation of mineral extraction activities in the Commonwealth as set out in Title 45.1.

B. The Director may utilize grant funding available from the Flood Prevention and Protection Assistance Fund and other available sources of funding to assist localities in the development of these maps, provided the localities contribute a local match. The highest priority for awarding funds shall be placed on assisting with the mapping of the highest class of dams.

C. Such maps shall be made available by the locality to the dam owner and the public. All properties identified within the *dam break* inundation zone shall be incorporated into the dam safety emergency

action plan of that dam so as to ensure the proper notification of persons downstream and other affected persons or property owners in the event of a flood hazard or the impending failure of the impounding structure.

§ 10.1-607.1. Criteria for designating a dam as unsafe.

A. Designation of a dam as unsafe shall be based on one or more of the following findings:

1. The dam has serious deficiencies in its design or construction or has a physical condition that if left unaddressed could result in a failure that may result in loss of life or damage to downstream property.

2. The design, construction, operation, or maintenance of the dam is such that its expected performance during flooding conditions threatens the structural integrity of the dam.

B. After completion of the safety inspections pursuant to § 10.1-607, or as otherwise informed of an unsafe condition, the Department shall take actions in accordance with § 10.1-608 or 10.1-609 depending on the degree of hazard and imminence of failure caused by the unsafe condition.

§ 10.1-609. Unsafe dams presenting nonimminent danger.

A. Within a reasonable time after completion of a safety inspection of an impounding structure authorized by § 10.1-607, the Board shall issue a report to the owner of the impounding structure containing its findings and recommendations for correction of any deficiencies which could threaten life or property if not corrected. Owners who have been issued a report containing recommendations for correction of deficiencies shall undertake to implement the recommendations contained in the report according to the schedule of implementation contained in the report. If an owner fails or refuses to commence or diligently implement the recommendations for correction of deficiencies according to the schedule contained in an issued report, the Director shall have the authority to issue an administrative order directing the owner to commence implementation and completion of such recommendations according to the schedule contained in the report with modifications as appropriate. Within thirty days after being served by personal service or by mail with a copy of an order issued pursuant to this section, any owner shall have the right to petition the Board for a hearing. A timely filed petition shall stay the effect of the administrative order.

The hearing shall be conducted before the Board or a designated member thereof pursuant to § 2.2-4019. The Board shall have the authority to affirm, modify, amend or cancel the administrative order. Any owner aggrieved by a decision of the Board after a hearing shall have the right to judicial review of the final Board decision pursuant to the provisions of the Administrative Process Act (§ 2.2-4000 et seq.).

B. The provisions of subsection A of this section notwithstanding, if the Director determines, after the report is issued, that changed circumstances justify reclassifying the deficiencies of an impounding structure as an imminent danger to life or property, the Director may proceed directly under § 10.1-613 for enforcement of his order, and the owner shall have the opportunity to contest the fact based upon which the administrative order was issued.

C. The Director, upon a determination that there is an unsafe condition at an impounding structure, is authorized to cause the lowering or complete draining of such impoundment until the unsafe condition has been corrected at the owner's expense and prior to any authorization to refill.

An owner who fails to comply with the provisions contained in an administrative order of the Department shall be subject to procedures set out in § 10.1-613 and the penalties authorized under §§ 10.1-613.1 and 10.1-613.2.

D. No persons, other than those authorized to maintain an impounding structure, shall interfere with the operation of an impounding structure.

§ 10.1-609.2. Prohibited vegetation.

Dam owners shall not permit the growth of trees and other woody vegetation and shall remove any such vegetation from the slopes and crest of embankments and the emergency spillway area, and within a distance of 25 feet from the toe of the embankment and abutments of the dam. Owners failing to maintain their dam in accordance with this section shall be subject to enforcement pursuant to § 10.1-613.

§ 10.1-610.1. Monitoring progress of work.

A. During the maintenance, construction, or alteration of any dam or reservoir, the Department shall make periodic inspections for the purpose of securing conformity with the approved plans and specifications. The Department shall require the owner to perform at his expense such work or tests as necessary to obtain information sufficient to enable the Department to determine whether conformity with the approved plans and specifications is being secured.

