

VIRGINIA ACTS OF ASSEMBLY -- 2011 SESSION

CHAPTER 637

An Act to amend and reenact §§ 10.1-603.19 and 10.1-606.4 of the Code of Virginia and to amend the Code of Virginia by adding sections numbered 10.1-604.1 and 10.1-605.3, relating to impoundment structures.

[S 1060]

Approved March 26, 2011

Be it enacted by the General Assembly of Virginia:

1. That §§ 10.1-603.19 and 10.1-606.4 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding sections numbered 10.1-604.1 and 10.1-605.3 as follows:

Article 1.2.

Dam Safety, Flood Prevention, and Protection Assistance Fund.

§ 10.1-603.19. Purposes for which Fund is to be used; Authority to set terms and conditions of loans.

A. The Director is ~~authorized to~~ *may* make grants or loans to any local government for the purpose of assisting the local government in the development and implementation of flood prevention or protection projects, or for flood prevention or protection studies.

B. The Director is ~~authorized to~~ *may* expend from the Fund up to \$50,000 annually for cost share with federal agencies in flood protection studies of statewide or regional significance.

C. The Director is ~~also authorized~~ *may*, in order to protect public safety and welfare, ~~to make~~ (i) grants or loans to local governments owning dams and ~~to make~~ loans to private entities for the design, repair, and the safety modifications of dams identified in safety reports generated pursuant to § 10.1-607 or 10.1-609, and ~~to make~~ (ii) grants to local governments and private entities *for the determination of the hazard classification for impounding structures, dam break analysis, the mapping and digitization of dam break inundation zones, and incremental damage analysis, and other engineering requirements such as emergency action plan development.*

D. *The Director may, in order to reduce dam owner expenses associated with hazard classification, dam break analysis, the mapping and digitization of dam break inundation zones, incremental damage analysis, and other engineering requirements such as emergency action plan development, expend moneys from the Fund to employ staff or to directly contract for these services. The Director may establish a fee to be paid by the dam owner to offset a portion of these services. Such fee shall not exceed 50 percent of the cost incurred by the Department.*

E. *The Director may, in order to protect people at risk from a dam failure and to assist dam owners, localities, and emergency responders, expend moneys from the Fund to maintain a statewide dam failure early warning system in cooperation with the Department of Emergency Management and the U.S. National Weather Service.*

F. The total amount of expenditures for grants in any fiscal year shall not exceed 50 percent of the total noninterest or income deposits made to the Fund during the previous fiscal year, together with the total amount collected in interest or income from the investment of moneys in the Fund from the previous fiscal year as determined at the beginning of the fiscal year.

~~E~~ G. Any grants made from the Fund shall require a 50 percent project match by the applicant. Any loans made from the Fund shall require a minimum of a 10 percent project match by the applicant.

~~F~~ H. Except as otherwise provided in this article, money in the Fund shall be used solely to make loans or grants to local governments or private entities to finance or refinance the cost of a project. The local government or private entity to which loans or grants are made, the purposes of the loan or grant, the required match for the specific loan or grant, and the amount of each loan or grant, shall be designated in writing by the Director to the Authority. No loan or grant from the Fund shall exceed the total cost of the project to be financed or the outstanding principal amount of the indebtedness to be refinanced plus reasonable financing expenses. Loans may also be from the Fund, at the Director's discretion, to a local government that has developed a low-interest loan program to provide loans or other incentives to facilitate the correction of dam or impounding structure deficiencies, as required by the Department, provided that the moneys are to be used only for the program and that the dams or impounding structures to be repaired or upgraded are owned by private entities.

~~G~~ I. Except as otherwise provided in this article, the Authority shall determine the interest rate and terms and conditions of any loan from the Fund, which may vary between different loans and between local governments and private entities to finance or refinance the cost of a project. Each loan shall be evidenced by appropriate bonds or notes of the local government or by the appropriate debt instrument for private entities payable to the Fund. Private entities shall duly authorize an appropriate debt instrument and execute same by their authorized legal representatives. The bonds or notes shall have

been duly authorized by the local government and executed by its authorized legal representatives. The Authority may require in connection with any loan from the Fund such documents, instruments, certificates, legal opinions, covenants, conditions, and other information as it may deem necessary or convenient to further the purpose of the loan. In addition to any other terms or conditions that the Authority may establish, the Authority may require, as a condition to making any loan from the Fund, that the local government or private entity receiving the loan covenant to perform any of the following:

1. Establish and collect rents, rates, fees, and charges to produce revenue sufficient to pay all or a specified portion of (i) the costs of operation, maintenance, replacement, renewal, and repairs of the project; (ii) any outstanding indebtedness incurred for the purposes of the project, including the principal of, premium, if any, and interest on the loan from the Fund; and (iii) any amounts necessary to create and maintain any required reserve, including any rate stabilization fund deemed necessary or appropriate by the Authority to offset the need, in whole or part, for future increases in rents, rates, fees, or charges;

2. With respect to local governments, levy and collect ad valorem taxes on all property within the jurisdiction of the local government subject to local taxation sufficient to pay the principal of and premium, if any, and interest on the loan from the Fund to the local government;

3. Create and maintain a special fund or funds for the payment of the principal of, premium, if any, and interest on the loan from the Fund and any other amounts becoming due under any agreement entered into in connection with the loan, or for the operation, maintenance, repair, or replacement of the project or any portions thereof or other property of the borrower, and deposit into any fund or funds amounts sufficient to make any payments on the loan as they become due and payable;

4. Create and maintain other special funds as required by the Authority;

5. Perform other acts otherwise permitted by applicable law to secure payment of the principal of, premium, if any, and interest on the loan from the Fund and to provide for the remedies of the Fund in the event of any default by the borrower in payment of the loan, including, without limitation, any of the following:

- a. The conveyance of, or the granting of liens on or security interests in, real and personal property, together with all rights, title and interest therein;

- b. The procurement of insurance, guarantees, letters of credit and other forms of collateral, security, liquidity arrangements or credit supports for the loan from any source, public or private, and the payment therefor of premiums, fees, or other charges;

- c. The combination of one or more projects, or the combination of one or more projects with one or more other undertakings, facilities, utilities, or systems, for the purpose of operations and financing, and the pledging of the revenues from such combined projects, undertakings, facilities, utilities and systems to secure the loan from the Fund borrower made in connection with such combination or any part or parts thereof;

- d. The maintenance, replacement, renewal, and repair of the project; and

- e. The procurement of casualty and liability insurance;

6. Obtain a review of the accounting and internal controls from the Auditor of Public Accounts or his legally authorized representatives, as applicable. The Authority may request additional reviews at any time during the term of the loan. In addition, anyone receiving a report in accordance with § 10.1-603.23 may request an additional review as set forth in this section; and

7. Directly offer, pledge, and consent to the Authority to take action pursuant to § 62.1-216.1 to obtain payment of any amounts in default, as applicable.

All local governments or private entities borrowing money from the Fund are authorized to perform any acts, take any action, adopt any proceedings, and make and carry out any contracts that are contemplated by this article. Such contracts need not be identical among all local governments or private entities, but may be structured as determined by the Authority according to the needs of the contracting local governments or private entities and the Fund.

Subject to the rights, if any, of the registered owners of any of the bonds of the Authority, the Authority may consent to and approve any modification in the terms of any loan to any local government.

§ 10.1-604.1. Determination of hazard potential classification.

A. The hazard potential classification for an impounding structure shall be determined by one of the following procedures:

- 1. The owner of an impounding structure that does not currently hold a regular or conditional certificate from the Board, or the owner of an impounding structure that is already under certificate but the owner believes that a condition has changed downstream of the impounding structure that may reduce its hazard potential classification, may request that the Department conduct a simplified dam break inundation zone analysis to determine whether the impounding structure has a low hazard potential classification. The owner shall pay 50 percent of the cost of the analysis. If the Department finds that the impounding structure has a low hazard potential classification, the owner shall be eligible for general permit coverage in accordance with § 10.1-605.3. If the Department finds that the impounding structure appears to be a high or significant hazard potential structure, the owner's engineer shall provide further analysis in accordance with § 10.1-606.2 and the criteria set out in the*

Impounding Structure Regulations (4 VAC 50-20). The owner may be eligible for grant assistance in accordance with § 10.1-603.19.

2. The owner may propose a hazard potential classification that shall be subject to approval by the Board. To support the proposed hazard classification, an analysis shall be conducted by the owner's engineer and shall comply with the criteria set out in the Impounding Structure Regulations (4 VAC 50-20). If the engineer finds that the impounding structure has a low hazard potential classification, the owner shall be eligible for general permit coverage in accordance with § 10.1-605.3.

An impounding structure's hazard potential classification's determination shall include an analysis of those hazards created by flood and nonflood dam failures. In conducting the hazard potential classification, the Department or the owner's engineer may utilize an incremental damage analysis. When considering the failure of the impounding structure under a flood condition, such engineers shall only consider those hazards that exceed those created by the flood event.

