

Summary of Second Assessment of Public Comments (July 2009)

Adoption of Rule Amending Dam Safety Regulations

The original Notice of Proposed Rule Making was issued on February 13, 2008 to amend the dam safety regulations at 6 NYCRR Parts 608, 621.4, and 673. The regulatory amendments were proposed in order to comply with Chapter 364 of the laws of 1999 and with Chapter 178 of the Laws of 2006. A public comment period followed. On May 20, 2009, the New York Department of Environmental Conservation (NYSDEC) issued a revised Notice of Revised Rule Making. The second public comment period (for the revised rule making) closed on June 19, 2009.

The Second Assessment of Public Comments (SAPC) summarizes, condenses, and codifies all of the comments. Complete copies of all written submissions are included in the SAPC.

This summary of the SAPC provides an overview of the most frequently received comments and responses.

Frequent Comment #1: Comments concerning the cost of the revised regulations were largely the same as those received during the first public comment period following the Notice of Proposed Rule Making issued on February 13, 2008, which were answered in the May 2009 Assessment of Public Comments. NYSDEC repeats the May 2009 Frequent Comment #1 and NYSDEC's Response.

Frequent Comment #2: Numerous comments were received regarding emergency action plans (EAP's).

Definition of an EAP, EAP development, updating, and submission, EAP sections that need to be developed by an engineer, use of electronic submittals, inundation mapping standards, role emergency management

authorities, and time frame to submit an EAP following a dam's hazard classification change. Additionally, would EAP's be required with a dam safety permit application for a "B" or "C" hazard class dam.

Response: NYSDEC reviewed U.S. Army Corp and FEMA provisions regarding EAPs, including definitions, during the course of this rule making, and wrote the regulations consistent with New York's existing dam safety statute, and existing permitting requirements, regulations and guidance.

The NYSDEC has guidance on EAPs in Chapter 8 of the NYSDEC's guidance document entitled, "An Owner's Manual for the Inspection and Maintenance of Dams in New York". Federal guidance for EAP development is in "FEMA 64 - Federal Guidelines for Dam Safety: Emergency Action Planning for Dam Owners." The Department plans to issue additional guidance on the preparation of EAPs.

A hard copy of the initial EAP is required by the NYSDEC, emergency responders, and other applicable agencies.

EAP's have been a longstanding element of an owner dam safety program and the time frames for implementation are appropriate.

Frequent Comment #3: Comments concerning hazard classifications were similar to those received during the first public comment period following the Notice of Proposed Rule Making issued on February 13, 2008, which were answered in the May 2009 Assessment of Public Comments. NYSDEC repeats the May 2009 Frequent Comment #3 and NYSDEC's Response.

Additional comments recommended that the NYSDEC add to include damage and/or economic loss related to property on the impoundment's shorelines; provide an analysis when NYSDEC changes a hazard classification; and ensure that all dams are assigned a hazard classification. Also guidance incorporating natural resource damage in hazard classification determinations was requested. A concern was raised regarding NYSDEC

changing a dam's hazard class based on unfounded information. A comment also stated that the terms in the hazard classification definition were unclear or subjective.

Response: NYSDEC repeats the Response to Frequent Comment #3 from the May 2009 Assessment of Public Comments, and responds: downstream damages are considered when the hazard classification is established. By regulation, the owner will be notified when the hazard classification is changed and will be provided the basis for that change. DEC's practice is to verify any information received.

Frequent Comment #4:

Comments concerning engineers were similar to those received during the first public comment period following the Notice of Proposed Rule Making issued on February 13, 2008, which were answered in the May 2009 Assessment of Public Comments. NYSDEC repeats the May 2009 Frequent Comment #4 and NYSDEC's Response.

Additional comments were about the definition of "engineer", engineers' qualifications and experience required under the regulations, and NYSDEC providing criteria or a list of approved engineers, and the use of conservationists for farm.

Response: "Engineer" was discussed in the Frequent Comment # 4 in the May 2009 Assessment of Public Comments and the NYSDEC repeats this response. Additionally, the topic of farms pond and use of a conservationist was discussed in the Frequent Comment #2 in the May 2009 Assessment of Public Comments and the NYSDEC refers to an excerpt from this response. NYSDEC also responds that the responsibility for retaining an engineer is with the owner, who should verify the engineer has the required education and experience for the particular project.

Frequent Comment #5:

Comments concerning the definition of dam owner were similar to those received during the first public comment period following the Notice of Proposed Rule Making issued on February 13, 2008, which were answered in the May 2009 Assessment of Public Comments. NYSDEC repeats the May 2009 Frequent Comment #5 and NYSDEC's Response. Comments also noted that the definition could result in the State of New York being an owner of every dam. NYSDEC responds that the statutory definition of dam owner does not include the state. Environmental compliance requirements for state agencies are governed by the ECL and other state laws and executive orders.

Frequent Comment #6: Comments stated invoking the financial assurance provision of the regulations is punitive, could result in the loss of property, and the circumstances in which it will be used should be better defined. Financial assurance provisions, if used, should be used only if the dam is "unsafe" or "unsound". No financial assurance should be required if a State Public Benefit Corporation owns the dam. Public entities that are self-insured should be allowed to use "global" financial security if required to provide financial assurance.