B. If, after any inspections, investigations, or examinations, or at any time as the work progresses, or at any time prior to issuance of a certificate of approval, it is found by the Director that project modifications or changes are necessary to ensure conformity with the approved plans and specifications, the Director may issue an administrative order to the owner to comply with the plans and specifications. Within 15 calendar days after being served by personal service or by mail with a copy of an order issued pursuant to this section, any owner shall have the right to petition the Board for a hearing. A timely filed petition shall stay the effect of the administrative order. The hearing shall be conducted

before the Board or a designated member of the Board pursuant to § 2.2-4019. The Board shall have the authority to affirm, modify, amend, or cancel the administrative order. Any owner aggrieved by a decision of the Board after a hearing shall have the right to judicial review of the final Board decision pursuant to the provisions of the Administrative Process Act (§ 2.2-4000 et seq.).

C. Following the Board hearing, subject to judicial review of the final decision of the Board, if conditions are revealed that will not permit the construction of a safe dam or reservoir, the certificate of approval may be revoked. As part of the revocation, the Board may compel the owner to remove the incomplete structure sufficiently to eliminate any safety hazard to life or property.

§ 10.1-612.1. Temporary stop work order; hearing; injunctive relief.

A. The Director may issue a temporary stop work order on a construction or alteration project if he finds that an owner is constructing or altering a dam without having first obtained the necessary certificate of approval, or if the activities are not in accordance with approved plans and specifications. The order shall include written notice to the owner of the date, time, and location where the owner may appear at a hearing before the Board or a designated member thereof pursuant to § 2.2-4019 to show cause why the temporary order should be vacated. The hearing shall be held within 15 calendar days of the date of the order, unless the owner consents to a longer period.

B. Following the hearing, the Board may affirm or cancel the temporary order and may issue a final order directing that immediate steps be taken to abate or ameliorate any harm or damage arising from the violation. The owner may seek judicial review of the final decision of the Board pursuant to the provisions of the Administrative Process Act (§ 2.2-4000 et seq.).

C. If the violation continues after the Board has issued a final decision and order pursuant to subsection B or a temporary order issued by the Director pursuant to subsection A, the Board may apply for an injunction from the appropriate court. A decision to seek injunctive relief does not preclude other forms of relief, enforcement, or penalties against the owner.

§ 10.1-613. Enforcement.

Any person or legal entity failing or refusing to comply with an order issued pursuant to this article may be compelled to comply with the order in a proceeding instituted in any appropriate court by the Board. The Board shall bring suit in the name of the Commonwealth in any court of competent jurisdiction to enjoin the unlawful construction, modification, operation, or maintenance of any dam regulated under this article. Such court may require the removal or modification of any such dam by mandatory injunction. If the court orders the removal of the dam, the owner shall be required to bear the expenses of such removal.

Should the Board be required to implement and carry out the action, the Board shall charge the owner for any expenses associated with the action, and if the repayment is not made within 90 days after written demand, the Board may bring an action in the proper court to recover this expense. The Board shall file an action in the court having jurisdiction over any owner or the owner's property for the recovery of such costs. A lien in the amount of such costs shall be automatically created on all property owned by any such owner at or proximate to such dam or reservoir.

§ 10.1-613.1. Criminal penalties.

A. It is unlawful for any owner to knowingly:

1. Operate, construct, or alter a dam without an approval as provided in this article;
2. Violate the terms of an approval, order, regulation, or requirement of the Board or Director under this article; or
3. Obstruct, hinder, or prevent the Board or its designated agents or employees from performing duties under this article.

A violation of any provision of this subsection or this article is a Class 3 misdemeanor.

B. Each day that any such violation occurs after notice of the original violation is served upon the violator by the Board or its designated agents or employees by registered mail shall constitute a separate offense. Upon conviction, the violator is subject to a fine not exceeding \$500 per day for each day of the offense, not to exceed a total fine of \$25,000, with costs imposed at the discretion of the court. In determining the amount of the penalty, the appropriate court shall consider the degree of harm to the public; whether the violation was knowing or willful; the past conduct of the defendant; whether the defendant should have been on notice of the violation; whether the defendant has taken steps to cease, remove, or mitigate the violation; and any other relevant information.