B. Any owner aggrieved by a decision of the Department regarding his impounding structure shall have the right to judicial review of the final decision pursuant to the provisions of the Administrative Process Act (§ 2.2-4000 et seq.).

C. The Board may adopt regulations in accordance with § 10.1-605 to establish a simplified methodology for dam break inundation zone analysis.

§ 10.1-605.3. General permit for certain impounding structures.

A. The Board shall develop a general permit for the regulation of low hazard potential impounding structures in accordance with § 10.1-605.

B. The regulations shall include the following:

1. A registration statement requiring:

a. The name and address of the owner;

b. The location of the impounding structure;

c. The height of the impounding structure;

d. The volume of water impounded; and

e. A certification from the owner that the impounding structure (i) is classified as low hazard pursuant to a determination by the Department or the owner's professional engineer in accordance with § 10.1-604.1; (ii) is, to the best of his knowledge, properly and safely constructed and currently has no observable deficiencies; and (iii) shall be maintained and operated in accordance with the provisions of the general permit.

2. A spillway design flood requirement of the 100-year flood. When appropriate, the spillway design flood requirement may be reduced to the 50-year flood in accordance with an incremental damage analysis.

3. A simplified emergency preparedness plan that provides:

a. Name and location information for the impounding structure;

b. Name of owner and operator and associated contact information;

c. Contact information for relevant emergency responders;

d. Procedures for notifying downstream property owners or occupants; and

e. Identification of any downstream roadways that would be impacted by a failure.

4. An annual inspection of the impounding structure by the owner. No inspection of the impounding structure by a licensed professional engineer shall be required if the owner certifies at the time of general permit coverage renewal that conditions at the impounding structure and downstream are unchanged.

5. Procedures for seeking and issuing coverage under the general permit.

6. A six-year term of coverage under the general permit after which time the owner shall reapply for coverage by filing a new registration statement. The Board may, by regulation, establish a fee for the processing of registration statements.

C. The owner shall notify the Department immediately of any change in circumstances that would cause the impounding structure to no longer qualify for coverage under the general permit. In the event of a failure or an imminent failure at the impounding structure, the owner shall immediately notify the local emergency services coordinator, the Department of Emergency Management, and the Department. The Department shall take actions in accordance with § 10.1-608 or 10.1-609, depending on the degree of hazard and the imminence of failure caused by the unsafe condition.

D. Failure to comply with the provisions of the general permit may result in penalties assessed in accordance with §§ 10.1-613.1 and 10.1-613.2.

E. In order to qualify for the provisions of § 10.1-606.3, a dam owner eligible for a general permit shall file a dam break inundation map with the Department and with the offices with plat and plan approval authority or zoning responsibilities as designated by the locality for each locality in which the dam break inundation zone resides in accordance with § 10.1-606.2.

F. If the failure of a low hazard potential impounding structure is not expected to cause loss of human life or economic damage to any property except property owned by the owner, the owner may follow the special criteria established for certain low hazard impounding structures in the Impounding Structure Regulations (4 VAC 50-20) in lieu of coverage under the general permit.

§ 10.1-606.4. Notice to the public.

A. When applying to the Department for a permit under the Virginia Impounding Structure Regulations (4VAC 50-20) to construct a new *high or significant hazard potential* impounding structure, the applicant shall provide localities that lie within the inundation zone with copies of the construction permit request and the dam break inundation zone map.

B. When submitting the application to the Department, the permit applicant shall publish a notice in a newspaper of general circulation in the affected localities summarizing the permit request and providing the address of locations where copies of the construction permit request and the dam break inundation zone map may be examined. The applicant shall provide copies of the published notice to the Department and to the local government offices with plat and plan approval authority or zoning responsibilities as designated by the locality.

C. The Department may hold, on behalf of the Virginia Soil and Water Conservation Board, a public hearing on safety issues associated with the construction permit application for the impounding structure.

D. The Department may require a permit applicant to provide other forms of reasonable notice, such as the placement of a sign on the proposed site, to ensure that affected parties have been informed.

E. The permit applicant shall send, by certified mail, to each property owner within the dam break inundation zone, a summary of the permit request and the addresses of locations where the map of the dam break inundation zone may be viewed. In the case of a condominium or cooperative, such information shall be sent to each property owner or the owners' association. The permit applicant may rely upon real estate assessment records to identify property owners. If requested by the Department, the applicant shall provide a list of the persons to whom notice has been sent.