Response: The inclusion of financial assurance was specifically authorized in the 1999 amendments to the dam safety statute (ECL §15-0507). Under the revised regulations, financial assurance is not required unless a dam is "unsafe", "unsound" or "deficiently maintained", and then, only when requested by the Department. The financial assurance elements would be invoked only after the owner has failed to bring the dam into compliance. The revised regulations clarify that financial assurance measures are not required of owners of all Class C (High Hazard) dams, specify when NYSDEC would seek financial assurance, and limit the goal to that of covering the costs of breach or removal of the dam.

Frequent Comment #7:

Comments concerning release of information on dams were similar to those received during the first public comment period following the Notice of Proposed Rule Making issued on February 13, 2008, which were answered in the May 2009 Assessment of Public Comments. NYSDEC repeats the May 2009 Frequent Comment #7.

Response: NYSDEC and municipalities are subject to Freedom of Information Law (FOIL). NYSDEC responds to requests for information about dams in accordance with this law. Requirements for the distribution of inspection reports by NYSDEC are in ECL §15-0516. FOIL does allow for the withholding of critical infrastructure information (CII). The Department will consider revising its inspection report format so CII is segregated and identified so that it may more easily be reviewed and, if necessary, redacted on a case-by-case basis in response to FOIL requests. Communities receiving an inspection report will be directed to withhold the CII.

Frequent Comment #8:

Comments concerning “ordinary maintenance” were similar to those received during the first public comment period following the Notice of Proposed Rule Making issued on February 13, 2008, which were answered in the May 2009 Assessment of Public Comments. NYSDEC repeats the May 2009 Frequent Comment #11 and NYSDEC’s Response.

Frequent Comment #9: comments were concerned with condition ratings (Subpart 673.16) based on their definitions, how they would be applied and time allowed to gather information to make an appeal.

Response: NYSDEC's discretion with respect to condition ratings is based on all of the facts and circumstances of the dam itself. This is also the case in assigning a condition rating in the absence of an engineering assessment. If a dam owner believes the Department's assignment is arbitrary or capricious, the owner must let the Department know promptly, through the appeal process in the regulations, or else focus on bringing the dam into compliance. Regulatory language was modified slightly to clarify ratings of "deficiently maintained" and "no deficiencies noted."

Frequent Comment #10: Comments stated Inspection and Maintenance Plans (I&M Plans) should be required only for Class B and C dams and more time is necessary to create the plans. The regulations should clarify owner responsibilities in developing and implementing I&M Plans.

Response: Owners of dams exceeding the permitting size thresholds, Class B or C dams, or dams that pose a threat of personal injury, substantial property damage, or environmental damage need develop an I&MP. Twelve months is adequate for the development of an I&M Plan for any dam. Guidance on inspection and maintenance is already available and additional guidance is under development. The regulations identifies that it is owners of dams who prepare I&M Plans.

Frequent Comment #12: The recent Executive Order 17 requires an assessment of formalized proposals for mandates on local governments which increase costs will raise property taxes. Comments expressed NYSDEC should investigate the potential cost of the required inspections, reports, financial assurance, and potential dam modifications. Many expressed that the rule making is an unfunded mandate upon private and municipal dam

owners. Comments expressed the rule shifts NYSDEC's governmental responsibility for inspections of dam infrastructure to the dam owner.

Response: Dam owners, public and private, have long been obligated by law to operate and maintain their dams in a safe condition. The costs associated with the inspection, operation, maintenance, repair or reconstruction of a dam, even for those dams whose hazard classification has changed, are not new or newly shifted to dam owners and do not originate with this rule making. The Executive Order does not address private entities, and only addresses increases in costs imposed by the regulations themselves, if any.

Frequent Comment #13: The definition of "breach" of a dam was questioned. Additionally, it was asked if a permit is needed every time the normal impoundment level is lowered, even if temporarily.

Response: Definition of 'Breach' of a dam was clarified to state the "permanent" lowering of a dam's spillway level, or the construction of a channel through or around the dam, so as to reduce the dam's ability to normally impound waters. Breach/removal is distinguished from, and is treated differently in the regulations than, an unplanned release or dam failure.

Frequent Comment #14: The definition of the "height" of a dam is the vertical dimension from the downstream toe of the dam at its lowest point to the top of the dam. Comments said the top of the dam should be the height of the spillway. Comments also suggested definitions for the "lowest point."

Response: The Department reviewed U.S. Army Corp and FEMA provisions, including definitions, and ensured the revised regulations are consistent with New York's existing dam safety statute, permitting

requirements, regulations and guidance. The Department has conformed the definition of height in 608.1(n) to match that in 673.2(n).

Frequent Comment #15: Subpart 608.1 and 673.2 both define the term “Maximum Impoundment Capacity.” Comments requested language “including during periods when a temporary surcharge pool exists” to the definition. Others stated a properly designed dam would never have to impound waters to the top of the dam.

Response: The definition of "maximum impoundment capacity" is statutory. Revised regulations must interpret New York's existing dam safety statute (within ECL Article 15) and be consistent with New York's existing permitting requirements, regulations and guidance. Definition does not significantly change that in the 1987 regulations, and is consistent with current NYSDEC practice, and the laws, regulations, and practice of many other state and federal agencies and guidance.