§ 10.1-613.2. Civil penalties.

In addition to or in lieu of any other forfeitures, remedies, or penalties authorized by law or regulations, any owner violating any provision of this article may be assessed a civil penalty of up to \$500 per day by the Board not to exceed a maximum of \$25,000.

In setting the civil penalty amount, the Board shall consider (i) the nature, duration, and number of previous instances of failure by the owner to comply with requirements of law relating to dam safety and the requirements of Board regulations and orders; (ii) the efforts of the owner to correct deficiencies or other instances of failure to comply with the requirements of law relating to dam safety and the requirements of Board regulations and orders that are the subject of the proposed penalty; (iii) the cost of carrying out actions required to meet the requirements of law and Board regulations and

orders; (iv) the hazard classification of the dam; and (v) other factors deemed appropriate by the Board.

All civil penalties will be assessed by written penalty notice from the Board and given by certified mail or personal service. The notice shall state the specific reasons for the penalty, the number of days the Department considers the owner in violation, and the total amount due. Within 30 days after receipt of a copy of the order issued pursuant to this section, any owner subject to the civil penalty provisions shall have the right to petition the Board, in writing, for a hearing. A timely filed petition shall stay the effect of the penalty notice.

The hearing shall be conducted before the Board or a designated member thereof pursuant to § 2.2-4019. The Board shall affirm, modify, amend, or cancel the penalty notice within 10 days following the conclusion of the hearing. Any owner aggrieved by a decision of the Board after a hearing shall have the right to judicial review of the final Board decision pursuant to the provisions of the Administrative Process Act (§ 2.2-4000 et seq.).

If any civil penalty has not been paid within 45 days after the final Board decision or court order has been served on the violator, the Board shall request the Attorney General to institute a civil action in the court of any county in which the violator resides or has his principal place of business to recover the amount of the assessment.

Civil penalties assessed under this section shall be paid into the Flood Prevention and Protection Assistance Fund, established pursuant to § 10.1-603.17, and shall be used for the administration of the dam safety program, including for the repair and maintenance of dams.

§ 10.1-613.3. No liability of Board, Department, employees, or agents.

An owner may not bring an action against the Commonwealth, the Board, the Department, or agents or employees of the Commonwealth for the recovery of damages caused by the partial or total failure of a dam or reservoir, or by the operation of a dam or reservoir, or by an act or omission in connection with:

1. Approval of the construction, alteration, or maintenance of a dam or reservoir, or approval of flood-operations plans during or after construction;
2. Issuance or enforcement of orders relating to maintenance or operation of the dam or reservoir;
3. Control or regulation of the dam or reservoir;
4. Measures taken to protect against failure of the dam or reservoir during an emergency;
5. Investigations or inspections authorized under this article;
6. Use of design and construction criteria prepared by the Department; or
7. Determination of the hazard classification of the dam.

§ 10.1-613.4. Liability of owner or operator.

Nothing in this article, and no order, notice, approval, or advice of the Director or Board shall relieve any owner or operator of such a structure from any legal duties, obligations, and liabilities resulting from such ownership or operation. The owner shall be responsible for liability for damage to the property of others or injury to persons, including, but not limited to, loss of life resulting from the operation or failure of a dam. Compliance with this article does not guarantee the safety of a dam or relieve the owner of liability in case of a dam failure.

§ 10.1-613.5. Program administration fees.

The Board is authorized to establish and collect application fees from any applicant to be deposited into the Flood Prevention and Protection Assistance Fund established pursuant to § 10.1-603.17 for the administration of the dam safety program, administrative review, certifications, and the repair and maintenance of dams. Permit applications shall not be reviewed without a full payment of the required fee. Virginia Soil and Water Conservation Districts shall be exempt from all fees established pursuant to this section.